

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SITTING AT MANCHESTER CIVIL JUSTICE CENTRE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2012

Before:

THE HONOURABLE MRS JUSTICE SHARP

Between :

William Andrew Tinkler (1)
WA Developments International Limited (2)

Claimants

- and -

Peter Elliott

Defendant

Craig Sephton QC (instructed by **Squire Sanders (UK) LLP**) for the **Claimants**
The Defendant, Peter Elliott, in person

Hearing date: 16 February 2012

Judgment

Mrs Justice Sharp:

1. This is an application made with the permission of HH Judge Pelling QC by Mr Peter Elliott, the Defendant in these proceedings to set aside a judgment obtained against him following a hearing in his absence before HH Judge Tetlow sitting as a High Court Judge on 15 March 2010.
2. Permission was required because the Defendant is subject to a general civil restraint order which was made on the same occasion; and it was given on 5 January 2012 in the following terms.

“I grant permission with considerable hesitation but do so in the end because I am satisfied that the Defendant has a sufficiently tenable case to make his proposed application an arguable one. Whilst I recognise that the Defendant may fail on the basis that the application has not been made promptly within the meaning of CPR 39.3 (5), that is not an inevitable outcome and thus is not a sufficient reason for refusing permission. This case has an unfortunate history. The history is set out in the various

judgments delivered by me in the committal proceedings. The Defendant did not appear at the trial at which the Orders of 15th March 2012 were made, apparently for reasons to do with his mental health, and the issues of substance between the parties have never been resolved at a contested hearing. Aside from the factual issues, I have concerns over the terms of the injunction granted by Judge Tetlow that are reflected in the Judgment I gave when determining the Claimant's most recent application to commit the Defendant for breach of that Order. The Defendant has attempted to apply for permission to appeal the Order made by Judge Tetlow. He maintains that although his time for appealing was extended by Arden LJ at an oral permission hearing, permission was refused on the basis that he could apply to set aside the Order. Thus the attempt by the Defendant to apply to set aside the Orders represents his last realistic opportunity to have the dispute between the parties resolved on its merits and for the court to consider the terms of the injunction granted by Judge Tetlow on 15th March. ”

3. Three large bundles for this application have been carefully prepared by the Defendant who appears in person, but they are not entirely comprehensive. No bundles have been lodged by the Claimants, though a witness statement dated 3 February 2012, has been made on their behalf by Mr Trevor Howarth, the Legal Director of the Second Claimant, which exhibits a small selection of the documents. To some extent therefore, I have had to piece together the relevant background which is as follows.
4. The First Claimant, Mr Tinkler is the chairman of and a shareholder in the Second Claimant WA Developments International Limited (WADI). Mr Tinkler is also the chief executive of Stobart Group, a FTSE 250 listed company. Other directors of WADI include Mr William Stobart, Mr Howarth and Mr Whawell.
5. The Defendant is an experienced helicopter pilot and was engaged by the WADI to provide aviation consultancy services, and as a pilot until March 2007, when he and WADI parted company in acrimonious circumstances.
6. The Defendant's case is that he was forced to resign as result of matters which have been central to the dispute between the parties ever since. These were allegations made by him that WADI was conducting unlawful flying operations; in particular, that WADI was providing charter flight operations which required an operator's licence from the Civil Aviation Authority (the CAA) if they were to be lawful, but that they did not have such a licence. WADI and/or Mr Tinkler and the operator of the airport therefore committed a criminal offence whenever the flights took place, and the receipt of money for such flights was also unlawful. As a result of his concerns, the Defendant reported the Claimants to the CAA. The CAA conducted an investigation in 2007 and in 2008 but decided to close its files and take no further action.

7. The Claimants' case on the other hand is that the breakdown in the relationship between the parties resulted from the Defendant taking strong exception to a particular pilot working for WADI; that he became embittered and obsessive, and has been determined to wreak revenge upon WADI for what he perceives to have been various injustices perpetrated against him ever since. It is said this has led to the Defendant making numerous unsubstantiated claims and allegations of wrongdoing of an extremely serious and damaging nature about the Claimants and others whom the Defendant has embroiled in this dispute, including those who have only a tangential connection with the parties.
8. One of the matters in dispute concerned the sale of land in Cumbria on which the Defendant was then living by the First Claimant to the Defendant. This resulted in litigation brought by the Defendant in the Chancery Division of the Manchester District Registry against the First Claimant (claim no. 7MA30191). The Chancery litigation was eventually compromised in July 2007 on terms contained in a schedule to a Tomlin order.
9. There was initially a dispute between the parties at the hearing before me about what was contained in the schedule, specifically, whether those terms included a written undertaking (the undertaking) which it is common ground was executed by the Defendant on 13 July 2007.
10. In his written arguments and witness statements the Defendant said the Tomlin order did not contain the undertaking. He also said the Claimants misled HH Judge Tetlow at the hearing on 15 March 2010 by suggesting that it did, and that two injunctions granted by the court in these proceedings, including the permanent injunction granted on 15 March 2010 were obtained in reliance on this misrepresentation amongst other matters.
11. I am satisfied the Defendant is wrong about that. Because of what appeared to be two versions of the Tomlin order, one with and one without the undertaking, I called for the original order sealed on 24 July 2007 on the court file. This included the undertaking (as the Defendant accepted once he had seen it) dated 13 July 2007 and signed by the First Claimant and the Defendant. It follows that it was part of the bargain struck between the parties in the overall settlement of the litigation between them.
12. The effect of the settlement in general terms can be summarised in this way:
 - i) The parties agreed that all claims between them, including claims arising out of the termination of the Defendant's engagement were settled on a full and final basis;
 - ii) As part of the compromise, the Defendant gave an undertaking on 13 July 2007 not to make or repeat damaging allegations about the Claimants and their associates.
13. The schedule contained both the undertaking and a proviso (the proviso). It said as follows:

“UNDERTAKING BY THE CLAIMANT TO W.A. DEVELOPMENTS INTERNATIONAL LIMITED”

The [Defendant] provides the following Undertaking provided that he is not subject to any defamatory or slanderous statements coming to his attention from the [Claimant] or his companies. If the [Defendant] does receive knowledge of such statements he will put into writing to the [Claimant] his concerns and ask for a retraction within 7 working days of such statements. If he does not receive such a retraction then the [Defendant] is at liberty to defend himself as he sees fit in the circumstances.

I, PETER ELLIOT, on behalf of myself, my servants, agents or howsoever (to which all reference to “I”, “myself” or like expressions in these undertakings refer), UNDERTAKE FROM THE DATE HEREOF:

A. that I shall not, whether by myself or by procuring, counselling or encouraging others to do so, make, permit, repeat or cause to be repeated, any allegation whatsoever to any third party, whether directly or indirectly, in whatever form or medium howsoever, whether orally or in writing (and if in writing in any medium whatsoever, including any electronic form):

(a) that W.A. Developments International Limited (“WADI”), any associated company or firm, or their respective directors, employees or agents or howsoever, have acted in respect of the operation of any or all aircraft (be they fixed wing or otherwise), in a manner which is in breach of any statutory or other regulatory requirements of either the United Kingdom or the United States of America, or any other country, and/ or which is otherwise contrary to the law of any country, save as I may be required to do so by the compulsion of law.

(b) is otherwise defamatory of W.A. Developments International Limited, any associated company or firm, its directors, employees, servants or agents or howsoever;

(c) with the intention of causing harm to the legitimate financial business interests of W.A. Developments International Limited, any associated company or firm, its directors, employees, servants or agents howsoever.

B. To keep the facts of this dispute, this settlement and the terms of the settlement confidential and not to repeat the same to any third party without the express written permission of WADI and signed by a director save that I shall be at liberty, in answer to a specific question concerning this dispute, to

respond that it has been settled amicably between the [Defendant] and the [Claimant].

C. To repeat these undertakings to a court of competent jurisdiction if required by WADI to do so.

These undertakings are given in full and final settlement of any previous allegations I made or may have made of a like nature to those paragraphs A (a), (b) and (c) above.”

14. The settlement agreement did not result in the resolution of the parties’ differences. The Defendant brought proceedings for defamation (claim no 8NE30065) against the First Claimant in the Newcastle upon Tyne District Registry (the defamation action) in an action begun on 18 September 2008. Particulars of Claim were served on the 18 December 2008. The claim form made a number of allegations against the Second Claimant, its directors and employees, including those referred to in paragraph 6 above, and others relating to that issue.
15. The issue of that claim was followed shortly afterwards by these proceedings. On 21 November 2008 an application was made by the First Claimant without notice for an injunction to enforce the Defendant’s compliance with the contractual obligations contained in the undertaking. The application was made to HH Judge Hegarty QC sitting as a High Court Judge (though he is referred to in the transcript of the judgment as HH Judge Foster). Mr Craig Sephton QC appeared for the First Claimant.
16. In view of what happened later, it is necessary to refer to some of the matters considered by the judge. It appears that the Claimants relied on three matters in support of their application: the content of the claim form in the defamation action (and an associated threat to issue witness summonses against highly placed individuals working for customers of Stobart Limited), the Defendant’s dissemination of the claim form to persons with no apparent interest in it, and written evidence sent to Carlisle City Council by the Defendant in relation to a planning application for Carlisle airport expressing his concern that the First Claimant and Mr Stobart were unsuitable persons to operate an airport. (It seems that WADI had acquired Carlisle airport in 2006; and had applied for planning consents to expand it and make it a regional hub. Carlisle City Council ultimately granted the planning consents on 12 March 2009, and WADI subsequently entered into negotiations with Stobart Group Limited to sell it the airport).
17. The judge noted that the terms of the undertaking were extremely wide, that the undertaking was given to WADI rather than the First Claimant personally, and that the undertaking might be affected if defamatory statements had been made by the First Claimant or any of his companies because of the terms of the proviso. The judge considered the picture that appeared to emerge from the documentation he was shown was that the Defendant was using the pleadings in the Newcastle action as a vehicle to disseminate to various individuals allegations which he expressly undertook not to disseminate by the undertaking. However, the judge was reluctant simply to convert the terms of the undertaking into an injunction (as he was apparently asked to do) or make an order which impinged on the Defendant’s right to continue the defamation action or any proceedings for defamation, or to fetter the Defendant’s right to communicate with Carlisle City Council.

18. The judge bore in mind that where a Defendant is neither present nor represented the court must be careful not to unduly fetter any right of self-expression; and also the right to communicate to a responsible body or authority matters of public importance. He considered the First Claimant was in principle entitled to some form of relief for a short period, but subject to a variety of safeguards including limiting the class of persons with whom the Defendant was prohibited from communicating the allegations in question.
19. This limited class was any person who the Defendant knew or ought reasonably to know was a customer of WADI, a customer of Eddie Stobart plc, Tesco plc, its directors, servants or agents, and any employee of WADI or Eddie Stobart plc.
20. The Defendant was prohibited from alleging to those persons:
 - a. that W.A. Developments International Limited (“WADI”), any associated company or firm, or their respective directors, employees or agents or howsoever, have acted in respect of the operation of any or all aircraft (be they fixed wing or otherwise), in a manner which is in breach of any statutory or other regulatory requirements of either the United Kingdom or the United States of America, or any other country, and/ or which is otherwise contrary to the law of any country, save as I may be required to do so by the compulsion of law.
 - b. with the intention of causing harm to the legitimate financial business interests of W.A. Developments International Limited, any associated company or firm, its directors, employees, servants or agents howsoever.
21. It is to be noted that at this without notice hearing, the high duty of an applicant to make full, fair and accurate disclosure of material information and to draw the court’s attention to significant factual, legal and procedural aspects of the case was not complied with in a number of respects.
22. First, the judge’s attention was not drawn to section 12 of the Human Rights Act 1998. The relevant parts of Section 12 provide as follows.

“Freedom of expression.

 - (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
 - (2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied—
 - (a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4)The court must have particular regard to the importance of the Convention right to freedom of expression...

(5)In this section—... “relief” includes any remedy or order (other than in criminal proceedings).”

23. The relief sought undoubtedly affected the Defendant’s right to freedom of expression. But because the judge’s attention was not drawn to section 12, the matters the court is required to consider before granting such relief were simply not addressed. The judge did not consider whether there was any compelling reason for the Defendant not to be notified. Nor did he consider the threshold it was necessary for the Claimants to surmount before such relief was granted – that is whether the Claimants were likely to establish that publication should not be allowed (in accordance with the test for likelihood identified by Lord Nicholls in *Cream Holdings v Banerjee* [2004] UKHL 44 at paragraph 22). Mr Sephton frankly accepts responsibility for this omission. He said he was not aware of this provision or its relevance until the matter was mentioned by HH Judge Pelling QC at a much later stage (in October 2010). The seriousness of this omission is such that it would in my view have justified the setting aside of the injunction without more, in particular, because, though the matter was obviously regarded as urgent by the Claimants, there is nothing in the evidence I have seen which suggests there was any compelling reason for not giving the Defendant at least some notice, however short, of the hearing.
24. The judge was obviously alert to the potential effect of the proviso but he was not told about a material document relating to it. This was an email sent by the Defendant to the First Claimant on 2 November 2007 (the 2007 email). It said as follows:

“Andrew

It has come to my attention that you have slandered me and also made defamatory comments about me to now (sic) several parties.

I offer you seven days to wholly retract and apologise to me for the following false statements that you have made to the above mentioned parties:

1 That I flew an Agusta helicopter for you unlawfully.

2 That I am responsible for the criminal aviation activities that you are under investigation for through poor advice from myself

3 That I was sacked from my position with WADI.

That I did not on numerous occasions advise you of your criminality and urged you to cease it

That I was not acting in the capacity as Aviation Director for WADI.

All of the above statements you have made to several parties are wholly false. I offer you seven days to unreservedly retract these false statements and Undertake to me that they will not be repeated.”

25. This was obviously relevant to whether the Claimants were likely to establish that publication should not be allowed. I do not know why it was not mentioned to the judge, but whatever the reason, the position was not then corrected as it should have been. The First Claimant was required by the judge’s order to serve a witness statement confirming what the judge was told at the hearing. His witness statement dated 24 November 2008 said this at paragraph 17:

“I wish to comment on two suggestions that Mr Elliott has made as to why he is entitled to ignore the promises he made in July 2007...(b) Mr Elliott may allege that he has been the subject of defamatory statements and therefore he is entitled by the terms of his promise to make any allegations he chooses. Mr Elliott has not particularised the defamatory statements about which he complains. He has not, as far as I know, put his concerns into writing and asked for a retraction (as he is required to do under the terms of his promise). He has simply written a letter in which vague allegations are made, requiring a published apology and threatening proceedings which he issued in very short order.”

26. Once again there was no mention of the 2007 email. Moreover the letter to which the First Claimant referred (and which he did not exhibit) was misrepresented. This was the Defendant’s letter before claim in the defamation action dated the 18 August 2008 (the 18 August letter). Contrary to the suggestion made by the First Claimant, it particularised the defamatory statements about which the Defendant complained and the draft undertaking attached to it did ask for a retraction, albeit within 28 days, rather than 7. It said in part as follows.

“APOLOGY and UNDERTAKING”

I, William Andrew Tinkler, on behalf of myself, my Companies. (including Stobart Group Ltd) ,my servants, agents or howsoever (to which all reference to “I” “myself” or like expressions in these Undertakings refer), wholly or unreservedly Apologise and further Undertake from the Date Hereof to not repeat such allegations against Peter Elliot:

A that I shall not, whether by myself or procuring, counseling (sic) or encouraging others to do so, whether directly or indirectly, make any further statement either orally or as put to writing in any medium, any comment which could be construed as libellous (sic), defamatory or slanderous to Peter Elliot under the Defamation Act 1996.

B as detailed below:

That Peter Elliot was sacked. I can indeed confirm his company did Repudiate its contract and in reality resign from its duties to me.

That Peter Elliot is “wired up to the moon” or has any mental disorder of any kind.

That Peter Elliot has been libelous (sic) of me at any time to my knowledge.

That Peter Elliot has ever had any of his Professional or Personal Aviation Licences Revoked from him under any Jurisdiction ever.

That Peter Elliot has on any occasion for me flown a helicopter without the appropriate licence to conduct that flight.

C I do indeed confirm that none of the negative comments detailed in B above are true or were ever true.

D To repeat these Undertakings to a competent court of jurisdiction if required by Peter Elliot to do so and I do here unreservedly apologise to Peter Elliot and retract all my previous negative statements made.

27. The Claimants issued proceedings on 24 November 2008 for damages and an injunction in the same terms as the undertaking. The Particulars of Claim relied on the terms of the undertaking; and asserted that the Defendant had made a number of allegations in breach of the undertaking:
- i) In an email to Rodney Baker-Bates (the Chairman of William Stobart Ltd) dated 24 April 2008, where it was said the Defendant had alleged that the First Claimant had committed multiple criminal offences and had conspired with William Stobart to pervert the course of justice;
 - ii) By sending copies of the claim form in the defamation action to 9 individuals or bodies, including Carlisle City Council and the Cumberland News. The claim form alleged amongst other things, that the Claimants had committed a large number of offences under the Air Navigation order, that WADI had made a deceitful planning application in relation to Carlisle airport, that the Claimants had sought to blackmail the Defendant into silence, and that

perjured evidence had been supplied to the CAA by various individuals in the course of their investigation.

28. It was also alleged that the Defendant threatened to distribute further copies of the claim form. Reliance was placed on:
- i) An email dated 20 November to Rodney Baker-Bates in which the Defendant said he would be issuing witness summonses to Sir Terence Leahy and Alex Laffy, senior executives of Tesco plc, important clients of Eddie Stobart Ltd, a company associated with the Second Claimant and in which the First Claimant has significant financial interests; and had yet to ascertain the identities of the correct individuals of Coca Cola, also important clients of Eddie Stobart Limited;
 - ii) A letter dated 18 August 2008 to the First Claimant, in which the Defendant said he intended to obtain witness summonses against amongst others, WADI directors and employees, Tesco Directors, Coca Cola Executives, the CAA and Cumbria police.
29. In the defence to the claim, the Defendant asserted amongst other matters, that
- i) It would be unconscionable if he could not defend himself from defamation by the Claimants and explain it was their criminal conduct which was the reason for his resignation; he relied on the fact that the Claimants have repeatedly asserted he was sacked, and that he must have the ability to rebut that allegation;
 - ii) The allegations made by him were made to public bodies with an interest in the matter;
 - iii) The allegations were of serious criminal conduct, and he should not be gagged in relation to such matters which were a matter of public interest;
 - iv) He had served a 7 day notice on the Claimants, thus nullifying the “gag” in any event;
 - v) He gave the undertaking under duress.
30. The Defendant also counterclaimed for damages for “blind shares which were agreed by the Claimant in 2006”. He alleged first, that he had made an introduction which enabled the Claimants to purchase Carlisle airport and second that the Claimants had agreed to pay him something by way of shares, for constructive dismissal, for exemplary and aggravated damages for causing him distress, and for abuse of the process of the court.
31. Unfortunately there is limited information about what happened at the injunction hearings which took place after the first hearing on 21 November 2008; and I was not provided, with a complete record of the orders made after that date. I therefore asked Mr Sephton to send to the court after the hearing before me copies of those orders. What follows is derived from those orders and other limited information about the events in the Defendant’s bundles.

32. On 24 November 2008 the order made by HH Judge Hegarty QC was continued by Christopher Clarke J (with the proviso that nothing in the order prevented the Defendant from telling the CAA “what they are said to have previously told the Defendant about the First Claimant’s claim that the Defendant had been sacked and about the First Claimant’s claim that the Defendant had flown a helicopter unlawfully”). On 2 December 2008 the order was continued again by Judge Foster QC sitting as a High Court Judge. On 13 January 2009, the matter came before HH Judge Tetlow sitting as a High Court Judge and on 15 January 2009 before Macduff J (so I was told by the Defendant, on an application to commit which failed because he had not been properly served).
33. On 19 May 2009 the matter came before HH Judge Tetlow again. The terms of the injunction against the Defendant was now widened significantly in two respects.
34. First, it incorporated paragraph A (b) of the undertaking. The Defendant was now prohibited from making any statement otherwise defamatory of W.A. Developments International Limited, any associated company or firm, its directors, employees, servants or agents or howsoever.
35. Second, the relevant categories of persons the Defendant was prohibited from communicating the allegations to was now widened to include any:
 - i) Shareholder, director or insurer of Eddie Stobart plc or its associated companies;
 - ii) Persons doing business with Eddie Stobart plc or its associated companies (but not the CAA who were not included in any of these categories); and
 - iii) Councillor, officer, employee or servant or agent of Carlisle City Council, save for the purpose of communicating with Mark Lambert of that council with respect to the intended judicial review proceedings relating to the planning permission granted by the council in respect of Carlisle airport and for the purpose of serving papers upon Mr Lambert and/or the Council’s nominated solicitors with respect to the judicial review proceedings.
36. I assume in the light of what Mr Sephton has said, that the implications of section 12 HRA 1998 were not raised by the Claimants at any of these subsequent injunction hearings either.
37. On 22 May 2009 the Claimants applied to commit the Defendant for breach of the order made HH Judge Tetlow.
38. On 10 June 2009 this application came before HH Judge Main QC sitting as a High Court Judge. The Defendant was in person. Mr Sephton appeared for the Claimants. The breaches complained of were circulating a letter to a number of individuals which made defamatory statements about WADI and its directors; and with the purpose of interfering with their legitimate business interests. The argument for the Claimants, which the judge accepted, was that it would be a breach of the order for the Defendant to make any defamatory statement about the Claimants, regardless of his motivation for doing so. The judge found the Defendant to be in breach of the order made on 19 May 2009 and sentenced him to 3 months’ immediate imprisonment for contempt.

39. The relevant statements made by the Defendant to two individuals, as set out in the judge's judgment were these:

"I request a new valuation/revaluation of Carlisle Airport which will I am sure be significantly less than the £14 million outlined in the prospectus. I suggest it will be circa £4 million, not £14 million." alleges the imprisonment was unlawful.

"WADH Ltd and its subsidiaries, a wholly owned private company of Andrew Tinkler and William Stobart, (related parties of the directors of the Stobart group) which appears to be technically insolvent"

"Why should Andrew Tinkler and William Stobart receive the full £14 million now when surely it would be more prudent to wait until the outcome of all the issues above?"

"All non-executives (and therefore not party to the day-to-day operations of the business) briefed, I am informed, by Trevor Howarth. I have issues with the independence of Trevor Howarth"

"I am not comfortable with the guarantees of Andrew Tinkler and William Stobart because we do not know their net asset position or financial abilities"

40. On 27 August 2009 a bankruptcy order was made against the Defendant on the Second Claimant's application, following his failure to satisfy various orders for costs made against him in this litigation. The Defendant remains an undischarged bankrupt.
41. By the time of the trial before HH Judge Tetlow on 15 March 2010, the Defendant had made a number of claims which were certified as being without merit.
- i) On 21 April 2009 his defamation action was struck out by DJ Atherton on a number of grounds including that the claim had no real prospect of success, *Jameel*¹ abuse and that the proceedings were an abuse of the process since the pleadings were being used to make and then circulate scandalous allegations intending to damage the First Claimant.
 - ii) On 7 October 2009 the Defendant began proceedings in the High Court (claim no. HQ09D04487) against the Stobart Group Ltd and Eddie Stobart Ltd, seeking millions of pounds of damages in relation to an abuse of the process alleged against the First Claimant. This claim was struck out by Master Leslie as disclosing no reasonable cause of action and an abuse of the process. The Master also adjourned the Claimants' cross application for an extended civil restraint order (ECRO) against the Defendant to the trial of this action.
 - iii) On 30 October 2009 the Defendant began proceedings against the First Claimant and Mr Howarth making, so it is said, very serious allegations against them (claim no. 9MA91624). On 13 November 2009 these were struck

¹ *Jameel (Yousef) v Dow Jones* [2005] EWCA Civ 75; [2005] 2. QB. 946.

out as an abuse of the process by HH Judge Tetlow sitting as a deputy high court judge. He also made an extended civil restraint order (ECRO) against the Defendant and ordered him to pay costs in the sum of £4,500. I should say that I have not seen copies of the pleadings in either this or the 7 October action.

42. On 15 March 2010 the trial of this action came before HH Judge Tetlow with a time estimate of 5 days. A transcript of the hearing is available. The hearing was brief. No reasoned judgment was given, and it is necessary to discern what happened from the transcript.
43. Mr Septon appeared for the Claimants. The Defendant did not appear. The consideration given to his non attendance appears from the beginning of the hearing as follows:

“The Judge: Yes, Mr Septon (sic) ?

Mr Septon: Your lordship has a vast number of bundles-The
Judge: Which I have not read. I have read a skeleton argument
from yourself and Mr Elliot.

Mr Septon: Mr Elliot is not here.

The Judge: No.

Mr Septon: I appear with my learned friend, Mr King, on
behalf of the claimants and I invite you to dismiss the
counterclaim and to grant me the relief I seek.

The Judge: Yes, I suppose I ought to hear some evidence,
should I?

Mr Septon: Well...

The Judge: Vaguely, I only say that because he is not here. He
has sent in a doctor's note, which was to the effect that he
cannot attend. Let me find it, I have now lost it. What did I do
with it? I did have it [*inaudible*] have lost it. Let me have a
quick look. Anyway. It says he is too ill to attend, full stop, and
he was told by email that that was not good enough and it was
going ahead anyway. So it is. Can you just... well, perhaps it
would help me if you just explain, because I have some idea
what it is about from past experience.

Mr Septon: Yes.

The Judge: It would help me, because it seems to me, whatever
happens, he will be able to apply to set aside the judgment as
long as he provides (a) why he was not there, he might succeed
on that, and (b) it shows a real prospect of success either on
defending the claim or on counterclaiming. Certainly, as
regards the counterclaim I do not think there is any difficulty

about that. If you could explain to me, so that I feel I am able to have some grip of it, what it is all about.”

44. As to the email to which the judge referred, the Defendant (who so far as I can tell is punctilious in relation to documentation) told me he did not receive such an email, and there is none, so far as I am aware, on the court file. At the judge’s invitation Mr Sephton took the judge through the Tomlin order and the undertaking. There was a short discussion about the proviso. As to that, Mr Sephton said only the Defendant had to demonstrate he had been subject to defamatory or slanderous statements, but his action for defamation had been struck out. There were a few more exchanges between the judge and Mr Sephton, and the judge then indicated he was prepared to grant the relief asked for. He said that if the Defendant had been done a grave injustice, he could apply to set the judgment aside. The judge was not referred to the provisions of section 12 of the HRA 1998 on this occasion either.

45. He granted a permanent injunction in the following terms.

“The defendant shall not by himself or by counselling, procuring or encouraging others to do so, repeat or cause to be repeated any allegations whatsoever to any third party, whether directly or indirectly, in whatever form or medium whatsoever:”

3.1. That W.A. Developments International Limited (“WADI”), any associated company or firm, or their respective directors, employees or agents or howsoever, have acted in respect of the operation of any or all aircraft (be they fixed wing or otherwise), in a manner which is in breach of any statutory or other regulatory requirements of either the United Kingdom or the United States of America, or any other country, and / or which is otherwise contrary to the law of any country, save as required to do so by compulsion of law.

3.2. That is otherwise defamatory of W.A. Developments International Limited, any associated company or firm, its directors, employees servants or agents howsoever;

3.3. With the intention of causing harm to the legitimate financial business interests of W.A Developments International Limited, any associated company or firm, its directors, employees, servants or agents or howsoever.

46. The judge also dismissed the Defendant’s counterclaim and made a general civil restraint order (GCRO) for two years against the Defendant. As to the GCRO, the reasons which led the judge to grant it are not entirely easy to discern. It appears to have been made on the ground that after the Defendant had been made the subject of an ECRO, he had made a further without merit application to Judge Holman (one of the nominated judges under that order) relating to shares held by the First Claimant and Mr Stobart, and for directions in relation to a witness summons.

47. Both the final order and the GCRO were served on the Defendant on the day they were made. Mr Sephton confirmed no note of the hearing was sent to the Defendant.
48. On 23 April 2010 the Defendant applied for an extension of time for permission to appeal against the order made by HH Judge Tetlow on 13 November 2009 and asked that the ECRO and the order for costs of £4500 made on the same occasion be set aside. On 23 June 2010 Deputy Master Meacher dismissed the appeal following the Defendant's failure to lodge a court bundle by the relevant deadline in accordance with the rules.
49. On 19 May 2011 the Claimants applied to commit the Defendant for breach of the injunction granted by HH Judge Tetlow on 15 March 2010.
50. On 21 July 2011 the Defendant applied to the Court of Appeal for permission to reinstate his appeal against the order made on 13 November 2009 and he also applied for an extension of time for permission to appeal against the final order made by HH Judge Tetlow on 15 March 2010. Both applications were refused by Sir Richard Buxton by orders made on 18 and 19 October 2011 respectively.
51. In the meantime, the Claimants' second application to commit the Defendant for contempt had been heard by HH Judge Pelling QC sitting as a Judge of the High Court. Mr Sephton appeared for the Claimants and the Defendant was in person.
52. On 20 October 2011 the judge delivered a full and careful judgment, from which it is apparent that there were a number of matters which troubled him. These included the mental health of the Defendant, the width and vagueness of the wording of the injunction granted on the 15 March 2010, the apparent absence of any previous consideration of section 12 of the HRA 1998 and the absence of submissions from the Claimants about the applicable legal principles (which was described as surprising). The judge had been sufficiently troubled about the mental health difficulties of the Defendant before the hearing to invoke the assistance of the Official Solicitor and direct an inquiry as to whether the Defendant had capacity. In the event, though obviously still concerned about the Defendant's state of mind, the judge was satisfied the Defendant did have capacity.
53. The judge construed the wording of the permanent injunction restrictively. For example, he rejected an argument for the Claimants that properly construed, it prohibited the Defendant from "making" any allegation at any time in the future that was defamatory of WADI, any associated company or firm, its directors, employees, servants or agents because the word "making" though in the undertaking was not in the final injunction. On his construction, the final injunction precluded the repetition of previously made defamatory remarks made with the intention of harming the legitimate financial interests of the classes of persons identified in paragraph 3.3 of the order. In this respect the judge differed from the interpretation given to the same wording in the interim injunction by HH Judge Main QC who had dealt with the application to commit in June 2009.
54. The judge nonetheless found 4 out of the 19 breaches alleged to be proved. These arose from a letter sent by the Defendant to the Director of Public Prosecutions dated 19 October 2010; and two emails to the CAA dated 8 November 2010 and 29

November 2010. He imposed a sentence of 3 months imprisonment, suspended for 2 years.

55. On 8 December 2011 the Defendant issued the application for permission to apply to set aside the order made by HH Judge Tetlow on 15 March 2010.
56. The Defendant also renewed his applications for permission to appeal, orally, following the refusal by Sir Richard Buxton. Those applications were heard by Arden LJ on 14 December 2011. The renewed applications were refused.
57. The Defendant now applies with permission as I have indicated of HH Judge Pelling QC to set aside the judgment given by HH Judge Tetlow. The application is made pursuant to CPR r 39.3(5). The Claimants oppose the application.

Discussion

58. In order to succeed in an application to set aside judgment, the Defendant has to satisfy the criteria in CPR r 39.3(5) (a) to (c) by showing that he acted promptly when he found out the court had exercised its power to enter judgment, that he had a good reason for not attending the trial, and that he has a reasonable prospect of success, which for this purpose means a defence which carries some degree of conviction (see the observations of Potter LJ in *ED&F Man Liquid Products Ltd v Patel & Anr* [2003] EWCA Civ 472 at paragraphs 11 to 13).
59. I deal first with the merits. In my judgment, the Defendant surmounts this threshold. A large number of matters are raised by the Defendant, not all of which are contained in the defence as served in 2009, but I will focus on the main points that seem to me to be material to the decision I have to make.
60. I deal first with the injunctive relief asked for. The Defendant has argued that the Claimants were not entitled to it because it would be unjust to bind him and disable him from defending himself against what is said about him by the Claimants.
61. It is certainly more than arguable in my view that the Claimants were, and are not entitled to the relief they asked for a number of reasons.
62. First, the injunctive relief asked for does not reflect the bargain reached between the parties. The part of the undertaking the Claimants asked the court to enforce bound the Defendant for all time (at pain of imprisonment) not to make or repeat various statements but without regard to the proviso which gave the Defendant the right in certain circumstances to defend himself as he saw fit, including by making statements he had otherwise promised not to make.
63. I asked Mr Sephton during the course of argument on what basis it could be contended that the Defendant could be permanently bound by his promises in the undertaking, but without regard to the “let out clause” if I may so describe it, in the proviso. His only response was that it would be open to the Defendant if he was defamed, to bring an action for defamation. This seems to me to be no answer to the point, noting as I do that it might be thought from the history which I have set out that one of the purposes of these proceedings, at least initially was to prevent the Defendant from making such a claim.

64. Second, there are further issues which are troubling about the wording of the undertaking the injunction purported to enforce.
65. One starts with the proposition that the terms of an injunction should be clear and unambiguous, not vague or uncertain; and that accordingly, a party who is the subject of an injunction should be able to know with a reasonable degree of certainty once it is imposed what it is he is permitted or required to do under its terms.
66. In my view however, the injunction asked for and granted did not meet those criteria. This was because it reflected the width and uncertainty of the wording of the undertaking (or the part of the undertaking) it purported to enforce. This is demonstrable from the number and nature of the issues of construction HH Judge Pelling QC had to address when determining whether the Defendant was in contempt and from the different interpretation which was given to what was to become paragraph 3.2 of the final injunction by the two judges dealing with the two committal applications. It need hardly be emphasised that someone should not be at risk of imprisonment (let alone imprisoned) on such a basis.
67. Paragraph 3.2 on the face of it was of a restriction of great width. It prohibited the Defendant from making (or “repeating” in the wording often used in defamation injunctions) any allegations defamatory of the Claimants. Whether an allegation is defamatory or not can be, and often is a matter of legitimate debate even at the highest judicial level, as the learning on this topic demonstrates. HH Judge Pelling QC understandably construed the wording of this paragraph restrictively. But whether terms are sufficiently clear and certain to be enforceable by an injunction, is an issue which needs to be addressed, not at the enforcement stage, but at the stage when the order is made.
68. Parties are of course generally free to compromise disputes between them on any terms which can then be included in a Tomlin order. Even if the terms are too vague to be capable of enforcement, the court will not decline to make a Tomlin order despite the difficulties in enforcement which may then arise. But it doesn’t follow that the court will then exercise its discretion to grant an injunction reflecting the terms of the Tomlin order: see *Wilson v Whitworth Ltd v Express and Independent Newspapers Ltd* [1969] 1 WLR 197.
69. It might be argued that the Defendant would have no defence to a claim for an injunction in relation to those parts of the undertaking which were sufficiently certain to be enforceable, and they could be severed from the rest of it without doing violence to the nature of the agreement between the parties. This would be a difficult argument to sustain in my view. The proviso is arguably integral to the agreement, but even if the Claimants were now to amend their claim for relief to take account of it, this would arguably make the relief asked for even more unsatisfactory, given the contingent possibilities the proviso contemplates.
70. Third, because of the implications of the relief asked for on the Defendant’s right to freedom of expression.
71. Some of the allegations made by the Defendant are described before me (as they have been at other times in this litigation) as outrageous, scurrilous and false. Some of them may be. The point is also made by the Claimants that the CAA conducted a thorough

investigation into the matter and decided that there was insufficient evidence of a breach of the legislation to provide a realistic prospect of conviction. Attention is drawn to the letter from Mr Crawley of the CAA dated 28 March 2008 which says as much, and in addition that none of the witnesses gave corroborative evidence to support the allegations the Defendant made.

72. There is other evidence however which may be said to point the other way, for example a letter from Mr Crawley to the First Claimant of 9 July 2007 in which he says:

“You told me you had invoiced back the companies that paid by for the aircraft use. You initially thought you were legally entitled to ‘charge’ companies within the group but now you have studied the Air Navigation Order further it appeared you were mistaken as to the technicalities of the law. You relied on Mr Peter Elliot to advise you but he did not do his consultancy job sufficiently well to protect you.”

73. In addition, a minute of the meeting of the board of the Second Claimant dated 13 March 2007, records as follows:

“Following the board meeting of Eddie Stobart Ltd held on 8th/9th March, the board of WA Developments International Ltd (WADI) has had further discussions concerning Peter Elliot.

After further investigations of illegal public transport made by Peter Elliot, and having taken advice from the FAA (Sam Lombardi), it appears possible that some of the inter – company / group charges may contravene FAA regulations.

Under advice from and aviation consultant (Peter Elliot), WADI believed that this charging was not contrary to FAA or CAA rules, as the charges were to companies within the Group or with common ownership.”

74. Whether or not there were technical breaches of the regulations, and, if so, whether the Defendant was responsible for them, or the “messenger who was shot”, is obviously a matter which is hotly disputed. But it is not plainly obvious that the central allegation made by the Defendant (that the Claimants or some of them may have acted at one time in breach of the relevant Air Navigation regulations) is false.
75. The Claimants’ simple point nonetheless is that there is no defence to a claim for a final injunction to enforce the contractual settlement, which included the Defendant’s undertaking not to allege that they had acted in breach of any statutory or regulatory requirement. They point too to the obvious importance of settlement agreements and the public interest in their enforcement.
76. However, whether it is appropriate for the courts to grant an injunction, and the terms in which it should be granted, particularly if it impacts on a party’s freedom of expression is a matter which has to be considered in the light of the relevant legal principles which apply in such circumstances, as HH Judge Pelling QC pointed out

when dealing with the Defendant's committal. He took the view that in the light of section 12 of the HRA 1998, and Article 10 of the ECHR, a final injunction was likely to be viewed as proportionate only if it precluded repetition of statements similar to those already held to be defamatory and not otherwise defensible.

77. The convention right to freedom of expression is set out in Article 10 of the ECHR and provides as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

78. Mr Sephton did not specifically address me on whether the injunction's restriction on the Defendant's freedom of expression could be justified as being no more than was necessary in a democratic society in accordance with the interests stated in Article 10 (2). But I assume for present purposes that it would be said to be for the protection of the Claimants' rights under the settlement agreement. The Defendant on the other hand argues that it was an unjustified fetter on his right to disclose in the public interest what on his case was criminal misconduct by the Claimants, and that in any event, in the form in which it was granted, the injunction prevented him from defending himself against unjustified slurs made about professional abilities amongst other matters.

79. The nature of the relationship between the parties, including whether there is a contract between them, is capable of being relevant to the public interest as the court explained in *HRH Prince of Wales v. Associated Newspapers Limited* [2006] EWCA Civ 1776 (see in particular paragraphs 67 to 69 and 71). There the court concluded that the test to be applied when considering whether it was necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence was not simply whether the information was a matter of public interest but whether in all the circumstances it was in the public interest that the duty of confidence should be breached. In applying the test of proportionality the nature of the relationship that gave rise to the duty of confidentiality might be important; and the extent to which a contract adds to the weight of duty of confidence arising out of a confidential relationship would depend upon the facts of the individual case.

80. Notwithstanding the potential weight of the contract argument mounted by the Claimants, including as it does an element of confidentiality, in my view there are a number of other matters which may affect whether the court would be willing to grant the final relief asked for or whether it would be regarded as a disproportionate interference with the Defendant's rights in convention terms. These include the matters I have already dealt with at paragraphs 62 to 69 above, where it might be said there was little to distinguish between what would be regarded equitable and proportionate. In addition, there are public interest issues raised by the Defendant which are obviously fact sensitive. As I have already indicated, I cannot say the matters he relies on are without substance, notwithstanding the view of the CAA that no action should be taken, or that the current restriction on the Defendant's freedom of expression is proportionate in all the circumstances, not least because the Defendant is not permitted to raise his concerns about the Claimants' allegedly criminal activities with bodies such as the CAA and the police.
81. I turn next to Defendant's claim that he was no longer bound by the undertaking because of the terms of the proviso.
82. As I have already said both the 2007 email and the 18 August letter may be material here. In each the Defendant specified the defamatory statements he said the Claimants had made about him, and in each he asked for a retraction. I should add that I do not regard it as material for present purposes that the Defendant offered the Claimants more time to provide a retraction in the 18 August letter than the 7 days the undertaking provided for.
83. The Defendant says both in his written evidence and in his submissions, albeit without the clarity that might be expected of a lawyer, that the Claimants have persistently defamed him during the material period, and that the undertaking was nullified as a result: see for example, what is said in the Defendant's second affidavit sworn on 30 December 2011 in support of this application at vi), viii) and ix). Mr Sephton submits on the other hand that the Defendant could not even arguably claim he was no longer bound by his contractual promise because the proviso could only apply to statements made after the undertaking was executed and before the 2007 email was sent, and there is no evidence that the Claimants made any statements defamatory of the Defendant during that period.
84. However I note that after sending the 18 August letter, the Defendant then started the defamation action, and there is a reasonable argument that he did so to defend himself against what he perceived to be defamatory attacks upon him which had been made after the undertaking was entered into.
85. The defamations complained of by the Defendant in his defamation action included the following:
- i) A statement said to have been made about the Defendant to the CAA that he had unlawfully flown a helicopter without the correct flying licence for one month in the summer of 2006 (a claim which the Defendant goes on to describe as "deliberate and wholly false to attempt to smear" him); and

- ii) A statement made by the First Claimant in a live web cast for the News and Star publication of Carlisle, that described claims made by the Defendant as “libellous” and “without foundation”;
 - iii) A statement said to have been made about the Defendant by Richard Gordon, the Defendant’s agent, to a media journalist in or about the 15 January 2008 that the Defendant was “wired to the moon.” And a “crackpot”, a statement which was then circulated in a village called Irthington, Cumbria.
86. Evidence as to those matters within the bundles includes:
- i) A letter from the CAA to the Defendant dated 26 March 2008 which referred to “the allegation by Mr Tinkler that you breached Article 26 Air Navigation Order in June 2006 by flying commercially in a G Reg helicopter without the correct licence.”;
 - ii) A page from a live web chat printout for 9 July 2008, in which the First Claimant appears to answer claims against him by the Defendant as follows: “I believe this man here has a deep grudge against WA Developments International and is being libellous. This has no substance.”;
 - iii) A witness statement from Richard Gordon dated 19 November 2008 (which appears from its heading to have been prepared for the defamation action). In it he describes himself as employed as a consultant by the First Claimant, and confirms that he did make comments to someone he describes a purported journalist, off the record, that the Defendant was “wired to the moon”. There is also a witness statement of Dale Ransley from Irthington, Cumbria, dated 7 January 2009 which says that he has since late 2007 heard many negative comments about the Defendant’s professional aviation status which appear to have been generated by Richard Gordon, and others associated with Carlisle airport.
87. Arguments may be raised by the Claimants that these statements, if they were made, antedated the undertaking and/or came to the attention of the Defendant before it was executed, and did not trigger the operation of the proviso for other reasons, but it seems to me the court is not in a position, to conduct a mini-trial on these issues, nor should it. Mr Sephton referred in addition to the fact that the defamation action was struck out, the point he also made before HH Judge Tetlow. I am not persuaded however that its fate before the District Judge is relevant to this aspect of the Defendant’s defence in this action, or to the determination to be made by me on this application. I am satisfied for present purposes that there is a reasonably arguable defence to the claim in relation to these matters.
88. There are two other matters raised by the Defendant which I should address: first, duress, and second the Employment Rights Act 1996 (ERA) as amended by the Public Interest Disclosure Act 1998 (PIDA). The Defendant’s case in summary is that he felt under immense pressure to settle the litigation in 2007 for financial and other reasons, in particular, because he was at risk of losing his home if his litigation in the property dispute failed. In addition, though the settlement agreement itself was dealt with by solicitors on both sides, he said his solicitors refused to have anything to do with the undertaking which was negotiated direct between the parties.

89. Mr Sephton on the other hand submits that there is no shred of evidence to support the allegation of duress. He says the Defendant may have been in a difficult position but that didn't mean he was being "blackmailed" or subjected to duress by being asked to give the undertakings. He always had the opportunity to go to court, and gave the promises he did to buy off the risk of the litigation. The Defendant was legally represented when the order was made and made no attempt to allege that the order had been obtained by duress until the Claimants began these proceedings. Moreover, he says if the Tomlin order was obtained by duress, this would render it voidable; but the Defendant would not want to avoid it (even if he now could) because he is still living in the house he obtained as a result of the Tomlin order. He submits in short that the Defendant has no prospect of demonstrating that the Tomlin order was vitiated by duress and should be avoided.
90. The circumstances in which the courts will set aside agreements on the grounds of duress and undue influence or pressure will operate are difficult to define; whether such a case arises will also depend on a meticulous examination of the facts (see *National Westminster Bank plc v Morgan* [1985] 1 A.C. 686). It is to be borne in mind that compromise agreements are normally reached because of different pressures operating on the parties to them. The arguments advanced by Mr Sephton may be good ones; and I cannot say on the evidence before me now that I regard this aspect of the Defendant's case as one which has a reasonable prospect of success. However there is no clear evidence about the circumstances which gave rise to the Tomlin order and the Defendant is in person. If the judgment is to be set aside it would be wrong in my view to shut the Defendant out now from arguing this aspect of his case. If the matter is to be tried therefore the Defendant should be permitted to make his case in this regard, if he can.
91. I turn next to the Defendant's case under the PIDA. He submits in reliance on section 43J of PIDA that the undertaking was void insofar as it operated to inhibit the making of protected disclosure. That section provides that:
- “(1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.
- (2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not) ...”
92. The Defendant relies on this provision because section 43B of PIDA provides so far as material, that a protected disclosure for this purpose means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show that a criminal offence has been committed or that a person has failed to comply with any legal obligation to which is he subject. And he submits therefore that the undertaking is void insofar as it purports to prohibit him from revealing the infractions committed by the Claimants.
93. Mr Sephton submits that PIDA could not apply here. He says very shortly first, that the Defendant was not a worker within PIDA having regard to the provisions of section 230(b) of the Employment Rights Act 1996, or the extended provisions, as he had provided consultancy services to the First Claimant through a limited company run by him. But in any event, whatever his status, the Defendant had ceased his

association with WADI by the time the undertaking was executed, and therefore fell out with the protection of PIDA.

94. Section 43K of the Employment Rights Act 1996 as amended provides for an extended meaning of “worker” to that contained in section 230(b) of the Employment Act 1996 as follows:

“(1) For the purposes of this Part “worker” includes an individual who is not a worker as defined by section 230(3) but who—

(a) works or worked for a person in circumstances in which—

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b) contracts or contracted with a person, for the purposes of that person’s business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for “personally” in that provision there were substituted “(whether personally or otherwise)”,...

(2) For the purposes of this Part “employer” includes—

(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged...”

95. A Consultancy Agreement dated 6 July 2006 is in the bundles. It is addressed to the Defendant and is said to formalise an agreement of 10 October 2005. It is made between the First Claimant and Corporation Aviation Consultancy Ltd, as the “Consultant” and provides that the Consultant agrees to carry out the role of Aviation Director.

96. Whether in the light of all the facts, the Defendant can bring himself within the provisions of section 43K, and the undertaking seems to me to raise issues of fact and law which are not straightforward. I note that the general approach to the construction of PIDA is a purposive one, which permits of a certain generosity in its construction and in the treatment of the facts: see for example *Boulding v Land Securities Trillium (Media Services) Ltd* UKEAT/0023/06/RN, para 24 and *Croke v Hydro Aluminium Worcester Ltd* [2007] UKEAT/0238/05/ZT at para 33. See *Croke* also in relation to the provision of services by a complainant through a limited company. As for post-termination protection, see *Woodward v Abbey National Plc* [2006] EWCA 822 [2006] ICR 1436 in which it was held that the whistle-blowing provisions of the ERA

1996 could be used by individuals who are subjected to a detriment by their employer following termination of their employment.

97. In the absence of any developed argument or citation of authority on any of the points advanced or on the application of the legislation generally, it is sufficient to say this. I am not persuaded as matters stand that it would be right to determine now that this aspect of the Defendant's case has no real prospect of success on the two points raised by the Claimants.
98. As for the Defendant's counterclaim, Mr Sephton argues that the Defendant has adduced no evidence in support of it on this application, and that it is hopeless. He draws attention to the fact that the Defendant could not provide particulars of the agreement or of the number of shares, he said were promised when asked to do so by a request for further and better particulars of the defence. There are aspects of the counterclaim which plainly can be dealt with summarily (there is no discrete cause of action for abuse of the process for example). There is an overlap however between the factual matrix underlying the counterclaim and that of the defence. I note too the witness statement of Leonie Butler, the Defendant's estranged wife, which presumably was prepared for the purposes of the trial in March 2010, dealing with the issue of the blind shareholding scheme. I conclude the right thing to do in the circumstances is to allow the counterclaim and the other issues raised by the Defendant in his defence to be dealt with at a trial, subject to consideration of the criteria under CPR Part 39.3 (5) (a) and (b).
99. I must now consider therefore the questions whether the Defendant had a good reason for not attending the trial, and whether he acted promptly when applying to set aside.
100. As the transcript shows, the Defendant asked for an adjournment before the trial on the ground that he was not well enough to attend the trial. He supported his request with a medical certificate from his GP.
101. In *Teinaz v. Wandsworth London Borough Council*, [2002] ICR 1471, Peter Gibson LJ, said this at paragraphs 21 and 22:

"A litigant whose presence is needed for the fair trial of a case but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.

If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but that the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction, such as would enable the

doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily makes any error of law in not taking such steps. All must depend on the particular circumstances of the case. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved".

102. On an application to set aside, a party seeking to justify his failure to attend a trial on medical grounds which had already been considered by the court when he failed to attend, might be in some difficulty if the reasons given by the judge for refusing the application in the first place were persuasive. However, in this case the judge did not give any reasons for refusing to adjourn the trial, apart from the few sentences exchanged with Mr Sephton at the hearing. Although the judge referred to an email that had been sent to the Defendant there is no evidence it was received by the Defendant if indeed, as the judge plainly thought, it was sent. There is nothing to contradict the Defendant's assertion that he did not receive it, and I accept he did not. There is nothing to suggest therefore that the Defendant knew before the hearing that more evidence was required apart from that he had already supplied; or that there was any reason for refusing the adjournment save that the judge did not consider the certificate that had been submitted to be good enough.
103. Whether that was a sufficient reason to refuse the adjournment or not, the question is whether at the time the Defendant had a good reason for not attending. The Defendant has demonstrated to my satisfaction that he did; and I reject the submission that the court has no material upon which it can properly find the Defendant had a good reason for being absent at the trial. I have had the opportunity to see the Defendant for myself as did HH Judge Pelling QC, who, as I have indicated, expressed his concern as to whether the Defendant had capacity when the matter came before him. The various medical certificates relating to the Defendant are not entirely comprehensive, but I do not think it surprising here that the certificates are intermittent. The illness described is stress related depression and consequential psychiatric difficulties, including unfortunately, two suicide attempts, one in 2010 as I understand it, on 7 March 2010, that is, shortly before the hearing on 15 March 2010, and one at the beginning of January 2011 which necessitated the intervention of the police and the Defendant's local Mental Health Crisis Intervention Team. Someone who is genuinely ill in such circumstances would not necessarily be making regular visits to their doctor to get medical certificates, nor is the court bound to require them to have done so, provided the overall picture is clear enough for the court to draw its own conclusions, as in my judgment it is in this case.
104. I turn therefore to the requirement of promptness. The Defendant relies broadly on two matters: first his mental health, and second his ignorance that he could apply to set aside the judgment. As to the first, the Claimants say the medical evidence

provides no plausible excuse for the Defendant's inaction. As to the second, it is said by the Claimants that even if the Defendant was unaware that he could make an application, his ignorance is merely an explanation not an excuse. The Claimants naturally draw attention to the period of 1 year and 8 months between when the Defendant found out about the judgment and his application for permission to bring this current application. Mr Sephton submits that however flexible the concept of promptness, it cannot stretch to accommodate these facts. He refers in addition in general terms to the potential prejudice to the Claimants if a trial were now to take place because of the lapse of time since the relevant events, and the potential for memories to fade. Taking the latter point first, on the material I have seen, I regard it as unlikely in the extreme that anyone involved in any of the material events, has anything other than a vivid recollection of their involvement in them.

105. What is 'prompt' must depend on all the circumstances of the case: see *Watson v Bluemoor Properties Ltd* [2002] EWCA Civ 1875, [2002] All ER (D) 117 at [16]. I accept that the court has to be cautious in the flexibility it gives to the interpretation of promptness; see what is said by Arden LJ in *Regency Rolls v Cahill* [2000] EWCA Civ, 379 at paragraph 39. I would however respectfully agree with the observations of Simon Brown LJ as he was then in *Regency Rolls* at paragraphs 44 and 45 where he said this:

"I wish to touch briefly on the question of promptness. As is pointed out in the footnote 39.3.7 to the Spring 2000 Civil Procedure White Book:

"Note that the wording of r.29.3(5) provides more stringent requirements than CCR O.37 r.2 which it replaces. The court no longer has a broad discretion. There is only jurisdiction to set aside a regular judgment if the party seeking to have the order set aside can satisfy all three requirements in r.39.3(5)."

This consideration must, I think, inform the court's approach to the construction of the word "promptly" in precondition (a). At first blush it might be thought that any inappropriate delay whatever on the part of an applicant would require that he be found not to have acted promptly. Yet such a construction would carry with it the Draconian consequence that, even if he had a good, perhaps compelling, reason for not having attended the trial, and a reasonable — perhaps, indeed, excellent — prospect of success at trial, the court would still be bound to refuse him a fresh trial. I would accordingly construe "promptly" here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances."

106. In my view, such an approach enables the court to do justice in the instant case in accordance with the overriding objective, which is what the civil procedure rules are designed to achieve.
107. Here, the Defendant was in my judgment under a significant disadvantage throughout the material period as a result of the combination of the health problems to which I

have referred (albeit they appear to have become more acute more recently: see letter of 6 September 2011 from a doctor who is an associate specialist in Psychiatry) and the fact that he was acting in person, for all but one very short period when solicitors came on the record for a period of about 2 weeks shortly after the Claimants applied to commit him for contempt on 27 May 2011. I should mention too the Defendant says, and I am disposed to accept that his mental difficulties were triggered by his imprisonment in Strangeways for contempt in 2009. This was his first experience of prison since he was of previous good character.

108. It is true as Mr Sephton says that the Defendant was meanwhile doing various things relating to the litigation. For example, trying to issue judicial review proceedings in relation to the grant of planning consent at Southend Airport, and applying for permission to appeal against the order made by HH Judge Tetlow on 30 November 2009. However I accept that the Defendant did not really understand that he could apply to set aside the judgment until he was refused permission to appeal in October 2011 where the fact that he could have made such an application was mentioned by Sir Richard Buxton as one of the reasons for refusal. Though setting aside judgment was mentioned at the hearing on 15 March 2010, the Defendant did not obtain the transcript until September 2011, but even then, he did not appreciate what he could do until after he received the reasons for refusing permission to appeal. It is also understandable in my view that the Defendant did not apply immediately after receiving those reasons. As he said, he had an outstanding application for permission to appeal which he intended to renew orally, and he had been roundly criticised for making too many applications, with the result that he had been made the subject of the GCRO.
109. A litigant seeking to have a judgment set aside after this length of time would normally face an uphill struggle to persuade a court that he should be allowed to do so. In my view however this is a special case on its facts, and having regard to all the circumstances the Defendant has persuaded me that it would be right to do so.
110. This case is also unusual because permission to appeal against the order made by HH Judge Tetlow on 15 March 2010 has already been refused. But that in itself is not a bar to the grant of relief since, as Mr Sephton accepts, the ‘merits’ issue on this application is whether the defence has a reasonable prospect of success. This is a broader ‘fact-based’ question, permitting examination of evidence, than the question addressed on the permission application, which is whether there is an arguable ground of appeal: see *Bank of Scotland v Pereira* [2011] EWCA Civ 241; [2011] 3 All ER 392, in particular the observations of Lloyd LJ at [82].
111. It follows therefore that the judgment on the claim and counterclaim granted in the Defendant’s absence will be set aside.
112. I turn next to the GCRO. By PD 3C para 4.1(3) such an order may be made where, despite being subject to an ECRO, a person has persistently issued claims or applications which are totally without merit, and where an ECRO would not be sufficient or appropriate. Subject to being given permission to do so, under the terms of the order itself, the person against whom such an order is made may apply to amend or discharge the order or to appeal it (see PD 3C para 4.2(2) and (3)).

113. It is plain from the transcript of the hearing on 15 March 2010 that the judge did not have available to him all the documents he might need in relation to this matter. The application appears to have been grounded on the fact that since the imposition of the ECRO there had been one further application in these proceedings to HH Judge Holman, which was struck out as without merit and the Defendant had made an additional claim against Stobart Group Ltd and Eddie Stobart Ltd for malicious defamation. However that additional claim was struck out before the ECRO was made and if there was then only one further application I have doubts as to whether the criteria for making a GCRO were met. I have concluded however that rather than setting aside the order now, the matter should be remitted for a further hearing at which the parties can make further submissions on this issue if they wish to.
114. It will be necessary for the matter to be listed now for further directions in relation to the trial. I direct this should be at the first available date before a High Court Judge or a deputy High Court Judge sitting in Manchester, and that further consideration should be given at that stage to whether the GCRO should be continued or set aside.
115. Mr Sephton invited me to re-impose an injunction pending the trial of this matter if judgment were set aside. I decline to do so for reasons which should be apparent from my decision to set aside the judgment on the merits. I have also taken into account the unfortunate history, as it was described, of this matter. The Claimants can apply for relief in the future if the need arises.
116. Finally, the Defendant has asked for other relief, for example in relation to the bankruptcy proceedings, where I am asked to annul or rescind the bankruptcy. These other matters are not however within the scope of permission granted by HH Judge Pelling QC. Accordingly, I did not hear argument on them and make no order in relation to them.