Neutral Citation Number: [2022] EWHC 1748 (Fam)

Case No: FD21P01004

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2022

Before :

MR JUSTICE MOSTYN

- -

Between :

MOHAMED AHMED	**Claimant**
- and -	
YASAR KHAN	**Defendant**

- -
- -

The claimant acted in person
Shaun Spencer (instructed by Russell and Russell Solicitors LLP) for the defendant
hearing date 29 June 2022

- -

Approved Judgment

.....

MR JUSTICE MOSTYN

The proceedings were heard, and this judgment was delivered, in public. No permission is needed to report this judgment. However, identification of the children, who are the subject of continuing proceedings under the Children Act 1989, is prohibited under section 97 of that Act.

Mr Justice Mostyn:

1. Wide-ranging litigation has arisen from the breakdown of the marriage of Mohamed Ahmed ("the father") and Esraa Mohamed ("'the mother"). The litigation has extended to a contempt application. That is before me and I have heard it, in the usual way, in open court.

2. There are three sets of proceedings.

Application by the father under the Children Act 1989 to the Family Court (No. MA20P01401)

3. On 2 July 2020 the father made an application under the Children Act 1989 in the Family Court at Manchester. The mother is the respondent. These proceedings were commenced shortly after the mother left the matrimonial home for a refuge, taking their three children with her.

4. On 26 November 2020, at a hearing at which the father was represented by counsel, an order was made by District Judge Relph which recorded:

> "The court was provided with the mother and children's current location and the Judge was satisfied that the children were safe and their educational and medical needs were being met."

The whereabouts of the children were therefore known to, and recorded by, the Family Court. They were not, however, known to the father.

5. On 25 October 2021, at a hearing at which both parties were represented the court made an order containing the following recital:

> "The respondent did not attend the hearing today. The reason given was that she had been unable to secure childcare. The respondent had returned to her place of residence after the Finding of Fact hearing had been vacated last week and had only secured childcare for the three-day listing last week."

Such a recital could not have been issued if the whereabouts of the mother and the children were unknown.

6. Over six days in February 2022 a lengthy fact-finding enquiry took place before Recorder Searle which culminated in a 39-page judgment on 14 March 2022 in which he made findings on the contested facts favourable to the father and adverse to the mother.

Application by the father to the High Court under its inherent jurisdiction (No. MA21P02687)

7. On 25 November 2021 the father made an application to the High Court for the children to be made wards of court and for passport orders. In his statement in support the father claimed that there was a risk of their removal by the mother to Egypt.

8. On 1 December 2021 at an *ex parte* hearing at which the father was represented by counsel, Russell J refused to make the children wards of court but made a passport order giving directions to the Tipstaff to seize the passports and identity documents of the mother and the children.

9. On 13 December 2021 the solicitors for the father made a written application for an order against the mother's solicitors, Russell and Russell LLP requiring them to disclose the whereabouts of the children. The application was made in Form C2 to the Family Court and was given a different number (**FD21P01004)**, although it was impressed with the seal of the High Court**.** Cause numbers and labels aside, this application was in reality made in the inherent jurisdiction proceedings. The grounds for making the application were stated in the Form C2 as follows:

> "Please find attached a draft disclosure order. Tipstaff attended the last known address of the respondent and children, they do not occupy the said address. We therefore seek a disclosure order against the respondent's solicitor in the children proceedings so Tipstaff can effect the order.
>
> This matter is listed on the 8th December 2021.
>
> We would ask that this be dealt with administratively on an urgent basis so attempts can be made prior to the hearing to obtain the passports.".

It would appear that the father had given the Tipstaff the last address of the mother known to him, and, unsurprisingly, the children were not found there. It would further appear that the father did not inform the Tipstaff that a year earlier the whereabouts of the children had been recorded by the Family Court or that seven weeks earlier the Family Court had been told about the mother's child care arrangements at her place of residence.

10. On that same day an order in the terms of the submitted draft was made by Macdonald J on the papers ("the disclosure order"). The order was headed IN THE HIGH COURT OF JUSTICE, FAMILY DIVISION and bears both numbers **FD21P01004** and **MA21P02687.**

11. The disclosure order stated on its face that the court had read "the relevant documents". It recited that the whereabouts of the children was "unknown", and that for this reason it was justifiable to deal with the matter *ex parte*.

12. But the whereabouts of the children was not unknown.

13. The validity of the disclosure order is not in issue and it is not within my remit to consider the conduct of the father's solicitors in making the disclosure application. I would merely point out that the only witness statement made in those proceedings was that of the father dated 25 November 2021. That statement did not say that the whereabouts of the children was unknown, nor could it have, given the discussions about mother's residence in the Family Court on 26 November 2020 and 25 October

2021. Rather, it set out the father's suspicion that the mother was preparing to abduct the children to Egypt.

14. There is nothing in the material before me to indicate that the High Court was told that the Family Court had received and recorded information about the residence of the children seven weeks earlier. Instead, the grounds for the application, which I have set out above, misleadingly imply that the mother and children had gone on the run and that their whereabouts were unknown.

15. The disclosure order provided that service could be affected by email or facsimile. It was emailed (unsealed) to Russell and Russell LLP on 23 December 2021. It provided that:

> "Russell & Russell Solicitors LLP must forthwith and in any event by no later than 7 days of service of this order, by its officers or agents disclose all information in their knowledge or control to [the father's solicitors] in respect of the whereabouts of [the children and the mother]."

16. The mother's solicitor at Russell and Russell LLP is Yasah Khan ("Mr Khan"). He is a junior solicitor employed by the firm. He understandably assumed that the disclosure order applied to him. I will explain below that he was wrong about that.

17. The disclosure order recorded that "the responsible person" at Russell and Russell LLP had the right to apply for variation or discharge of the order. But it specifically stated in a Notice that:

> "This right does not entitle you to disobey any part of this order until your application has been heard. "

18. That Notice did no more than to make explicit the old and familiar principle that it is the unqualified obligation of any person against whom an order is made to comply with it even if he believes that the order is not validly made and even if he has made an application to set it aside: see *KW & Ors v Rochdale Metropolitan Borough Council* [2015] EWCA Civ 1054 at [22], where the authorities are reviewed.

19. Using the rules concerning the computation of time in FPR rule 2.9(4), Mr Khan calculated that his time for compliance did not expire until 6 January 2022.

20. On 4 January 2022 Mr Khan made an application to discharge the disclosure order of 22 December 2021(*sic, semble* 13 December 2021). The application in Form C2 stated that the mother had been a victim of domestic abuse perpetrated by her ex-husband; that her address was confidential; and that the Form C8 had been submitted to the court accordingly.

21. However, Mr Khan did not comply with the disclosure order within the permitted timeframe prior to its expiration on 6 January 2022. Although he considered that the disclosure obligation applied to him, it appears that he believed that he was absolved from doing so because he had made the discharge application. That was an entirely

incorrect belief. He still had not complied with the order by the time that the father issued the contempt proceedings to which I will turn below.

22. Finally, I record that the tipstaff served the mother with the passport order and seized the identity documents of her and the children on 13 January 2022. In so doing her whereabouts were conclusively confirmed. The father and his solicitors therefore accepted that disclosure from Russell & Russell LLP was not necessary.

Contempt application by the father (No. FD21P01004)

23. The contempt application which is before me was commenced in the High Court on 10 January 2022. The claimant is the father and the defendant is Mr Khan. This application has the same number as the application for the disclosure order made on 13 December 2021.

24. The contempt application pleads that Mr Khan breached the disclosure order.

25. It states that Mr Khan was personally served with the disclosure order on 23 December 2021. That was not correct.

26. The application contains two counts of contempt.

27. Count 1 pleads that Mr Khan did not comply with the term of the order which required Russell and Russell LLP to disclose within seven days the whereabouts of the mother and the children.

28. Count 2 pleads that Mr Khan breached the term of the order which prohibited Russell and Russell LLP from informing the mother of the making of the order or any steps taken in compliance with it.

29. The application was supported by a statement made by the father on 10 January 2022 to which statement he appended the order of 13 December 2021, and one page of email correspondence written on 10 January 2022. That statement was not sworn or affirmed.

30. In the statement the father expresses, in bold script, his wish that the court should mete out the following to Mr Khan:

> **"I would like to ask the court to exercise its powers and apply the maximum punishment on this dishonest solicitor of imprisonment and to order him to bear all costs occurred/involved in the making of the court order he disobeyed and breached.**
>
> **I would like to ask the court to order for an enforcement of the court order along with the imprisonment punishment.**
>
> **I would like the court to order for a financial compensation to recover the severe distress and frustration I suffered from, caused by the defendant's crime, along with the**

> **imprisonment punishment and the enforcement of the court order."**

31. As regards Count 2 the father says:

> "On 02nd (*sic*) January 2022, I received a horrific lengthy text message from the respondent's brother, within which he threatened my life and promised to kill me as well as the respondent's other two brothers because of the making of this order and particularly because of it being made without a notice to his sister (the respondent). Due to the extreme risk on my life and for safeguarding reasons I would make a copy of this text message available only to the court at the hearing. The respondent and her brother could never be able to be aware of the making of this court order but through the defendant. The respondent's brother stated clearly in his horrific text message that the defendant has informed his sister (the respondent) of the court order and mentions him by name. The information in the text message matches the defendant's dishonest intention to disobeying the court order and to do this only as a revenge. These threats and the whole message has been reported to the police and a life threat crime has been recorded at CRI/06LL/0000555/22 and is currently being investigated and Police are currently taking serious safeguarding measures to maintain my safety. The defendant acted dishonestly and hit the court order into the wall showing his extreme undermining and degrading of the court's decisions and prohibitions.
>
> Also, after two days of receiving this horrific message the defendant made and submitted his application to discharge the court order, without obeying it, and within his application he stated exactly the same information in the text message. Moreover, by making such application the defendant has proven on himself the breach of the prohibition in section 8 of the court order, as he cannot make an application on behalf of the respondent without her consent, which implies his disclosure of the whole matter to the respondent."

32. On 6 May 2022 directions were given in the contempt proceedings by Mr Justice Peel. For the purposes of that hearing a position statement was filed by counsel on behalf of Mr Khan. That position statement accepted that Mr Khan was in breach of the order after 6 January 2022. It stated:

> "Though D denies being in breach on 4 January or before as previously explained, D accepts that after 6 January he should have disclosed the address but because of the application that had been made and he was waiting for a date, matters drifted and he regrets not disclosing the address then."

33. The order of Peel J states:

> "The claimant will not disclose the text message referred to in his statement dated 10 January 2022 for reasons of alleged family safety and accordingly the claimant does not seek to rely on that text message in the committal application;"

34. It further states:

> "AND UPON The Court inviting the parties to consider whether as a matter of law a committal application may be brought against an individual in circumstances where the order which is the subject of the alleged breach was against a firm."

35. The order provided that the substantive contempt application was to be listed to be heard on 29 June 2022.

36. On 1 June 2022 Mr Khan made an interlocutory application that the contempt application should be struck out.

37. The application asked that it should be heard before the hearing of the substantive application. It was not possible to accommodate this request. However, in the events that occurred, that is what has happened, as I explain below.

38. On 23 June 2022 the father made an interlocutory application seeking "permission to adduce the attached statement and exhibit". That statement and exhibit is dated 23 June 2022 and runs to 50 pages of documents. It sought that he be granted leave to amend his contempt application to include a third count of contempt namely:

> "The named defendant on 04th (*sic*) January 2022 made, signed and submitted to the High Court knowingly a false statement in a document that is verified with a statement of truth. "

39. The strike out application of Mr Khan, the permission application of the father, and the substantive application were all listed before me in open court on 29 June 2022 with an inadequate time estimate of one day.

40. The father had been awarded legal aid and instructed Ms Julia Gasparro of counsel. I allowed an hour of the court's time to be used for discussions between Ms Gasparro and the father. However, when I entered the courtroom at 11:30 I was told that Ms Gasparro would be professionally embarrassed were she to continue to represent the father and that accordingly she had to withdraw. She formally applied for an adjournment on behalf of the father, which application I refused. The father then made a half-hearted application in person for an adjournment, although he indicated that he was in fact content for the matter to proceed. I refused that application also.

41. I therefore embarked on the hearing. The mother was represented by Mr Shaun Spencer of counsel. The father acted in person. However, notwithstanding that the remainder of the sitting day was fully used it was not possible to do more than to hear the two interlocutory applications.

42. This is my judgment on those two applications.

The father's permission application

43. I propose to deal with the father's permission application first because if I were to deal with Mr Khan's application first, and if it were successful, then that would have the consequence that the merits of the father's application were not the subject of a judgment.

44. As mentioned above, the father's permission application has two limbs. First, it seeks significantly to expand the evidence on which he relies to support Counts 1 and 2. Second, it seeks permission to introduce an entirely new Count 3.

45. As to the first limb the case law is clear. The defendant to a contempt application only faces the charges as pleaded in the application: *Tankaria v Morgan* [2005] EWHC 3282 (Ch) at [27]. The applicant can seek leave to adduce evidence about events after the date of the application provided that such evidence only relates to, or touches on, relevant events pleaded in the application. Evidence which does not relate to, or touch upon, events pleaded in the application is not admissible.

46. In deciding whether to allow further evidence to be adduced which relates to, or touches upon, relevant events pleaded in the application, the court will consider why the evidence was not served first time round and the unfairness to the defendant of having to deal with it at this late stage.

47. In relation to Count 1 the main piece of new evidence the father wishes to adduce is the judgment of the Recorder given on 14 March 2022. Applying the aforesaid principles, my decision is that the judgment is inadmissible inasmuch as it relates to events after the date of the contempt application. Insofar as the decision of the Recorder touches on events pleaded in the contempt application then his findings are not inadmissible *per se*, but in my judgment should not be admitted on the ground of irrelevance. I cannot see how the Recorder's findings about the credibility of the mother would help me to decide whether Mr Khan was in contempt of court under Count 1. Indeed, it seems entirely superfluous in circumstances where Mr Khan has already accepted that Russell and Russell LLP did not comply with the disclosure order.

48. I turn to Count 2 which makes the exceptionally serious allegation that Mr Khan tipped the mother off about the disclosure order in breach of para 8 of the disclosure order. As explained above, as originally formulated this count was evidenced solely by a text message which the father claims he was sent by the mother's brother. Before Peel J the father withdrew reliance on that text, leaving the count entirely unsupported by any evidence. The father now seeks to adduce further evidence to support this charge. But the proposed further evidence does not in my judgment take the matter any further at all. Taken at its highest it is not potentially probative of the allegation. On analysis the proposed new evidence is no more than a statement of the father's "strong belief" that Mr Khan tipped off the mother. I refuse the father's application to adduce this new evidence in support of Count 2.

49. I turn to the proposed new Count 3. The father needs permission to make a contempt allegation alleging a false statement in a document verified by a statement of truth. This

requirement is stipulated in FPR rule 17.6 and rule 37.3(5). Rule 37.3(6) requires the application for permission to be included in the contempt application.

50. The application for permission was not included in the contempt application. There was no good reason for its omission given that the contempt application was issued six days after the allegedly false statement was made. I regard this as a significant procedural defect.

51. The test for the grant of permission is set out in *Tinkler & Anor v Elliott* [2014] EWCA Civ 564 at [44], where all the anterior authorities are considered. Gloster LJ held that the applicant must demonstrate:

i) a strong prima facie case that the maker of the statement knew (or did not care whether) it was false but also that he knew (or did not care whether) it was likely to interfere with the course of justice;

ii) that the public interest requires the committal proceedings to be brought having regard 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;

iii) that the proposed committal proceedings are proportionate having regard to the strength of the case against the defendant, the value of the claim in respect of which the allegedly false statement was made, and the likely costs that will be incurred by each side in pursuing the contempt proceedings; and

iv) that proposed committal proceedings are in accordance with the overriding objective having regard, inter alia to the amount of court time likely to be involved in case managing and then hearing the application.

52. In determining this discrete application to introduce Count 3 I am satisfied that the judgment of the Recorder of 16 March 2022 is admissible and relevant.

53. The father alleges that in the set-aside application, endorsed with a statement of truth and made on 4 January 2022, Mr Khan made three deliberately false statements viz:

- "We have acted for the respondent, mother, Esraa Mohamed throughout these proceedings. Our client has been a victim of domestic abuse perpetrated by her ex husband."

- "We submitted a C8 form to the court in August 2020 and therefore have always kept our clients (sic) address confidential."

- "Cafcass and the Judges involved throughout these proceedings have not allowed the father to have contact with the children."

54. The father says these statements are all false. In his submissions to me he described them as "wicked lies".

55. He said that the first statement is deliberately false because Mr Khan must have known, or strongly suspected, that his client's case in the fact-finding proceedings was deliberately false; that therefore the instructions given to him by his client were untrue; and that he was accordingly dishonestly complicit in advancing a false case by the mother. The father told me that he specifically raised in those fact-finding proceedings the complicity of Mr Khan in the manufacture of a deliberately false case by the mother.

56. There are problems with this argument. The first problem is that the Recorder's judgment does not record that the father raised Mr Khan's complicity in advancing a false case in the fact-finding proceedings. The second problem is this: if it must have been obvious to Mr Khan on the evidential material that the mother's case was false then that must have been equally obvious to the mother's counsel Ms Horren. And she would therefore have been equally complicit in running a false case. Yet, the Recorder in his exhaustive judgment made no findings of complicity against Mr Khan or counsel, or indeed any criticism of their conduct of the proceedings.

57. In his submissions the father was reduced to arguing that the statement was deliberately false because it did not contain the adverb "allegedly". I agree that the phrase would have been better expressed with the use of that adverb. At a time when the mother's allegations against the father were hotly contested and awaiting trial it would have been less inflammatory to have stated that she had "***allegedly*** been a victim of domestic abuse perpetrated by her ex-husband", rather than stating as a categorical fact that she was such a victim.

58. However, grammatical impurity is a long way from deliberate falsity. The statement accurately reflected Mr Khan's instructions. The first charge of making a false statement is completely baseless.

59. The second charge of making a false statement is hard to understand. Mr Khan wrote:

> "We submitted a C8 form to the court in August 2020. Therefore have always kept our client's address confidential".

The father says this was a deliberately false statement.

60. FPR rule 29.1 states:

> "(1) Unless the court directs otherwise, a party is not required to reveal –
>
> (a) the party's home address or other contact details;
>
> (b) the address or other contact details of any child;

> (c) the name of a person with whom the child is living, if that person is not the applicant; or …
>
> (2) Where a party does not wish to reveal any of the particulars in paragraph (1), that party must give notice of those particulars to the court and the particulars will not be revealed to any person unless the court directs otherwise. ….”

61. Form C8 is used to give the court notice of the particulars referred to in rule 29.1(2). Keeping a home address or other details confidential is an entitlement conferred by the rules and does not depend on the court’s permission. I have seen a Form C8 dated 3 August 2020, which names an address in Leigh, and which bears the court seal.

62. The father says that the statement made by Mr Khan must have been deliberately false because he (the father) knew perfectly well that the mother was living at the address in Leigh on that date, because he had been injuncted from going to that property. Therefore, it was not true for Mr Khan to have written that he had always kept the mother’s address confidential.

63. I have seen a further Form C8, referring to an address elsewhere in England, dated 15 September 2020. This does not have the court seal on it.

64. It is clear that the mother wished to avail herself of the protection given by FPR rule 29.1. It is also clear that while the father may have known the address of the mother in Leigh, Mr Khan endeavoured to keep her new address confidential. It may be that Mr Khan made an inadvertent slip in drafting the phrase in question as prior to the move of the mother to her new address her whereabouts in Leigh had not been kept literally confidential (even though it had been the subject of a request for confidentiality under rule 29.1.)

65. As I have stated above, in an order made on 26 November 2020 the court recorded:

> “The court was provided with the mother and children’s current location and the Judge was satisfied that the children were safe and their educational and medical needs were being met.”

66. Certainly, every step to keep the mother’s address confidential was being taken.

67. I have to say that the father’s allegation in this regard is incomprehensible. If Mr Khan made a mistake in his phraseology it was one of the utmost banality and triviality. No analysis can lead to the conclusion that this was a deliberately false statement.

68. The third allegedly false statement is Mr Khan’s phrase “Cafcass and the judges involved throughout these proceedings have not allowed the father to have contact with the children.” At the time this was written on 4 January 2022 the father had been refused direct contact to the children. The order of 26 November 2020 stated at para 11:

> “The father made an C2 application for interim contact. The court was not minded to grant this application in the interim pending the outcome of the fact finding hearing.”

69. The fact-finding hearing did not conclude until the judgment of Recorder Searle on 16 March 2022. Therefore on 4 January 2022 Mr Khan was not incorrect to write that the judges had not allowed father to have contact with the children. It was not a happy use of language to write that Cafcass had also made that decision. Cafcass do not decide whether fathers should or should not have contact with their children; they merely advise. But that solecism certainly does not mean that Mr Khan made a deliberately false statement. I asked the father to explain what was the semantic difference between the court being not minded to grant interim contact, and the court not allowing him to have contact. He was unable to answer my question.

70. I have to say that the father's allegation is baseless.

71. His application for permission under rules 17.6 and 37.3(5) fails every element of the legal test. The father does not show a strong prima facie case that Mr Khan knew that what he wrote was false and that it was likely to interfere with the course of justice. He does not show that the public interest requires committal proceedings to be brought against Mr Khan. On the contrary, the poverty of the evidence adduced against Mr Khan, and the objective of seeking to have the maximum possible penalty meted out to Mr Khan including imprisonment, all very clearly show that it would be contrary to the public interest for permission to be granted. The proposed committal proceedings would be disproportionate and contrary to the overriding objective in numerous respects.

72. This is not the first time that the father has sought permission to bring committal proceedings against Mr Khan for allegedly making false statements which had been verified by an endorsement of truth. On 6 October 2021 HHJ Booth refused a similar application made by the father in which he claimed that Mr Khan had made false statements in the divorce proceedings between the mother and the father.

73. I consider the father's permission application to be obviously ill-founded (see FPR PD 4A para 2.2, by way of analogy). It is therefore dismissed. I declare and certify it as having been made totally without merit.

Mr Khan's strike out application

74. FPR rule 4.4 provides:

> "(1) Except in proceedings to which Parts 12 to 14 apply, the court may strike out a statement of case if it appears to the court:
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the application;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;
>
> (c) that there has been a failure to comply with a rule, practice direction or court order …."

75. Mr Khan's application very carefully follows the contours of this rule.

Failure to comply with the rules (FPR rule 4.4(1)(c))

76. I shall deal first with Mr Khan's claim that the contempt application fails to comply with the rules.

77. I have recorded above that the original disclosure order against Russell and Russell LLP was made on 13 December 2021. It was not until 23 December 2021 that the father's solicitors made any attempt to serve that order. They emailed Russell and Russell LLP attaching the draft disclosure order which had accompanied the application for the order. The order provided no case number, was undated, did not identify the judge who made the order, and was unsealed. The covering email stated:

> "Dear Sir / Madam
>
> Please find enclosed an order directing you to disclose your client's address forthwith. This is not to be shared with your client,
>
> You will note you are prohibited as follows at para 8:
>
> Russell and Russell Solicitors LLP is prohibited from informing the respondents of the making of this order or any action taking in compliance with it.
>
> This was issued on 22nd December (*sic*), a sealed order is awaited but given the urgency we enclose a draft.
>
> We are aware your client does not live at:
>
> *(sic - blank in original)*
>
> Please reply urgently"

78. No reference was made in the served material to the wardship application nor that a passport order had been made.

79. At no point prior to 6 January 2022 was Mr Khan served, let alone personally served, with a sealed copy of the order of 13 December 2021.

80. Long-established case law emphasises the fundamental importance of safeguards for the defendant in contempt proceedings, given the quasi-criminal nature of the jurisdiction. See among numerous authorities *Hammerton v Hammerton* [2007] EWCA Civ 248, *Re K (A Child) (Removal from Jurisdiction: Committal for Failing to Secure Child's Return)* [2014] EWCA Civ 905, *Re L (A Child); Re Oddin* [2016] EWCA Civ 173 and *Andreewitch v Moutreuil* [2020] EWCA Civ 382.

81. These safeguards are now codified in FPR rule 37.4, which provides:

(1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.

(2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—

(a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);

(b) the date and terms of any order allegedly breached or disobeyed;

(c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;

(d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;

(e) confirmation that any order allegedly breached or disobeyed included a penal notice;

(f) the date and terms of any undertaking allegedly breached;

(g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;

(h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;

(i) that the defendant has the right to be legally represented in the contempt proceedings;

(j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;

(k) that the defendant may be entitled to the services of an interpreter;

(l) that the defendant is entitled to a reasonable time to prepare for the hearing;

(m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;

(n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;

> (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
>
> (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
>
> (q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;
>
> (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and
>
> (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.
>
> (**Emphasis added**)

82. Rule 37.2 defines a penal notice as:

> "**A prominent notice on the front of an order** warning that if the person against whom the order is made (and, in the case of a corporate body, a director or officer of that body) disobeys the court's order, the person (or director or officer) may be held in contempt of court and punished by a fine, imprisonment, confiscation of assets or other punishment under the law."
>
> (**Emphasis added**)

83. The safeguards fall into two categories, namely those that protect the defendant prior to the contempt hearing and those that protect the defendant at the contempt hearing. The first category comprises the following safeguards:

    i) The defendant must have been personally served with the original order with a penal notice endorsed on its front[1], unless the court or the parties dispensed with personal service. If the original order did not contain a penal notice the claimant can later endorse the notice thereon as of right – the court's permission is not required.

    ii) The contempt application must:

[1] Where it is claimed that the defendant has breached an undertaking a penal notice is not required but it is nonetheless necessary to prove that the defendant understood its terms and the consequences of breach.

a) Inform the defendant of the basis and detail of the case against him by setting out a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;

b) state that the original order in question was personally served, giving the date of service, alternatively giving the terms and date of the court's order dispensing with service (FPR 37.4(2)(c) and (d));

c) be supported by evidence given by affidavit or affirmation; and

d) be served, together with the supporting evidence, personally on the defendant, unless the court directs otherwise (FPR 37.5(1)).

iii) The defendant has the right to have legal representation, to apply for legal aid and the services of an interpreter and to have reasonable time to prepare.

84. These protective safeguards have historically been strictly construed in favour of alleged contemnors with only very minor and technical infringements being waived. In Borrie and Lowe: The Law of Contempt (LexisNexis 4th edition 2010) at para 13.29 it is stated:

> "The rules concerning an application for committal have normally been strictly construed particularly those designed to protect the alleged contemnor. As Cross J (as he then was) said in *Re B (JA) (an infant)* [1965] Ch 1112.
>
> "Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations. For example, it is provided that there must be personal service of the motion on him even though he appears by solicitors, and that the notice of motion must set out the grounds on which he is said to be in contempt; further, he must be served as well as with the motion, with the affidavits which constitute the evidence in support of it."
>
> It is clear that if safeguards such as these have not been observed in any particular case, then the process is defective even though in the particular case no harm may have been done. For example, if the notice has not been personally served, the fact that the respondent knows all about it, and indeed attends the hearing of the motion, makes no difference. In the same way, as is shown by *Taylor v Roe* [1893] WN 14, if the claim form does not give the grounds of the alleged contempt or the affidavits are not served at the same time as the notice of the motion, that is a fatal defect, even though the defendant gets to know everything before the application comes on, and indeed answers the affidavits. On the other hand not every defect in the claim form

> will be fatal to the action, for provided that the alleged contemnor can in no way be prejudiced by the defects: 'then it seems…that there is no reason why the courts should be any slower to waive such technical irregularities in a committal proceeding than they would be in any other proceeding'.
>
> In *Taylor v Roe* it was held that a notice of motion marked before 'Mr Justice Kekewich' instead of before 'Mr Justice Stirling' was a defect which could be remedied by giving leave to amend the notice of motion. In *Re B (JA) (an infant)* it was held that the omission on the notice of the words 'Solicitors for the Plaintiffs' was a mere technical irregularity that could be waived. Further objections were taken in the same case, for example, that certain affidavits were defective for containing the following statement: 'I of [giving the description] make oath and say as follows: There is now produced and shown to me marked…a statement of facts signed by me…I depose to the matters set out in my said statement of fact of my own knowledge.'
>
> Cross J did not think that the form of the affidavit was very satisfactory, it being better to say that: 'the statements in the exhibited statements are to my knowledge true', but it was not so defective as to render the affidavit bad. It was also argued that the affidavits were defective because the commissioner of oaths had not stated his address but it was held that while there may have been force in that argument had the affidavits been sworn in London, since the object of the requirement was to ensure identification of the commissioner in case of difficulty, this was not the case here since in a small town there would be no more than one or two commissioners altogether. As Cross J said, 'The absence of the address seems to me to be a matter of little importance, although I think strictly it should be given. But assuming that it is a defect it is an irregularity which is certainly not in any way fatal'.
>
> It was further argued that the affidavits were defective because one party did not give her address or occupation but again it was held that this omission amounted to an irregularity that could be waived."

85. FPR PD 37A para 2(2) allows the court to waive any procedural defect in the commencement or conduct of a contempt application, if it is satisfied that no injustice has been caused to the respondent by the defect. However, I do not read that provision as watering down the requirement for a strict construction and application of the safeguards, with waivers being confined to minor, technical infringements such as those mentioned above. A more modern example of a waived defect is *Cherwayko v Cherwayko (No 2) (Contempt, Contents of Application Notice)* [2015] EWHC 2436 (Fam), where the claimed breaches were not summarised in the contempt application but were fully set out in the supporting evidence.

No penal notice on the disclosure order of 13 December 2021

86. In my judgment, personal service of the original order endorsed with a penal notice is a fundamental safeguard which should almost never be waived where the alleged contemnor is present in the jurisdiction. I accept that personal service might have to be waived in extreme circumstances where the defendant is continually on the move and is demonstrably evading service[2]. In such circumstances a form of substituted service may be necessary.

87. But I cannot envisage any circumstances where the court should waive the requirement for a penal notice to be prominently displayed on the front of the original order. In *Re Dad* [2015] EWHC 2655 (Fam) the order served on the contemnor did not contain a penal notice prominently displayed on its front page. The application to commit was struck out by Holman J. At [17] he held:

> "In my view, therefore, this is not a situation where I can waive the procedural defect. All applications to commit require proper adherence to the requirements of any enactment and rule of court. In the present case there is a serious defect in the order upon which the application to commit is based. I simply cannot commit Mr Chaudhry to prison for any breach of the order, however egregious. In my view that has the consequence that I must indeed strike out the application as a threshold decision, and Mr Chaudhry must not be required to give any evidence or to defend himself on the substance of this application. For those reasons, the application issued on 7th July 2015 to commit Muhammad Nawaz Chaudhry to prison for contempt of court is struck out."

88. As I have explained above, where the original order does not have the penal notice on its front the claimant can write the words on it as of right before arranging for personal service of the order.

89. In my judgment, the failure to serve Mr Khan with a copy of the disclosure order of 13 December 2021 with a penal notice endorsed on its front is a fatal, non-remediable, defect which of itself must lead to the contempt application being struck out.

No personal service of the disclosure order of 13 December 2021

90. In this case the disclosure order of 13 December 2021 stated:

> "The solicitors for the applicants are granted permission to serve a copy of this order by email or facsimile."

[2] If the alleged contemnor is out of the jurisdiction different considerations concerning service will apply which I do not address here.

In my judgment that order does not constitute a waiver of personal service for the purposes of FPR 37.4(2)(d). That rule requires the court specifically to consider whether this vital procedural safeguard for an alleged contemnor should be disapplied. The order in this case was made on the basis of a paper application and there is nothing to suggest that the court was asked to consider specifically the dis-application of this procedural safeguard. Naturally, the order is effective to notify Russell and Russell LLP of its obligations, and there may be consequences (disciplinary or regulatory consequences, for example) if the order is not complied with. Where a disclosure order is made against a firm of solicitors it would not normally be necessary to think about personal service for the purposes of committal because everyone would take it as read that the firm, as officers of the court, would comply with the order unquestioningly.

91. That common understanding does not, however, act to water down the force of the safeguards should contempt proceedings be initiated against a firm of solicitors alleging that the firm has breached an order of the High Court.

92. In my judgment, removal of the fundamental safeguard in contempt proceedings of personal service of the original order is only properly achieved if the order allowing, say, email service of the original order states on its face that personal service of that order is waived in accordance with FPR rule 37.4(2)(d) for the purposes of any subsequent contempt proceedings. The disclosure order of 13 December 2021 does not say that. I cannot accept that a routine disclosure order, made on the papers as box work, a term of which provides for email service of the order, has the effect of depriving a third party discloser of this vital procedural safeguard in subsequent contempt proceedings, unless the court has specifically so provided in the order.

93. It is my conclusion, notwithstanding the terms of para 6 of the disclosure order, that if the father wanted to pursue contempt proceedings against Mr Khan, he had to serve him personally with the disclosure order. He did not do so, and for this additional reason the contempt application must be struck out.

94. Mr Spencer refers to the father's statement dated 10 January 2022 in support of the contempt application and points out that this is neither in affidavit nor affirmation form. And argues that this is yet another breach of the rules. That is true, but that is precisely the sort of minor and inconsequential defect which should be waived.

Abuse of process (FPR rule 4.4(1)(b))

95. I agree with Mr Spencer that when pursuing committal proceedings the father must act as a quasi-prosecutor serving the public interest as much as he is pursuing his own interests as a private litigant. That requires the father 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: *Navigator Equities Ltd v Deripaska* [2020] EWHC 1798 (Comm) at [143]). I suggest that this degree of impartiality will be very difficult for a litigant in person to achieve.

96. Further, I agree that a committal application must not be brought for an illegitimate or ulterior end: *Sectorguard plc v Dienne* [2009] EWHC 2693 (Ch).

97. Plainly, the nature of committal proceedings will inevitably give rise to a measure of personal animus. After all, in regular criminal proceedings there is no room for a prosecutor to adduce a "plea in aggravation", in contrast to committal proceedings: see *Lomas v Parle* [2003] EWCA Civ 1804 at [37] per Thorpe LJ. But even allowing for this factor, I agree that the father has not met, and is not meeting, the twin requirements referred to above.

98. I have set out above the father's plea that the maximum possible penalty be meted out to Mr Khan. I have shown how his allegations are either false, banal, or baseless. During the hearing the father noticed the direction the judicial wind was blowing and abruptly changed his stance stating that he could not care if Mr Khan was sent to prison and that his principal, if not sole, objective was to ensure that Mr Khan could no longer represent the mother. This put beyond doubt that the father's objectives when making the contempt application were illegitimate and ulterior.

99. The father's contempt application is struck out on this ground also.

No reasonable grounds that Mr Khan is guilty of contempt (FPR rule 4.4(1)(a))

100. Finally, I turn to Mr Khan's argument that there are no reasonable grounds for alleging that he is guilty of contempt of court.

101. FPR rule 4.4(1)(a) provides that the court may order a strike out of an application on the ground that the statement of case discloses no reasonable grounds for bringing or defending the application. FPR PD 4A para 2.1 gives as examples:

i) a case which sets out no facts indicating what the application is about;

ii) a case which it is incoherent or makes no sense; and

iii) a case which fails to disclose any legally recognisable application against the respondent.

102. In *Wyatt v Vince* [2015] UKSC 14 at [27] Lord Wilson held that the three sets of facts set out in para 2.1 of PD 4A exemplify the limited reach of FPR rule 4.4(1)(a). The touchstone is whether the application is legally recognisable.

103. Mr Spencer argues that the reach of the disclosure order, when correctly construed, does not extend to Mr Khan.

104. The disclosure order contains the following words and phrases, which I have emphasised**:**

> **IMPORTANT NOTICE TO THE RESPONSIBLE PERSON AT RUSSELL & RUSSELL SOLICITORS LLP:**
>
> Underneath this notice three legal rights are identified.
>
> It then states in Recital No 1:

> **1. An application has been made by the applicant for a disclosure order against Russell & Russell Solicitors LLP.**

Order No 5 states:

> **5. Russell & Russell Solicitors LLP must forthwith and in any event by no later than 7 days of service of this order, by its officers or agents disclose all information in their knowledge or control to [the father's solicitors] in respect of the whereabouts of [the mother and the children].**

Order Nos 8 - 10 state:

> **8. Russell & Russell Solicitors LLP is prohibited from informing the respondents of the making of this order or any action taken in compliance with it.**
>
> **9. Russell & Russell Solicitors LLP may apply to vary or discharge this order upon 24 hours' notice.**
>
> **10. The costs incurred by Russell & Russell Solicitors LLP in complying with this order, which the solicitors for the applicant have undertaken to pay, are considered by the court to be a reasonable disbursement on the applicant's public funding certificate.**

105. It is clear that the reach of the disclosure order extends only to the Limited Liability Partnership (LLP) known as Russell & Russell Solicitors. That is what Recital No. 1 says. The order is therefore against a non-natural or juridical person, which is a separate legal entity. That juridical person is a corporate body, registered at Companies House. It is a type of hybrid entity, adopting many characteristics of a company and a partnership.

106. The obligations under the disclosure order are formally directed to that legal entity. But, in the usual way, those obligations are imposed on the people who control the LLP. Expressly under the terms of the order the obligations attach to the "officers or agents" of the LLP. By operation of the law it attaches to the partners.

107. An agent of an LLP is someone who has authority to change or enter into legal relations on behalf of the LLP.

108. LLPs do not have officers as such. The reference in the order to "officers" in my judgment is to persons who have the management or control of the LLP's business. I derive this conclusion from FPR 17A para 3.6 which stipulates who may sign a statement of truth on a statement of case or application notice. It states:

> "Where the document is to be verified on behalf of a partnership, those who may sign the statement of truth are
>
> (a) any of the partners; or

> (b) a person having the management or control of the partnership business."

109. As a recently employed junior solicitor Mr Khan was not a partner of the LLP on 6 January 2022. Neither was he an agent of it. There is no evidence that he had then, or has now, the authority to enter into any legal relations on behalf of the LLP. I am confident that he could not enter into a client retainer without the agreement of a partner.

110. Mr Khan is not an "officer" of the LLP. He is not a person having the management or control of the LLP's business.

111. Accordingly, I conclude that the obligations under the disclosure order do not extend to Mr Khan personally. It would have been the easiest thing for Mr Khan to have been individually named in the order as being subject to the disclosure obligation, but for some reason the father's solicitors chose not to draft the order in that way.

112. Accordingly, the contempt application is not a legally recognisable application against Mr Khan. Therefore, the contempt application is struck out under this head also.

Admitted breach of the order

113. Although the order does not attach to Mr Khan it remains a disturbing fact that the partners of Russell and Russell LLP did not comply with the order requiring disclosure of the whereabouts of the mother and children by 6 January 2022. It is extremely disquieting that a firm of solicitors, officers of the court, failed to comply with a clear and unambiguous order of the High Court.

114. Mr Spencer argues that the position statement drafted by other counsel on 5 May 2022 in which the admission of breach was made, is inadmissible because it was contained in a position statement that counsel was professionally bound to file. It was therefore made under compulsion and is inadmissible under the privilege against self-incrimination. I reject that argument. It was not compulsory for Mr Khan's then counsel to make the admission in the position statement.

115. The breach is therefore clearly admitted, and indeed Mr Spencer accepted that a breach occurred as a matter of fact.

116. Mr Khan has incurred costs of £16,128.56. He applies for an order for costs in that amount against the father. However, in circumstances where there is a clearly admitted breach of an order of the High Court I consider that the appropriate order is that there should be no order as to costs.
