Neutral Citation Number: [2022] EWHC 3267 (KB)

Case No: KB-2022-002990

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 December 2022

Before:

SARAH CROWTHER KC
(Sitting as a Judge of the High Court)

- -

Between:

AVIVA INSURANCE LIMITED	**Claimant**
- and -	
MR KELVIN ANKOMAH SAKYI	**Defendant**

- -
- -

Edward Hutchins (instructed by **Clyde & Co Claims LLP**) for the **Claimant**
The Defendant appeared in person

Hearing dates: 2 December 2022

- -

Approved Judgment

SARAH CROWTHER KC:

Introduction:

1. This is an application pursuant to CPR 81.3(5) by the Claimant for permission to bring proceedings for contempt of court against Mr Sakyi. I shall refer to Aviva, who is the Claimant in these Part 8 proceedings, as the Applicant to avoid confusion with the parties' roles in the previous County Court proceedings. For the same reason I shall call Mr Sakyi 'the Respondent' even though he was the Claimant in the County Court.

2. The application is made on the basis that the Respondent is alleged to have interfered with the due administration of justice and that he knowingly made false statements in his particulars of claim and witness statement in that action.

Factual Background

3. On 16 February 2019 a road traffic accident took place on the A3 Newington Causeway in South-East London at about 8.30pm in the evening between a motorcycle ridden by the Respondent and a VW Passat car driven by the Applicant's insured. At the time of the collision, the Respondent was 18 years old and working as a takeaway food delivery driver. The driver of the VW Passat and his wife (who was the front seat passenger), were on their way to a flat where they were staying. The collision occurred in what the witnesses referred to as the bus lane (although the accident outside the operational hours of the restrictions and so all traffic was permitted), as the VW Passat was in the process of approaching the left-hand turn to the entrance to their property.

4. The key issue in the County Court proceedings was a fundamental difference of evidence between the car driver and the Respondent as to the circumstances of the collision.

5. The Respondent instructed solicitors very shortly following the accident and a Claim Notification Form was completed on 26 March 2019, which was endorsed with a statement of truth, but which is not actually signed by anyone. It can be seen from the form that it was completed by the legal representative on the Respondent's behalf.

6. It asks a series of 'tick box' questions which include:

    a. 'Has the claimant had to take any time off work as a result of the injury?' (Ticked yes),

    b. 'Is the claimant still off work?' (Ticked yes),

    c. 'Has the claimant sought any medical attention? (Ticked no) and

    d. 'Did the claimant attend hospital as a result of the accident?' (Ticked no)

7. The injury is described as 'injuries include; pain to the legs.' and the box for 'soft tissue' injury is ticked. However, in the section 'Rehabilitation' which asks, 'has a medical professional recommended the claimant should undertake any rehabilitation such as

physiotherapy?' the box 'no' has been ticked rather than 'medical professional not seen.'

8. In respect of 'Alternative Vehicle Provision' the form indicates that the claimant requires the use of an alternative vehicle. The 'brief description' of the accident states,

> "*The claimant was proceeding on Newington Causeway, when the defendant failed to maintain a safe distance and collided with the rear of the claimants motorcycle, knocking them off the same*."

9. On 1 April 2019, the Respondent was examined by Dr Hill, who was instructed to complete a Medical Report form for use in low value personal injury claims in road traffic accidents, which is stated to be, 'without notes except where requested by medical experts.' He records,

> "Mr Sakyi reports that he:
>
> Suffered moderate right ankle pain and swelling which resolved after 2 weeks. It was due to a soft tissue injury sustained in the accident.
>
> Immediate Treatment
>
> Mr Sakyi was treated by a paramedic. He then drove home.
>
> Later Treatment
>
> Consulted his GP about his right ankle a day after the accident and received advice and a prescription for painkillers.
>
> Employment position/education
>
> His main occupation is as a Delivery Driver Deliveroo for 70 hours per week.
>
> Mr Sakyi took 3 days off because of the accident.
>
> After taking time off, he has been able to fulfil his normal duties.
>
> In my opinion, the accident caused Mr Sakyi pain whilst at work. The problem resolved after 2 weeks."

10. Proceedings were issued out of the Money Claims Centre of the County Court on 19 June 2019 under claim number F78YJ945, in which the Respondent claimed damages for personal injuries arising out of the accident. He also claimed special damages which included charges for hire of a replacement motorcycle which had been incurred on credit terms, in the sum of approximately £25,000 at that stage, £906 recovery and storage charges in respect of the damaged motorcycle, a claim for £1,706.40 said to be the 'pre-accident value' of the motorcycle, suggesting that the same had been damaged beyond economic repair in the accident. The claim also included £50 of unspecified 'miscellaneous expenses.

11. The claim form had a signed statement of truth (using the standard wording which at that time did not include any express warning about contempt of court proceedings), signed by the Respondent's solicitor.

12. The Particulars of Claim were extremely brief in their assertions as to the circumstances of the accident. At paragraph 2, the Respondent asserted,

> "[he] was riding his motor cycle along the A3 Newington Causeway, London, when the Defendant so negligently drove into collision with the rear of the Claimants motor cycle" (sic).

13. The sub-paragraphs below under 'Particulars of Negligence' do not shed much further light on the precise circumstances of the Respondent's case at that stage. Apart from standard form allegations in respect of excessive speed and lack of proper lookout, they simply repeat the assertion that the VW driver drove into the rear of the Respondent's motorcycle.

14. At paragraph 3, there is reference to personal injury, loss and damage as well as 'loss of use and inconvenience' being heads of claim. The Respondent adds that he,

> 'intends to raise the issue of impecuniosity.'

15. The pleading of loss and damage is thereafter as follows: -

"PARTICULARS OF GENERAL DAMAGES

Please see medical report of Dr Hill dated 1.4.19 annexed hereto.
The Claimant's date of birth is 23 October 2000.

Injuries sustained: right ankle

Estimated recovery: 2 weeks post-accident

PARTICULARS OF SPECIAL DAMAGES

Hire	£25,441.04 and continuing
Recovery and Storage	£906.00
Pre-accident value	£1,706.40
Miscellaneous Expenses	£50.00
Loss of Earnings	£TBQ

Please see attached Engineers report dated 1.3.19."

16. The Statement of Truth on the Particulars of Claim is also signed by the solicitor acting on behalf of the Respondent.

17. A defence was filed and served which was signed on 31 July 2019 by a litigation executive acting on behalf of the driver of the VW Passat (and the Applicant). It put forward a different version of events of the collision, as follows:

> "3. As to the accident circumstances, the Defendant's Insured will say aver (sic) as follows:
>
> a. He was driving along A3 Newington Causeway in London in the right hand lane;
>
> b. He needed to turn left off A3 Newington Causeway to the entrance to the flat in which they were staying in (sic);
>
> c. He indicated left and moved into the left lane, which was a bus lane, when it was safe to do so;
>
> d. He reduced his speed in preparation to turn off Newington Causeway;
>
> e. He was aware of a motorcycle that was also indicating left, however he noticed that there was not safe (sic) for the motorcycle to move left as well given the space between the moving traffic.
>
> f. In an attempt to avoid any collision, he moved sharply left into the cycle lane;
>
> g. Despite the Defendant taking evasive action, the motorcycle continued to move left and into contact with the front offside of the Volkswagen."

18. The Defence put in issue all the claims for injury, loss and damage and made complaint about the fact that the proceedings had been issued 'without ever disclosing any of the hire agreements, invoices or engineer's reports. In respect of the claim for credit hire charges, the Defence disputed the reasonable need for a replacement vehicle and the reasonableness of the recovery and storage charges. The claim for value of the lost motorcycle was not admitted and disclosure regarding the motorcycle, its MOT and insurance was requested.

19. It is notable in my judgment, that despite the Defence extending in detail to some 11 pages and dealing with all the special damages heads of loss point by point, there is no pleading to the general damages claim or indeed the medical report of Dr Hill. I draw the inference that the question of the modest claim for 2 weeks' soft tissue injuries to the ankle were not of particular concern to the Applicant in the context of the other issues in the case.

20. On 23 December 2019, at a hearing before District Judge Owen in the Hastings County Court, directions were given allocating the claim to the fast-track. Permission was given to the Respondent to rely on the evidence of Dr Hill and also the engineer's report of 'Evans Harding' (in fact the author of the report is Mr Tony Stack who is engaged by Evans Harding Engineers) dated 1 March 2019 which had been served with the Particulars of Claim. Various orders were made in respect of disclosure of documents concerning the credit hire and other special damages claims.

21. As far as I can see from the order, and, as was confirmed in the course of his helpful submissions by Counsel for the Applicant, Mr Hutchins, there was no suggestion that disclosure would encompass medical records. The Applicant did not make any application to the court for further information regarding the injuries or their treatment. Although permission was given to the Applicant to raise questions of Dr Hill, in the event no such questions were raised. This further reinforces my view regarding the relative unimportance of the personal injuries claim to the Applicant.

22. Disclosure was ordered to take place from both parties, and Mr Hutchins tells me that this took place in accordance with the order in January 2020. I have not seen the disclosure list of either party, but I understand that the CCTV footage was not included in the Applicant's list at that stage.

23. Witness statements were ordered to be exchanged by 24 February 2020. In the event, the Respondent's witness statement is dated 10 March 2020 and bears a statement of truth which he appears to have signed personally. At this point, the Respondent gave more detail regarding his case concerning the circumstances of the accident. He states,

> "13. I was filtering through the traffic in the normal vehicle lane, riding towards the traffic lights at the junctions with Southwark Bridge Road on my Yamaha motorcycle, registration number YX15 VXW.
>
> 14. I was near the front of the queue of traffic and could see that there was enough space for my bike between two cars at the front.
>
> 15. I checked my mirrors before turning my motorbike to the left and went through the gaps of traffic.
>
> 16. I proceeded slowly between the stationary cars towards the bus lane which at this point was empty.
>
> 17. **I came to a stop just as I was about to enter the bus lane**. The front of my wheel was on the white line separating the lanes.
>
> 18. I looked to the left to check for oncoming traffic, and this is when I saw the Passat motor vehicle, registration number AJ58 AVE travelling along the bus lane.
>
> 19. **I was still stationary and waiting for the vehicle to pass** when the Defendant came to a stop about 1 car length away from me.
>
> 20. I thought the Defendant was giving way to me and letting me out as he had seen me waiting.
>
> 21. I pulled out slowly and turned right onto the bus lane to straighten up and **came to a stop as the lights were still on red**.

> 22. Suddenly and without warning **I felt an impact to the rear of my motorbike**.
>
> 23. I was shoved forward, and the right handlebar of my bike hit the passenger side of another vehicle which was stationary waiting in traffic next to me.
>
> 24. I lost control of my bike, and I was thrown to the ground.
>
> 25. My motorcycle fell on top of me and landed on my legs…
>
> 31. An ambulance was called, and a paramedic arrived to examine my injuries. They advised me to go to hospital, but I wanted to go home.
>
> 32. Although my bike was damaged, I was able to ride my motorbike home slowly and park it up after the accident.
>
> 33. I believe that the accident was caused by Mr Pybus. I was positioned correctly in a lane waiting at the traffic lights, stationary, when Mr Pybus collided into the rear of my motorbike." (Emphasis added).

24. By the time of the witness statement, the claim for hire charges, which were incurred for a period just slightly over 10 months, had increased to £74,524.24. At paragraph 39 of the witness statement, the Respondent states that his motorcycle was not roadworthy following the accident and at paragraph 38 he states that he was unable to afford to have it repaired. However, on 14 January 2020, he received a cheque for the pre-accident value of the motorcycle and then he ended the credit hire arrangements for a replacement motorcycle.

25. At paragraphs 49 – 53, he sets out his evidence regarding the ankle injury. He states that he contacted a friend after the accident who took him to St Thomas' hospital for an x-ray and was told to take painkillers. He also says that he went to the GP the following day and received the same advice. He took 3 days off work. He confirms the contents of the report of Dr Hill and states that the prognosis was correct, and he had made a full recovery.

26. The insured driver and his wife also prepared a witness statement each of which was served on the Respondent's solicitors. At paragraphs 43-44 of her statement, the driver's wife said that she had asked the bus driver whether he had witnessed the collision and he said he had not, but 'not to worry because the bus had CCTV.'

27. In the course of the hearing, it was explained to me that the CCTV footage was disclosed to the Respondent's solicitors after the disclosure date and very shortly before trial. I have not been able to watch the footage but there appears to be no real dispute about what it shows, namely that the Respondent was not stationary waiting for the Applicant's insured to pass him in the bus lane and did not move out to join a traffic queue at the lights and was not stationary before being hit from behind. It is common ground that it supports the case of the Applicant's insured that the Respondent clipped

the offside of the car as he misjudged the space and time available to overtake as he was weaving through traffic.

28. Immediately after the disclosure of the CCTV, the Respondent made an application seeking to have the footage disallowed due to delay. At a hearing on 7 July 2020, the District Judge dismissed the Respondent's application, admitting the CCTV footage into evidence, but giving permission to the Respondent to file any witness statement in response by 18 August 2020. No such witness statement was filed or served. The trial date was re-listed for October 2020.

29. Then, in early October 2020, the Applicant then made a second round of further disclosure of documents, including various searches of insurance databases and DVLA records in respect of the motorcycle. The effect of these documents, it is said, is to demonstrate that contrary to the Respondent's case, his motorcycle was not damaged to such an extent that it was unroadworthy, but in fact he was able to and did drive it. Some of documents related to a second road accident on 30 September 2019 in which the Respondent was making a claim both for personal injuries and credit hire replacement vehicle charges. The salient point here is that these documents suggest that the Respondent was riding the index motorcycle from time to time during the period of hire which, if correct, is completely inconsistent with the Respondent's case in his action that the motorcycle was damaged beyond use and therefore he had need of a replacement hire vehicle. The Applicant observes that the claim notification form in respect of the second accident suggests that the Respondent had once again suffered soft tissue injury to his legs and is some evidence of repeat claims behaviour.

30. It was following the disclosure of these documents that the Respondent's solicitors filed a notice of discontinuance on the eve of the trial, 8 October 2020.

31. In November 2020, the Applicant made an application pursuant to CPR 44.16 for a finding on balance of probabilities that the claim was 'fundamentally dishonest.'

Proceedings before Deputy District Judge White

32. On 20 May 2021 DDJ White heard the Applicant's application pursuant to CPR Part 44.16 for an order that the costs order in respect of the discontinuance be made enforceable, by reason of fundamental dishonesty on the part of the Respondent with respect to the claim.

33. The Respondent attended the hearing but had not submitted any evidence in response to the application and did not give any evidence at the hearing. There was discussion in submissions about the procedure which the Court ought to follow. Having read the transcript of the hearing, it appears that the Deputy District Judge proceeded to consider the application based on oral submissions on the written evidence of the Applicant. I should say, this is not a criticism, because as far as I can see, there is no prescribed procedure in CPR 44.16 for such an application and it was not suggested by Counsel then acting on behalf of the Respondent that he had any evidence to give.

34. I have also been provided with a transcript of the Judgment of DDJ White. Mr Hutchins for the Applicant accepts that under CPR 44.16, the determination of DDJ White applied the balance of probabilities as the standard of proof to the question whether the Respondent had been fundamentally dishonest in relation to the claim. That is a lower

standard of proof than applies for the purposes of this application, which is the criminal standard, beyond reasonable doubt. He also points out that paragraph 12 of the Practice Direction to CPR Part 44 provides for summary determination of fundamental dishonesty applications which arise after service of a notice of discontinuance.

35. I would also add that the purpose of the hearing before DDJ White was rather different to the question I now have to decide, because the test under CPR 44.16 is whether there was 'fundamental dishonesty' in relation to the claim as a whole. This is necessarily a more general assessment than the approach which in my view is required for committal for contempt, for reasons I discuss later in this judgment.

36. The submissions on behalf of the Respondent focussed on the question of dishonesty and suggested that there was a genuine dispute of fact between the parties and that there was a case of mistaken recollection by the Respondent.

37. As regards the injuries issue, Counsel for the Respondent submitted that the issues were 'discrepancies, they are nothing more than that. They do not amount to dishonesty, but more significantly they are not fundamental to the claim in the sense that they do not go to the root of it or go to a substantial part of it.'

38. The credit hire claim issue was met with an absence of pleading point and repeated complaint about lateness of disclosure. It was not suggested that the documents which showed the motorcycle in use after the accident were not correct.

39. There was no request for adjournment and no suggestion that the Respondent would wish to put in witness evidence to address the matters in more detail.

Judgment of DDJ White

40. The Judge gave an ex-tempore judgment, in which he found that, 'the CCTV footage, as both counsel accept, is quite determinative. It entirely supports the defendant's version of events, and directly contradicts the claimant's version of events. It shows that the claimant's version of events cannot be and cannot ever have been true.' He rejected the submission that the discrepancy could be explained by the development of false memory over time, noting that 'recollection does not fade that quickly' (para 7) and noting that the accounts of the accident were given within a short time frame of its occurring.

41. He relied on the fact that there was documentary evidence that the motorcycle which was alleged to have been written off in the accident was subject of an MOT in September 2019 and that it was apparently being ridden when it was involved in another accident in September 2019. He found that 'the Claimant's witness statement cannot simply be described as discrepancies of memory, nor that he can't quite recall properly.' (Para 9).

42. In respect of the personal injury element, he considered the claim notification forms, but discounted these as being often unreliable and containing discrepancies (para 10).

43. He found, in general terms, that the court 'would have made a finding of fundamental dishonesty' on the liability issue in view of the CCTV footage (para 14) and also found that 'the Claimant would have had no credibility' in light of the evidence about the

injury sustained in the second accident and also given the fact that the motorcycle was in fact not only driveable but being driven (para 16).

Events since May 2021

44. In response to my queries during the hearing, Mr Hutchins confirmed to the Court that the fundamental dishonesty application did not contain any warning that the Applicant intended to apply to commit the Respondent for contempt of court. He also told me that prior to the issue of the current application on 26 October 2022 there had been no communication with the Respondent in which the Applicant had put him on notice of any potential contempt of court proceedings. The Respondent told me that although he could not be sure exactly what correspondence had passed between himself and the Applicant since May 2021, the first time he was aware that there was an allegation of contempt of court being pursued was when the Part 8 claim form and evidence was served on him personally on 22 November 2022.

The Law

45. The test to be applied under CPR 81.3(5) is not set out in the CPR, but there is a wealth of recent caselaw which contains guidance. A comprehensive summary can be found in *TBD (Owen Holland) Ltd v Simons and Others, Practice Note [2021] 1 WLR 992: [2020] EWCA Civ 1182,* where Arnold LJ sets out the principles in relation to committals for false statements of truth:

> "232 turning to the approach which the court should adopt to an application for permission under rule 81.17, the leading authority is the judgment of Moore-Bick LJ in *KJM Superbikes Ltd v Hinton (Practice Note) [2009] 1 WLR 2406*. The guidance in that judgment was helpfully distilled by Hooper LJ in *Barnes (trading as Pool Motors) v Seabrook [2010] CP Rep 42* in a passage at paragraph 41 which was cited by Christopher Clarke LJ in *Cavendish Square Holdings BV v Makdessi (No 2)* [2013] EWCA Civ 1540 at [28]:
>
> > '(i) A person who makes a statement verified with a statement of truth or a false disclosure statement is only guilty of contempt if the statement is false, and the person knew it to be so when he made it.
> >
> > (ii) It must be in the public interest for proceedings to be brought. In deciding whether it is in the public interest, the following factors are relevant: (a) the case against the alleged contemnor must be a strong case (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); (b) the false statements must have been significant in the proceedings; (c) the court should ask itself whether the alleged contemnor understood the likely effect of the statement and the use to which it would be put in the proceedings; (d) 'the pursuit of contempt proceedings in ordinary cases may have a significant effect by drawing the

attention of the legal profession, and through it that of potential witnesses, to the dangers of making false statements. If the courts are seen to treat serious examples of false evidence as of little importance, they run the risk of encouraging witnesses to regard the statement of truth as a mere formality.

(iii) The court must give reasons but be careful to avoid prejudicing the outcome of the substantive proceedings.

(iv) Only limited weight should be attached to the likely penalty.

(v) A failure to warn the alleged contemnor at the earliest opportunity of the fact that he may have committed a contempt is a matter that the court *may* take into account.'

"233 I would add two points to this summary. The first is the point made by David Richards J (as he then was) in *Daltel Europe Ltd v Makki [2005] EWHC 749 (Ch) at [80]* and cited with approval by Moore-Bick LJ in *KJM* at para 18:

'Allegations that statements of case and witness statements contain deliberately false statements are by no means uncommon and, in a fair number of cases, the allegations are well-founded. If parties thought that they could gain an advantage by singling out these statements and making them the subject of a committal application, the usual process of litigation would be seriously disrupted. In general, the proper time for determining the truth or falsity of these statements is at trial, when all the relevant issues of fact are before the court and the statements can be considered against the totality of the evidence. Further, the court will then decide all the issues according to the civil standard of proof and will not be applying the criminal standard to isolated issues, as must happen on an application under CPR Part 32.14.'

"234 The second is the point made by Christopher Clarke LJ in *Cavendish Square [2013] EWCA Civ 1540 at [79]:*

"The critical question, in this and every case, is whether or not it is in the public interest that an application to commit should be made. That is not an issue of fact but a question of judgment. The discretion to permit an application to commit should be approached with considerable caution. It is not in the public interest that applications to commit should become a regular feature in cases where at or shortly before trial is appears that statements of fact in pleadings supported by statements of truth may have been untrue."

46. In the course of submissions, Mr Hutchins took me to the decision of the Court of Appeal in *Zurich v Romaine [2019] 1 WLR 5223, 5237, para 47, per Haddon-Cave LJ* where specific consideration was given to whether a court should attach weight to the lack of a warning in the context of a fraudulent personal injury claim where the Respondent alleged contemnor was the claimant in a personal injury action:

> "In practice, the absence of a warning is unlikely to be of any relevance where the alleged contemnor is himself the claimant in an underlying personal injury claim (such as the present case) and where the allegedly false statements are contained in claims documents prepare by himself or his solicitor and signed with a "statement of truth". Whilst the CPR do not provide (or allow) for a penal notice to be attached to a "statement of truth", it is difficult to conceive of circumstances where a claimant can be heard to say that he was prejudiced by the absence of warning about the risks of contempt proceedings if he, himself, has been responsible for bringing a fraudulent claim."

47. Whilst I would completely accept that the prejudice to an alleged contemnor arising out of a lack of specific warning from an applicant with respect to potential contempt proceedings is significantly reduced in circumstances where a litigant claimant has signed a statement of truth, in my experience it is still - even with the benefit of the modern wording which includes a penal notice - not uncommon for litigants in personal injury claims in fact to be largely ignorant of the nature and extent of the Court's powers to punish abuse of its process using contempt proceedings. Whatever hope was expressed about the deterrent power of committal proceedings as a message to the legal profession and through them, witnesses, does not yet at least, appear to have been fulfilled.

48. Mr Hutchins also relied on the passage of the judgment in *Zurich v Romaine* at paragraphs 48 – 51 regarding the relevance of discontinuance by a claimant in response to fraudulent behaviour in the pursuance of his claim being uncovered where Haddon-Cave LJ said,

> "The fact that a claimant or applicant discontinues proceedings or an application immediately or shortly after being confronted with evidence or an accusation of falsity is likely to be a relevant factor to be taken into account in most cases. This is because the claimant who discontinues immediately upon realising that the "game is up" is naturally, and appropriately, to be contrasted with the claimant who contumaciously presses on nevertheless, wasting everyone's time and costs in the process. However, the analysis goes deeper than this. The stratagem of early discontinuance should not be seen to be used by unscrupulous claimants or lawyers as an inviolable means of protecting themselves from the consequences of their dishonest conduct. It is clear that the modus operandi of some of those involved in fraudulent insurance claims has been to issue tranches of deliberately low value claims (sometimes on an industrial scale) for e.g. whiplash, slips and trips etc and when confronted with resistance or evidence of falsity, simply then to drop those

> particular claims, in anticipation that it would probably not be worth the candle for insurers to pursue the matter further, particularly since recover of costs can itself be time-consuming and costly and nominal claimants may be impecunious. The problem has become even more acute in recent times because of one-way cost shifting ("QOCS") and the costs of proving "fundamental dishonesty" under CPR r 44.16 (and cf section 57 of the Criminal Justice and Courts Act 2015)."

49. I would in the context of this application, highlight two further areas of relevance in respect of the exercise of the discretion to give permission, which are discussed in the caselaw. First, in relation to delay in bringing an application for permission to commit for contempt. The issue was considered by the Court of Appeal in *Barnes (T/A Pool Motors) v Seabrook [2010] EWHC 1849 (Admin)* by Hooper LJ where he referred to the *Daltel Europe Ltd* decision (para 42) and noted that committal proceedings are characterised as criminal proceedings for the purposes of Article 6, regardless of whether (to the extent the distinction still exists in English law: see *Arlidge, Eady on Contempt*) the contempt itself is considered 'civil' or 'criminal'.

50. Article 6 gives an alleged contemnor the right to a determination of the charge against him within a reasonable time, accordingly, Article 6 is important both at the permission stage and thereafter (para 42). At paragraph 47, Hooper LJ said,

> "In my view and without reference to Article 6, the fact that a claimant has delayed in bringing the proceedings is a significant factor which the court should take into account."

51. Supplemental to that conclusion, Hooper LJ made the following comments (para 57),

> "It will be helpful if the required affidavit (a witness statement is not sufficient) includes a chronology of the events, including a chronology of the proceedings. Give that undue delay may (in my view) lead to permission not being granted, it is important to explain any delay or absence of delay…"

52. The second point relates to particularity in the Grounds of contempt for which permission is sought. I have already mentioned that there is a difference between applying for a finding of fundamental dishonesty on the claim as a whole and a committal application which requires consideration of specific allegations by reference to statements of truth. This is an application of the general principles of natural justice, which require the respondent to know the case he has to meet. In *Royal Sun Alliance plc v Kosky [2013] EWHC 835, Sir Raymond Jack* refused an application for permission to bring committal proceedings following a personal injury claim which was advanced on a general basis on the back of extensive surveillance footage of the respondent, which the applicant said was inconsistent with her evidence in the claim. He held that the refusal of permission underscored the need for applicants to set out,

> 'precisely what is asserted to be untrue, and the way in which it is said not to be true.'

The Application

53. The Application is dated 26 October 2022 and the bundle comprises over 270 pages. It is essentially a reheat of the documents from the personal injury action, together with a similar repetition of the submissions made in respect of fundamental dishonesty in May 2021, put forward as the 'Grounds' of the application. It is supported by an affidavit of Charles Clayton, solicitor for the Applicant. The affidavit does not set out a detailed chronology, apart from a few main dates. In particular, it fails to mention at all what occurred after the judgment of DDJ White on the CPR 44.16 application.

54. The Application contains 3 proposed Grounds for Committal:

(i) 'The Claimant's account of the accident was untrue.'

(ii) 'The Claimant's account of his injuries was untrue.'

(iii) 'The claim for credit hire, recovery and storage was untrue.'

55. Further detail was provided in narrative form in both the draft Grounds and also the Affidavit, setting out evidence which the Applicant said is inconsistent with the Respondent's case in the County Court proceedings. It did not identify which statements of the Respondent were in question and nor did it say in what way the Respondent's case was said not to be true.

56. I was able in the hearing, with the assistance of Mr Hutchins, to ascertain what the Applicant's case is and what the Grounds ought in my judgment to have set out in particulars:

Ground (i) 'The Respondent's witness statement dated 10 March 2021 was not true and known by him not to be true at the time when he signed it in that

- He did not come to a stop and wait for the VW Passat to pass him at the edge of the bus lane
- He did not pull up stationary to the lights in the left-hand lane and wait
- He was not struck in the rear of the motorcycle by the VW Passat.

Ground (ii) 'The Respondent's witness statement dated 10 March 2021 was not true and was known by him not to be true at the time when he signed it in that

- He did not sustain any injury at all in the accident
- He did not take 3 days off work because of his injuries.

Ground (iii) 'The Respondent's particulars of claim and his witness statement of 10 March 2020 at paragraphs 38 and 39 were not true and the Respondent knew at the time of signature of each document that they were not true because

- His motorcycle was not in fact unroadworthy during the period he claimed for hire of use of alternative vehicle (18 February 2019 to 14 January 2020)

- He did not have need of a replacement vehicle
- He did not need to store his motorcycle; and
- He had not lost the pre-accident value of his motorcycle.

57. Mr Hutchins confirmed at the hearing that the Applicant was not pursuing the allegation that the Respondent was no impecunious.

58. The Affidavit did not address the delay in issuing the application at all, which was surprising because Mr Hutchins cited the *Barnes v Seabrook* decision to the Court in his submissions. In answer to my questions, he indicated that the Applicant had needed time to consider its position following the finding of fundamental dishonesty in May 2021 and to seek to enforce the costs order in the County Court proceedings. There was no evidence included in the Affidavit, however, as to the steps which had been taken by the Applicant to enforce the costs award, or indeed when such steps were taken.

59. Mr Hutchins submitted that the Respondent was on notice of the fact that his credibility and honesty were in issue from July 2020 when his application to exclude the late disclosure of the CCTV footage was made, and permission was given for him to serve witness evidence in response. Mr Hutchins observed that would have been a perfect opportunity to come clean and to set out any explanation, but instead the Respondent attended the application through Counsel and sought to oppose the order without giving any details of his case or explanation of his conduct.

60. In respect of the public interest in committal of the Respondent, Mr Hutchins pointed out that the Respondent had not paid the order for costs which was enforceable against him considering the fundamental dishonesty finding. He added that unless the committal proceeds there would be 'no sanction' and this would give rise to a sense that the Respondent had 'got away with it'. Whilst he did not quite say as much, Mr Hutchins came close to suggesting that the only reason his client was pursuing this application was as a penalty for the Respondent's failure to pay his client's costs of the County Court claim and that if the costs order had been met, this application would not have been contemplated.

61. The Respondent attended the hearing and made submissions in person. He was reminded of his right not to self-incriminate and the desirability of seeking legal assistance, bearing in mind that he may qualify for legal aid for representation. As this latter point was news to the Respondent, I raised the option of his making an application to adjourn, but he indicated his wish to proceed with the hearing unrepresented.

62. He told me that he was not aware that there was a possibility of contempt of court proceedings until he received service of the application on 22 November 2022. He denied telling lies about his injuries, stating that he had hurt his right ankle in the collision when his motorcycle fell onto his legs. His explanation for his account of the circumstances of the accident was that it was possible to make yourself believe something had happened. He apologised to the Court and to the Applicant for wasting everyone's time and expressed a hope that there might be a way to resolve the application without proceeding.

63. In view of the fact that I had given the Applicant some time over the weekend in order to provide me with some further detail of the chronology of the previous proceedings and as there were a lot of materials provided with the application, I decided to reserve this judgment.

Analysis

64. I bear in mind that it is no part of my function at this stage to determine whether the allegations are made out and I have deliberately kept my reasons brief on the merits so as not to express any view which might prejudice that later determination.

Ground 2

65. The allegations regarding the personal injury elements do not come anywhere near the threshold of establishing a prima facie case to the criminal standard in my view. The fact that there are discrepancies between recorded accounts of injury in medical report forms which are by design intended to be pro-forma and brief do not make them untrue, indeed, it would be remarkable if they were wholly consistent. The nature of the discrepancies is modest and well within the bounds to be expected where the account of symptoms has been recorded by different authors and at different stages of the process. Moreover, the Respondent has failed to obtain any of the evidence which would have assisted in establishing a prima facie case: it did not raise questions of Dr Hill as permitted and it never sought the medical records of the Respondent.

66. In the circumstances, it is unnecessary for me to consider whether it would have been in the public interest to pursue the Ground 2 allegation, but I would have found that it was not. I observe that the general pleading of the allegation does not assist the Applicant because the wide and open-ended in nature would have resulted in a time-consuming and in my view disproportionate exploration of the issues at a contempt hearing. The value of the personal injury element of the original proceedings was extremely modest in comparison to the credit hire claim and was largely disregarded by the Applicant in the course of the County Court proceedings. In my judgment the injuries claim was not a sufficiently significant part of the proceedings to justify a committal application and it would not be in the public interest for this part of the application to proceed.

Grounds 1 and 3

67. It is common ground that the CCTV footage is inconsistent with the account set out in the witness statement of the Respondent dated 10 March 2020. Further, but without determining the matter, I am also satisfied that there is a strong prima facie case that the Respondent knew the statements as being untrue when he signed the statement of truth. For the avoidance of doubt, in reaching this conclusion, I do not attach any weight to the findings of DDJ White on the fundamental dishonesty application, because he did not have the benefit of any evidence from the Respondent and was applying a lower standard of proof.

68. In terms of Ground 3, I am also satisfied that the documentary evidence regarding use of the motorcycle during the period when it was said to be unroadworthy, and incapable of use gives rise to a strong case to answer that the Respondent knowingly advanced a false claim for credit hire, storage and recovery charges.

Public Interest

69. Both the Grounds concerning the accident circumstances and the claim that the motorcycle was rendered unroadworthy as a result were central to the claim: without these statements no claim would have existed.

70. Equally, I have no doubt that the Respondent knew what he was doing in making the statements, in the sense that he fully understood that by signing a statement of truth on his witness statement, he was aware that it was an important document on which reliance would be placed in his County Court claim.

71. Taking these two points together, this case is an example of falsehoods, which if established, would show the Respondent knowingly put forward untruths which absolutely went to the heart of the court proceedings.

72. I also bear in mind the wider public interest in contempt proceedings where witnesses make false statements and the need to ensure that statements of truth are not reduced to a formality but retain genuine currency. These, if established, are serious examples of false evidence and it would be wholly wrong to treat them as being of little importance, because they are not.

73. I attach no weight to the fact that there was no specific warning given by the Applicant to the Respondent of potential contempt proceedings. Whilst it would obviously have been much the better practice for the Applicant to give a warning, in line with what was said in *Zurich v Romaine,* the damage here was already done because it was the Respondent's alleged contempt which started the proceedings.

74. I have given consideration to the effect of the discontinuance of the County Court proceedings by the Respondent following disclosure of the documents relevant to the roadworthiness of the motorcycle post-accident. First, I bear in mind that, although the CCTV was disclosed in July 2020, the Respondent did not withdraw his claim at that point, and indeed persisted to the eve of the re-listed trial in October. Therefore, any 'credit' due for early discontinuance would have been limited. Secondly, I take into account the fact that the claim was predominantly one for credit hire, a species of claim where multiple claims are often made, and which are open to abuse by the unscrupulous. The kind of tactical discontinuance discussed by Haddon-Cave LJ in *Zurich v Romaine* is a real concern to the courts and the wider interest of the public in the justice system not being misused. Ultimately, I have concluded that I cannot take any account of the Respondent's discontinuance of the County Court proceedings.

75. On the other hand, I have been very troubled by the extreme length of time which the Applicant has taken to issue this application. Whilst the authorities do not speak with one voice about when time should start to run for consideration of 'the reasonable period' for a contempt application, it does not seem obvious to me why in this case it was necessary for the Applicant to await the outcome of its application to enforce the costs order pursuant to CPR 44.16, less still to consider whether payment of the costs was made before contemplating contempt proceedings. As I have said, the two applications fulfil different functions: the committal proceedings have a public interest which does not arise on the costs enforcement question. In my judgment, the Applicant could and should have contemplated any contempt proceedings from the date of the discontinuance on 8 October 2020. Even assuming in the Applicant's favour that I am

wrong about this, and 'reasonable time' only started running in May 2021, that still leaves a period of some 17 months before the application was issued, which I find to be well beyond a reasonable period within which this application ought to have been raised.

76. Moreover, the suggestion now made in oral submissions on behalf of the Applicant that an insurer 'has no need' to bring committal proceedings in cases where the costs order is enforceable lends support to the inference that in some cases committal applications are being deliberately held back because they are being used as a commercial tactic or lever to extract payment from discontinuing parties.

77. Quite apart from the potentially discriminatory effect this approach has on those who are without means to pay what might be a sizeable costs order, to create deliberate delay in bringing a contempt application in furtherance of private objectives with respect to costs would not be a proper use of the process. Committal proceedings are not a means of enforcement of civil judgments and the Court should be slow to allow its contempt process to be adopted as a tool for private ends: this seems to me to amount to the sort of 'vindictive litigant with a grievance' behaviour that the court is concerned to be cautious about (see *TBD above at paragraphs 232 – 234*). Contempt proceedings are designed to meet the public interest in adherence with court orders and elimination of false statements of truth in court proceedings.

78. Contrary to the guidance in *Barnes v Seabrook*, there is no evidence before me of the attempts to enforce the costs order or when those attempts took place. Whilst I do not find that the delay in this case was deliberate, I do however find that there is no reasonable explanation for the delay.

79. That leaves the question of what impact the delay has in the context of this application. I have come to the conclusion that notwithstanding the excessive and unexplained delay, the application should be permitted to proceed on Grounds 1 and 3.

80. I consider that the Respondent can still have a fair hearing in respect of Grounds 1 and 3 on the specific facts of this case because of the nature of the allegations. Unusually, perhaps, the allegations do not turn on his recollection of facts and matters stretching over a period of time but are discrete points unrelated to memory or other evidence. The question of whether the motorcycle was in fact roadworthy is not one which depends on memory of past events which might corrode over time. The issue of whether the Respondent's false account of the accident circumstances was put forward knowingly by him is also something which does not turn on memory or other witness evidence, other than his own account of himself, which he is perfectly able to give. In any event, the Respondent has been aware of the nature of the allegations since July or October 2020 and had one opportunity to address both of these narrow questions when the Applicant made its first application pursuant to CPR 44.16 in May 2021. The importance of the alleged falsehoods to the claim and the seriousness of the breaches also weigh heavily in the scales towards permission being granted.

81. Therefore, in my judgment the delay, albeit significant, does not weigh as heavily in the balance as the other factors which suggest that this application is in the public interest.

Conclusion

82. I give partial permission pursuant to CPR 81.3(5) for the application to proceed, on Grounds 1 and 3 as set out at paragraph 56 of this judgment above. Costs will be in the application. I will hear submissions on any consequential directions for the listing of the application at hand-down if they cannot be agreed in advance between the parties. I repeat the comments I made at the hearing to the Respondent with respect to him making efforts to seek legal assistance in this matter.