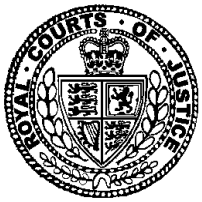

Neutral Citation Number: [2020] EWHC 3170 (Comm)

Case No: CL-2018-000750

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25th November 2020

Before :

THE HONOURABLE MR JUSTICE BUTCHER

- -

Between :

Fulham Football Club Limited	**Claimant**
- and -	
Mr Craig Kline	**Defendant**

- -
- -

Nick De Marco QC and Adam Baradon (instructed by **Simmons & Simmons LLP**) for the **Claimant**
The Defendant appeared in person

Hearing dates: 2, 3, 12 November 2020

- -

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.

.....

The Honourable Mr Justice Butcher :

1. There are two applications by the Claimant ("Fulham") for the committal of the Defendant ("Mr Kline"). One of those applications was previously stayed, and is restored pursuant to an order of the Court. Mr Kline has issued an application to set aside that restoration.

2. I heard these applications in private for the reasons given in my judgment delivered on 30 October. There were hearings on 2 and 3 November, and a further hearing on 13 November. The parties served significant amounts of material, called evidence (and Mr Kline himself gave evidence), and made written and oral submissions, all of which I have considered. I give this judgment in public, in accordance with CPR rule 81.8(6). I have however endeavoured not to state in this judgment matters which, to make public, would undermine the object of the hearing.

3. The genesis of these applications as it appears from the evidence before the court can be summarised as follows:

   (1) Mr Kline was formerly employed by Fulham, a relationship which came to an end in 2017. Under an Agreement of 22 November 2017, various terms were agreed between the parties, which included a number of confidentiality and non-disparagement undertakings given by Mr Kline.

   (2) Fulham contended that Mr Kline breached those undertakings. It accordingly applied for an injunction. On 23 November 2018 various of the undertakings were repeated and given force by interim injunctions granted by Moulder J. At that hearing, which was ex parte on notice, Moulder J warned Mr Kline that he should comply with the order which she was then making, and urged him to take legal advice if he was unclear as to its scope. Moulder J's order, which contained a penal notice, was thereafter served on Mr Kline.

   (3) Fulham contended that Mr Kline breached Moulder J's order, and applied to commit him for contempt. The application was personally served on Mr Kline. It was stayed pursuant to an order of Teare J, made by consent, dated 4 March 2019, after Mr Kline had sworn and served an affidavit admitting the 42 breaches of Moulder J's order alleged by Fulham, apologising to the Court for those breaches, and undertaking to commit no further breaches of that order.

   (4) Fulham contends that Mr Kline again breached the Moulder J order, and on 16 April 2020 issued a second committal application. On the same date it also applied to restore the first committal application pursuant to an express liberty to restore in paragraph 2 of the order of 4 March 2019.

   (5) By order of 24 April 2020, Moulder J gave permission to restore the first committal application, but also gave Mr Kline 7 days from service of the order to apply to set it aside or vary it.

   (6) By his application dated 5 May 2020, Mr Kline applied to set aside the restoration order.

(7) Thus, there come before me the two committal applications and the set aside application.

4. I will deal first with Mr Kline's set aside application. This was supported by a statement from Mr Kline dated 4 May 2020. In that statement Mr Kline said that the admission of breaches which had been made in his affidavit and which had led to the consent order of 4 March 2019, was at best a qualified quasi-admission, and one which did not distinguish between de minimis, technical or justified breaches, and actionable breaches. I do not consider that it is open to Mr Kline to disavow the affidavit which he swore, which, with the apology he made and his promise not to breach Moulder J's order again, had led to the stay of the first committal application by the order of 4 March 2019. Given that Fulham contends that there have been further breaches of Moulder J's order, which, if established would be a breach of the undertaking set out in the consent order of 4 March 2019, I do not see any valid grounds on which Mr Kline can set aside the restoration of the first committal application. That restoration allows this court now to consider whether there should be any sanction for the breaches which Mr Kline admitted in his admissions affidavit, if it finds that there have been further breaches of the Moulder J order.

5. I turn to consider the two committal applications which are before the Court.

6. It is appropriate to summarise, first, the jurisdiction which the Court is being asked to exercise. The following are relevant features of that jurisdiction:

(1) It is for the claimant to prove the contempt alleged to the criminal standard of proof. As set out in the White Book 3C-17:
"A person is guilty of contempt by breach of a court order only if all the following factors are proved to the criminal standard of proof: (a) having received notice of the order (being an unambiguous order) the contemnor did an act prohibited by the order or failed to do an act required by the order within the time set by the order; (b) he intended to do the act or failed to do the act as the case may be; (c) he had knowledge of the facts which would make the carrying out of the prohibited act or the omission to do the required act a breach of the order. Further, the act constituting the breach must be deliberate rather than merely inadvertent, but an intention to commit a breach is not necessary, although intention or lack of intention to flout the court order is relevant to penalty."

(2) It is not necessary to show an intention to disobey the order, if the contemnor intended to do the act which constituted the breach. Rose J in Palmer & Reid v Tsai [2017] EWHC 1860 (Ch) at [12] said:

"As regards the mental element, contempt of court is, in general, a strict liability offence. Provided that the alleged contemnor intended to carry out the conduct which was prohibited, it is no answer to say that there was no direct intention to disobey the order. The court is not interested in examining the motive or intent behind the actions of an individual breaching the terms of an injunction."

7. The order of Moulder J contained a number of injunctions which required Mr Kline not to do various things. These included that he should not make or issue "any derogatory or critical comments or statements" relating (inter alia) to his employment

with Fulham, his departure from Fulham, or complaints which he had previously made about any act or omission of Fulham or any Affiliate (as defined) of Fulham; or any statement or remark which may harm the business or reputation of Fulham or any current or former officer, employee, agent or shareholder of Fulham.

8. In the admissions affidavit, Mr Kline admitted to the 42 breaches of the Moulder J order which were alleged and itemised in the first committal application. Each of the breaches itemised was a tweet or post made by Mr Kline between 14 December 2018 and 4 February 2019. I do not consider that Mr Kline can go behind those admissions. I reject the suggestion which Mr Kline made in oral evidence, apparently for the first time, that it was in some doubt that he was the author of a few of these tweets / posts.

9. Mr Kline emphasised, in relation to the tweets / posts that had been the subject of the first committal application that they had all been taken down by the time that the application was issued, and a number, he said, had been taken down before a complaint had been made about them. I accept that the tweets / posts were removed and will take that into account.

10. The second committal application concerns 16 posts or tweets, dating from between 19 August 2019 and 5 April 2020. Mr Kline did not accept that any of these posts or tweets constituted a breach of the Moulder J order or his undertaking embodied in the consent order of 4 March 2019. He put forward a number of arguments as to why they did not.

11. One point which Mr Kline mentioned, was that he disputed the validity of the original agreement of 22 November 2017. He accepted, however, that such arguments were not properly before me. He suggested nevertheless that I should consider those matters "sua sponte", as he put it, but said that he did not wish thereby to forego his right to bring those allegations forward in full and in the appropriate forum. I did not consider that I could act on any arguments as to the invalidity of the agreement of 22 November 2017. The simple position is that the terms of the agreement were given force by Moulder J's order and it is that which Mr Kline is alleged, on this application, to have breached. That order has not been set aside, and was to be obeyed. The principle is put in the White Book at 3C-19 as follows:

    "An order made by a court of unlimited jurisdiction, even though irregular, must be obeyed unless and until it is set aside, and therefore disobedience to an interlocutory injunction which is irregular amounts to a contempt of court (Isaacs v Robertson [1985] AC 97, PC)."

12. While that principle is there expressed in relation to an irregular order, and I should make it quite clear that I am not saying that Moulder J's judgment is irregular, the important point is that it is an order made by a court of unlimited jurisdiction, which has not been set aside, and had to be obeyed.

13. That is also the answer to the suggestion which Mr Kline made that some or all of his tweets / posts might be justified in the public interest. There is no such exception specified in the order of Moulder J.

14. Mr Kline sought to argue that many of the tweets or posts were not in breach of the order because they were expressed in terms which did not identify any of the individuals specified in the order as persons about whom he should not be making derogatory, critical or damaging remarks. Mr Kline argued that he had been attempting not to breach the order and had accordingly expressed himself in a way which was sufficiently general or vague that it could embrace others than those whom he described as "the protected parties". I understood him to accept that he had had in mind persons whom he described as "protected parties" in making most of the tweets / posts as at least some of those to whom his statements related, but he argued that he had expressed himself in terms which, viewed objectively, did not refer to "protected parties".

15. The test must be as to whom and to what a reasonable person would reasonably understand the tweet / post to refer. If a tweet or post contained a statement or remark which might harm the business or reputation of the persons to whom it was reasonably understood to refer, and if Fulham, or its current or former officers, employees, agents or shareholders were amongst those persons, then there would have been a breach. Similarly if Mr Kline's tweets or posts were in terms which would reasonably be understood to relate to his employment with Fulham and/or to complaints which he had previously raised relating to acts or omissions of Fulham or Affiliates; or contained a harmful statement or remark which would be reasonably understood as applying to Fulham or its current or former officers, employees, agents or shareholders, there would be a breach.

16. I have carefully considered the tweets / posts identified in the second committal application. I am prepared to accept that there is a doubt as to whether a reasonable person would reasonably understand 9 of the tweets / posts to relate to events or subjects or persons to whom or to which Mr Kline was prohibited by the order from referring.

17. I am, however, in no doubt that in the case of 7 of the tweets / posts, they would have been reasonably understood as relating to persons and matters to which Mr Kline was prohibited by the order from referring. In each of these cases, as Mr Kline had deliberately made the tweet or post, there was a breach, even if he may not have directly intended to breach the order. Mr Kline was accordingly in contempt of court.

18. While not relevant to breach, it is relevant to the seriousness of the contempt to make some further assessment of Mr Kline's state of mind. Mr Kline is an intelligent and articulate man, with a legal background. He is capable of sophisticated, but often misconceived, reasoning. He is clearly so convinced of the justice of his cause, that on occasion in these proceedings he has overstepped the limit of truthfulness to further it. He regards the restrictions placed upon him, including by the Moulder J order, as unjustified. Once it had been impressed upon him that he was required to obey the orders of the Court, he sought to comply by the adoption of a casuistical approach under which he made comments which he subjectively meant to apply to what he called "protected parties" and which he must have known would have been understood to relate wholly or mainly to them, but which were drafted in a way which he considered, incorrectly in many cases, to allow him to argue that they did not relate to such parties.

19. I do however have regard to the fact that Mr Kline has removed the tweets / posts complained of in the second committal application.

20. As I have already indicated to the parties, I intend now to give directions for a further hearing at which I will consider the issue of sanctions.