



Neutral Citation Number: [2020] EWCA Civ 382

Case No: B6/2020/0455

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (FAMILY DIVISION)

Mrs Justice Lieven

FD19F00024

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 March 2020

Before :

LORD JUSTICE PETER JACKSON

and

LORD JUSTICE POPPLEWELL

Between :

Peter Richard Andreewitch

Appellant

- and -

Magali Moutreuil

Respondent

Christopher Sykes (instructed by Janes Solicitors) for the Appellant

James Weale (instructed by LSGA Solicitors) for the Respondent

Hearing date : 11 March 2020

Approved Judgment

Lord Justice Peter Jackson :

1. The applicant, Peter Andreewitch ('PA'), seeks permission to appeal from findings of fact made against him in the course of proceedings for alleged contempt of court brought by his former partner, Magali Moutreuil ('MM'). He complains of procedural irregularity in the committal hearing, namely that as an unrepresented litigant he gave evidence without having been informed of his right to silence.
2. The nature of the underlying proceedings can be shortly stated. The parties are in dispute, amongst other things, about the beneficial ownership of a valuable property in which they lived before their separation. The property is owned by a company of which PA is the sole director and MM the sole shareholder. On 22 March 2019, a freezing order was made, restraining the parties from disposing of or dealing with the company income or assets except to enable the company to meet its tax or other liabilities. In November 2019, a further order required PA to produce the company bank statements. These showed that he had used the company bank account to make payments amounting to over £25,000 in respect of his personal living expenses and legal fees, some £18,000 of which post-dated the freezing order. PA did not dispute that he had caused the company to make the payments but claimed that they were made in respect of the company's liabilities, namely in paying him a salary, in repaying loans he said he had made to it, and in discharging the company's alleged liability for legal fees.
3. On 13 January 2020, MM applied for PA's committal for contempt of court. The hearing of the summons took place before Lieven J on 3 February 2020, on which occasion MM was represented by counsel, Mr Weale. PA represented himself, as he had done at a number of previous hearings. The evidence before the judge consisted of two affidavits from MM and an unsigned 12-page document from PA entitled "Notes", which contained a statement of truth at the end. This was a quite sophisticated document, dealing in some detail with the allegations and raising procedural objections by reference to the relevant rules of court. MM's case was that she was seeking findings in respect of breach of the order but not seeking an order for committal at that hearing; rather she asked for the matter to be adjourned to a further hearing once findings had been made.
4. At the outset of the hearing the judge carefully explained to PA that he had a right to representation and a right to legal aid. He replied that he preferred that the hearing should continue:

“JUDGE ... Mr Andreewitch, you are entitled to legal representation and, indeed, because this is a committal you are entitled to legal aid. Are you aware of that?”

PA: Yes, your Ladyship, and I have waived my right to have a legal representative.

JUDGE: All right. So - this is very important as far as I am concerned, I can record that I had informed you that you have a right to legal aid and you have waived your right to legal representation.

PA: But since we are here today and there is no lawyer for me, we would have to adjourn again and ---

JUDGE: We would. Well, it is up to you. You have an absolute right to legal representation because this is a committal, and you have a right to legal aid.

PA: Yes. I - I understand, your Ladyship and I prefer we continue.

JUDGE: All right.”

5. Mr Weale then raised the question of PA’s “Note”:

“COUNSEL: --- you will have seen that Mr Andreewitch submitted a document that he described as a note but the end of it says, “I confirm the contents of my statement are true”. What I would propose to do is to have Mr Andreewitch sworn in on the contents of that note because that sets out, to the extent that there is a discernible defence, his defence and then that would give me the peg on which to hang oral evidence in cross-examination.

JUDGE: Do – do you understand, Mr Andreewitch? You have made this statement – I perfectly understand you are representing yourself – but strictly speaking it is not a sworn statement at the moment. So what I would ask you to do is, when I come back from having read Ms Moutreuil’s first witness statement, [to] ask you to go into the witness box and swear to the truth of the contents.”

PA: Yes.”

When the judge returned to court, Mr Weale suggested that PA was sworn in and that he would cross-examine him for about an hour. The judge acceded to this, adding that PA could first highlight anything he wanted from his note. The following exchange eventually took place:

“JUDGE: Mr Andreewitch, why do you not go into the witness box...

PA: Yes, of course...

JUDGE: ... because then everything you say in your note I can take as evidence.

PA: Thank you. Thank you.”

PA was then questioned briefly by the judge and cross-examined by Mr Weale for about two hours. The transcript of the cross-examination covers 50 pages.

6. The judge gave her judgment on 5 February. She narrated the background and the events of the hearing. She carefully satisfied herself that the proceedings had been brought in a regular manner and directed herself in relation to the mental element in contempt. She then recorded the parties submissions before stating her detailed conclusions. In summary, she rejected PA's explanation that each of the categories of payment were ones to which he was entitled as being proper liabilities of the company. She noted the absence of any corroborative documentation. She concluded that his arguments were not credible and found that he was in knowing breach of the order to the criminal standard of proof. He was in her view "making matters up as he went along as excuses for using the money in the account as he wished and then hoping to persuade a court there was no breach of the order." She observed that he is an intelligent man who has considerable familiarity with the law and with business affairs. He was an unreliable witness who had breached the order in deliberate and full knowledge that he was in breach of it. A draft order provided for the question of sanction to be decided at another imminent hearing and for PA to pay costs of some £8000 on an indemnity basis.
7. PA, acting in person, filed an appellant's notice on 3 March. He raised seven grounds of appeal, both of a procedural nature and taking issue with the judge's substantive findings. On 9 March I directed that the application be listed for oral hearing with the appeal to follow if permission was granted. In doing so, I noted that this court's initial focus would be upon one particular ground of appeal, namely:

"2. Appearing as a litigant-in-person, the judge ought first to have explained to me that in a committal proceeding I was not obliged to give evidence at all. I was given no such warning. To the contrary, I was asked to give evidence and was immediately cross-examined."
8. PA now has the benefit of legal aid and representation by Mr Sykes, who was instructed at short notice and was in a position to deal only with the single identified ground. He makes the simple case that a defendant in criminal proceedings and a respondent in contempt proceedings has a right to remain silent and that this right lies at the heart of the notion of fair procedure. It is an important right and a failure to protect it is not a merely technical default. It is of particular importance where a litigant is unrepresented and it does not matter that the litigant may be relatively able: the safeguard is available to all, as it is in criminal proceedings. In this case, the judge, though evidently concerned to ensure a fair hearing, erred by suggesting to PA that he should give evidence despite there being no obligation upon him to do so. PA then gave evidence that was used to his detriment.
9. On behalf of MM, Mr Weale notes that there is currently no procedural rule enshrining the right to remain silent. However, the right is implicit in Rule 37.27(2) of the Family Procedure Rules 2010, and CPR 81.28, which provides that at a committal hearing the respondent is entitled to give oral evidence, whether or not s/he has filed or served written evidence and, if doing so, may be cross-examined. He points out that this rule was mentioned in his skeleton argument for the committal hearing. Accordingly, his first submission is that PA was informed of his rights and that there has been no procedural breach in this case. He argues that there is a tension between informing the respondent of the right to be silent and warning him or her of the potential consequences

of silence, and that it is important that respondents are not deterred from putting their best case forward.

10. Mr Weale's second submission is that if there was a procedural defect, it was a technical one and should be waived. He refers to the Practice Directions (FPR PD37 13.2 and CPR PD81 16.2):

“The court may waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice has been caused to the respondent by the defect.”

This provision is the subject of commentary in both the Family Court Practice 2019 (the Red Book) and the White Book 2019. The latter contains the following passage at 81.10.2:

“An order for committal for breach of a judgment or order to do or abstain from doing an act is more than a form of execution available to one party to enforce an order against another, because the court itself has a very substantial interest in seeing that its orders are upheld. Where an application is made to commit a defendant for contempt of court, it is obviously important that great care is taken by the applicant to ensure that all the procedural requirements in this Section of Pt 81 are met. However, committal orders ought not to be set aside on purely technical grounds which have nothing to do with the justice of the case, because that would have the effect of undermining the system of justice and the credibility of court orders. (See *Nicholls v Nicholls* [1997] 1 W.L.R. 314, CA, *Bell v Tuohy* [2002] EWCA Civ 423; [2002] 1 W.L.R. 2703, CA, *R. v Yaxley-Lennon* [2018] EWCA Crim 1856; [2019] 1 W.L.R. 5400; [2018] 2 Cr. App. R. 30, and authorities referred to there.) Accordingly, para.16.2 of Practice Direction 81 states that the court may waive any procedural defect in the commencement (or conduct) of a committal application if satisfied that no injustice has been caused to the respondent by the defect...”

11. Mr Weale also notes *NFU v Tiernan* [2015] EWCA Civ 1419, where this court noted that CPR 81PD (this also applies to FPR 37PD) does not explicitly refer to the right of silence and that it would be better if it did. I agree. I note that this week the Civil Procedure Rules Committee has opened a consultation exercise on proposed rule changes relating to contempt of court. The suggested redrafting of Part 81 specifically refers to the right to silence. It is also proposed that the respondent should be referred to as the defendant, no doubt to underline the quasi-criminal nature of the proceedings.
12. Mr Weale made submissions in respect of a number of authorities that emphasise the importance of correct procedure in committal proceedings, specifically with reference to the right to remain silent. This line of authority was summarised by Sir James Munby P in *L (A Child)* [2016] EWCA Civ 173:

“31. The absolute right of a person accused of contempt to remain silent, which carries with it the absolute right not to go into the witness box, was established in *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 QB 67, where this court held that such a person is not a compellable witness. This right is to be distinguished both from the privilege against self-incrimination and from legal professional privilege, each of which may entitle a witness in certain circumstances to decline to answer a particular question but neither of which entitles the witness to refuse to go into the witness box or refuse to take the oath (or affirm): see *Re X (Disclosure for Purposes of Criminal Proceedings)* [2008] EWHC 242 (Fam), [2008] 2 FLR 944, para 9.

32. As both *Re G* and *Hammerton v Hammerton* illustrate, the principle in *Comet* has repeatedly been emphasised in this court; see also *Re K (Return Order: Failure to Comply: Committal: Appeal)* [2014] EWCA Civ 905, [2015] 1 FLR 927, para 61, to which we were referred. Most recently, so far as I am aware, the relevant principles were summarised by Jackson LJ, with whom both Lewison LJ and Treacy LJ agreed, in *Inplayer Ltd and ors v Thorogood* [2014] EWCA Civ 1511, paras 40-45:

"40 A person accused of contempt, like the defendant in a criminal trial, has the right to remain silent: see *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 QB 67. It is the duty of the court to ensure that the accused person is made aware of that right and also of the risk that adverse inferences may be drawn from his silence.

41 If the committal application is heard at the same time as other issues about which the alleged contemnor needs to give evidence, he is placed in the position where he is effectively deprived of the right of silence. That is a serious procedural error: see *Hammerton v Hammerton* [2007] EWCA Civ 248. This is precisely what happened in the present case. Furthermore no-one told Mr Thorogood that an alleged contemnor has the right not to give evidence.

42 If the contempt application had been the subject of a separate hearing and Mr Thorogood had been informed of his right not to give evidence, he might have exercised that right. He could then have dealt with the contempt allegations by way of submissions. In that regard it should be noted that the judge based her two findings of contempt upon answers which Mr Thorogood had given under skilful cross-examination.

43 Mr Milford points out that Mr Thorogood was reminded of his right not to incriminate himself. That is true, but it is not sufficient. Mr Thorogood should have been told that he

was not obliged to give evidence. Furthermore the litigation should not have been managed in a way that forced Mr Thorogood into the witness box.

44 Mr Milford submits that even if there had been a separate hearing of the contempt application, the result would have been the same. If Mr Thorogood gave evidence, he would have been caught out in cross-examination. If he had declined to give evidence, the court would have drawn adverse inferences.

45 What Mr Milford says may well be true. Indeed, as things have turned out, Mr Thorogood may be a very lucky man. Nevertheless there can be no question of upholding findings of contempt against a person who has been deprived of valuable safeguards in the circumstances of this case."

As regards the facts of *Re L*, Sir James continued:

"55. The consequence of what I have just described was a serious, and in my judgment irremediable, procedural error. Because of the use that was made against him during the hearing on 18 January 2016 of the evidence which had been extracted from him under compulsion on 8 October 2015, Mr Oddin was denied the safeguards which anyone facing proceedings for committal is entitled to: in particular, and fatally, the right to remain silent, the right to refuse to go into the witness box. The court had forced him into the witness box on 8 October 2015 and then used his evidence against him, not in committal proceedings for perjury committed on that occasion (which would have been entirely permissible) but in support of committal proceedings in relation to a previous order. In my judgment, this amounted to a clear, serious and irremediable breach of the Comet principle, necessitating, for the reasons given in *Hammerton v Hammerton* and *Inplayer*, that the appeal be allowed. As Jackson LJ said in the passage from *Inplayer* which I have already quoted, "there can be no question of upholding findings of contempt against a person who has been deprived of valuable safeguards in [such] circumstances." ...

56. On this ground alone, the appeal must, in my judgment, be allowed."

13. Mr Weale also rightly addresses the more recent decision of this court in *Douherty v The Chief Constable of Essex Police* [2019] EWCA Civ 55, where the judgment of Nicola Davies LJ contains these relevant paragraphs:

"30. The judge having decided that the hearing would proceed, and having told the appellant that she could hear from him as a litigant in person, should have informed him of his right to

remain silent. Nothing was said to the appellant by the judge or Ms Philpott to inform him of this fundamental right.

31. The appellant having elected to give evidence, the next step for the judge was to warn him about self-incrimination. No such warning was given. This failure compounded the failures to allow him legal representation and the failure to inform the appellant of his right to remain silent.

...

33. The point is made by the respondent that even if the appellant had been advised of his right to remain silent and warned of self-incrimination the outcome would have been no different. To that submission I note the approach of the court in the matter of *L (a child)* (above). Sir James Munby P rejected the respondent's argument that even if there had been a separate hearing of the contempt application the result would have been the same. He observed that the appellant may have been a very lucky man but went on to state that "...there can be no question of upholding findings of contempt against a person who has been deprived of valuable safeguards in the circumstances of this case". A similar approach was taken by Sir Brian Leveson P in *Re West* where the court recognised that the failure of process invalidated the conclusion reached by the judge. Sir Brian Leveson P stated: "We recognise that it is likely to have made little difference but we are not prepared to assert that; it is far more important to underline the vital importance, where issues of contempt arise in circumstances of this nature, of following the approach laid down by the Crim PR." It is apparent from the authorities that the courts adopt a fairly strict approach and are reluctant to countenance arguments that procedural failings that go to the fairness of proceedings are immaterial."

34. I accept the appellant's submission that there were four breaches of procedure at the appellant's committal proceedings. They were caused by the failure of the judge to:

- i) Adjourn the proceedings to permit the appellant to obtain legal aid and legal representation;
- ii) Advise the appellant of his right to remain silent;
- iii) Warn the appellant of the risk of self-incrimination prior to giving evidence; and
- iv) For a second time, not adjourning the proceedings to afford the appellant the opportunity to obtain legal representation such as to enable properly informed and focused mitigation to be made on his behalf.

35. The effect of these breaches, singularly and cumulatively, was to deprive the appellant of valuable safeguards the purpose of which is to ensure a fair hearing. The appellant did not receive such a hearing. As a result the order for committal must be quashed.”

14. Mr Weale seeks to distinguish these cases – *Hammerton, Inplayer, Re L* and *Douherty* – as being extreme on their facts, and on the grounds that the appeals in those cases were allowed on multiple grounds and not just because of the lack of reference to the right to silence. He submits that if one looks closely at the facts of this case, the judge was in fact trying to assist PA by ensuring that the material contained in his Note was incorporated into admissible evidence so that proper weight could be given to it, and that PA understood this and wished to go ahead in this way. Indeed, it was manifestly in his interests to do so, as otherwise the application would inevitably have succeeded. Any breach of procedure was technical and minor and did not render the proceedings unfair. The proposed appeal is opportunistic and has nothing to do with the justice of the case, particularly as MM was not trying to seek a custodial sentence for PA. To overturn the judge’s findings on such technical grounds is liable to undermine the system of justice and the credibility of court orders, as referred to in *Nicholls*.
15. Proceedings for contempt of court are unlike ordinary civil or family proceedings in that they may lead to the imposition of a punishment. For that reason special safeguards exist for the benefit of the respondent/defendant. At the same time, the overall objective is fairness, and in seeking to achieve that the court must take into account the interests of all parties and the public interest in the maintenance of the authority of the court. That approach, which is common across all subject jurisdictions, is reflected in FPR PD37 13.2 and CPR PD81 16.2 which permit, but do not require, the court to waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice has been caused. Accordingly, while it is of great importance that the procedural rules are complied with, the process will not be invalidated on (to borrow from the White Book) purely technical grounds that have nothing to do with the justice of the case. As was said in *Yaxley-Lennon*, a balance must be struck where the relevant rules have not been followed to the letter.
16. The starting point when striking the balance in this case is the duty upon a court hearing committal proceedings to ensure that the accused person is made aware that they are not obliged to give evidence and also warned that adverse consequences or inferences may arise from exercising the right to silence. Those messages may indeed contain a tension, but what matters is that the choice of how to proceed belongs to the litigant and not to the other party or to the court. This is of particular importance when the litigant is unrepresented, and it does not apply any the less to the seasoned litigant in person, or to the litigant who appears eager to enter the witness box. The last mentioned individual may be the one who most needs to be reminded of his or her rights.
17. I therefore do not accept the argument that there was no procedural defect in what occurred in this case. I reject the submission that PA can be taken to have been informed of his rights by the reference to the rules in the skeleton argument. Even if that went some small way to informing him of where he stood, it was undone by the events at the hearing, as described at paragraph 5 above. Likewise, I cannot accept the description of this breach as being a purely technical one. The right to silence is a core element in criminal proceedings and proceedings of a criminal character.

18. That being the case, the decision can only stand if we are satisfied that no injustice has been caused. There is a temptation to reason that the case brought by MM was on the face of it a strong one, that in the absence of a good explanation from PA it was likely to be proved, that PA is an able litigant in person who accepted the suggestion that he give evidence with alacrity, and that the outcome may well have been the same whether or not he gave oral evidence. I am not persuaded by these arguments. The injunction allowed for proper payments to be made from the company account, so the mere making of payments did not establish the alleged breaches. MM had to prove that PA made the payments knowing that they were not proper liabilities of the company. There can be no doubt that the judge's conclusions on that matter owed much to her assessment of PA's oral evidence.
19. As it was, PA had provided a document setting out his case which, but for a signature, could be received as a witness statement. He did not need to give oral evidence for it to have been treated as evidence: he could simply have been asked whether he wished to sign it. The court would then have had written evidence from both parties. At that point, PA would have had the choice of giving evidence or not. Had he chosen to give evidence, he could have had no complaint about the consequences. Had he chosen not to give evidence, the court would have dealt with the matter on the evidence before it.
20. As appears above, we have considered a range of reported decisions. They establish the general principles that I have outlined and they show how the balance was struck in the circumstances of each case. In some instances the procedural defects were more numerous and florid than they are here. Others concerned more technical matters concerning paperwork and service. In the end, each case has to be decided on its own facts and in the present case I am driven to conclude that this court cannot be satisfied that no injustice has occurred. Had PA been informed that he was not obliged to give evidence, it is not possible to be sure that he would have done so, and had he not done so the judge's findings might not have been the same. Put another way, there has been a serious procedural irregularity that justifies the grant of permission to appeal and the allowing of the appeal on this ground. In the circumstances the other grounds of appeal fall away and I say nothing about them.
21. Having been informed of the court's decision, the parties have made submissions about the resulting orders, which set aside the judge's order and findings and require MM to decide within 14 days whether she wishes to restore her committal application or not. There will at all events be no order for costs here and below.
22. I would conclude by recording that counsel for both parties acknowledged, as do I, the careful way in which the judge approached the application before her. Her judgment contains a methodical checking of the procedural requirements that were satisfied. It is unfortunate that she was not also reminded of the need to inform PA of his right not to give oral evidence. This court was referred to the checklist contained in paragraph 78 of the judgment of Theis J in *Re L* (see below) and I have no doubt that if the judge had had the same benefit, this appeal would not have arisen.

“78. Before any court embarks on hearing a committal application, whether for a contempt in the face of the court or for breach of an order, it should ensure that the following matters are at the forefront of its mind:

- (1) There is complete clarity at the start of the proceedings as to precisely what the foundation of the alleged contempt is: contempt in the face of the court, or breach of an order.
- (2) Prior to the hearing the alleged contempt should be set out clearly in a document or application that complies with FPR rule 37 and which the person accused of contempt has been served with.
- (3) If the alleged contempt is founded on breach of a previous court order, the person accused had been served with that order, and that it contained a penal notice in the required form and place in the order.
- (4) Whether the person accused of contempt has been given the opportunity to secure legal representation, as they are entitled to.
- (5) Whether the judge hearing the committal application should do so, or whether it should be heard by another judge.
- (6) Whether the person accused of contempt has been advised of the right to remain silent.
- (7) If the person accused of contempt chooses to give evidence, whether they have been warned about self-incrimination.
- (8) The need to ensure that in order to find the breach proved the evidence must meet the criminal standard of proof, of being sure that the breach is established.
- (9) Any committal order made needs to set out what the findings are that establish the contempt of court, which are the foundation of the court's decision regarding any committal order.

79. Counsel and solicitors are reminded of their duty to assist the court. This is particularly important when considering procedural matters where a person's liberty is at stake.”

The revised procedure rules that are currently subject to consultation should be a further source of assistance for litigants, lawyers and judges in ensuring the procedural integrity of committal proceedings.

Lord Justice Popplewell

23. I agree.
