Case No: QB-2020-000975

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Neutral Citation Number: [2020] EWHC 2660 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9/10/2020

Before :

MR JUSTICE MARTIN SPENCER

- -

Between :

Advetec Holdings Limited	**Claimant**
- and -	
(1) Craig Andrew Shaw	**Defendant**
(2) Green Gold Consulting Limited	

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- -

Mr Mohinderpal Sethi QC (instructed by **Paladin-Knight**) for the **Claimant**
Mr Dominic Howells (instructed by **Royds Withy King**) for the **Defendant**

Hearing dates: 22, 23 and 24 September 2020

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APPROVED JUDGMENT

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 1pm on 9 October 2020.

MR JUSTICE MARTIN SPENCER :

Introduction

1. In this matter, the Claimant applies for permission to bring committal proceedings against the First Defendant in respect of alleged breaches of an injunction order made by Foster J on 9 March 2020 and in respect of false statements allegedly made in witness statements dated 12 March 2020 and 17 March 2020 and in the Defence dated 6 April 2020, each of which was verified by a statement of truth signed by the First Defendant. In addition, there is an application to amend the Particulars of Claim.

Background Facts

2. The background to this matter is that the Claimant was incorporated on 11 January 2007 and is engaged in the provision of specialist business-to-business solutions for the treatment of effluent and waste. The Claimant was founded by the First Defendant, who was a director and the chief executive officer ("CEO"). Others involved in the Claimant were Mr Scott Windham, Ms Amber Edwards, and the First Defendant's wife, Mrs Jill Shaw. In a written contract of employment dated 11 April 2019, the Claimant agreed to continue to employ the First Defendant as CEO and the contract contained the usual duties of an employee to devote his whole time, attention and ability to the business of the company and to carry out his duties faithfully, diligently and competently to the best of his ability and without detriment to the company and to use his best endeavours to promote, protect, develop and extend the business of the company. Clause 13 of the contract of employment defines the Claimant's intellectual property rights.

3. It would appear that, in the Spring of 2019, the Claimant was in need of investment capital and there was some disaffection with the First Defendant's role as CEO. In any event, in May 2019 the board of directors of the Claimant resolved to recruit a new CEO in place of the First Defendant as a precondition to the making of an investment of £2.5 million. The result was that the First Defendant stepped down as CEO on 16 May 2019. On 29 August 2019, he also stepped down as a director. On the same day, Mr James Lovett was appointed the Claimant's new CEO.

4. At a board meeting on 14 June 2019, the board agreed to restructure the company both in the UK and in the USA with a view to hiring a more professional team with greater expertise. However, according to a witness statement of Mr Richard Moon, who has been chairman of the Claimant since December 2015, the First Defendant breached the confidentiality of that board meeting and told various members of staff, ahead of the formal announcement, of the plan to restructure and how that would affect them. Whatever the rights or wrongs, it is clear that there was a significant deterioration in the relationship between the board and the First Defendant and, on 18 June 2019, Mr Moon challenged the First Defendant and required him to work from home until the restructure was complete.

5. Despite these events, the First Defendant remained an employee of the Claimant and, after relinquishing his directorship, he was employed with the title of "Founder". A new written contract of employment is dated 1 September 2019.

6. In November/December 2019, the First Defendant was in negotiation with the Claimant to terminate his employment altogether. Thus, on 6 December 2019, Mr Grahame Macauley of Thatcher and Hallam, the First Defendant's solicitor, wrote an email to Mr Lovett, the new CEO of the Claimant, including the following:
"What is now being suggested by Craig is that there be a settlement deed which brings his employment to an end, which then gives rise to a consultancy agreement, where Craig, as Founder continues to provide agreed consultancy services for Advetec on terms to be finalised."

   Unfortunately, the negotiations broke down and prior to taking annual leave on 9 January 2020, the First Defendant brought in, on 8 January 2020, his work laptop which he had first wiped of all data and had a factory reset performed. On 13 January 2020, Mr Moon was informed by an employee of Soltech IT Ltd (a company which provided IT support to the Claimant) that she had been asked by the First Defendant to collect the company laptop from him in order to reset it to its factory settings, and when she asked the First Defendant, whether he needed anything off the laptop first was told that he had already copied all of the contents to another device, which she referred to as his "GGC" laptop.

7. On 23 January 2020, Mr Lovett wrote to the First Defendant, suspending him pending a disciplinary investigation. In the course of that investigation, it emerged that the First Defendant had also deleted all the contents of his company email account inbox, sent items and trash folder.

The Proceedings and Injunctions

8. On 9 March 2020 the Claimant obtained an ex parte injunction order from Foster J, which included an order for delivery up, in the following terms:

> "The Respondents must immediately deliver up to the Supervising Solicitor:
>
> (1) any desktop or laptop computer, USB storage device, memory stick, disc, tablet device, mobile phone and any other electronic storage device or computer in each of their possession or control ('Devices') together with usernames, login details and passwords which are necessary to enable the contents of the devices to be copied or imaged;
>
> (2) names, login details and passwords for any account or medium held by the Respondents on which documents or information may be stored in an electronic format, including (but not limited to) any email account, webmail account, website, social networking site, online storage or backup facility or other remote storage facility ('Electronic Accounts')".

   The order of Foster J also required the First Defendant to make and serve on the Claimant's solicitors a witness statement verified by a statement of truth, confirming his and the Second Defendant's compliance with earlier parts of the order and identifying

> "the name and address of everyone to whom, other than pursuant to the First Defendant's lawful duties on behalf of the Applicant, the Respondents have supplied the Applicant's confidential information so far as relates to products, processes, product information, know-how, designs or trade secrets." The Order also required the Defendants to state what confidential information of this kind had been supplied and to give full details of the dates of every such supply.

9. The Supervising Solicitor was Mr Edmund Fiddick of TLT solicitors and his report to the court is dated 12 March 2020. The order of Foster J was served on 10 March 2020 and the First Defendant, having summoned his solicitor, Mr Macauley and taken advice, delivered up a Dell desktop computer, an Apple MacBook pro laptop, a 64 GB memory stick, and 8GB memory stick, an Apple iPad and an iPhone X. The First Defendant also identified an email account (craig@GGC.global), an iCloud storage account and a Sage accounting account. The Devices were delivered by Mr Fiddick to a computer expert company, Cyfor, for imaging.

10. The next day, the First Defendant instructed Mr Stephen Welfare of Royds Withy King as his solicitor in these proceedings, and Mr Welfare confirmed to Mr Fiddick that there was in fact a further email account used by the First Defendant: shaw007@me.com. Later that day Mr Welfare sent an email to Mr Fiddick confirming that Mr Shaw had recalled yet another email account, craig@Genevatrust.global, and the password for that account was provided.

11. Pursuant to Foster J's order, the First Defendant signed a witness statement ("Shaw1") on 12 March 2020 in purported compliance with Foster J's order. In that witness statement, he confirmed compliance with the order and at paragraph 7, he said:

> > "Pursuant to clause 4.2 of the order I can confirm that neither the Second Defendant, or I have supplied any of the Applicant's confidential information to anyone other than in the course of my lawful duties on behalf of the Applicant, so far as it relates to products, processes, product information, know-how, designs or trade secrets."

12. The original return date for the injunction order was 20 March 2020, but this was adjourned and the matter came before Griffiths J on 25 March 2020. The Defendants applied for the injunction to be discharged on the basis that it should never have been granted in the first place and the First Defendant made a further witness statement ("Shaw2") on 17 March 2020 for the purposes of that hearing. In that witness statement, the First Defendant explained (at paragraph 23) that:

> > "The Second Defendant is a family company used to manage our properties. As already explained, it was my intention to then utilise it for my consultancy business after I left the Claimant."

At paragraph 24, the First Defendant stated that he had not yet promoted anything about himself or the Second Defendant. At paragraph 40, he relied upon an exchange of emails

with one Isaac Garcia, a director at Boston Children's Hospital, which he said made it clear that he, the First Defendant, was introducing Mr Garcia to the Claimant and encouraging him to use the Claimant's services and products, stating:

> "It should also be clear from that email that I'm not setting up in competition with the Claimant. The fact is that as yet no work has commenced by the Second Defendant, nor has it or I engaged in any marketing initiatives, nothing beyond the draft GGC presentation."

This was a reference to a PowerPoint presentation exhibited to Mr Moon's witness statement at RJM 20 (pages 132 to 161). Also, at paragraph 40, the First Defendant stated:

> "Peter Klaich was sacked by the Claimant in December 2018 and has had no involvement with it since."

13. The hearing before Griffiths J on 25 March 2020 was a fully contested hearing at which the Defendants were represented by Mr Dominic Howells of counsel. I have not seen the transcript of any judgment by Griffiths J. Mr Howells told me, in the course of the hearing before me, that the format adopted was for different issues to be argued and for Griffiths J then to give a reasoned ruling on each of those issues in turn, before moving onto the next issue, rather than give a comprehensive judgment at the end of the hearing. What is clear is that, despite the contents of the First Defendant's witness statement and despite the arguments of Mr Howells, Griffiths J declined to discharge the injunction. He continued the injunctions in relation to confidential information and preservation of evidence and he further ordered:

> "4. The First Respondent must not, until Trial or further Order of the Court, and save as notified to and agreed by the Board of the Applicant, (whether paid or unpaid) be directly or indirectly engaged or concerned in any capacity in any business other than the Applicant, except that he is not prohibited from:
>
> (1) acting as a director and shareholder of the Second Respondent: and
>
> (2) holding an investment by way of shares or other securities of any company where such company does not carry on a business similar to or competitive with any business been carried out by the Applicant or any Group Company."

At the same time, the Claimant gave undertakings to the court, including an undertaking to keep the First Defendant in its employment on full pay until trial or further order and not to require him to carry out any duties. At the time of the Griffiths J order, it was anticipated that there would be an expedited trial in June 2020.

14. In advance of the hearing before Griffiths J, the Claimant filed Particulars of Claim on 23 March 2020. As explained in a witness statement by Mr Neil Ashley of Paladin Solicitors (the Claimant's solicitors) dated 9 July 2020, at the time that the Particulars of Claim were filed, although the Claimant believed that the Defendants had been guilty of

significant wrongdoing, they did not know the precise nature and extent of that wrongdoing and therefore the Particulars of Claim was necessarily drawn in general terms. He referred to the Defendants having been very critical of the lack of particularity, stating: "The Claimant was always clear that an amendment was likely to follow" and expressing his belief that this would have been reasonably obvious to the Defendants as well. In that witness statement, Mr Ashley describes the process of disclosure by the Defendants through the Defendants' computer experts, Lineal. On 15 May 2020, the Defendants made their first disclosure statement and at the same time, Lineal provided a letter explaining their search methodology and how the search results were provided through an online document repository called Relativity. With the receipt of the first disclosure statement and the information from Lineal, Ms Marsha Robinson of the Claimant's solicitors, Paladin, wrote, at 10:55 on 15 May 2020, an email to Lineal, stating, among other things, as follows:

> "Also, we note you refer to, 'iPad, iPhone data and cloud data'. In fact, the data captured by Cyfor was more extensive than this and covered a greater range of devices, including an Apple MacBook Pro laptop, a Dell Computer, two pen drives and five electronic accounts. Could you please confirm that you carried out the search exercise across the entirety of this Cyfor for data."

This was followed by a further email from Mr David Holmes of Lineal sent at 17:55 on 15 May 2020, which included the following:

> "Lineal have today detected a tranche of files, potentially containing documents that were not identified in the original data corpus for processing. We are currently undertaking a full investigation as to how and why this happened and will revert once that investigation is completed, and provide you with our findings. Lineal's immediate concern is that the newly identified files may contain documents that are responsive to parsing criteria such as keywords etc. We are aware that disclosure occurred on Thursday 15th May. Please be on notice that there might possibly be a supplemental set of documents for disclosure."

15. On 27 May 2020, the Defendant's solicitors, Royds Withy King, wrote to Paladin attaching a further disclosure statement and a supplemental list of documents. The disclosure of documents on 15 May and 27 May has, according to Mr Ashley, enabled the Claimant to set out its case with much fuller particularity and this has resulted in the application of 9 July 2020 for permission to file and serve amended Particulars of Claim. It became clear to the parties, and in particular to the Claimant, that not only would the Particulars of Claim require amendment but also that the proposed trial in June 2020 would not be feasible. In his witness statement, Mr Ashley refers to the significant time and effort put into considering the disclosure and "trying to piece together what the Defendants were doing between early 2019 and the service of the injunction." He says:

> "In the event, the upshot of the Claimant's and our efforts has been the identification of over 170 separate specific occasions/instances of wrongdoing by the Defendants. Bearing in mind that all of these will constitute multiple breaches

> of express and implied terms in the First Defendant's contract of employment, and fiduciary duties, and that many will constitute further breaches of contract, equitable, tortious and/or fiduciary duties, the individual breaches identified from the disclosure run into the thousands."

The Committal Application

16. With the above background and history, on 23 July 2020 the Claimant made its application for committal against the Defendants for contempt of court, supported by an affidavit of 22 July 2020 from Mr Ashley. In that affidavit, Mr Ashley purports to identify five false statements contained in the First Defendant's first witness statement, Shaw1. He also purports to identify a further 20 false statements, numbered 6 to 25, within the First Defendant's second witness statement, Shaw2. Finally, so far as false statements are concerned, Mr Ashley identifies a further 12 allegedly false statements in the Defence filed by the Defendants on 6 April 2020 and endorsed with a statement of truth signed by the First Defendant. These are numbered 26 to 37.

17. The formula adopted in the committal application, a formula which has been much criticised by Mr Howells in the hearing before me, has been to cross-refer to Mr Ashley's affidavit as containing details of the grounds of committal. In addition to the alleged false statements, Mr Ashley also identifies 4 alleged breaches of the order of Foster J as set out in paragraphs 42 to 45 of the affidavit.

18. Finally, in response to the application and the affidavit of Mr Ashley, the First Defendant, Mr Shaw, swore and served an affidavit on 27 August 2020, setting out his response to the allegations of breach of the order of Foster J and of having made false statements.

19. The application for permission to bring committal proceedings came before me by way of video hearing on 22 September 2020 and was heard over three days, finishing at lunchtime on 24 September 2020. The Claimant was represented by Mr Mohinderpal Sethi, QC and the Defendants were represented by Mr Dominic Howells, of counsel.

The Legal Test and Principles to be Applied

20. The procedural rules for bringing proceedings in the High Court for contempt by making false statements in a document verified by a statement of truth are found in CPR rr81.17 and 81.18 and PD81 paras 5.1 to 5.6. Rule 81.17(3)-(4) explains the scope and interaction of committal for false statements (to which Part 81 Section 6 applies) with committals for non-compliance with orders (to which Part 81 Section 2 applies) as follows:

> "(3) Where the committal application relates to both-
>
> (a) a false statement of truth or disclosure statement; and
>
> (b) breach of a judgment, order or undertaking to do or abstain from doing an act,

Section 2 (Committal for breach of a judgment, order or undertaking to do or abstain from doing an act) applies, but subject to paragraph (4).

(4) To the extent that a committal application referred to in paragraph (3) relates to a false statement of truth or disclosure statement –

(a) the Applicant must obtain the permission of the court in accordance with rule 81.18; or

(b) the court may direct that the matter be referred to the Attorney General with a request that the Attorney General consider whether to bring proceedings for contempt of court."

Rule 81.18(1)-(2) provides:

"(1) A committal application in relation to a false statement of truth or disclosure statement in connection with proceedings in the High Court, a Divisional Court or the Court of Appeal, may be made only—

(a) with the permission of the court dealing with the proceedings in which the false statement or disclosure statement was made; or

(b) by the Attorney General.

(2) Where permission is required under paragraph 1(a), rule 81.14 applies as if the reference in that rule to a Part 8 claim form were a reference to a Part 23 application notice and the references to the claim form were references to the Part 23 application notice."

21. The approach of the court to applications for permission to bring committal proceedings was largely agreed between the parties and was considered by the Court of Appeal in *Elliott v Tinkler* [2014] EWCA Civ 564 where the court approved at paragraph 44 the first instance judge's summary of the correct legal approach as follows:

> "The approach to be adopted on applications for permission has been considered in a number of authorities. The principles that emerge are the following:
>
> i) In order for an allegation of contempt to succeed it must be shown that "in addition to knowing that what you are saying is false, you had to have known that what you are saying was likely to interfere with the course of justice" - see *Edward Nield v. Loveday* [2011] EWHC 2324 (Admin);
>
> ii) The burden of proof is on the party alleging the contempt who must prove each element identified above beyond reasonable doubt - see *Edward Nield v. Loveday* (ante);

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);

iv) Permission should not be granted unless a strong prima facie case has been shown against the alleged contemnor- see *Malgar Limited v. RE Leach (Engineering) Limited* [1999] EWHC 843 (Ch), *Kirk v. Walton* [2008] EWHC 1780 (QB), Cox J at paragraph 29 and *Berry Piling Systems Limited v. Sheer Projects Limited* (ante) at Paragraph 30(a);

v) Before permission is given the court should be satisfied that a) the public interest requires the committal proceedings to be brought; b) The proposed committal proceedings are proportionate; and c) The proposed committal proceedings are in accordance with the overriding objective - see *Kirk v. Walton* (ante) at paragraph 29;

vi) In assessing proportionality, regard is to be had to the strength of the case against the respondents, the value of the claim in respect of which the allegedly false statement was made, the likely costs that will be incurred by each side in pursuing the contempt proceedings and the amount of court time likely to be involved in case managing and then hearing the application but bearing in mind the overriding objective - see - *Berry Piling Systems Limited v. Sheer Projects Limited* (ante) at Paragraph 30(d);

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; and

viii) In determining a permission application, care should be taken to avoid prejudicing the outcome of the application if permission is to be given by avoiding saying more about the merits of the complaint than is necessary to resolve the permission application - see *KJM Superbikes Limited v. Hinton* (ante) at Paragraph 20."

22. In addition to the above principles, Mr Howells has referred me to the decision of the Court of Appeal in *TBD (Owen Holland) Ltd v Simons* [2020] EWCA Civ 1182 at paragraphs 232-234. Mr Howells submits that the following additional principles should

be incorporated into the principles set out in *Elliott v Tinkler*:

> (i) only limited weight should be attached to likely penalty;
>
> (ii) 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;
>
> (iii) allegations that deliberately false statements have been made in witness statements or statements of case are by no means uncommon. In general the proper time for determining the truth or falsity of such 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. The usual process of litigation would be seriously disrupted if parties thought they could obtain an advantage by singling out statements relating to contested facts and making those statements the subject of a committal application;
>
> (iv) the critical question is whether or not it is in the public interest that an application to commit should be made. 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 become a regular feature in cases where, at or shortly before trial, it appears that statements of fact in pleadings supported by statements of truth may have been untrue.

23. In addition, Mr Howells submits that an application must be properly particularised and compliant with PD 81, section 5.2, whereby it is provided that, for each false statement, the Applicant must identify the statement said to be false, explain why it is false, why the statement-maker knew it to be false, and why contempt proceedings would be appropriate in the light of the overriding objective. He submits that compliance with this provision is extremely important because it would not be fair or in accordance with Article 6 ECHR to allow an improperly particularised application to proceed, and the court may strike out a committal application if the application is an abuse of process, likely to obstruct the just disposal of the proceedings, or if there has been a failure to comply with a rule, practice direction or court order.

24. Mr Howells further submits that the quasi-prosecutorial role of the Applicant in pursuing a contempt charge means that its proper function is to act generally dispassionately, to present the facts fairly and with balance and then let those facts speak for themselves, assisting the court to make a fair quasi-criminal judgment. For this, he relies on *Navigator Equities Ltd v Deripaska* [2020] EWHC 1798, at paragraph 143.

25. Finally, in relation to the principles to be applied, Mr Howells submits as follows:

> "Where, as here, the application for permission is premature because it raises factual issues which will be investigated at trial, it follows that contempt proceedings at this stage would not be in the public interest. That entails the

> dismissal of the application. It would be wrong as a matter of logic and principle to adjourn rather than dismiss the permission application merely because after trial a similar application (inevitably by then based on different evidence) might be capable of being brought: see *TBD (Owen Holland) Ltd v Simons* [2020] EWCA Civ 1182 at paragraphs 236-238."

However, in the course of the hearing, Mr Howells made it clear that, by this submission, he did not intend to submit that the raising of factual issues which will be investigated at trial makes an application for permission premature *per se*, so that the committal proceedings are not in the public interest. He accepted that the raising of factual issues which will be investigated at trial may or may not be premature, but, if it is premature, then the application should be dismissed.

The Alleged False Statements: strong prima facie case

26. Much of the hearing before me was taken up with a detailed examination of the 37 alleged false statements set out in the affidavit of Mr Ashley and in consideration of the First Defendant's explanation. Time did not permit Mr Howells to make submissions in relation to each such statement and I take that fully into account. Clearly, it would be inappropriate for me, in this judgment, to set out my detailed views on the evidence given the clear warning in the authorities to avoid prejudicing the outcome of the substantive proceedings, but, where the court finds that there is a strong prima facie case in relation to false statements, it must give at least some reasoning for that conclusion. Having heard the submissions, and having considered carefully the evidence, I have come to the conclusion that there is a strong prima facie case that the First Defendant has made false statements in these proceedings. Of course, I have not heard the First Defendant give evidence, I had not seen him examined or cross-examined, and it may be that he will be able fully to explain and justify the statements he has made. However, for present purposes, I can refer to perhaps three statements as examples – and I emphasize that these are only examples – of where, it seems to me, there is a strong prima facie case.

(i) In his second witness statement, Shaw2, made for the purposes of the hearing before Griffiths J, the First Defendant stated at paragraph 40 that:

> "Peter Klaich was sacked by the Claimant in December 2018 and has had no involvement with it since."

At page 789 of the bundle, there is an email from the First Defendant to Mr Klaich dated 28 October 2019, sent at 11:52, in which the First Defendant forwarded to Mr Klaich diagrams of the Claimant's machines with their dimensions. Each such diagram includes the words:

> "This document contains confidential and proprietary information that cannot be reproduced or divulged, in whole or in part, without authorisation in writing from Advetec."

The sending of such confidential information to Mr Klaich is difficult to reconcile

with the First Defendant's statement that Mr Klaich had had no involvement with the Claimant since December 2018.

(ii) In his witness statement, the First Defendant referred to the Second Defendant being a family company used to manage the family's properties and which he only intended to use for his consultancy business after he had left the Claimant. He said he had not yet promoted anything about himself or the Second Defendant He said at paragraph 40:

> "The fact is that as yet no work has commenced by the Second Defendant , nor has it, or I, engaged in any marketing initiatives, nothing beyond the draft GGC presentation."

However, at page 779 of the bundle, there is an email sent by the First Defendant from his GGC.global email account to Mr John Woods, of Nutrelgroup, a customer of Advetec, with 'Solsea Order' as the subject, in the following terms:

> "Hi John, you used to buy product from Advetec and they no longer process that material, it's now handled by Green Gold Consulting, and we have a volume in stock of the seaweed. Please can you send me your requirements and I will be happy to set up the same terms, etc you had from Advetec. If you order this week we can ship your goods either next week or on Monday 6th October."

Again, the First Defendant's statements in Shaw2 and the contents of this email are difficult to reconcile.

(iii) At paragraph 40 of his second statement, Shaw2, the First Defendant stated:

> "Generally in response to paragraphs 107 to 115 I state that far from my being in competition with the Claimant, I was, notwithstanding all that was going on and the way that I was being treated by them, still promoting the Claimant's business. By way of example there is included at pages 41-42 of my Exhibit an exchange of emails with Isaac Garcia, director at Boston Children's Hospital. As is very clear I am introducing to him to the Claimant and encouraging him to use their services/products. It should also be clear from that email that I am not setting up in competition with the Claimant."

The emails in questions are dated 22 January 2020. However, on 21 January 2020 (bundle at page 879), the First Defendant sent an email from his GGC.global account to Jeniece Schroeter in the following terms:

> "Let's assume that Amber is the mole. If I send the email below to Isaac, and Issaih, and they send it back confirming that we are not dealing with the project. We shut everything down. We can also get this dated say for last week before I left UK. Then, that's Advetec gone and us clear. Then we can introduce new player to Isaac to take project forward. Isaac would need to be

on board and complete the resources."

The clear implication of this email is that the email exchange between the First Defendant and Mr Garcia was in fact a subterfuge whereby the real intention was for Advetec to be "gone" (rather the opposite of promoted) and then GGC to be in the clear to introduce a third party as a "new player" to take the Boston Children's Hospital project forward. Again, the email to Ms Schroeter is difficult to reconcile with what the First Defendant says in paragraph 40 of his second witness statement.

27. In considering the above three statements, it will be observed that I have not referred to the First Defendant's evidence or explanation of those matters. The failure to do so was, indeed, a criticism of Mr Sethi QC by Mr Howells in relation to Mr Sethi's presentation of the Claimant's case. However, it is enough for me to say that I have taken into account the First Defendant's evidence and come to the conclusion that it does not persuade me that there is not a strong prima facie case. It would be inappropriate to say more at this stage, for fear of going further than is necessary and prejudicing the final hearing.

Alleged Breaches of Order of Foster J

28. The next question to be considered is whether there is a prima facie case of breach of the order of Foster J of 9 March 2020. Four breaches of the Order are alleged.

Breach 1

29. As Mr Sethi submitted, the electronic disclosure revealed a dropbox online storage facility, which was used regularly by the First Defendant and the Second Defendant as a means of sharing large files and information. However, the First Defendant failed to provide details of any dropbox account to the Supervising Solicitor, or to mention it in Shaw1 or Shaw2. In his affidavit of 27 August 2020, the First Defendant in fact referred to two, if not three, dropbox accounts containing relevant documents.

30. The explanation by the First Defendant is that he had "forgotten" that, in order to access a dropbox account, it was necessary to provide the necessary credentials: the email address and the password. This was because, when he used dropbox on his computer, it was unnecessary to re-enter these credentials each time, once the account had first been set up. This explanation seems to me implausible when part of the rationale of a Dropbox account is that it can be accessed from any computer with access to the Internet by entering the email address and password. However, again, the plausibility of the First Defendant's explanation will be a matter for consideration at the full hearing. It is enough for me to find, as I do, that there is a prima facie breach of the order of Foster J.

Breach 2

31. The second alleged breach of the order of Foster J relates to a GGC server set up remotely by Mr Lee Botley of Soltech IT as reflected in an email from the First

Defendant to Jeniece Schroeter of 30 January 2020 (page 885) and an email from the First Defendant to Mr Botley of 31 January 2020 (page 886) asking him to create another drive on his server called GenevaTrust and to give access to just himself and Mr Windham. The First Defendant says that this was a partition of the hard drive on his Dell personal computer which he used to call the "GGC server" for easy reference and was taken to Cyfor for data collection. It seems to me that this is a sufficient explanation in the absence of any evidence from the Claimant's witnesses that Cyfor were unable to access any part of the hard drive of the PC because it had been partitioned. Mr Sethi pointed out that the Defendants had been invited to obtain and serve an affidavit from Mr Botley and had not done so, but in my judgment, the burden of proof being on the Claimant, there was no obligation on the Defendants to do so and the evidence presented by the Claimant is insufficient to establish a prima facie case of breach of the order of Foster J in this particular regard.

Breaches 3 and 4

32. Breaches 3 and 4 of the order of Foster J are closely related to the allegation of false statements and are therefore not alleged breaches which fall to be considered separately. It is sufficient for me to say that I find that there is a prima facie case in relation to both of these alleged breaches of Foster J's Order.

Public Interest

33. As has been said, for the court to find that there is a prima facie case of breach of an Order, or a strong prima facie case that false statements have been made, is necessary but not sufficient for permission to bring committal proceedings to be brought. It is also necessary to consider whether it is in the public interest for committal proceedings to be brought, and in this respect, regard is to be had to the question of proportionality and also the fact, as here, that there is significant overlap between the issues which would be determined by the court on an application to commit and the issues to be determined at trial. Thus, in see *KJM Superbikes Limited v. Hinton* [2008] EWCA Civ 1280, Moore-Bick LJ said at paragraph 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 the statements and making them the subject of a committal application, the usual process of the litigation would be seriously disrupted. In general the proper time for determining the truth or falsity of the 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."

In *Cavendish Square Holdings BV v Makdessi* [2013] EWCA Civ 1540 Christopher

Clarke LJ said (at paragraph 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, it appears that statements of fact in pleadings supported by statements of truth may have been untrue."

34. The question of whether to grant an application for permission to bring committal proceedings is in the public interest was also considered in *TBD (Owen Holland) Ltd v Simons* [2020] EWCA Civ 1182 ("TBD") in which the Court of Appeal cited with approval the following passage from the judgment of Judge Keyser at first instance (save for his conclusion that the application should be adjourned):

> "4. The overriding test to be applied to an application for permission to bring committal proceedings is whether such proceedings are in the public interest. A necessary but not sufficient condition for the Applicant to satisfy is to show that there is a strong prima facie case that the respondent is in contempt of court. In deciding whether that condition is satisfied, the court must give reasons for its decision while being careful not to prejudice either the substantive litigation or any future committal proceedings. The matters on which TBD relies in making its present application are all concerned, of course, with Mr O'Boyle's conduct in the litigation; they are not themselves matters directly concerning his involvement in the events constituting the subject matter of the substantive claim. However, in this particular case that is a very nice distinction, because the falsehoods for which Mr O'Boyle is said to have been responsible are concerned with the state of his (or, in one case, OSL's) involvement in the events constituting that subject matter. Despite the best efforts of Mr Butler QC for TBD to persuade me to the contrary, it seems to me that a trial of the alleged acts of contempt would impinge very greatly on the issues in the substantive litigation. In those circumstances, I do not consider it to be in the interests of the efficient proceedings while the substantive litigation is ongoing. I am also mindful of the risk that, in what without fear of contradiction I may describe as vigorously pursued litigation, committal proceedings might become an inter partes tool of litigation advantage and cease to be a vehicle of the public interest.
>
> 5. I have considered and rejected two possible courses of action. One is to determine the permission application now and, if permission were granted, to give direction that the committal proceedings be dealt with at the end of the case. The disadvantage of that course, as it seems to me, is that I should have to form a judgment now on the existence or non-existence of a strong prima facie case against Mr O'Boyle. Because of the close connection between that issue and the issues in the substantive claim against Mr O'Boyle, that seems to me to be an unattractive course. It would also have limited utility, as any view that could now be expressed would have a less secure basis than would the view formed by the

> trial judge.
>
> 6. The other possible course that I have considered but rejected is simply to strike out or dismiss the present application. It seems to me that nothing material would be gained by that. It would, of course, mean that an application for permission were not pending during the further continuance of the proceedings. However, TBD would be entitled to bring a further application for permission at a later stage and, if it intended to do so, it would be proper for it to give notice of that intention to Mr O'Boyle at this stage. The matters relied on by TBD are such that the possibility of committal proceedings cannot be ruled out, at least until after trial. To leave the application in abeyance would be materially similar to granting permission now but directing that committal proceedings would not take place before the conclusion of this case; in submissions, counsel were agreed that the latter course would be permissible, though for difference reasons they urged me against taking it.
>
> 7. Instead, I have decided to determine some main issues between the parties in connection with TBD's application (namely, whether the application ought to be refused on grounds of litigation privilege, the privilege against self-incrimination, or misconduct in connection with the execution of a search order); and, having determined those issues in TBD's favour for reasons set out below to adjourn the present application for further consideration after the trial or further order in the meantime. All I think it necessary to say at this stage is that, in view of the conclusions I have reached as to admissibility of evidence, it cannot be said to be unarguable that there is a strong prima facie case. However, in my judgment, for reasons I have indicated, it is preferable that the question whether there is indeed such a case be not considered in advance of the trial."

35. Judge Keyser's view that the appropriate course was to adjourn the application for permission to bring committal proceedings for further consideration after the trial or further order in the meantime was overturned by the Court of Appeal which allowed the Defendant's appeal against that decision, Arnold LJ, saying at paragraph 237:

> "Counsel for Mr O'Boyle submitted that the judge's reasoning at [6] was flawed. As the judge's reasoning at [4]-[5] and [7] recognised, the application for permission to bring committal proceedings against Mr O'Boyle was premature, because the issues raised by TBD's grounds would be investigated at trial. It followed that, as the judge himself said, it was not in the public interest for an application for committal to be brought at that stage. That should have led the judge to conclude that the application should be dismissed. Upon analysis, the only reason given by the judge for not taking that course in [6] was that it would be open to TBD to bring a further application later, and in particular after trial. Counsel submitted that that did not justify the judge's decision to adjourn the current application, which was for permission to bring committal proceedings before trial. Apart from anything else, the evidence would be bound to change at trial.

> 238. I accept these submissions. I would add that, after trial, the parties will have the benefit of the judge's findings. These are likely to be the court's first port of call when deciding whether or not committal proceedings should be brought against Mr O'Boyle. Accordingly, I would allow Mr O'Boyle's appeal against Judge Keyser's decision to adjourn the application."

36. Relying on this passage, Mr Howells submits that the proper time for determining the truth or falsity of the alleged false statements in this case is at trial, when all the relevant issues of fact will be before the court and the statements can be considered against the totality of the evidence. He submits that the application is accordingly premature and should be dismissed.

37. Mr Sethi QC submits that the sheer breadth of the alleged false statements make this an exceptional case and that there is no danger here of the court acting contrary to the guidance provided by the Court of Appeal in the *TBD* case. On the Claimant's case, the First Defendant is, he submits, making a mockery of the rules and it is important to bring home to litigants that where a court makes an injunction order, as Foster J did in this case, those subject to the injunction must obey it to the letter so as to preserve the integrity of the court's processes. If, as the Claimant alleges here, there has been widespread non-compliance by the making of false statements which pervade the whole of the First Defendant's evidence, and that goes unchecked, it risks contaminating the whole court process and resulting in significant injustice for the Claimant. The requirement that there be a strong prima facie case sets the bar importantly high and is the main curb on the dangers expressed by Moore-Bick LJ in *KJM Superbikes* and Christopher Clarke LJ in *Cavendish Square*. The false statements in this case are not, he submits, trivial, or incidental, or the kind of falsities which are commonly encountered in litigation, but go to the very heart of this case. This is not a case of falsities coming to light a short time before trial with an application for committal disrupting the trial process: no trial date has been set in this case. Mr Sethi submits that committal proceedings are proportionate and in the public interest because:

    (i) There is a very strong prima facie case in relation to myriad false statements pervading the First Defendant's evidence;

    (ii) Subject to the alternative submission dealt with in paragraph 38 below, there is in effect no alternative option: the application should be allowed or dismissed: see *TBD*;

    (iii) The First Defendant is wholly unrepentant despite blatant untruths, proved to be untrue by reference to the First Defendant's own documents. He draws upon an exchange during argument between the court and Mr Howells, in relation to the alleged false statement considered at paragraph 26(i) above. Mr Howells was driven to accept that the First Defendant's statement that Mr Klaich had had no involvement with the Claimant since December 2018 could only be supported if the word "direct" were inserted (i.e. "no direct involvement"), a concession which

had not been recognised or offered by the First Defendant in his affidavit or otherwise;

(iv) On the evidence, the First Defendant is persisting in using his knowledge and information which is confidential to the Claimant to gain a springboard for GGC, despite the First Defendant remaining a fully-paid (and highly paid) employee of the Claimant;

(v) The overriding objective requires no less than that the matter be properly dealt with in advance of trial.

38. If, however, the court did not accept the above submission, then Mr Sethi submitted that an alternative course would be to grant permission and direct that the application for committal should be determined by the trial judge, which would give a saving in terms of costs and time and would provide for finality.

39. Whilst I have found this issue to be a difficult one, and I can see the force of Mr Howells' submissions in the light of the authorities he has cited, I have nevertheless come to the conclusion that this is indeed such an exceptional case that it is in the public interest that permission to bring committal proceedings should be granted, for the reasons submitted by Mr Sethi. It is undesirable that I should say more, for fear of expressing views or coming to conclusions which pre-empt the committal hearing. Furthermore, the committal proceedings should be heard as soon as possible, and in advance of the trial so that, should the judge trying the matter come to the conclusion that the Defendants have been in contempt of court, there is an opportunity for the trial to be put on a proper basis and for the issue to be dealt with fairly.

40. Finally, in relation to the application for permission to bring committal proceedings, it is necessary to deal with Mr Howells' criticism of the way in which the application had been made, and in particular that there had been a failure to comply with the provisions of section 5.2 of PD 81 CPR. This provides that it is necessary in respect of each false statement for the Applicant to identify the statement said to be false, explain why it is false, and why the statement maker knew it to be false. Mr Howells was further critical of Mr Ashley's failure in this affidavit to identify obvious matters which might be said against the application, such as handwritten notes made by Mr Lovett of the Claimant showing open discussion between him and the first amendment of some of the matters giving rise to the allegation of false statements. This was also a criticism of Mr Sethi's presentation of the application.

41. However, in my judgment, there is no merit in the submissions: the alleged false statements have been clearly identified by Mr Ashley in his affidavit, the reason why they are said to be false has been set out with some particularity by reference to the documents provided on disclosure and the nature of the false statements is such that, if they are false, it is virtually inconceivable that the First Defendant did not know them to be false: in other words, the First Defendant's knowledge speaks for itself. No further particularity of the First Defendant's knowledge is required.

42. Mr Howells has also submitted that the Claimant failed to raise the matters of alleged contempt of court in correspondence before bringing the application for permission to bring committal proceedings and that 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, and in this case Mr Howells submits should, take into account. Whilst I accept that it would perhaps have been better if these matters had been raised in correspondence, first, in my judgment, this is not something to be taken into account to such an extent as to refuse the application. In the circumstances of this particular case, I can understand the anxiety of the Claimant to have the application brought before the court as soon as possible. I can further understand that the nature and extent of the alleged false statements was such that the Claimant did not expect that pre-application correspondence would resolve the matter. In this regard, the unrepentant nature of the First Defendant's response to the allegations of contempt show clearly that it would have made no difference for the allegations to have been raised in correspondence first, it would only have delayed matters further.

Application to amend the Particulars of Claim

43. The second main application is the Claimant's application to amend the Particulars of Claim. In correspondence, the Defendants were not prepared to consent to this application except on terms which were not acceptable to the Claimants, for example in relation to costs. However, at the hearing, the Defendants did not oppose the application, but there remains an issue as to whether the costs of and occasioned by the application to amend should be paid by the Claimant. In my judgment, for the reasons set out by Mr Sethi QC in his written skeleton argument, and adopted in his oral submissions, the costs of and occasioned by amendment should be reserved to the trial judge. Thus, this is not a normal amendment application arising from a situation in which it can be said that the Claimant could and should have pleaded its case in the original Particulars of Claim in the manner now set out in the Amended Particulars of Claim. The amendment has been caused by the substantial disclosure of documents which, on the Claimant's case, evidence widespread wrongdoing by the Defendants and the Claimant did not have the information which it now has to have enabled it to have pleaded the Particulars of Claim other than in general terms.

Other Matters

44. Two further matters fall for determination: first, the Claimant's application to be released from its undertaking to continue to employ the First Defendant on full pay, without requiring him to carry out any duties. Secondly the Claimant's application to be released from its undertaking to provide security for costs together with the Defendants' application that the security for costs should be enlarged to take account of the significantly extended issues embraced by the Amended Particulars of Claim.

<u>Application to be released from Undertaking to employ D1</u>

45. So far as the Claimant's Application to be released from Undertaking to continue to employ the First Defendant is concerned, at the conclusion of the hearing I indicated that I would be minded to allow this Application, as it seemed to me incongruous that the Claimant should be held to such an Undertaking given the complete breakdown in the parties' relationship and the fact that the speedy trial envisaged by Griffiths J in June 2020 had not happened. However, I also indicated that the corollary of so doing would be to release the First Defendant from the injunction contained in paragraph 4 of the order of Griffiths J. This provides:

> "The First Respondent must not, until Trial or further Order of the Court, and save as notified to and agreed by the Board of the Applicant, (whether paid or unpaid) be directly or indirectly engaged or concerned in any capacity in any business other than the Applicant, except that he is not prohibited from:
>
> (1) acting as a director or shareholder of the Second Respondent; or
>
> (2) holding an investment by way of shares or other securities of any company where such company does not carry on a business similar to or competitive with any business been carried out by the Appany Group Company."

46. Time did not allow for the terms upon which the Claimant should be released from this undertaking to be argued, and I therefore permitted the parties to make further submissions in writing, and they have done so. Mr Sethi QC argues that the terms of the non-competition injunction against the First Defendant should be preserved or alternatively narrowed. He submits:

> "1.11 To remove the injunction would mean that D1, as a past and current fiduciary and employee of C, was by order of Griffiths J but no longer is prohibited from competing with C despite the overwhelming evidence of alleged wrongdoing by D1 giving rise to a serious issue to be tried that D1 is in actual and threatened breach of his contractual, tortious, fiduciary and equitable obligations to C as now particularised in the APOC. The American Cyanamid test for the non-competition injunction against D1 was clearly established on the far more limited evidence before Griffiths J. The current evidence of wrongdoing by D1 is far greater than was the case before Foster J or Griffiths J. To release D1 from any injunction backed by penal notice prohibiting competition in these circumstances is unprecedented, unprincipled, against the evidence and would, respectfully, be a clear error of law. It is plainly unjust in all the circumstances of this case and contrary to the overriding objective. It is not known if and indeed when C will be in a position to undertake and conclude a formal disciplinary process into alleged gross misconduct by D1. Such a process will of course take some time. Meanwhile, C is left more vulnerable and unprotected
>
> 1.12. The very reason that Griffiths J ordered the non-competition injunction in the first place was to protect C's legitimate business interests until a speedy trial.

> In order to have even granted such relief, Griffiths J applying the well-established American Cyanimid principles, had to have been satisfied as a minimum:
>
> (1) That there was a serious to be tried as to C's entitlement to a final non-competition injunction at trial;
> (2) That damages would be an inadequate remedy for C;
> (3) That damages paid under C's usual cross-undertaking in damages would be an adequate remedy for D1 at trial;
> (4) If not the latter, then the balance of convenience (i.e., the balance of the risk of doing an injustice) lay in favour of granting the interim injunction.
>
> 1.13. There has not been any material change of circumstances warranting departure from that fundamental position. No party has suggested otherwise. Given the greater evidence of unlawful competition against D1 (all the while as an employee and fiduciary), it is reasonable to observe that, now more than ever before, C needs the protection of the non-competition injunction until a trial can determine the serious
> issues raised in the APOC."

47. In response, in admirably concise submissions, Mr Howells argues:

> "2. Ds' case before the court was that C's undertaking to keep D1 in employment should not be set aside because the relationship of employment between C and D1 was (and is) the legal basis for the injunction set out at §4 of the order of Griffiths J. If the relationship of employment does not continue, the injunction will lack legal basis: see Ds' first skeleton argument dated 21.9.20, §40(a). Plainly, an injunction which ceases to have legal basis requires to be set aside. It cannot be said that Ds' position on this point has changed.
>
> 3. The discharge of the §4 injunction in its present form is simply the corollary of the discharge of the undertaking, which C itself sought from the court. C had not made an application for an alternative form of injunction, so the issue as to whether (and if so on what terms) one should be granted was not before the court. If C considers that it would be entitled to a more limited form of injunction following its intended summary dismissal of D1 then that is something on which it should follow the ordinary course: it should seek undertakings in correspondence and, if those undertakings are not forthcoming, it should apply. In those circumstances, C's threat of immediate further litigation and costs consequences for D1 (see §1.9 of C's second skeleton) is quite inappropriate.
>
> 4. If the court orders an alternative form of injunction against D1 which is dependant for its legal basis on the contract of employment between C and D1, then D1 reserves his right to make an application to discharge or modify the injunction if the contract of employment comes to an end, whether by summary dismissal as threatened by C or otherwise."

48. In my judgment, Mr Sethi's argument ignores the clear inter-relation between the terms of the injunction at paragraph 4 and the undertaking given by the Claimant to continue to employ the First Defendant on full pay, as explained and submitted by Mr Howells. It seems to me that the solution is to release the Claimant from its undertaking, and to order that the injunction at paragraph 4 is only to continue so long as the Claimant continues to employ the First Defendant. Should the Claimant decide to dismiss the First Defendant, as it would now no longer be barred from doing, then it will have the option to seek undertakings from the First Defendant or apply to the court for a further injunction if such undertakings are not forthcoming. The consequences of dismissal, and in particular whether the restrictive covenants contained in the contract of employment would be enforceable, did not arise before Griffiths J because the Claimant was undertaking to keep the First Defendant employed. I therefore do not accept Mr Sethi's submissions at paragraph 1.12, set out above. It will be a matter for the Claimant whether to continue to employ the First Defendant and retain the benefit of paragraph 4 of the injunction, or dismiss him and take its chances of the court granting a further injunction, whether in the same terms as paragraph 4 or in narrower terms.

Security for Costs

49. In my judgment, the circumstances have not so radically changed that the Claimant should be released from its undertaking to provide security for costs. However, I decline to enlarge the amount of the security as requested by the Defendants.