Neutral Citation Number: [2020] EWHC 937 (Ch)

Case No: HC-2016-001002

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

7 Rolls Building
Fetter Lane
London EC4 1NL

Date: 21 April 2020

Before :

Mr Justice Zacaroli

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Between :

(1) EVELYN GREEN	**Claimants**
(2) DAVID ROBERT GREEN	
(3) IAN MABLIN	
- and –	
ROBERT ALFRED HURST	**Defendant**

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Mr Mark Tushingham (instructed by **Peters & Peters Solicitors LLP**) for the **claimants**
Mr Robert Hurst, the defendant, appeared in person

Hearing date: 6 April 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

1. This is, in form, an application by the defendant ("Mr Hurst") for a "declaration" that the claimants are in contempt of court. In substance, it is an application for permission to bring committal proceedings against the claimants. That is because the alleged contempt consists of making a false statement in connection with proceedings in the High Court and an application for committal in such circumstances can only be brought with the permission of the court: CPR rule 81.18(1)(a).

2. There are numerous procedural failings in the application, including breach of the requirement for personal service and of the requirement for evidence to be in the form of an affidavit exhibiting all relevant documents. The claimants, however, do not oppose Mr Hurst's application to waive these defects and are content that this application is treated as an application for permission pursuant to CPR 81.18(1)(a).

Background

3. This application arises in the context of a long-standing family dispute. Mr Hurst is the brother of the second claimant ("Mrs Green"). The first claimant (Mr Green) is Mrs Green's husband. The third claimant ("Mr Mablin") is an accountant who has acted for the family for many years.

4. On 8 July 2003, the mother of Mr Hurst and Mrs Green - Hanna Hurst ("Mrs Hurst") - entered into a transaction with a view to avoiding inheritance tax on her property, consisting primarily of her home. This involved establishing a trust to which she sold her property, while retaining a life interest in it. The purchase price was left outstanding, and this debt was then settled on further trusts in favour of her children. The intention was that on Mrs Hurst's death, the trust property would be realised and distributed. The claimants were appointed by Mrs Hurst as the trustees of the trusts.

5. The family's solicitors at the time, Berwin Leighton Paisner LLP ("BLP") acted for Mrs Hurst and the family in relation to the transaction. Mrs Hurst was also advised by Mr Mablin. Mr Hurst was not in favour of this scheme from the outset.

6. Mrs Hurst died on 1 August 2014. Mr Hurst was her Executor. Following the sale of Mrs Hurst's property, the claimants contended that Mr Hurst improperly dissipated significant sums of trust money without obtaining the necessary authority of the Claimants (as trustees). On 23 March 2016, therefore, the Claimants brought proceedings against Mr Hurst to recover the sums dissipated by him.

7. Mr Hurst cross-claimed, alleging that the trusts established in July 2003 had been procured by the undue influence of the claimants and were therefore voidable.

8. The present application relates to certain statements made in the witness statements filed by each of the claimants in those proceedings.

9. Each of the witness statements was dated 18 June 2016 (the "June 2016 Statements"). The passages within them which Mr Hurst contends contain knowingly false statements are identified in paragraphs 2 to 4 of Mr Hurst's witness statement dated 19 March 2020. They each relate to the legal advice obtained by Mrs Hurst some 13 years previously, immediately prior to the transaction.

10. So far as Mr Green is concerned, Mr Hurst relies on two passages in his June 2016 Statement:

    i) Paragraph 12, in which he said that on 7 July 2003 Mrs Hurst attended a meeting with Joanna Tolhurst at BLP; and

    ii) Paragraph 19, in which he quoted a "representation" made by Paul Whitehead of BLP in a letter dated 16 September 2014 to the effect that Mrs Hurst had been "present at a number of meetings at which the basis of the planning was explained to her, points were clarified and, ultimately, she decided to proceed."

11. As against Mrs Green, Mr Hurst relies on the fact that in her short corroborating witness statement, she confirmed that she had read the witness statement of Mr Green and said: "I confirm that I believe that the facts stated in it are true."

12. As against Mr Mablin, Mr Hurst relies on paragraph 6 of his June 2016 Statement, in which he said that he had "accompanied Mrs Hurst, with [Mr Green], to BLP's offices where we met with an associate solicitor called Joanna Tolhurst."

13. Mr Hurst contends that these statements were all false, and made with knowledge of their falsity, on the strength of two matters. The first is a conversation he had in a meeting with Mrs Green on 15 August 2018, in which Mrs Green said that Mrs Hurst had "never travelled to BLP's offices", that the "only meeting that [Mrs Hurst] had ever had with a representative of BLP occurred when a solicitor visited her at her home and requested her to sign the documents in suit. That visit occurred on 8 July 2003." Mr Hurst says that he then asked her whether she was absolutely sure that Mrs Hurst did not attend a meeting at BLP's offices and that she "responded in the affirmative."

14. Mr Hurst's focus on the question whether Mrs Hurst attended a meeting at BLP's offices suggests that this is the critical element that was false in the June 2016 Statements. He disavowed any such intention, however, at the hearing and said that the critical false evidence given in the June 2016 Statements was that Mrs Hurst had had meetings (plural) with BLP, whereas there had only been one meeting, when BLP attended at her home purely to obtain her signature on the documents.

15. His meeting with Mrs Green on 15 August 2018 had been a without prejudice meeting, to discuss settlement with Mr Hurst. Mr Hurst maintains that there was no privilege because Mrs Green did not make any serious attempt to negotiate. He also says that any privilege there may have been does not

extend to committing perjury. The claimants acknowledge that these are matters which I am not in a position to resolve on this application for permission, and that I should assume in Mr Hurst's favour that if I were to give permission to bring contempt proceedings he would be able to admit Mrs Green's statement into evidence.

16. The second matter on which Mr Hurst relies to establish the falsity of the statements is a letter to him from the Solicitors Regulation Authority ("SRA") dated 24 September 2019. This letter was written in response to a complaint by Mr Hurst against BLP, specifically that in Mr Whitehead's letter of 16 September 2014 (referred to above), it was said that "your mother was present at a number of meetings", which Mr Hurst said was misleading because he had been told by Mrs Green that no such meetings took place.

17. In that letter, the SRA said that they had contacted BLP about Mr Hurst's allegations, and that BLP had responded to say that "it took instructions from its client about the meetings and the statement was based on the instructions received." Mr Hurst said that this revealed that Mr Whitehead's letter of 16 September 2014 had been false because, whereas Mr Whitehead had given an unqualified *assurance* that there had been a number of meetings, BLP had admitted in response to the SRA that the statement had been based only on instructions from their (unnamed) client.

18. Although Mr Hurst voiced serious concerns about the truth of the assertion he said was made in Mr Whitehead's letter, it is important to note that this application is not made against BLP, Mr Whitehead or any other partner or employee of BLP. Indeed, Mr Hurst, recognising the seriousness of such a complaint against a solicitor, made it clear that he could only speculate in this regard, but was raising questions which needed to be answered, either by an affidavit from Mr Whitehead or at a trial. Given that Mr Hurst has raised these matters in a public forum, I stress that I have no reason to conclude that there is anything wrong in Mr Whitehead's conduct in writing the letter of 16 September 2014. As Mr Hurst acknowledges, Mr Whitehead had not had any involvement in the transaction in 2003 and the solicitor who had been involved in the transaction (Ms Tolhurst) had left BLP sometime around 2005. What Mr Whitehead said, therefore, was necessarily based on what he had been told by others. Further, Mr Whitehead identified his clients in the opening paragraph of the letter as the trustees of the Life Interest Trust dated 8 July 2003, namely the claimants. I do not consider that the fact Mr Whitehead did not identify in terms that the information as to the meetings with Mrs Hurst in 2003 came from instructions from clients falsifies the terms of his letter.

19. In reality, the SRA's letter provides no support at all for the allegation that the June 2016 Statements were false. Mr Hurst acknowledged that its sole relevance to the present application is that it was only on receipt of it that he realised that BLP had *not* given an assurance (from their own knowledge) that there had been multiple meetings between them and Mrs Hurst, so that the only source of that information was the claimants themselves. He said that, whereas prior to that point he had been reluctant to accuse the claimants of being in contempt of court based only on his conversation with Mrs Green, the

letter from the SRA gave him the confidence to do so. I shall need to come back to this point in considering whether committal proceedings would be in the public interest.

20. This is not the first time Mr Hurst has sought relief from a court in relation to the allegedly false statements, as I explain in the following paragraphs.

21. In the original proceedings (including Mr Hurst's counterclaim to avoid the transaction on the basis of undue influence) Master Price handed down judgment on 3 August 2016. He found that Mr Hurst's allegations of undue influence were "completely unsustainable". He upheld the Claimants' claims and entered judgment against Mr Hurst in the sum of £296,633.04 (the "judgment debt").

22. Following a statutory demand served in 2017, the Claimants presented a bankruptcy petition against Mr Hurst on 23 October 2017 based on the judgment debt. A Bankruptcy Order was made on that petition on 15 February 2018.

23. On 21 May 2019, Mr Hurst applied under section 282(1)(a) of the Insolvency Act 1986 for an annulment of the Bankruptcy Order on the grounds that it had been "procured by fraud". The alleged fraud was based on the same false statements relied on in this committal application.

24. On 30 May 2019, and against the background of Mr Hurst's allegations of fraud and his evidence as set out above, ICC Judge Barber directed a hearing of the following preliminary issue:

> "Whether, on consideration of the written judgment of Master Price which gave rise to his Order of 3 August 2016, the factual discrepancy alleged by Mr Hurst in his witness statement dated 21 May 2019 is of such materiality as to give rise to (1) arguable grounds for setting aside the Order of 3 August 2016; or (2), on an application of the principles espoused *in Dawodu v American Express Bank* [2001] BPIR 983, an arguable defence to the bankruptcy petition upon which the bankruptcy order dated 15 February 2018 was based."

25. The preliminary issue was determined in the claimants' favour by ICC Judge Prentis on 22 July 2019. In summary, he held it was not realistically arguable that the factual account now relied upon by Mr Hurst (i.e. based on what Mrs Green told him at the without prejudice meeting on 15 August 2018) would have caused Master Price to conclude that undue influence had in fact been proved. He noted, in particular, that it is not in dispute that there was a meeting at Mrs Hurst's home with her solicitor where she was asked to sign the documents.

26. Mr Hurst's appeal against that decision was dismissed by Fancourt J for reasons contained in a Judgment dated 5 February 2020. In essence, Fancourt J agreed with ICC Judge Prentis that it was not arguable that the new evidence, assuming it to be true and admissible, would have caused Master

Price to conclude that undue influence was proved. Mr Hurst has applied for permission to appeal to the Court of Appeal against Fancourt J's decision.

27. Five days after the handing down of Fancourt J's Judgment, Mr Hurst filed a second application under section 282(1)(a) of the Insolvency Act 1986 for an annulment of his bankruptcy. In his witness statement in support of that application, Mr Hurst contends that:

> "Since the [claimants] were and continue to be in Contempt of Court, they were not entitled to either issue the Petition on 19 October 2017 or apply for my Bankruptcy on 15 February 2018. Notwithstanding many requests on my part since 9 May 2019, they have not purged their contempt."

28. This second application was again based on the same evidence as that on which the earlier annulment application had been based, namely what he had been told by Mrs Green at the without prejudice meeting in August 2018. This second application was dismissed by ICC Judge Jones on 12 March 2020. Mr Hurst told me that ICC Judge Jones said that any application for contempt of court must be brought in the court in which the alleged contempt was committed and it is that which has prompted the present application.

The Legal Test

29. CPR r 32.14 provides that: "Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth." This form of contempt (which is a species of criminal contempt) falls within the inherent jurisdiction of the High Court: see the White Book at paragraph 32.14.2.

30. As I have already noted, committal proceedings of this nature may be brought only with the permission of the court. This reflects the fact that this species of contempt involves an allegation of a public wrong (namely interference with the administration of justice). A private person, in bringing such proceedings, is not acting in a private role, but is acting in pursuance of the public interest. Accordingly, there should be an element of public control over the bringing of such proceedings: *Barnes (trading as Pool Motors) v Seabrook* [2010] EWHC 1849 (Admin) at [6].

31. The legal test to be applied on an application for permission was conveniently set out by the Court of Appeal in *Tinkler v Elliott* [2014] EWCA Civ 564, at para 44, citing with approval paragraph 23 of the judgment of the judge at first instance in that case (HHJ Pelling QC):

> "23. 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
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> 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."

32. Two other factors are of relevance in this case. First, delay in bringing contempt proceedings is a significant factor to be taken into account on a permission application: see *Barnes* (above) at [47]. Second, "it is not an appropriate or proper application to seek permission for committal in respect of witness statements which have already been placed before a court, have been considered, and the arguments available as to why it is said that elements of it are not true, were all available at the time of the hearing to the person who now seeks … permission": *Ergun v Smith* [2015] EWHC 2494 (QB) at [20].

Strong prima facie case

33. As I have noted above, the only evidence on which Mr Hurst relies for the allegation that the claimants made knowingly false statements in the June 2016 Statements is his conversation with Mrs Green in August 2018.

34. If his evidence as to what Mrs Green said is correct *and* if what Mrs Green said was correct, then it would follow that at least part of the evidence given in the June 2016 Statements was false. In particular, the evidence that Mrs Hurst attended a meeting *at BLP's offices* (in Mr Mablin's statement, but not in the others) and the evidence of all three claimants that there were meetings with Mrs Hurst on both the 7 and 8 of July 2003. So far as Mr Green's reference to BLP's letter of 16 September 2014 is concerned, I think that the natural reading of the relevant passage in the letter is that BLP were suggesting that they had met with Mrs Hurst on more than one occasion, although that is not entirely clear as Mr Whitehead does not in terms say that each of the meetings he referred to were with BLP.

35. As to the conflict as to *where* the meeting took place, Mr Hurst accepts that this was irrelevant and he does not rely on it. In any event, that conflict existed on the face of the June 2016 Statements, since Mr Green's evidence taken as a whole indicated that the meeting on the 7 July 2003 was at his

mother's home (because at paragraph 14 of his statement he referred to Ms Tolhurst having *returned* to his mother's house the following day).

36. There is no contemporaneous note or other documentary evidence of what Mrs Green said at the August 2018 meeting. Indeed, the first time Mr Hurst committed the conversation to writing was in his witness statement served in the first annulment application in May 2019. While he explained the reason for the delay in bringing that application on the attempts made (ultimately unsuccessfully) to find solicitors to represent him, that does not address the point that confidence as to the accuracy of his recollection is diminished by the passage of nine months between the meeting with Mrs Green and the first time he committed his account of what was said at it to writing. That is compounded by the fact that, as he fairly acknowledged at the hearing, Mr Hurst cannot remember the precise conversation, and by the fact that the matter which he said (in his May 2019 witness statement) he pressed Mrs Green upon was whether his mother had ever attended a meeting *at BLP's offices*, a point which he now accepts is irrelevant and which was in any event consistent with a proper reading of Mr and Mrs Green's June 2016 Statements.

37. The accuracy of what Mrs Green said in August 2018 – assuming she said it – is itself called into question by the fact that she was speaking (during the course of a meeting which Mr Hurst described as hostile) of events which were by then fifteen years old. In addition, insofar as the critical point as to the number of meetings which Mrs Hurst had with BLP, it is not clear how Mrs Green would be in a position to know for sure that her mother had *not* had any other meetings.

38. In any event, at most this evidence provides a prima facie case that the relevant passages in the June 2016 Statements were wrong. In order to justify permission being granted to bring committal proceedings, Mr Hurst would need to establish a strong prima facie case that the claimants *knowingly* made false statements (or at least made them reckless as to their truth). It is commonplace for the courts to be faced with conflicting oral evidence, but much more rarely is that conflict the result of dishonesty on the part of one or other of the witnesses. As has been stated on many occasions, the memory of witnesses is fallible. That is particularly so when the events to which the evidence relates took place 13 years before the witness commits anything to writing.

39. I have already mentioned the conflicting evidence as to *where* the meeting on 7 July 2003 took place (as between Mr Mablin and Mr Green). Since that conflict appeared on the face of the June 2016 Statements, it is inherently unlikely that it was the consequence of any deliberate attempt to mislead the court. This reinforces the likelihood that if Mr Hurst's recollection of what Mrs Green said in August 2018 is correct, and what Mrs Green said was true, then the errors in the June 2016 Statements are the product of mistaken recollection and not deliberate dishonesty.

40. Further, this is not a case where a single witness is accused of giving false evidence, but an allegation of a conspiracy between the three claimants to attempt to deceive the court. That raises the bar significantly, particularly where one of the conspirators was Mr Mablin, a professional and long-standing accountant to the family. Mr Hurst has not provided any credible reason why Mr Mablin would have been prepared to commit perjury in relation to what was essentially a family dispute between Mr and Mrs Green and Mr Hurst.

41. Taking all of the above into account, I do not think that Mr Hurst's allegations amount to a strong prima facie case that the claimants knowingly made false statements in the June 2016 Statements.

Other factors

42. Even if there were a strong prima facie case, it would be necessary to show that committal proceedings would be in the public interest and proportionate.

43. In considering whether committal proceedings would be in the public interest, an important factor is the materiality of the statements to the proceedings in which they were made. Mr Hurst submitted that it must always be in the public interest to punish those who have knowingly made false statements in evidence. It is clearly established, however (see, for example, the passage from *Tinkler v Elliott* quoted above), that the use to which the false statement was put and its materiality to the proceedings are important considerations in determining whether it is in the public interest to permit a private individual to bring proceedings of a criminal nature against a litigant.

44. This is an issue which has already been determined by ICC Judge Prentis: the terms of the preliminary issue before him explicitly required him to decide whether the new evidence (in the form of what Mrs Green is said to have told Mr Hurst in August 2018) was of sufficient materiality that it might have persuaded Master Price to reach a different conclusion on the issue of undue influence. As I have pointed out above, ICC Judge Prentis determined that it was not, and Fancourt J has dismissed an appeal against that conclusion. It is not open to Mr Hurst to seek use this committal application as a collateral attack on the decision of Fancourt J.

45. The fact that there is a pending application for permission to appeal against Fancourt J's orders is irrelevant. If that application fails, then the position remains as it is. If, on the other hand, Mr Hurst succeeds on appeal in overturning the order of ICC Judge Prentis, then he would have his remedy (setting aside the bankruptcy order) which – as I explain below – is the principal purpose in this committal application, thereby rendering this application unnecessary.

46. This points up another important consideration in this case: Mr Hurst frankly volunteered during the hearing that he has no desire to put his sister and brother-in-law in prison, although when it was pointed out to him that this, or a fine in the alternative, is what a committal application seeks to do, he said that if that was the consequence of his application then he would be content

with it. His primary purpose in bringing this application, however, was to support a yet further application to set aside the bankruptcy order made against him. He wishes to rely on a principle that a person who has committed a contempt of court may not make any application to the court until they have purged that contempt. That was precisely the relief he sought on his second annulment application which was dismissed by ICC Jones on 12 March 2020. As he said at the hearing, it is precisely because ICC Jones said that only a High Court judge has jurisdiction to determine an application for committal under CPR 81 that he made this application.

47. Mr Hurst submitted that he has identified numerous questions which deserve an answer. He relied heavily on the failure of Mr Whitehead to provide any response to his questions as to how he came to write the letter of 16 September 2014 in the way that he did. He also relied on the fact that there is not a single piece of direct evidence from any of the claimants in answer to his contentions. He said that these points should be answered on affidavit and, depending on what that evidence revealed, the matter could then proceed to a trial.

48. These submissions demonstrate a misunderstanding of the nature and purpose of applications for committal. As I have already pointed out, such applications should only be brought where (among other things) they serve the public interest. What Mr Hurst really wants is a simple declaration that the claimants are in contempt of court so that he can make a further application to annul his bankruptcy order.

49. In my judgment, that is not a proper use of the court's jurisdiction in respect of committal for contempt of court. Permission is not granted to enable a private individual to pursue a private grievance. This factor is compounded in this case where Mr Hurst has already sought, but failed, to set aside the relevant judgment on the basis of precisely the same underlying allegations of dishonesty, albeit under the label "fraud" as opposed to "contempt".

50. Mr Hurst submitted (as I have noted above) that it was only on receipt of the SRA letter in September 2019 that he realised he had a strong case to make an allegation of dishonesty against the claimants, which he acknowledges is a serious thing to do. I do not accept this. His first annulment application was made on the basis that the order of Master Price (on which the bankruptcy petition was based) had been obtained by fraud. That is a similarly serious allegation, yet Mr Hurst was prepared to make it on the strength only of what he was told by Mrs Green in August 2018.

51. Finally, although Mr Hurst's case is that he first became aware of the allegedly false statements at the without prejudice meeting in August 2018, he did not commence these contempt proceedings until March 2020. This lengthy delay is a further factor which counts against the grant of permission, particularly where the claim turns on the recollection of witnesses.

52. For these reasons I conclude that granting permission in this case would not be in the public interest. It would, for similar reasons, coupled with the time and considerable expense involved in such proceedings, not be proportionate to permit committal proceedings to be brought.

Conclusion

53. The discretion to grant permission to bring contempt proceedings should be "exercised with great caution" (see *Barnes* (above), per Hooper LJ at [39]). For all of the reasons given above, I decline to grant permission on the basis that there is an insufficiently strong prima facie case that the claimants made knowingly false statements and on the basis that committal proceedings would in any event not be proportionate or in the public interest.