Case No: HC-2016-003126 and HC-2016-003513

Neutral Citation Number: [2018] EWHC 480 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2018

Before:

MR. JUSTICE ZACAROLI

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Between:

	(1) TERRY NEIL **(2) ANTHONY HALL**	**Applicants**
	- and -	
	SORAYA JASMINE HENDERSON **(aka NEIL)**	**Respondent**

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MR. ROMIE TAGER QC and **MS. CAMILLA CHORFI** (instructed by **Hughmans Solicitors LLP**) for the Claimants
MR. ORLANDO FRASER QC, MR DONALD LILLY (instructed by **Bark & Co.**) for the Defendant

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Judgment*If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.*

MR. JUSTICE ZACAROLI :

1.In a judgment handed down on 23rd January of this year I found the Defendant Ms. Henderson guilty on four counts of contempt. I refer to that judgment for my detailed findings. In short, the grounds on which I found her guilty were: (1) Service of a witness statement on the Claimants, exhibiting forged documents; (2) Deployment of those forged documents at a hearing on 8 November 2016; (3) Service of a forged witness statement purportedly of a Ms. Eva Borkova; and (4) Deployment of that witness statement at the hearing on 8 November 2016. Since giving judgment in a witness statement dated 31 January 2018 Ms. Henderson has belatedly admitted that she knowingly and wrongly used those forged documents in the proceedings in 2016. She apologises for doing so to the court, to Ms. Borkova and to the Claimants.

2.I now have to consider the appropriate sanction for those (now admitted) contempts of court. I have been assisted by submissions from the Claimants' Counsel limited to the relevant legal principles, citation of authorities that might be helpful and factual matters relevant to the penalty. Beyond this, it is not appropriate for the Claimants to make submissions as to the extent of any penalty to be imposed, and they do not. I have regard to their submissions principally to the extent that they deal with the relevant legal framework. I have also received oral and written submissions from the Defendant's Counsel. In Ms. Henderson's statement of 31 January 2018 she offers various matters by way of mitigation and exhibits a report from her general practitioner to which I shall return.

3.The legal principles applicable to sanction for contempt of court are relatively uncontroversial. They are helpfully drawn together in the recent decision of Marcus Smith J in a case called *Patel v Patel* [2017] EWHC 3229 (Ch). I gratefully adopt his summary, particularly as it was given in the context of a contempt of court consisting of conduct not wholly dissimilar to that in this case. In *Patel* the nature of the contempt was giving evidence by way of witness statements, affidavits and oral evidence which evidence was subsequently admitted to be false. The following points arise from that case and others which I shall specifically mention.

4.First, sentencing in a contempt case has potentially two functions, a coercive function and a punitive function. The former has no relevance in this case because the acts of contempt are all in the past and incapable of being cured. I bear in mind that contempt of court involves an affront to the rule of law and to the court, not a wrong done to the other parties.

5.Second, section 14(1) of the Contempt of Court Act 1981 provides for a maximum sentence of two years imprisonment, which applies to a sentence given on any one occasion regardless of how many counts of contempt are in issue. A person is entitled to unconditional release, however, after serving half the sentence: see s. 258 of the Criminal Justice Act 2003.

6.Third, in all cases the court should consider whether a prison sentence is necessary or whether as a sanction of last resort it can be avoided.

7.Fourth, a useful starting point, therefore, is to consider whether the circumstances reach what has been termed the "custody threshold". In *R v Montgomery* [1995] 2 Cr App. R 23 Potter J said that.

> "an immediate custody sentence is the only appropriate sentence to impose upon a person who interferes with the administration of justice, unless the circumstances are wholly exceptional."

This reflects the often-stated position as to the seriousness of fabricating evidence. As Moses LJ said, in *South Wales Fire & Rescue Service v Smith* [2011] EWHC 1749 (Admin) at [4]:

> "Our system of adversarial justice depends upon openness, upon transparency and above all upon honesty. The system is seriously damaged by lying claims."

While that case involved making false claims where other factors, including the endemic nature of that practice and the particular need for deterrence of others, were involved that are not present here, that passage from Moses LJ's decision is of equal relevance to the facts of this case. The production of knowingly false evidence, particularly where it is forged for the purposes of proceedings, seriously undermines the system of justice.

8. More recently in *International Sports Ltd v Shorey* [2015] EWHC 2040 (QB) Green J, faced with a defendant who had admitted knowingly proferring false evidence in an affidavit which was then corrected at an early stage in the proceedings said:

> "My necessary starting point is that this was a serious

> infringement committed deliberately and with knowledge with the specific intent of undermining judicial proceedings. A court would be remiss if it did not conclude that this is the sort of conduct where in many instances the custody threshold would prima facie be passed."

Green J went on to consider whether mitigating factors negated the need for a custodial sentence. In fact, in that case, mitigating factors, consisting principally of the fact of an early admission of guilt and the fact that the contempt had been purged at an early stage, persuaded the judge that a custodial sentence was not necessary. He also took into account, albeit giving them only modest weight, the defendant's prior good character and the personal pressure the defendant was acting under at home and at work.

9. Fifth, if the court is to impose a custodial sentence then it must consider two further points. The term of imprisonment should be as short as possible commensurate with the gravity of the contempt and the need to deter the contemnor. It also must consider whether any term of imprisonment ought to be suspended and if so the terms of that suspension. Suspension of sentence serves a particular purpose where contempt is capable of being purged, by encouraging that to take place. It is not only in those circumstances, however, that it may be appropriate. It is an option in the discretion of the court in all cases, taking into account mitigating circumstances: see *Templeton Insurance Ltd v Anthony Thomas & Ors.* [2013] EWCA Civ 35 per Rix LJ at [49].

10. Sixth, the relevant factors which the court may take into account, while not being a closed list, include the following as set out in *Patel* by Marcus Smith J.:

- "Whether the claimant has been prejudiced by the contempt and whether the prejudice is capable of remedy;
- The extent to which the contemnor has acted under pressure;
- Whether the breach of the order was deliberate or unintentional;
- The degree of culpability;
- Whether the contemnor was placed in breach by reason of the conduct of others;
- Whether the contemnor appreciated the seriousness of the breach;
- Whether the contemnor has co-operated. A genuine offer following judgment but before sentence to co-operate in the provision of information is capable of being a serious mitigating

factor;

- Whether the contemnor has admitted contempt and has entered the equivalent of a guilty plea. By analogy with sentencing in criminal cases, the earlier the admission is made, the more credit the contemnor is entitled to be given;

- Whether the contemnor has made a sincere apology for his [or her] contempt;

- The contemnor's previous good character and antecedents;

- Any personal mitigation advanced on his or her behalf."

Some of these have no direct relevance here, being confined to cases of breach of an order, but many of them do and others apply by analogy.

11. There is some debate in the authorities as to whether the fact the Defendant is a first-time offender is a relevant consideration. In *Templeman Insurance Ltd v Anthony Thomas & Ors* [2013] EWCA Civ 35, Rix LJ at [45], dismissed the importance of the fact the defendant was a first-time offender, noting that in cases of contempt the court was often faced with first-time offenders who were unlikely to offend again. Nevertheless, in three recent cases the lack of any prior convictions was at least of "some weight" in the court's deliberation. Those are *International Sports Tours v Shorey*, *The Official Receiver v Brown* and *Patel* itself. I accept that this is a factor to be given some limited weight in the balance, as one aspect of previous good character. Mr. Fraser QC for the Defendant urged me to adopt the approach taken in certain family cases on the basis that Ms. Henderson's conduct in this case arose out of an acrimonious family breakdown. He referred me in particular to *Ansar v Ansar* [1976] Fam Rep. 138 and *Hale v Tanner* [2001] WLR 2377. In the latter case, at page 2380 F-G, Hale LJ noted that the heightened emotional tensions that arise between family members make the court's task in dealing with a contempt in a family context different from that in a commercial context.

12. I note that both these cases concerned breaches by a spouse of non-molestation orders, a circumstance some distance from the conduct involved here. While I accept that Mr. Neal and Ms. Henderson were involved in a bitter and acrimonious battle at the relevant time including in relation to financial matters arising from their divorce, nevertheless the immediate context for the contempt in this case was the battle for control of a company, MSS, which involved people other than Mr. Neal and Ms. Henderson. Nevertheless, and although Hale LJ's comments in *Hale v Tanner* were expressly limited to family cases, her comment at page 2381C that the length of committal has to bear some reasonable relationship to the maximum of two years which is available, is one of general application and I bear that very much in mind.

13. I have been referred to many cases in order to demonstrate the type and severity of sentence passed in other situations. I have also been referred to sentencing guidelines in respect of analogous crimes, such as fraud, forgery and perjury. I note that the potential length of sentence in such cases is far longer than the maximum for contempt of court and the starting point for fraud offences for anything other than trivial sums is eighteen months' imprisonment or above. Care must be taken when looking at those cases, however, given the need for the committal period to bear a reasonable relationship with the maximum available of two years.

14. So far as comparison with other cases, more generally, is concerned I agree with the comment of Marcus Smith J in *Patel* that each case must turn on its own facts, and while I have had regard to the nature of the penalty in the cases cited to me in order to see by way of overview the general approach adopted by other courts, I must have regard to the facts and circumstances of this particular case, to which I now turn.

15. In applying the legal principles to the facts here, I address my comments directly to Ms. Henderson. Although the contempts of which I have found you guilty are split up into four different counts, they are all part of essentially the same conduct, namely adducing evidence you knew to have been forged, in order to demonstrate that Mr. Neil was properly removed and you were properly appointed as a director at MSS. I will therefore address them in the round before considering the appropriate sentence for each count.

16. First, I have no doubt that the custody threshold has been reached in this case. You have now admitted that you deliberately falsified evidence for use in court proceedings. The courts have emphasised on a number of occasions the seriousness with which such conduct is treated. In this case your conduct was not merely a passing matter but a deviously planned and executed course of conduct involving the hijacking of an innocent person's identity, the duping of your own solicitor, as well as the deployment of false evidence with the intention of gaining an advantage in proceedings. While I address the mitigating factors in greater detail later, I can say immediately that I do not regard them as being sufficient to take this case below the custody threshold.

17. So far as the impact on the Claimants is concerned, I bear in mind that the contempt caused them relatively minor prejudice, limited to having to obtain and file evidence (on an emergency basis and no doubt at considerable expense) in response to the false evidence, and the costs of dealing with the proceedings on and after 4th November when the forged evidence was served on them. However, this is counterbalanced to some degree by the distress no doubt caused by your conduct to those who were necessarily implicated in your deceit. First, there is Ms. Borkova herself whose identity you stole and who you have consistently since November 2016 accused of giving false evidence; second, Ms. Barber your solicitor, who was unwittingly and innocently used to further your plan; third, Ms. Perez, Ms. Borkova's Spanish lawyer, who you have also accused

of giving false evidence; and fourth, your former husband Mr. Neil who you falsely claimed throughout had intimidated and bribed witnesses. This is all prejudice stemming from your conduct in November 2016 which is not capable of remedy.

18. There is no doubt that you are culpable to a high degree. This was deliberate, concerted action. Nor is it a case where you could be said to have been acting under pressure from anyone else. You were the sole author of, and principal actor in, your plan.

19. Your Counsel frankly accepts this is not a case where your belated admission of guilt warrants any discount against sentence. Your admission came at the very last minute after judgment when it was obvious (and you were so advised) that you were facing the threat of a prison sentence. It is too little too late and must be weighed against the fact that you persisted with your deceit throughout the contempt proceedings, causing a wholly unnecessary eight-day trial and much anguish to many people you wrongly accused of lying or inducing others to lie. None of this is capable of increasing the severity of punishment, but it undoubtedly removes any possibility of material credit being given for your late admission.

20. I also note that the admission was only your second reaction to the judgment. Your first reaction was to publish (in breach of a strict embargo on the front page of the draft judgment) a criticism of it on line on your Facebook page. Again, that is not something which can increase the appropriate sentence but it lessens the impact your admission might otherwise have had.

21. As against these points I balance the following factors which to some extent provide some mitigation.

22. First, I do accept that your apology is, while shamefully belated, genuine. My impression of you from the evidence you gave at trial is that having started on a path of deceit you became more and more bound up in it and were unable to see sense. As I have found in my judgment dated 23 January 2018, the stories that you told to support your version of events were ever more incredible. Having dug yourself into a hole with the initial fabrication, it appears that you were unable to do anything other than keep digging. That, at least, has come to an end with your admission.

23. Second, it is (as I have held) a relevant factor to which some weight is to be given that you are of previous good character. There are of course unresolved allegations of misappropriation of large amounts of money from the company, but I am in no position to resolve those and it would be unfair to assume your guilt in that respect for the purpose of sentencing you for the wholly separate matter of a contempt of court. Nevertheless, when weighed against the seriousness of your conduct, I find that very little weight can be afforded to this factor.

24. Third, I take into account your most recent evidence identifying certain personal factors by way of mitigation. You refer to the pressure you were under following the breakdown of your marriage, the bitter acrimony between you and your ex-husband and the fact that your children were taking sides, and you felt you were pushed out of the company you had worked for for many years. This is not the sort of pressure which in any way excuses your actions, but it does provide at least some explanation for why you were perhaps acting not as you normally would have done during the relevant period. You also refer to your health problems. I note in particular you have been treated for depression for some years and that this is no doubt exacerbated by stress. It is right to bear in mind that the most significant stress that you are under is no doubt as a result of these court proceedings, which are wholly down to you. Your depression does not in my judgment provide any material ground for excusing your conduct in November 2016. Nevertheless, it is an important factor to bear in mind, when considering sentencing, that while suffering from depression the effects of prison may well be magnified upon you.

25. Fourth, I also take into account that this is not a case where, in the relevant proceedings I am considering, that is the injunction proceedings of November 2016, you actually deployed the false evidence at the court hearing with the intention of deceiving the court to make a decision in your favour on an issue of substance. It was deployed in evidence at only one hearing and even then you offered undertakings in terms of the injunction before the hearing started, so that in fact you never sought to persuade a court of the truth of the false evidence. There was no further use of the materials after 8th November.

26. Mr. Fraser on your behalf urges me that this is a substantial mitigating factor and it distinguishes this case from others such as *Patel* where the first defendant persisted in his lies based on a forged will throughout the original trial. I do accept that the fact that your reliance on the false evidence did not last that long in those proceedings means that it is ultimately less serious than the conduct in *Patel*, but as against this the fact you did not place reliance on the false evidence any further was not due to any admission, change of heart or withdrawal on your part. It was due to outside events, namely the insolvency of MSS, the company. It is in my judgment appropriate to have regard to this, in determining what weight should be given to the fact that your reliance on the false evidence was relatively short lived in the original proceedings, and it is also appropriate to set it against the fact that you persisted in the false allegations for many months thereafter, developing - in substantial further evidence - the web of lies. Again, this cannot, and does not, increase the sentence, but it in my judgment does lessen the credit that might otherwise be given to you for the fact the false evidence was not used in proceedings beyond 8th November.

27. Finally, I have regard to the position that you find yourself in, that is that you have lost your husband and your family and the company you had helped build up and worked in over many years. According to the evidence at trial you did not appear to have the

benefit of support of a close circle of friends to compensate for all of this.

28. Taking into account all these matters, but emphasising it is my duty to have particular regard to the seriousness of concocting evidence for the purpose of misleading a court and the damage that leaving such conduct unpunished does to the integrity of the legal system, I have concluded that there is no alternative but to impose an immediate custodial sentence.

29. I deal separately with counts 3 and 4 on the one hand and counts 5 and 6 on the other. Counts 3 and 4 relate to the use of the forged September documents which were exhibited to your own witness statement. Counts 5 and 6 relate to the use of the forged statement purportedly made by Ms. Borkova. I regard Counts 5 and 6 as very substantially more serious than counts 3 and 4. While the September documents were not forged for the purpose of court proceedings, that was on the other hand the whole purpose of the disputed Borkova statement. Moreover, it involved, as aggravating factors, the hijacking of another person's identity, at no doubt considerable distress to her, and the duping of your own solicitor.

30. I need to have regard to the question: what is the shortest period possible commensurate with the seriousness of the offence? In doing so I weigh in the balance, on the one hand, that I regard your conduct, at least in relation to the forgery and deployment of the disputed Borkova statement, as towards the higher end of seriousness for contempts of this sort. As against that I weigh in particular two factors. First, the fact that in the end the administration of justice was disrupted only to a limited extent and, second, your personal circumstances, at the time of the contempt and now, including your depression and the stress caused by the loss of your marriage, family and livelihood, as well as your previous good character. I have little doubt that any prison sentence of whatever length will undoubtedly come as a shock and have a major effect on you. In this regard what is involved is, to echo the words of the Court of Appeal in *Templeton Insurance v Thomas*, exercising some degree of mercy based on your specific personal circumstances.

31. Taking all that into account, I have decided that on the less serious contempt, that is Counts 3 and 4 relating to the September documents, you will be sentenced to four months imprisonment. But on the substantially more serious contempts, Counts 5 and 6 relating to the disputed Borkova statement, the appropriate sentence is eight months. The sentences will run concurrently. That is, you will be subject to an overall sentence of eight months in prison. By reason, as I have mentioned, of section 258 of the Criminal Justice Act 2003 you will be entitled to unconditional release after serving four months in prison. I have given separate consideration to whether the sentences should be suspended. However, given the seriousness of Counts 5 and 6 involving the disputed Borkova statement, I have concluded, reflecting the language of the Court of Appeal in *Lane v Shah*, that the administration of justice and its protection require an immediate custodial sentence. When I have completed giving judgment you will need to surrender

yourself to the tipstaff who is present in court.

32. Turning to the question of costs, your counsel has rightly accepted that your conduct in maintaining the falsehood throughout the proceedings in itself justifies an order that you pay costs, and the whole of the costs, of the Claimants on an indemnity basis. That is the order I would in any event have made, and I do so. It is also agreed there be a payment on account of costs. As to the amount I need to be satisfied the figure is one I can be confident would inevitably be paid on an assessment. The Claimants have produced a summary bill with a headline figure of some £459,000. No particular issue is taken with any of the figures contained in it other than to point out your own legal team's bill is substantially smaller, in the region of £250,000. I accept Mr. Tager's submission on this point that the Claimants had to do all of the running, including calling a number of witnesses you had implicated by your conduct.

33. I propose to order the sum of £320,000 to be paid on account of costs, which is just short of 70% of the bill. As for time to pay, I will order payment in twenty-eight days. I accept there is no evidence as to your ability to pay being any greater within that time than within fourteen days. I also accept the point made on your behalf that given the disruption to your life which is about to begin it is not unreasonable to allow you that additional period.

34. Those are the orders I shall make. I will provide a minute of the order by e-mail to Counsel in due course, but the warrant for committal will be signed immediately.