Neutral Citation Number: [2023] EWHC 3101 (KB)

Case No: KB-2021-000760

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 November 2023

Before :

HHJ RICHARD ROBERTS
(Sitting as a Judge of the High Court)

- -

Between :

METROLINE LIMITED	**Claimant**
- and -	
MR DIEGO BARBOSA ARAUJO	**Defendant**

- -
- -

Ms Anastasia Karseras of Counsel (instructed by **Weightmans LLP**) for the **Claimant**
The Defendant not appearing

Hearing date: 30 November 2023
- -

Approved Judgment

HIS HONOUR JUDGE RICHARD ROBERTS :

Introduction

1. This is the final hearing of a committal application for contempt on the grounds of making knowingly false statements in documents supported by statements of truth and for interference with the due administration of justice of the Claimant against the Defendant. Ms Karseras of Counsel appears on behalf of the Claimant. I am grateful for her skeleton argument, dated 27 November 2023[1] and her very detailed and helpful oral submissions. The Defendant does not appear.

2. There are the following bundles before the Court:

   i) Bundle 1: a bundle marked "Additional bundle" of 381 pages, which I will refer to below as "main bundle";

   ii) Bundle 2: a statements and exhibits bundle of 203 pages;

   iii) Bundle 3: Exhibits to accompany the statement of Michelle Reilly;

   iv) The bundle for the permission hearing on 5 May 2021;

   v) Claimant's bundle of authorities for the hearing on 25 October 2023;

   vi) Claimant's supplementary bundle of authorities.

The Defendant's claim

3. On 21 January 2019, the Claimant's bus collided with the rear of the Defendant's motorcycle.

4. The Defendant claimed that his motorcycle fell on its offside as a result of the accident and sustained damage rendering it beyond economic repair. He made claims in his updated Schedule of Loss[2] for:

i)	The motorcycle's pre-accident value	£802.82
ii)	Credit hire of replacement motorcycle	
	from 27 January 2019 to 9 November 2019	£48,511.92
iii)	recovery charges	£234.00
iv)	Storage charges	£638.40
v)	Miscellaneous expenses	£50.00

5. The Claimant served CCTV from the bus, showing that the Defendant's motorcycle did not fall onto its side as a result of the impact with the bus.

[1] Bundle 3, 10-24
[2] 151

6. The Claimant requested an opportunity to inspect the damaged motorcycle.

7. The Defendant claimed that his motorcycle was sold and picked up from his address on 3 June 2019, and as a consequence the Claimant could not inspect the motorcycle. However, surveillance photographs taken by Mr Alan Wolfson revealed that the motorcycle was still parked outside or near to the Defendant's home on 7 June, 11 June, 14 June, 21 June, 26 June, and 28 June 2019.

8. The Claimant served Part 35 questions to the Defendant's engineer (Mr Simon Levitt of Evans Harding). Mr Levitt said in his replies, dated 31 January 2020[3]:

> "5: Yes, I concur that the damage would have been limited to the Wooden base plate of the top box, and I did not record any damage to this item at the time of my inspection.
>
> 6: Yes, the claimant's motorcycle was not rendered BER [beyond economic repair] in the index incident.
>
> 7. Yes, the damage detailed in your question cannot be related to the index incident.
>
> …
>
> 12, Yes, I agree that the motorcycle had undergone some repairs between my inspection and the first set of images taken by Mr Wolfson."

9. The Defendant claimed in the Particulars of Claim of the original action, which were verified by a statement of truth signed by a solicitor on the Defendant's behalf, for a damaged mobile phone in the sum of £569, a damaged helmet in the sum of £79.99, and loss of earnings which were to be quantified. The motorcycle helmet and mobile phone could only have been damaged if the motorcycle had fallen over as a result of the accident. These items were not claimed in an Updated Schedule of Loss, which was served after the CCTV footage had been disclosed.

10. On 9 December 2019 the Claimant filed and served an amended Defence and Counter Schedule, stating that the claim should be struck out as a result of the Defendant's dishonesty and conduct.

11. On 10 March 2020[4] the Defendant discontinued proceedings.

Claimant's contempt proceedings

12. On 3 March 2021 the Claimant issued an application for permission to bring these contempt proceedings. In the Claimant's claim form, issued on 3 March 2021, they set out the six grounds of contempt[5]:

[3] Main bundle, 290-291
[4] Page 310 of bundle for hearing for permission on 5 May 2021
[5] Page 7 of bundle for hearing for permission on 5 May 2021

i) Knowingly making a false statement of truth in his witness statement dated 15 November 2019 at paragraphs 19 to 20 that he sold the motorcycle to Forza Motorcycles on 3 June 2019 who collected it the same day and he had "no idea what happened to my vehicle after the 3rd of June 2019".

ii) Interference with the due administration of justice by attempting to bring a claim for the pre-accident value of the motorcycle and hire charges on false pretences when he knew the claims could not properly be brought at the time he brought them.

iii) Interference with the due administration of justice by preventing the Claimant from inspecting the motorcycle.

iv) Knowingly making a false statement of truth either in the witness statement dated 15 November 2019 at paragraph 18 that "Bravos Motorcycles, had advised that they did not want to purchase it" or in his supplemental witness statement dated 20 February 2020 at paragraph 7 that Bravos Motorcycles verbally agreed to buy the motorcycle on 3 June 2019.

v) Knowingly causing a false statement of truth to be made in the Particulars of Claim in respect of the claims for damaged helmet and mobile phone.

vi) Interference with the due administration of justice in not reporting that repairs had been carried out to his motorcycle.

13. On 17 March 2021 Stewart J gave directions as to the hearing of the application for permission to bring committal proceedings.

14. On 5 May 2021 HHJ Walden-Smith granted the Claimant permission to bring the present contempt proceedings. The order records that the Court was satisfied that the Defendant had been served with proceedings and that he was given notice of the proceedings.

15. On 15 September 2021 Lavender J made an order[6] granting the Claimant permission to serve the order of HHJ Walden-Smith by first class post at 36 Wellington Road, London, E17 6LS.

16. The committal was listed for a final hearing before HHJ Walden-Smith on 4 May 2023. The Defendant did not attend the hearing. At this hearing, HHJ Walden-Smith issued a bench warrant for the arrest of the Defendant[7].

17. The matter came before HHJ Lickley KC on 23 May 2023. The Defendant was neither present nor represented. It was ordered[8]:

> "1. The substantive hearing of the Claimant's application is adjourned.

[6] 92
[7] 94-101
[8] Statements and Exhibits, 191

> 2. If the warrant for the Defendant's arrest is executed before 4pm on 13 June 2023, the Defendant shall be produced before a Judge of the High Court as soon as is practicable.
>
> 3. The Claimant will immediately be given notice of the Defendant's arrest and of the time and location of the hearing.
>
> 4. At the said hearing:
>
> i) The Defendant is to explain his failure to attend the hearing on 23 May 2023;
>
> ii) The court will give directions for the determination of the Claimant's application;
>
> iii) For the avoidance of doubt, the Claimant's application will not be determined at that hearing.
>
> 5. If the warrant for the Defendant's arrest is not executed before 4pm on 13 June 2023, the Claimant's application shall be re-listed on the first available date in accordance with the availability of Counsel for the Claimant and the Claimant's witnesses, with a time estimate of one day. At that hearing, if the Defendant does not attend, the court will consider whether to proceed in his absence."

Finding of contempt by HHJ Richard Roberts

18. The Defendant did not attend the committal hearing on 25 October 2023.

19. In my order, I stated, inter alia,

> **"AND UPON** Deputy Tipstaff and the Metropolitan Police having taken further steps to execute the warrant for the Defendant's arrest on 25 October 2023 at 33 Westward Road, London, E4 8LZ, these steps having been confirmed by email from Deputy Tipstaff Mr Ross Mewett-Mckinlay to the Claimant's solicitor on the same date which was read to the Court
>
> **AND UPON** the Defendant being neither present nor represented at this hearing
>
> **AND UPON** the Court being satisfied that the Defendant has been properly served with the relevant documents including notice of this hearing pursuant to the Court Orders made on 15 September 2021 and 12 October 2023 and pursuant to the CPR
>
> **AND UPON** the Court being satisfied that it was appropriate to proceed with the Committal Application in the Defendant's absence for the reasons stated in the Court's judgment

AND UPON reading the evidence filed by the Claimant and hearing oral evidence of two witnesses called by the Claimant and argument at the hearing of the Committal Application

AND UPON the Court being satisfied beyond reasonable doubt that the Defendant is guilty of contempt in the particulars stated in paragraphs (1) to (6) of the Details of Claim which accompanied the Claim Form issued on 3 March 2021, namely:

Knowingly making a false statement of truth in his witness statement dated 15 November 2019 at paragraphs 19-20 that he sold the Bike to Forza Motorcycles on 3 June 2019 who collected it that same day and he had "no idea what happened to my vehicle after the 3rd of June 2019"

Interference with the due administration of justice by attempting to bring a claim for the pre-accident value of the bike and hire charges on false pretences when he knew the claims could not properly be brought at the time he brought them

Interference with the due administration of justice by preventing the Claimant from inspecting the Bike

Knowingly making a false statement of truth either in the witness statement dated 15 November 2019 at paragraph 18 that "Bravos Motorcycles, had advised that they did not want to purchase it" or in his supplemental witness statement dated 20 February 2020 at paragraph 7 that Bravos Motorcycles verbally agreed to buy the Bike on 3 June 2019

Knowingly causing a false statement of truth to be made on the Particulars of Claim in respect of the claims for damaged helmet and mobile phone

Interference with the due administration of justice in not reporting that repairs had been carried out to his Bike

AND UPON it being recorded that the matters required by CPR 81.4(2) were included in the Claim Form

IT IS ORDERED THAT:

1. The hearing to consider sentencing is adjourned to be listed before His Honour Judge Richard Roberts sitting as a High Court Judge (if possible) on the first available date after 15 November 2023 in accordance with Counsel for the Claimant's availability, with a time estimate of one day.

…

> 3. The Claimant shall serve a copy of this Order upon the Defendant in accordance with paragraph 1 of the Order of Mrs Justice Hill dated 12 October 2023.
>
> 4. As this Order was made in the Defendant's absence, the Defendant may apply to ask for the Committal Application to be reconsidered and/or to have the Order set aside or varied. Any such application must be made by 4pm on 8 November 2023.
>
> 5. The Defendant shall pay the Claimant's costs of these proceedings to date on the indemnity basis. Whether the costs shall be summarily assessed or shall be the subject of detailed assessment will be determined at the final hearing."

Service of order of 25 October 2023 and hearing on 30 November 2023

20. There is before the Court a witness statement of Michelle Reilly, dated 28 November 2023[9]. Ms Reilly says in her witness statement:

    i) At paragraph 4, on 27 October 2023 a letter was sent by first class post to the Defendant at 33 Westward Road. It enclosed a copy of my order of 25 October 2023. The Defendant was informed that a sentencing hearing had been listed on 30 November 2023. The Defendant was advised that he could apply to set aside or vary the order of 25 October 2023. He was informed that he was eligible for Legal Aid.

    ii) At paragraph 5, that on 28 November 2023 the process server served the Defendant with the skeleton arguments of Ms Karseras, dated 27 November, and the Claimant's statement of costs, dated 28 November 2023. There is a statement of the witness server, Elizabeth Schmitz, dated 28 November 2023[10], confirming that service was effected by placing these documents in the letter box of the Defendant's address at 33 Westward Road, London E4 8LZ.

21. I find that the Claimant has served the Defendant notice of today's hearing in accordance with the order of Mrs Justice Hill, dated 12 October 2023.

Hearing in absence of Defendant

22. As with the hearings on 4 May 2023, 23 May 2023 and 25 October 2023, the Defendant did not attend the hearing on 30 November 2023.

23. In *JSC BTA Bank v Alexander Yu Stepanov* [2010] EWHC 794 (Ch) Roth J said,

> "11. The court has jurisdiction to hear a contempt application in the absence of the defendant in exceptional circumstances.

[9] Exhibits to accompany the statement of Michelle Reilly
[10] Exhibits to accompany the statement of Michelle Reilly. 7-31

In *Lamb v Lamb* [1983] FLR 278 Lord Justice Oliver, in his judgment in the Court of Appeal, said this:

'… I see the danger of hearing any application for committal for contempt, which is, after all, a quasi-criminal proceeding, ex parte. It is, I think, established that it is something that should only be done in exceptional circumstances but the question is always one for the discretion of the judge who has to hear the matter. He has to balance the desirability of making an immediate hearing, the urgency of the matter, and so on, against the possibility that the evidence before him may not be complete. But here, if the evidence was to be believed, and there is no reason why it should not have been (and indeed it was not, I think, substantially challenged on the subsequent hearing), the judge was faced with what he considered to be a flagrant and deliberate contempt of court committed only two days after the injunction had been granted, an injunction which had been fully explained to the respondent and in circumstances in which the respondent could be under no illusion about the consequences of a breach. He had to balance the desirability of obtaining the respondent's account of the matter against the possibility that, in the case where the petitioner had been complaining of harassment, such harassment as had taken place was again going to be committed and in his discretion he came to the conclusion that it was a case which he ought to hear ex parte and deal with on that basis. I am not, speaking for myself, on the present material, prepared to say that in making that decision he was wrong.'

…

12. Contempt proceedings are quasi-criminal proceedings, as Lord Justice Oliver there emphasises, and they are criminal proceedings for the purposes of Article 6 of the European Convention on Human Rights. I was therefore referred to consideration by the House of Lords as to when a criminal trial can take place in the absence of the defendant. This was in the case of *R v Jones (Anthony)* [2002] UKHL 5 [2003] 1 AC 1. There their Lordships approved, with one qualification, the guidance given in that case in the Court of Appeal in a judgment of the court delivered by Lord Justice Rose, *R v Hayward* [2001] QB 862. The Court of Appeal, after noting the general right of a defendant to be present at his trial and indeed to be legally represented, and the discretion of the trial judge to proceed without him, said this (at para.22):

'That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented. In exercising that discretion fairness to the defence is of prime importance, but fairness to the prosecution

must also be taken into account. The judge must have regard to all the circumstances of the case, including in particular …'

The Court of Appeal then set out various factors to be considered, which I read omitting the one that was disapproved by Lord Bingham on appeal in the House of Lords:

'(1) The nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;

(2) Whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings;

(3) The likely length of such an adjournment;

(4) Whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation.'

(5) concerns an absent defendant's legal representations which does not here apply:

'(6) The extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him.'

(7) concerns the risk of the jury reaching an improper conclusion about the absence of the defendant and so obviously does not apply; and (8) refers to the seriousness of the offence;

'(9) The general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates.'

24. In *ICBC Standard Bank plc v Erdenet Mining Corporation LLC* [2017] EWHC 3135, Mrs Justice Cockerill dealt with the issue of proceeding in the absence of a defendant at paragraphs 53-65. Her Ladyship adopted the checklist set out by Cobb J in *Sanchez v Oboz* [2015] EWHC 235 (Fam). The checklist runs as follows:

i) Whether the respondents have been served with the relevant documents, including notice of this hearing;

ii) Whether the respondents have had sufficient notice to enable them to prepare for the hearing;

iii) Whether any reason has been advanced for their non-appearance;

iv) Whether by reference to the nature and circumstances of the respondents' behaviour, they have waived their right to be present [i.e. is it reasonable to

conclude that the respondents knew of or were indifferent to the consequences of the case proceeding in their absence?];

v) Whether an adjournment would be likely to secure the attendance of the respondent or facilitate their representation;

vi) The extent of the disadvantage to the respondents in not being able to present their account of events;

vii) Whether undue prejudice would be caused to the applicant by any delay;

viii) Whether undue prejudice would be caused to the forensic process if the application was to proceed in the absence of the respondents;

ix) The terms of the 'overriding objective' [including the obligation on the court to deal with the case justly, including doing so expeditiously and fairly and taking any step or making any order for the purposes of furthering the overriding objective].

25. Applying the checklist to the present case, I find that:

i) The Defendant has been served with the relevant documents, including notice of the hearing.

ii) The Defendant has had sufficient notice to enable him to prepare for the hearing. The Defendant was given notice of the hearing on 5 May 2021 and all hearings thereafter.

iii) No reason has been advanced for the Defendant's non-attendance.

iv) It is appropriate to conclude that the Defendant has waived his right to be present. The Defendant knew and was indifferent to the consequences of the case proceeding in his absence.

v) On the facts of this case, it is most unlikely that an adjournment would facilitate representation/attendance. The Defendant has failed to attend five hearings, three of which have been after a bench warrant had been issued.

vi) I find that it is hard to see what legitimate disadvantage there could be to the Defendant in proceeding in his absence, bearing in mind he has had plenty of time to challenge the Claimant's evidence if he wished.

vii) I am satisfied there would be undue prejudice to the Claimant in further delay.

viii) I find there would be no undue prejudice to the forensic process in proceeding in the Defendant's absence.

ix) The overriding objective in CPR 1 – CPR 1.1 points firmly towards dealing with the application in the absence of the Defendant.

Sentence

26. I have borne in mind all the matters set out at paragraphs 14 to 35 of Ms Karseras's skeleton argument and will not repeat them here.

27. I must first consider the culpability of the contemnor and the harm caused. Regarding culpability, I find that the culpability of the Defendant is high. The case involves the making of serial false statements, which undermine the administration of justice. If the false statements had been accepted by the Court, the Defendant would have received damages for the write off value of his motorcycle and credit hire of £48,511.92. As was said in *Liverpool Victoria Insurance Co Ltd v. Dr Asef Zafar* [2019] 1 WLR 3833, the Court of Appeal emphasised (at paragraph 60) that:

> "Because this form of contempt undermines the administration of justice, it is always serious, even if the falsity of the relevant statement is identified at an early stage and does not in the end affect the outcome of the litigation. The fact that only a comparatively modest sum is claimed in the proceedings in which the false statement is made does not remove the seriousness of the contempt."

28. Further I note that in addition to making false statements the Defendant has interfered with the administration of justice by preventing the Claimant from inspecting the motorcycle.

29. Secondly, I find that the harm is high. The Claimant has been forced to incur significant costs, namely £96,285.26. I have noted what the Claimant's Head of Claims, Mr Marriott, says in his affidavit sworn on 8th December 2020 at paragraphs 31 and 32. He says that fraudulent claims have a particularly significant effect on the bus industry. The Claimant is responsible for meeting the costs of claims up to a value of £750,000 out of its own funds. Further substantial judicial resources have been expended on multiple hearings, which have had to be adjourned due to the Defendant's non-attendance.

30. Fourthly, there has been no acceptance of responsibility, no apology and no contrition by the Defendant. To the contrary, I find that the Defendant has aggravated his contempt by failing to attend any of the hearings and by deliberately evading his arrest. Numerous attempts by the tipstaff and the Metropolitan Police to execute the warrant have been unsuccessful.

31. There is no mitigation before the Court, because the Defendant has not engaged with the committal proceedings.

32. Having regard to the aforementioned factors, I conclude that the custody threshold is passed and a sentence of imprisonment is appropriate.

33. I have considered whether the sentence can be suspended. I find that nothing short of an immediate term of imprisonment is appropriate having regard to the very serious nature of the six contempt's of court and the Defendant's aggravating conduct in not attending hearings and evading arrest.

34. I find that the six grounds absent aggravating factors would justify a term of imprisonment of six months. However, having regard to the Defendant's aggravating conduct in not attending multiple hearing and evading arrest I consider that the shortest term which will achieve the purpose for which it is being imposed is nine months (273 days) and I impose this sentence on each of grounds 1 – 6, to run concurrently.

Orders that the Defendant surrenders himself to Tipp staff and surrenders his passport

35. Ms Karseras submits in her skeleton argument at paragraphs 38-42[11] that the Court should order that the Defendant:

    i) Surrender himself to the custody of the Tipstaff so that they may execute the Court's warrant.

    ii) Surrenders his passport.

36. Ms Karseras referred the Court to JSC BTA Bank v Ablyazov (no. 8) [2015] UKSC 64. In this case the Supreme Court held that the court had the power to make such orders as referred to in paragraph 35 above.

37. Ms Karseras submits that the Defendant's exposure to the risk of additional findings of contempt could provide the Defendant with an incentive to surrender to the Court.

38. On the facts of the present case, I am unconvinced that making the order sought would provide an incentive to the Defendant to surrender to court. The Defendant has failed to attend five hearings to date, three of which have taken place after a bench warrant was issued on 4 May 2023 in order to secure his attendance. Therefore, in my discretion I decline to make such an order.

Costs of proceedings

39. On 25 October 2023, I ordered that the Defendant shall pay the Claimant's costs of these proceedings to date on the indemnity basis. Today I extend that order to the Claimant's costs of these proceedings to the present date on the indemnity basis.

40. The Claimant has served a Form N260 of costs, dated 28 November 2023, in the total sum of £96,285.26[12]. Having regard to the amount of the costs, I order that the costs be subject to a detailed assessment.

41. CPR 44.2(8) provides that where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.

42. I order that the Defendant do pay the Claimant by 14 December 2023 the sum of £60,000 on account of costs, pursuant to CPR 44.2(8).

[11] Exhibits to accompany the statement of Michelle Reilly, 23-24
[12] Exhibits to accompany the statement of Michelle Reilly, 26

Service of this order and the warrant of committal upon the Defendant

43. Pursuant to CPR 81.9(3), an order or warrant of committal must be personally served on the Defendant unless that Court orders otherwise.

44. I note that Mrs Justice Hill ordered on 12 October 2023 that the Claimant has permission to serve any further documentation in this case by alternative methods under CPR 6.15, namely by first-class pre-paid post to 33 Westward Road, London E4 8LZ.

45. I order that service of the order and warrant of committal upon the Defendant shall be by first-class pre-paid post to 33 Westward Road, London E4 8LZ.