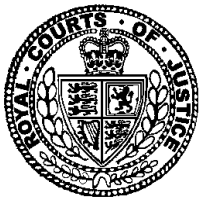

Neutral Citation Number: [2023] EWCA Civ 785

Case No: CA-2021-003228

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
KING'S BENCH DIVISION (ADMINISTRATIVE COURT)
Mr Justice Kerr
CO/353/2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2023

Before :

LORD JUSTICE BEAN
LADY JUSTICE THIRLWALL
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

(1) Terence William Norman	**First Appellant/Claimant**
(2) Georgia Lee Norman	**Second Appellant/Claimant**
- and –	
(1) DI Yoni Adler	**First Respondent/Defendant**
(2) DC Gail Wilkinson	**Second Respondent/Defendant**

- -
- -

Anthony Metzer KC and Alexander dos Santos (instructed by **Paul Martin and Co Solicitors)**
for the **First Appellants**
Sam Thomas (instructed by **Penningtons Manches Cooper LLP**)
for the **First and Second Respondents**

Hearing date: 18.01.2023

- -

Approved Judgment

This judgment was handed down remotely at 11:00am on Friday, 7 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lady Justice Thirlwall:

1. The appellants seek to commit two police officers for contempt of court on the grounds that they knowingly or recklessly misled the Crown Court when applying for search warrants. Kerr J refused their application for permission to apply for an order of committal under CPR 81. This is their appeal from that decision, brought with the leave of Stuart Smith LJ.

2. Kerr J's refusal after a hearing on 12 November 2021 was preceded by a decision on the papers to the same effect by Sir Ross Cranston, sitting as a High Court Judge.

3. The appellants are married to each other. Mr Norman runs a business in the fintech sector. The respondents are officers of Essex Police. Yoni Adler, DI Adler is the more senior officer, a Detective Inspector. Gail Wilkinson, DC Wilkinson is a Detective Constable. They are sued for contempt in their personal capacity for actions taken in the course of their duties as police officers.

4. On 9 April 2019, The Honorary Recorder of Chelmsford issued search warrants on the application of DC Wilkinson who was acting under the direction of DI Adler. One warrant was directed to office premises, the other to the home of the appellants. On 16 April 2019 the police attempted to execute both warrants. They were unsuccessful at the office premises because the address was not that of the first appellant's business but of a firm of accountants who provided services to the first appellant's business. The accountants refused entry to their premises. The other warrant was executed at the appellants' home. They and their son were arrested.

5. This is the third set of proceedings in respect of the warrants. They were quashed by agreement and criminal proceedings discontinued as part of the resolution of the applicants' claims for judicial review of the lawfulness of the warrants.

6. The appellants then brought a claim for wrongful arrest which was heard and dismissed by the Divisional Court in 2020.

7. We are grateful to Mr Metzer KC and Mr dos Santos, counsel for the appellants and to Mr Thomas, counsel for the respondents, for their clear and helpful written and oral submissions.

Background

8. The first appellant has for some time operated an investment scheme known as "Blue Tractor". There are a number of Blue Tractor companies. At Kerr J's request the parties provided an agreed form of words to describe Blue Tractor's business. It reads:

> "Blue Tractor was created to develop novel intellectual property ("IP") that would allow it to obtain exemptive relief from the SEC [*Securities and Exchange Commission*] in the USA to trade in non-transparent exchange traded funds on USA markets. Exemptive relief was granted for Blue Tractor which allows it to license its novel IP to third parties who trade on the NASDAQ [*National Association of Securities Dealers*

> *Automated Quotations]* and NYSE [*New York Stock Exchange*]."

9. It is plain that the police officers in this case did not understand what Blue Tractor did. This is not surprising. It is niche and highly complex. To those outside the fintech sector the meaning of the agreed form of words may be opaque.

10. For the detailed background we adopt, as Kerr J did, detailed passages from the judgment of the Divisional Court (Dingemans LJ and Davis J) in *R(Norman) v Crown Court at Chelmsford and the Chief Constable of Essex Police [2020] EWHC 3456* (Admin), dismissing claims by the appellants, for a declaration that their arrests were unlawful and their claims for damages for false imprisonment.

> "7. In February 2019 Essex police received intelligence suggesting that Mr Norman was running an investment scheme called "Blue Tractor" which was a vehicle for fraud. In addition, on 4 September 2018 a financial institution had reported to a law enforcement agency that concerns had been raised about a deposit of cash made into a bank account by one person for a friend to purchase shares in Blue Tractor (UK) Limited ("Blue Tractor UK"). Essex police made inquiries which showed that Mr Norman had not been employed since 2008 and had paid no income tax since 2008. Bank accounts associated with him and his companies had a turnover in excess of £1 million. A personal bank account had a balance of £202,000 and a turnover in the period February 2018 to February 2019 of £640,000. Companies controlled by Mr Norman were Blue Tractor Europe Limited ("Blue Tractor Europe") which was dormant, and Global Financial Solutions Limited ("GFS"), Blue Tractor UK and Towergate Consultants Limited ("Towergate") which had no turnover. Vehicles with an estimated value of £1 million were registered at Mr and Mrs Norman's home which was called Ropers Farm situated in Essex. Ropers Farm was a substantial property with no mortgage. A website for Blue Tractor UK and other internet reports suggested that financial algorithms were being developed.
>
> 8. Detective Sergeant Adler (now Detective Inspector Adler) ("DI Adler") decided to apply for search warrants. On 19 March 2019 an application was made to Her Honour Judge Lynch QC in the Crown Court at Chelmsford for a search warrant under the special procedure in schedule 1 of PACE. The warrant was issued but it was noticed that there was an error in the address for Ropers Farm and a new warrant was applied for and granted on 25 March 2019 by HHJ Lynch.
>
> 9. On 27 March 2019 DI Adler set out in a policy decision dated 27 March 2019 a decision to arrest "all adult members of family present at Ropers Farm on the day of the warrant for the money laundering offences". The rationale was recorded as:

> "there is sufficient grounds to suggest that all adult members of the family [Mr and Mrs Norman, their adult sons and adult daughters] have benefitted from the offences. All live on the property and the vehicles are in their names. There are huge amounts of financial transactions through the various accounts and very little in the way of HMRC declarations, certainly not consistent with their wealth. ….

10. On 2 April 2019 an application was made to His Honour Judge Gratwicke for a fresh warrant under section 352 of the Proceeds of Crime Act 2002 ("POCA"). However the draft warrants had the wrong heading and he refused the application, and discharged the earlier warrants.

11.On 9 April 2019 successful applications were made for search and seizure warrants issued pursuant to section 352 of the Proceeds of Crime Act 2002 ("POCA") in respect of two properties being: (1) Ropers Farm; and (2) offices at 4 Hadleigh Business Centre, 351 London Road, Benfleet, Essex ("the offices") by the Crown Court at Chelmsford.

12. At some stage it was decided to arrest only Mr Norman on the execution of the warrants.

The arrests

13. The warrants were executed on 16 April 2019 at 7.30 am at Ropers Farm. DI Adler pressed the intercom on electric gates at the end of the drive at Ropers Farm. There was a delay and the intercom was answered and DI Adler reported that he had a warrant to search the premises. There was then a further delay of several minutes and the gates were opened. Mr and Mrs Norman's son was located in a bungalow and he was arrested. Mr Norman showed DI Adler around the house and opened a safe containing money and he was arrested at 0737 hours on suspicion of fraud and money-laundering. PC Bridge and DS Robson found carrier bags containing cash concealed in bushes at the back of the garden. Footmarks were said to be noted in the dew on the lawn leading from the kitchen across the garden to the gate at the end of the garden near to the bushes. A pair of ladies' trainers were found which were wet and with grass cuttings, with the heels turned down which was said to suggest that they had been put on and taken off in a hurry. Mrs Norman was the only adult female who was up and seemed to have dressed hurriedly. DI Adler and DC O'Toole suspected that Mrs Norman had placed the bags of cash in the hedge to conceal them from police officers conducting the search. At 0910 hours Mrs Norman was arrested on suspicion of fraud and money-laundering.

> 14. Various documents, cash, jewellery, a piano and vehicles were seized. It was common ground that the seizure of the jewellery, piano and cash was not covered by the terms of the warrant. Mrs Norman made a complaint that she was advised to remove jewellery on arrest so that it could be safely left in the house, and it was then seized. About £100,000 in cash was found in the house and in the bushes.
>
> 15. …
>
> 16. Attempts were made to enforce the warrant at the offices. The offices were in fact the address of a firm of chartered accountants who provided accountancy services to Mr Norman and the companies. The police were refused access by the accountants because it did not appear that the police had even realised that the offices were the accountants' offices."

Kerr J continued,

> "Materially for present purposes, the Divisional Court found the following facts (at [74] and [75]):
>
> "74. … DI Adler suspected that offences of fraud and money laundering had been committed and suspected that Mr Norman was guilty of the offences. I am also satisfied, and find, that DC O'Toole suspected that offences of fraud and money laundering had been committed and suspected that Mrs Norman was guilty of the offences. It is apparent from the fact that DI Adler arranged (albeit it is now common ground without any lawful basis) for the seizure of all the valuable assets from Ropers Farm that DI Adler believed that Mr and Mrs Norman had acquired and were living on the proceeds of crime.
>
> 75. I am also satisfied … that DI Adler believed that it was necessary to arrest Mr Norman under section 24(5) of PACE. I am satisfied, and find, that DC O'Toole believed that it was necessary to arrest Mrs Norman under section 24(5) of PACE. DI Adler had always planned to arrest Mr Norman so that he could get his account of the source of his wealth without collusion, and Mrs Norman was arrested because DC O'Toole believed Mrs Norman had hidden bags of cash to frustrate the police investigation."
>
> And at [82]-[84], Dingemans LJ said this:
>
> "82. In my judgment there were reasonable grounds to suspect that both Mr and Mrs Norman had committed offences of fraud and money-laundering. This was because there was intelligence reporting that the financial algorithm created by Mr Norman was being sold to investors who had received nothing in return. The informant had spoken to DI Adler, suggesting that the informant

> was not just a malicious complainant. Companies House research did show that many shareholders had invested with Mr Norman's companies, but this did not undermine this intelligence, because on the basis of the intelligence it was reasonable to assume that these were the victims of the fraud. The fact that there was no evidence of complaints from the shareholders was important, but it is well-known that victims of fraud may be the last persons to realise that they are victims. The fact that the companies did not have any relevant turnover supported the intelligence that these shareholders had not received anything for their money. The fact that genuine applications had been made to the SEC was again a relevant factor, but the absence of a return to investors to date supported the informant's statement that this was a fraud.
>
> 83. Further the fact that Mr Norman had sold the shares in cash suggested that no reasonable checks about the source of funds had been made and that was an indicator of money laundering. The fact that Mr Norman had kept the money in cash supported the proposition that this was not a normal reputable business providing an opportunity to invest in Fintech. There was an apparent mismatch between the assets possessed by Mr and Mrs Norman and what was declared as income to HMRC.
>
> 84. Although these reasonable suspicions were raised by material primarily related to Mr Norman, Mrs Norman was an officer of a relevant company. She was living with Mr Norman with the cars and cash and benefitting from the fraud and money laundering. It was reasonable to suspect that if there was a fraud going on she must have known about it and been involved in it otherwise it would have been reported. It was reasonable to suspect that she was involved in the money laundering because she must have been involved with the cash lying around Ropers Farm."
>
> The Divisional Court therefore refused a declaration that the arrests of the appellants were unlawful and dismissed their claim for damages for false imprisonment**.**

The hearing before the Recorder of Chelmsford

11. The application for warrants was made by DC Wilkinson in respect of a money laundering investigation in the United Kingdom.

12. The declaration on the application pro forma reads, at (6)

> "Declaration. See Criminal Procedure Rules r47.25 (4) (5) The Crown Court can punish for contempt of court a person who knowingly makes a false declaration to the court."

13. The section then reads,

> "To the best of my knowledge and belief:
>
> This application discloses all the information that is material to what the court must decide, including anything that might reasonably be considered capable of undermining any of the grounds of the application, and the content of this application is true."

The form is signed by DC Wilkinson and dated 2 April 2019 at 11.00.

14. The information said to be material to the court's decision was, in summary, as set out in [7] of the Divisional Court judgment together with the information that there were at the appellants' home (where their adult children also live) high performance motor cars with a value of around £1m.

15. Paragraph (7) of the form, headed Authorisation reads

> "I have reviewed this application and the attached draft warrant(s) in accordance with the Code of Practice applicable and I authorise the applicant to make it."

The authorising officer's name is Paul Dibell, Detective Inspector. He signed it a few minutes after it was signed by DC Wilkinson.

16. DC Wilkinson attended before the Recorder of Chelmsford, HHJ Gratwicke who granted the application. He had refused an application the previous week because there were errors on the application form.

17. Kerr J and this court were taken to the transcript of the hearing, which was very short. DC Wilkinson confirmed the truth of the contents of the application. The judge's concern was to be clear about the business address to be searched. He asked DC Wilkinson to tell him a little bit about 4 Hadleigh Business Centre.

18. DC Wilkinson missed the point of the question and replied "there are five companies in total that are under the control of Mr Norman and his family, two of which are registered as being as the Hadleigh Address, the other three at his home address, Roper's Farm. "

19. The Judge then asked, "is it a business centre where lots of companies all over the country have their registered address?"

DCW "No, it's a purpose build (sic) block of business offices… and all individual office within a big block." She went on to explain that number four is a room "and when I say him and him alone, it it's just him and that company. There is not other people in there at all"

Judge "In that room.."

DCW "That's correct".

Judge "Is it a room?"

DCW "It's a room. I mean obviously we've not been actually in it. But they are pretty much like this rooms with computers and desks and that's how they operate." The judge repeated his question about whether this was an address that a business could use as the registered business office. He was told that only one person could have control of that room at any one time.

The judge made it plain that he wanted to be satisfied that there was no danger of material being seized relating to some other company.

DCW "That wouldn't happen your honour."

And that was the extent of her oral evidence.

The judge noted on the document recording the grant of the warrants that he had been given additional information as to the nature of Hadleigh Business centre.

The application for permission – procedure

20. Separate from the substance of the appeal, Counsel for the appellants raised for this court's consideration whether the application had been correctly transferred to the Administrative Court. Whilst the issue, however it is resolved, does not give rise to a ground of appeal, guidance may be helpful.

21. It is not in dispute that permission is required, see CPR 81.3(3) and (5)).

22. Between 2014 and until an amendment made in November 2020, CPR Part 81.13(2) read:

> "Where contempt of court is committed otherwise than in connection with any proceedings, the application for permission may be made only to the Administrative Court."

23. The amendment made in November 2020 restored the rule to its pre 2014 amendment content. It reads at Part 81.3(8)

> "If permission is needed and the application does not relate to existing court proceedings or relates to criminal or county court proceedings or to proceedings in the Civil Division of the Court of Appeal, the question of permission shall be determined by a single judge of the Queen's Bench Division. If permission is granted, the contempt application shall be determined by a single judge of the Queen's Bench Division or a Divisional Court."

24. The appellants submit that the application, which was lodged in the King's Bench Division after the amendment to the rules, should not have been transferred to the Administrative Court. I agree. This administrative error went unnoticed until this appeal. In practice the case was considered throughout by judges of the King's Bench Division, the first on the papers, the second after a hearing.

25. Mr Metzer points out that no one asked for the decision to be made on the papers and the decision did not refer to the procedural rule or power which was used to make the decision on the papers. He acknowledges that notwithstanding that there is no express provision for such an approach in Part 81 (the matter not being a judicial review or statutory appeal with a paper filter), the Court had a power to make this decision 'of its own initiative, without hearing the parties or giving them an opportunity to make representations' pursuant to CPR Parts 3.3(1) and (4). The appellants therefore applied pursuant to CPR Part 3.3(5)(a) to set aside the decision and seek a hearing of the application.

26. The appellants submit that an application for permission to bring proceedings for contempt should, absent the agreement of the parties for the matter to be dealt with on the papers, ordinarily be considered at a hearing.

27. I disagree. There is good reason for such applications to be considered first on the papers. Not least because a paper decision is quicker, cheaper and can be a useful filter against claims that are destined to fail. It does not close off a remedy to an applicant who, where permission is refused, may apply for the decision to be set aside at a hearing with both parties in attendance. Where the judge grants permission directions may be given for the hearing of the application without the need for a directions hearing (unless such is sought)

28. To the extent that guidance as to the procedure is required it is that applications for permission to bring proceedings for contempt should be considered in the first instance by a judge of the KBD on the papers. Where permission is refused it is open to the applicant to make an application pursuant to CPR Part 3.3(5)(a) for the decision to be set aside at a hearing, as was done in this case.

The case before Kerr J

29. The case before Kerr J, as it was before Sir Ross Cranston, was in essence the same as before this court. In summary:

i) The public interest in the administration of justice and confidence in the police and courts requires that the public and judges can rely on the integrity of police officers making applications for draconian and intrusive warrants permitting search and seizure of private property as well as business premises;

ii) police officers should not be held to a lower standard than other litigants who mislead the court (for example persons who put false evidence relating to personal injury before the court in support of a personal injury claim);

iii) the information contained in the written application to the Crown Court (signed by DC Wilkinson and subject to the declaration) was incomplete because the police officers withheld information that could exonerate the appellants namely:

Companies House returns for Blue Tractor which were up to date and, on analysis would, it is said, easily have negated the inference of money laundering and unexplained wealth;

filings with the SEC made in 2016 by two Blue Tractor companies for exemptive relief to permit them to operate without being subject to a daily portfolio transparency condition;

the fact that there had been no complaints from shareholders;

iv) answers given on oath by DC Wilkinson at the hearing were demonstrably inaccurate and in the truth of which she can have had no honest belief.

v) concessions made by the Chief Constable of Essex police in the judicial review proceedings that the application was defective supported the application for contempt.

30. The appellants argued that those omissions and the admitted defects, raised a strong prima facie case (contrary to Sir Ross Cranston's view) that the respondents lacked any honest belief in the truth of what they told HHJ Gratwicke, including through evidence given on oath by DC Wilkinson on 9 April 2019.

31. There was no real argument about the principles at (i) and (ii). At issue was whether the police officers had knowingly misled the court by failing to put before the court evidence which could reasonably have undermined the application and, DC Wilkinson only, giving evidence that she knew was untrue or in which she can have had no reasonable belief.

32. Kerr J addressed the arguments afresh rather than conduct a review of the decision of Sir Ross Cranston. Having considered the evidence and arguments to which I shall return later he concluded "In my judgment, the strong prima facie case here is one of serious lack of judgment and forensic skill and serious lack of care in managing the information available to Essex police. It is not a strong prima facie case of dishonestly misleading the judge." He continued, "If I had been of the view that there was a strong prima facie case of deliberate misleading of the court, in a more than trivial way, I would most likely have followed the same course as the Court of Appeal in *KJM Superbikes* (a reference to *KJM Superbikes Limited v. Hinton* [2008] EWCA Civ 1280***)*** and granted permission. It is difficult to see any public interest in permitting knowingly false evidence to be given to a judge with impunity."

Grounds of Appeal.

33. There are five grounds of appeal.

Ground One:

Failing to have any or any adequate regard to the decision of Akenhead J in **Berry Piling Systems Limited v Sheer Projects Limited [2013]** EWHC 437 (TCC) when finding that there was "not much room for reckless falsity of that kind in a case such as this, if indeed the notion is sound at all;"

Ground Two:

Failing to address the specific wording of the declaration accompanying the warrant applications;

Ground Three:

Failing to find that there was an arguable case that the respondents had misled the Court, having found that DI Adler "did not do…the necessary research and forensic work that would have exposed the weaknesses in the case" and that DC Wilkinson confirmed the correctness of the information in the warrant application that is now known to be and conceded to be erroneous;

Ground Four:

Speculating as to the honesty of the respondents;

Ground Five:

Failing to take into account the impact the actions of the respondents had on the appellants, the severe interference with the appellants' liberty and the respondents' duty of candour and full disclosure to which they were subject.

Law
General principles

34. Proceedings for contempt are not concerned with the furtherance of private interests. The overarching consideration is whether the proceedings are in the public interest – see *KJM Superbikes***,** a decision of this court in which a witness in proceedings had admitted knowingly misleading the court. The judge at first instance refused permission to bring proceedings for contempt. This court reversed that decision. The first principle articulated by Moore-Bick LJ is *"*Whenever the court is asked by a private litigant for permission to bring proceedings for contempt based on false statements allegedly made in a witness statement it should remind itself that the proceedings are public in nature and that ultimately the only question is whether it is in the public interest for such proceedings to be brought". The court went on to review the matters to be taken into account in answering that question. I shall refer to that below.

35. In *Malgar Ltd v R E Leach (Engineering) Ltd* [2000] F.S.R 393 the claimant applied to Scott V-C for permission to bring proceedings to commit the defendant company and two of its officers for contempt of court in making false statements in documents verified by statements of truth in court proceedings. Implicit in the application was that the statements were made without an honest belief in the truth of such statements. The application was made under Civil Procedure Rule 32.14. It was the first such application made under the then new CPR which had come into force on April 26 of 1999. CPR 32.14 read**,**

> (1) Proceedings for contempt of court may be brought against a person who makes or causes to be made a false statement in a document, prepared in anticipation of or during proceedings and

> verified by a statement of truth, without an honest belief in its truth.
>
> …
> (3) Proceedings under this rule may be brought only—
> (a)by the Attorney General; or
> (b)with the permission of the court.

36. Sir Richard Scott observed that "Rules of Court cannot make substantive change in the law of contempt… It is not open to Rules of Court to introduce a new category of contempt and CPR rule 32.14 does not do that. It provides for the possibility of a person being prosecuted for contempt if he makes or causes to be made a false statement etc, but it does not predict what the outcome of the prosecution will be. That is a matter which must be left to the general law."

37. He turned to the general law and at [396] said "The general law of contempt is that actions done by an individual which interfere with the course of justice, or which attempt to interfere with the course of justice are capable of constituting contempt of court. In order for the individual who has done acts which fall into that category to be liable for contempt, an appropriate state of mind of the individual must be shown… The difficulty lies in knowing quite what the mental state on the part of the accused has to be shown. *But I would think that it must in every case be shown that the individual knew that what he was saying was false and that his false statement was likely to interfere with the course of justice. The standard of proof of course, in respect of each of the elements of contempt, is proof beyond reasonable doubt, the burden of proof being on the party who is bringing the proceedings for contempt."* (my emphasis)

38. The approach of Sir Richard Scott was endorsed and repeated by the Divisional Court in *Edward Neild v Loveday [2011] EWHC 2324* (Admin) at [9] – which repeated the section set out in the italicised section of paragraph 37 above. It had also by then been approved by this court in *KJM Superbikes* where Moore-Bick LJ with whom Arden and Mummery LJJ agreed, said

> "However, when answering that question [whether it is in the public interest for proceedings to be brought] there are many factors that the court will need to consider. *Among the foremost are the strength of the evidence tending to show not only that the statement in question was false but that it was known at the time to be false, the circumstances in which it was made, its significance having regard to the nature of the proceedings in which it was made, such evidence as there may be of the maker's state of mind, including his understanding of the likely effect of the statement and the use to which it was actually put in the proceedings*. Factors such as these are likely to indicate whether the alleged contempt, if proved, is of sufficient gravity for there to be a public interest in taking proceedings in relation to it. In addition, the court will also wish to have regard to whether the proceedings would be likely to justify the resources that would have to be devoted to them." (my emphasis).

39. Moore-Bick LJ continued,

> "In my view, the wider public interest would not be served if courts were to exercise the discretion too freely in favour of allowing proceedings of this kind to be pursued by private persons. There is an obvious need to guard carefully against the risk of allowing vindictive litigants to use such proceedings to harass persons against whom they have a grievance, whether justified or not, and although the rules do not prescribe the class of persons who may bring proceedings of this kind, the court will normally wish to be satisfied that the applicant was liable to be directly affected by the making of the statement in question before granting permission to bring proceedings in respect of it."

He cautioned against allowing proceedings for contempt where the case was weak or the contempt, if proved, trivial.

> "I would therefore echo the observation of Pumfrey J in the *Kabushiki Kaisha Sony Computer case [2004] EWHC 1192 (Ch)* at [16] that the court should exercise great caution before giving permission to bring proceedings. In my view it should not do so unless there is a strong case both that the statement in question was untrue and that the maker knew that it was untrue at the time he made it. All other relevant factors, including those to which I have referred, will then have to be taken into account in making the final decision."

In the cases to which I have referred the practical starting point when considering permission to bring proceedings for contempt in the public interest is whether there is a strong case (capable of being proved to the criminal standard) that the alleged contemnor made a statement to the court knowing it to be untrue and knowing that it would be relied upon by the court. Sometimes there is reference to a strong prima facie case (self evidently something more than a prima facie case). In *KJM Superbikes* the phrases were used interchangeably. They mean the same thing: a case in which the evidence is sufficiently strong, without more, to satisfy the criminal standard of proof.

Recklessness

40. *In Berry Piling Systems Limited v Sheer Projects Limited [2013] EWHC 347 (TCC)* Akenhead J considered, in the context of a statement subject to a statement of truth, that the wording of CPR part 32.14 would cover both a statement made by a person who knew it to be untrue and a person who was reckless as to whether the statement was true or not. He considered [24] that if a person has no idea one way or the other whether what he or she is saying is true, he or she does not have an honest belief that it is true.

41. I set out Akenhead J's conclusion at [28] of the judgment in full since it is referred to in the decision of this court in *Elliott v Tinkler* [2014] EWCA Civ 564, upon which Mr Metzer places reliance,

> "[28] On balance, I conclude that it can be contempt of court for a witness to make a statement, supported by a statement of truth recklessly, that is, saying something which it can be proved beyond reasonable doubt that he or she consciously has no idea whether it is right or wrong. This is supported by the wording of CPR Part 32.14 and by the Vice Chancellor in **Malgar** when he said that CPR Part 32.14 did not introduce a new category of contempt; it is not undermined by the **Edward Nield** case which was not concerned with whether a reckless statement could amount to contempt. Recklessness is a concept which judges can address as they do in a criminal context. Logic also suggests that a person who represents as true something which he or she consciously does not know whether it is true or not is consciously misleading the Court and that should be considered as contemptuous."

42. In the event Akenhead J refused permission to bring proceedings for contempt because the evidence and documentation relied on did not establish a strong prima facie case. It "arguably just about establishes a prima facie case, it does not establish a strong such case." Mr Metzer acknowledges that Akenhead's conclusions about recklessness are therefore obiter. Mr Thomas points out the huge volume of material that was before the judge in support of the application for permission and yet the evidence did not satisfy the strong case test.

43. Mr Metzer relied on the decision in *Berry Piling* as support for his argument that recklessness as to the truth of a statement was sufficient mental element to found a case of contempt. He took the court to the decision of this court in *Tinkler and anor v Elliott [2014] EWCA* Civ 564 in which, he argues, the court approved the decision in *Berry Piling.* Mr Thomas argued that *Tinkler* was consistent with the decision in *KJM Superbikes.*

44. *Tinkler* concerned an application for permission to bring proceedings for contempt in long running litigation. The judge at first instance gave permission to the appellant, acting in person, to bring proceedings in respect of seven allegations out of 58 against his former business colleague. This court overturned the decision on each of the allegations in respect of which he had given permission, on the grounds that there was no strong prima facie case on any of them, thus bringing the proceedings to an end.

45. The parties had agreed at first instance the principles of law which they considered applied in contempt cases. This court repeated them at paragraph 44 of the lead judgment of Gloster LJ with whom the other members of the court agreed.

46. Mr Metzer refers us to the principle at sub paragraph (iii) of paragraph 44 of *Tinkler*, which reads,

> "iii) A statement made by someone who effectively does not care whether it is true or false is *liable as if that person knew* what was being said was false - see *Berry Piling Systems Limited v. Sheer Projects Limited [2013]* EWHC 347 (TCC), Paragraph 28 - but carelessness will not be sufficient – see Berry Piling

> Systems Limited v. Sheer Projects Limited (ante), Paragraph 30(c)";

47. It is correct that at 30(c) of *Berry Piling*, Akenhead J said, "optimism or even carelessness in the making of statements particularly in the case of value judgment type statements will not be sufficient to establish that a party deliberately or recklessly made a misstatement." That is uncontroversial.

48. Mr Metzer relies on the first part of sub paragraph (iii) as authority for the proposition there set out that a person who does not care whether a statement, he is making is true or false is liable as if that person knew what was being said was false, this court having accepted the principles set out in the court below.

49. I do not accept that this court is bound by the decision in *Tinkler* to apply the principle set out at [44] (iii) of *Tinkler*, derived from the decision in *Berry Piling* for these reasons:

50. Firstly, in *Tinkler*, the court was concerned only with allegations of lying, and deliberate dishonest statements. Whether or not statements had been made recklessly was irrelevant to the court's decision, as was the principle of law said by the parties to be derived from the decision in *Berry Piling.* At its highest, the principle would be obiter.

51. Second, the court adopted the agreed principles of law without any analysis of the principles or of any of the underlying authorities because "the appeal focussed on whether the judge had correctly applied the principles" (see Gloster LJ at [45]). There was no acknowledgement that reckless contempt was a novel concept.

52. Third, had recklessness been an issue in *Tinkler*, this court would have been bound to review the authorities since this was a potential development of the law and to consider, and, if necessary, resolve, the potential tension between the decision in *Berry Piling* and the decision in *KJM Superbikes*, referred to in sub paragraph (vii) of the agreed principles of law which reads:

> " (vii) In assessing whether the public interest requires that permission be granted, regard should be had to the strength of the evidence tending to show that the statement was false and known at the time to be false, the circumstances in which it came to be made, its significance, the use to which it was actually put and the maker's understanding of the likely effect of the statement bearing in mind that the public interest lies in bringing home to the profession and through the profession to witnesses the dangers of knowingly making false statements - see *KJM Superbikes Limited v. Hinton* [2008] EWCA Civ 1280, Moore-Bick LJ at paragraphs 16 and 23;…"

53. As a minimum, subparagraph (vii), which undoubtedly was relevant to the appeal in *Tinkler*, supports my view that the Court of Appeal were not there concerned with recklessness and cannot be considered to have approved the decision in *Berry Piling*. I would go further and say that this court's reliance on the passage at (vii) together with a further passage at (viii) demonstrates that the decision in *KJM Superbikes* was not superseded by the decision in *Tinkler*, as was argued before us.

54. In addition to my assessment of the effect of *Tinkler* on the status of the decision in *Berry Pilings* I would make the following observations about Akenhead J's conclusions:

55. Firstly, whilst the wording of CPR part 32.14 is consistent with the contention that a reckless misstatement could amount to contempt, it does not follow that simply by reason of the rule a person can be guilty of contempt by making a statement to the court recklessly. That is a matter for the general law.

56. Second, we were taken to no example of a case in which anything less than knowingly misleading the court has sufficed for a finding of contempt of court.

57. Third, Akenhead J observed, correctly, that the court in *Malgar* was not considering recklessness but the passages to which I have referred in the judgments in *Neild* and *Malgar* were directly concerned with what needed to be proved in a case of contempt. Scott V-C referred to what was required "in every case". The same applies to the judgment of this court in *KJM Superbikes* to which Akenhead J made no reference.

58. Fourth, in my judgment a person who makes a statement "consciously not knowing whether it is right or wrong" (*Berry Piling* [28]) is no different from a person who makes a statement knowing that he does not know whether it is right or wrong.

59. The issue of the mental element to be proved in contempt cases where the appellant's case was, as in this case effectively, that the alleged contemnor "must have known" or "did not care" whether the statement was right or wrong was considered in *JSC BTA Bank v Anatoly Ereschenko [2013] EWCA Civ*. This was an appeal from a decision by Vos J dismissing the bank's application to commit the respondent to prison for contempt of court. The application was based on the assertion that Mr Ereschenko had given false and dishonest evidence in court proceedings between the parties. Vos J had decided that he was not satisfied beyond reasonable doubt that Mr Ereschenko had been dishonest. It was argued on behalf of the appellants that it could not and should not be a defence for a respondent to a committal application to reply from a position in which he has hidden his head in the sand, or in which he is (as the judge said at paragraph 149) in a state of denial. Counsel for the appellant argued that such a state of mind amounts to a deliberate refusal to engage with the obligations, ...such that Mr Ereschenko must have known that he was not responding to the order to the best of his ability. In particular, he submitted that Mr Ereschenko had deliberately refused to engage with the obligations under the Disclosure Order by refusing to apply his mind properly to the questions posed and to his obligation to make reasonable enquiries….if he had applied his mind to the questions properly and had made all reasonable enquiries, then his actual answer must necessarily be untruthful and must also have been made without an honest belief as to its truth.

60. Those submissions were rejected. At [42] Lloyd LJ said "I do not accept that proposition. What the Bank has to persuade the court of, to make out its case of contempt as regards each or any of the statements in question, is that Mr Ereschenko's statement was not true, and that when he made it, he knew it was not true or did not honestly believe it to be true. That applies to every aspect of Mr Ereschenko's relevant statements. If Mr Ereschenko had not in fact made all reasonable enquiries before making his statement in answer to the Disclosure Order, then in that respect the answer may be untrue if the answer includes a statement (express of implicit) that he has made

all reasonable enquiries. The Bank may be able to show that this is the case if Mr Ereschenko has not applied his mind properly to the obligation. That is an objective question. But to prove this does not show that Mr Ereschenko knew that his enquiries, whatever they may have been, were not all that he could and should reasonably have made. That question is subjective and depends on Mr Ereschenko's state of mind when he made the statement. It is not to be overridden by a policy position that a respondent must not be allowed to get away with making an objectively inadequate compliance with the order. To show that not all reasonable enquiries have been made may be enough to justify a supplementary order designed to reinforce the original obligations. It does not by itself justify a finding of criminal contempt, based on dishonesty."

61. This reasoning underlines the need for the alleged contemnor to know that what he is saying is not true. It is not sufficient to say that the contemnor did not care whether what he said was true or not. It must first be proved to the requisite standard that he knew that he did not know whether what he said was true or not.

62. It follows that the test for permission remains as summarised in paragraph 39 above.

63. I would add that absent an admission or compelling documentation it may be difficult to prove the mental element in contempt to the criminal standard. In *Sony v Kabushiki Kaisha* Pumfrey J gave permission only in respect of matters which had been admitted. In *KJM Superbikes* this court overturned the decision below and gave permission in the light of admissions from the witness that he had lied in the proceedings. In *Walton v Kirk* [2008] EWHC 1780 (QB) Cox J gave permission in the light of compelling evidence that the alleged contemnor knew she was making false statements when she made them, and the purpose of the statements (to increase the award of damages) was clear but even in that case only a very few of the allegations were found proved at the hearing of the application by Coulson J. *Walton v Kirk* [2009] EWHC 703 (QB).

The police context

64. The public interest requires the police to act with integrity at all times. It imposes upon them a duty of disclosure when making ex parte applications for orders that interfere with the private lives of individuals and the running of businesses. This requires them to put before the court those matters of which they are aware which might reasonably undermine the application as well as those which support it. None of this is disputed.

65. Where a claimant can demonstrate a strong case of contempt in the context of an application by a police officer for a search warrant, it is overwhelmingly likely that the court will determine that the public interest demands that permission to be given. This is a straightforward application of the public interest test in this context. There is no different test for police officers.

66. In this case it is accepted that the judge was misled, and the warrants should not have been granted. It is not suggested that the police officers did not know the purpose of the application or the consequences of misleading the court.

67. For permission to be granted the judge had to be satisfied that there was a strong case that the police officers knowingly (and so dishonestly) misled the court by not putting

before it the matters which would or may have undermined the applications, having acknowledged the duty to disclose such matters on the face of the application and, DC Wilkinson only, misleading the court, knowingly and dishonestly, in her oral evidence.

The judgment of Kerr J

68. In his clear and succinct judgment Kerr J considered that the law was adequately and fully stated in *KJM Superbikes*. He made a number of findings about the evidence namely:-

In respect of DI Adler

i) that he had responsibility for determining the content of the warrant application, subject to the oversight of DI Dibbel. His belief that the appellants were money launderers and using their property for that purpose was genuine. "He was not seeking a search warrant in bad faith." This important finding was consistent with the findings of the Divisional Court. Kerr J pointed out that the situation was different from a person making a false statement in a personal injury claim with the intention of securing damages. This was a reference to the decision of Coulson J in *Walton v Kirk* [2009] EWHC 703 QB where a finding of contempt was made against the claimant. The difference is plain; there was no question of personal gain in this case, unlike in *Walton v Kirk.* Nor was there anything to be gained professionally from misleading the court. The contrary is true.

ii) that he had little understanding of the way in which Blue Tractor conducted its business.

It is impossible to disagree with this assessment. The first appellant and his solicitor made it plain in their detailed statements that the police did not understand Blue Tractor's business. The first appellant was plainly exasperated by the fact that the police did not understand the basics of ETFs, even when interviewing him. It is not apparent that he considers they ever did understand his business.

iii) that DI Adler saw an absence of paperwork and (since 2008) of personal tax returns or tax payments on the part of the first appellant and that he appeared to have believed that the evidence in his possession presented a strong case for a warrant. He arranged for DC Wilkinson to place that evidence before the judge and attest (on oath) to its correctness. This assessment of the evidence is consistent with that of the Divisional Court.

iv) that he fully appreciated the point that the business appeared to be conducted in cash and that purchasers of shares appeared to have got nothing for their money.

This was important. As the Divisional Court said, both of these are indicators of fraud and money laundering.

v) that DI Adler did not do "the necessary research and forensic work that would have exposed the weaknesses in the case that the appellants were money launderers and using their private property for that purpose in that:-

> "He did not research Companies House documents.
>
> He did not make sure that the judge was clearly told whether the first appellant's bank balance was £202,000 or £202 million." This was a reference to a typographical error in the application which Essex police conceded in the Judicial Review proceedings, surprisingly in my view, might have misled the reader. Read in context it obviously means £202,000. There is no suggestion the judge was in fact misled and nothing turns on that. It was an obvious typographical error.
>
> "He did not, for some reason, verify the nature of the business premises that turned out to be the office of an accountancy firm. The evidence that he did not properly brief his subordinate, DC Wilkinson, is very strong."
>
> "He did not follow up with any investigation of the communications between Blue Tractor companies and the SEC. He preferred to content himself with the thought that these dealings with the SEC were intended to lend a "veneer of respectability" to the business and that this was not something the judge needed to be told about". This was a reference to DI Adler's statements in the Judicial Review proceedings (exhibited to statements lodged on behalf of the appellants in these proceedings).

There is no complaint about this account of the evidence. Kerr J found it troubling that DI Adler did not require DC Wilkinson to tell the judge about the communications between Blue Tractor companies and the SEC because the case advanced by Essex police was that Blue Tractor was trying to operate outside the conventional financial system, without proper paperwork yet the SEC application showed Blue Tractor doing the opposite: placing itself on record with an internationally respected financial body with all the powers it needed to scrutinise the propriety of Blue Tractor's business. However, he did not consider that this omission raised a strong prima case of anything worse than a serious error of judgment. "It is not the purpose of contempt proceedings to discipline and punish those who make such errors", he said.

69. Much of Mr Metzer's argument before Kerr J had been concerned with the notion that what the Crown Court judge was told was "recklessly false" (Mr Metzer's phrase) ie either the maker of the statement did not care whether the statement made to the court was true or false; or that any belief in its truth was so obviously unsupported by objective material as to raise a strong prima facie case that the belief must be discounted.

70. On this issue the judge concluded "I do not think there is much room for reckless falsity of that kind in a case such as this, if indeed the notion is sound at all. Mr Metzer's real (and well founded) criticism is that the police did not (as he put it) "do their homework". There could be a case where an omission is so glaring as to raise an irresistible inference of intent to mislead the court; but that is not close to the position here."

In respect of DC Wilkinson

71. Kerr J noted that DC Wilkinson presented the evidence in support of the application to the court, acting under the direction of DI Adler and, ultimately, of DI Dibbel. It took several attempts to get the paperwork for the warrant application in order, aside from the substantive content of the evidence which she declared, under her signature, to be full, complete and correct.

72. The judge considered that the transcript of the hearing before HHJ Gratwicke on 9 April 2016 showed that DC Wilkinson had little understanding of Blue Tractor's business. "The strong prima facie case at this stage, as against DC Wilkinson, is that she took her boss's word for the correctness of the evidence contained in the warrant application. She was out of her depth, professionally, and should not have been asked to take on a responsibility for which she was ill equipped."

73. Kerr J went on to reject the submission that DC Wilkinson knowingly misled Judge Gratwicke because she confirmed the correctness of the information in the warrant application that is now conceded to be erroneous, but he concluded that her confirmation of those erroneous matters was as consistent with honest mistake as with nefarious intent to deceive the court. The latter is far-fetched; the former very likely.

He said,

> "A person giving evidence to a court (on oath or affirmation) may give evidence to the effect "I believe X is true". By that, she may mean that she has personally satisfied herself from her own researches of the evidence supporting that belief. Or, she may mean: "I believe X is true because Y told me it is true and I believe him".
>
> "If the judge, in the present case, had asked DC Wilkinson during her evidence on 9 April 2019: "what checks have you carried out?", she might well have answered "none at all". Or, she might have answered: "personally, none but I understand this has all been checked out by others and I am confident it is correct and complete".
>
> "Neither of those two answers would be satisfactory but neither would be dishonest. Such an answer might well lead the judge to refuse the warrant application. It would be a different matter if the untrue answer was that the witness had personally checked all the information and confirmed its veracity when she had done no such thing."

74. I reject the submission that Kerr J was in this passage of the judgment criticising the judge who granted the warrants for not asking those questions. He was simply illustrating his point by reference to an example.

75. Kerr J continued, "A judge faced with an application such as this has a difficult job. The court has to strike the balance between careful probing to flush out any inadequacies in the supporting evidence, on the one hand; and, on the other, permitting

properly founded police investigations to proceed in a manner likely to assist in the detection of crime and the bringing of offenders to justice. The balance is delicate."

I repeat his conclusion for ease of reference, "In the present case, the warrant should not have been applied for or granted, but it does not follow that there is a strong prima facie case that a contempt was committed here, by either defendant. I will therefore refuse permission, as Sir Ross Cranston did."

Ground One:

76. Failing to have any or any adequate regard to the decision of Akenhead J in *Berry Piling Systems Limited v Sheer Projects Limited [2013]* EWHC 437 (TCC) when finding that there was "not much room for reckless falsity of that kind in a case such as this, if indeed the notion is sound at all.""

77. I reject this ground. Given Kerr J's finding that the application was not made in bad faith, a finding which was plainly open to him, the concept of reckless falsity was of no application in this case.

78. Even had the judge specifically followed the decision of Akenhead J he would have found there was no evidence, still less evidence to found a strong case, of any conscious decision by either respondent not to put before the court material that may undermine the application.

79. The judge was right to consider that the law was adequately and fully set out in *KJM Superbikes*.

Ground Two:

80. Failing to address the specific wording of the declaration accompanying the warrant applications.

81. I repeat the declaration for ease of reference

"Declaration. Criminal Procedure Rules r47.25 (4) (5) The Crown Court can punish for contempt of court a person who knowingly makes a false declaration to the court…

To the best of my knowledge and belief:

This application discloses all the information that is material to what the court must decide, including anything that might reasonably be considered capable of undermining any of the grounds of the application, and the content of this application is true."

82. I reject this ground. The judge was referred in terms to the wording on the declaration during the hearing and in submissions. The form does not impose the duty to put before the court information that might reasonably be considered capable of undermining the application. It reminds the applicant of the duty and warns the applicant of the consequences of breaching it. It is to be noted that the warning makes no reference to recklessness.

83. It is plain from his judgment that Kerr J understood the duty to disclose matters which undermined the application. He set the matters out in detail. He made plain that there

had been no analysis of the Companies' House data (of which DI Adler was aware) and that there had been a deliberate decision not to put the SEC filings before the court. It was the failure to put the SEC documents before the court that the judge considered troubling. It was troubling precisely because of the duty to disclose matters that may undermine the application.

84. This is not a case, unlike *Coghlan v Bailey* [2017] EWHC 570 (QB) where Mitting J had given permission in the absence of an explanation for what appeared to be misleading information given in coercive proceedings against an individual. Kerr J had the statements of DI Adler in the Judicial Review and statements from the first appellant and his solicitor and the judgment of the Divisional Court. The judge was sufficiently informed to assess the strength of the case.

Ground Three

85. Failing to find that there was an arguable case that the respondents had misled the Court, having found that DI Adler "did not do…the necessary research and forensic work that would have exposed the weaknesses in the case" and that DC Wilkinson confirmed the correctness of the information in the warrant application that is now known to be and conceded to be erroneous.

86. The test is not whether there is an arguable case but whether there is a strong prima facie case. The question is not whether the respondents misled the court, but whether they did so knowingly. To determine whether there was a strong case on that question the judge had to consider whether there was evidence which showed that the necessary research was not done because DI Adler believed that may expose the weaknesses in the case. There is no evidence of that and no basis for the judge to think it may be so.

87. As to the position of DC Wilkinson there is no evidence that she had any real understanding of the matters before the court or that she had any insight into the shortcomings in her knowledge. She was acting on information obtained by and provided to her by DI Adler. The scope of her personal knowledge was minimal, her belief derived from what DI Adler had told her and she was entitled to rely on it.

88. Having read the transcript of the hearing before the Recorder of Chelmsford, as Kerr J did, it is clear that DC Wilkinson was not reckless or even careless, still less dishonest. She was out of her depth, as Kerr J found. It was plainly open to Kerr J to conclude that DI Adler should not have instructed her to apply for the warrants. There was no evidence, still less a strong case, that she was acting dishonestly.

Ground Four:

89. Speculating as to the honesty of the respondents.

90. The judge was not just entitled but was required to review the written application and the oral evidence given by DC Wilkinson and to consider whether or not there was a strong prima facie case that she or DI Adler had knowingly withheld information from the court, something which could only have been done dishonestly, and that she had lied on oath. The judge was not speculating, he was drawing inferences from the evidence, taken at its highest. He concluded in terms that DC Wilkinson's actions were "as consistent with honest mistake as with nefarious intent to deceive the court." This

ground is no more than a disagreement with the judge's assessment of the strength of the case. I need not repeat the judge's findings about the fact that the application was not made in bad faith.

Ground Five contains a number of issues.

91. Failing to take into account the impact the actions of the respondents had on the appellants, the severe interference with the appellants' liberty and the respondents' duty of candour and full disclosure to which they were subject.

I reject each aspect of this ground.

92. The judge had well in mind that search warrants are highly intrusive, that police officers must act with integrity and that when applying for search warrants, they must disclose matters which may undermine their application. His concern about DI Adler's failure to require DC Wilkinson to tell the judge about the communications between Blue Tractor companies and the SEC arose in that context. He concluded that the omission raised a strong prima facie case of nothing worse than a serious error of judgment. He was entitled to make that finding on the evidence before him. He was also right to observe, "It is not the purpose of contempt proceedings to discipline and punish those who make such errors."

93. A serious error of judgment does not equate with dishonesty. The fundamental difficulty for the appellants is that the judge was not satisfied that the evidence revealed a strong case that the police officers were dishonest in their approach to the application or to the truth of its contents. On his findings there was not even a prima facie case of contempt, still less a strong case.

94. The police officers did not know what they did not know. That they did not understand how ETFs work is not disputed. That DI Adler considered some of the shareholders unsavoury characters and the fact that they had bought shares in cash suggested money laundering did not give rise, even prima facie, to the view that he was acting dishonestly when opining that the SEC filings were, effectively, window dressing. The fact that no complaints had been made by shareholders was, at most a neutral feature. As the Divisional Court observed, the investors in a fraud are often the last to complain.

95. As to DC Wilkinson, the form she signed records that the information in it is true "to the best of my knowledge and belief". She was acting on information obtained by and provided to her by a more senior officer. The scope of her personal knowledge was minimal, her belief derived from what she had been told and she was entitled to rely on it. This was all plain on the evidence before the court.

Conclusion

96. The purpose of contempt proceedings is not to punish incompetence or errors of judgment. Where such conduct is obvious on the face of the papers and explains the failure to put matters before the court that should have been produced, a judge is entitled to and should take it into account when assessing whether there is a strong case of contempt. Kerr J did that here.

97. The purpose of proceedings is to protect the public interest by punishing those who dishonestly mislead the court. Kerr J said in terms that there could be a case where "an omission is so glaring as to raise an irresistible inference of intent to mislead the court", before concluding that was nowhere near the position here. He had already said that the applications were not made in bad faith. He had well in mind all the matters relevant to the question of permission. He said in terms that he would have granted permission had the evidence justified it.

98. I am quite satisfied that there was no error by the judge in his approach or in his conclusion that there was no strong case of contempt against either respondent. Permission was correctly refused.

99. I would dismiss this appeal.

Lady Justice Nicolas Davies:

100. I agree.

Lord Justice Bean:

101. Moore-Bick LJ said in *KJM Superbikes Ltd v Hinton* (following established authority such as the decision of Sir Richard Scott V-C in *Malgar*) that an applicant for permission to bring contempt proceedings in respect of a false statement must establish a strong prima facie case "not only that the statement in question was false but that it was known at the time to be false". Akenhead J should not, in my view, have departed from this principle in *Berry Piling*. The apparent deviation from it in paragraph 44(iii) of *Tinkler v Elliott* should not be relied on either, since (a) Gloster LJ was simply setting out what the parties in that case agreed to be the law; (b) the subparagraph in question was unnecessary to the decision; and (c) it was contrary to the doctrine of precedent. *KJM* lays down a clear and understandable test which I suggest should not be complicated by introducing concepts of recklessness or conscious lack of knowledge. Deliberately misleading the court may be equivalent to knowingly making a false statement, but I do not think that any further gloss is required.

102. In the present case Kerr J applied the test of whether the claimants had shown a strong prima facie case of deliberately misleading the court. He found that they had not, observing that "there could be a case where an omission is so glaring as to raise an irresistible inference of intent to mislead the court, but that is not the position here". In my view he applied the correct test and came to the correct conclusion.

103. Accordingly, for the reasons given by Thirlwall LJ, with which I agree, I too would dismiss the appeal.