In The Supreme Court Of Bermuda

CIVIL JURISDICTION

2017 No: 51

BETWEEN:

MAHESH SANNAPAREDDY

Applicant

-v-

THE COMMISSIONER OF POLICE

Respondent

Before:	Saul Froomkin OBE, K.C. A/J
Appearances:	Jerome Lynch K.C., for the Applicant
	Ben Adamson, for the Respondent
Date of Hearing:	26 October 2022
Date of Judgment:	24 November 2022

A. INTRODUCTION

1. These proceedings were commenced by Notice Of Motion For Committal For Breach Of A Court Order, filed 1 September 2022, by the Dr. Mahesh Sannapareddy (the " Claimant ") and others,[the Claimant being the sole claimant remaining,] against The Commissioner of The Police Service (the "Respondent") and others ,[the Commissioner being the sole respondent herein .] The Claimant prays for an Order that "the 1st. Respondent be required to purge his contempt failing which he be committed to prison or sanctioned by such Order as the Court deems just."

2. Although the said Notice refers only to the Order made by Subair-Williams J on 14 February 2019 (referred to by counsel for the Claimant as the **"access Order ")** counsel submitted that in fact the claim was also based upon the Order of Hellman J dated 13 February 2017 (referred to by counsel as the "**preservation Order"**) since it was "subsumed" by the access Order. A penal Notice was included in the Order of Hellman J.

3. The said Notice alleges two breaches as follows:

Contempt 1

That on 14th. February 2019 the Supreme Court ordered that only 75 selected Patient Medical Files [PMF] were to be uploaded onto the server by a limited number of personnel working with or for the Bermuda Police Service [BPS} and only those personnel namely DS James Hoyte, DC Paul Fenwick and John Ashington and that once competed were not to be accessed by the BPS at all without either satisfying the specific exception contained within the Order and on notice to the Applicant/Claimants, or on further application to the court. By a letter [the letter] dated 11th. March2022 the BPS breached the order in that they permitted PMF's to be incinerated.

Contempt 2

That on 14 February 2019 the Supreme Court ordered that Patient Medical Files [PMF] were to be handled by the said personnel. By the letter the BPS breached the Order in that they permitted PMFs to be incinerated by officers other than those named.

4. At the hearing Claimant's counsel withdrew Complaint 2. In support of his application the Claimant filed the affidavit of Dr. Ewart F. Brown Jr. to which were appended several exhibits.

5. In opposing the said Notice the Respondent filed the affidavits of Commissioner Darrin Simons, DC James Hoyte and SIO John Briggs.

6. It is worth noting here that the said letter of 11 March 2022 referred to in "Contempt 1" was sent to Mr. Delroy Duncan K.C. the attorney for the Complainant by the said DC John Briggs stating, inter alia, that:

> **"As the investigation into medical fraud has now discontinued, the copied patient files have no further bearing on the other investigations. The BPS have now incinerated all copies of the patient files, under the direct supervision of the case officers. I can confirm that the BPS now hold no copies of any patient files seized by them following the execution of the warrants in February 20."**

B. CLAIMANT'S CASE

1. That the Respondent Commissioner, (although not the Commissioner during the relevant period) as the head of the Bermuda Police Service, is deemed to have had specific knowledge of the acts of the officers under command of the Commissioner. He refers to Arlidge on Contempt 5th. Ed. At paragraph 12-113 under the rubric "**Vicarious liability for civil contempt**".

2. That specific knowledge of the breach is not a necessary ingredient to be proven. Learned Counsel relies upon the judgment of Mrs. Justice Cockerill DBE in the case of **XL Insurance Company SE v IPORS Underwriting Limited et al** [2021} EWHC 1407 (Comm) at 59, quoting the dicta of Rose LJ **in Varma v Atkinson and another** [2020] EWCA Civ 1602 at 54:

> ***"once knowledge of the order is proved, and once it is proved that the contemnor knew that he was doing or omitting to do certain things then it is not necessary for the contemnor to know his actions put him in breach of the order; it is enough that as a matter of fact and law, they do so put him in breach."***

3. That the combination of the two orders in question resulted in strict preservation of and access
to the PMF, and specific reliance is placed upon paragraphs 8, 9, 10 and 13 (4) and (5) of the preservation Order. Counsel submits that although the said Orders were silent as to what was to become of the documents once the investigation was completed, it was clearly implied that they were to be returned to the patients. Although it is admitted that the original documents were returned once they had been copied, it is the Claimant's case that all copies had to be returned or if they were to be destroyed that could only be done either with the consent of the patients or in their presence.

4. That the copies of the PDFs having admittedly been incinerated by officers of the BPS without the knowledge or consent of the Claimant or the patients a contumacious breach occurred for which the Respondent is vicariously liable.

5. That the requirements for a finding of contempt were as set out in the judgment of Clarke J in **Masri v Khoury [2011] EWHC 1024** Comm cited with approval by Cockerill DBE, supra, as follows:

> ***"In order to establish that someone is in contempt it is necessary to show that (1) he knew the terms of the order; (ii) that he acted (or failed to act) in a manner which involved a breach of the order; and (iii) that he knew of the facts which made his conduct a breach "(citing authorities)*** **had been proven by the Complainant beyond a reasonable doubt, being the required standard of proof."**

C. RESPONDENT'S CASE

1. That the wrong person was sued in that the present Respondent was not the Commissioner during the relevant period and had no knowledge of the alleged breach.

2. That neither of the said Orders prohibits destruction of the PDFs and relate solely to the preservation of and access to the documents.

3. Neither Order deals with the question as to what is to transpire once the investigation has concluded.

4. That The Claimant must prove that the Respondent personally knew the facts including the terms of the orders. Counsel cites Arlidge supra, at paragraph 12-41 as follows:

> ***"It is also necessary where committal is sought to establish service of any order which is alleged to have been disobeyed by leaving a copy with the person to be served. The importance of personal service of the order is to enable the person bound by the order, and who is alleged to be in contempt, to know what conduct would amount to a breach; and such notice is required to be proved beyond reasonable doubt...."***

5. There can be no vicarious liability of the Respondent as he had no knowledge.

6. That an allegation of contempt cannot be based upon an alleged breach of an implied term of an order. Mr. Adamson relies upon the commentary in Arlidge, supra, at paragraphs 12-61 and 12-62.

D. THE EVIDENCE

The evidence before me is uncontroversial and consists of the following:

i. The affidavit of Dr. Ewart F. Brown Jr. together with a number of exhibits including inter alia the "access "Order" the "preservation Order "and the letter of 11th March 2022.

ii. The affidavits of Commissioner Darrin Simons, SIO John Briggs and DC Hoyte.

E. DISCUSSION

1. The issue to be decided is whether the Respondent has committed a contempt consequent upon officers of the BPS incinerating the PMFs without the knowledge or consent of those to whom the information contained therein belonged. Mr. Lynch Q.C. accepts that the original documents had been properly returned and that the copies which were in possession of the BPS could, at the end of the investigation, be destroyed so long as permission was sought and obtained from the patients.

2. Mr. Adamson submits that the Respondent is "the wrong target" in view of the admitted fact that Commissioner Simons was not the Commissioner of the BPS during the relevant period and had no personal knowledge of the facts alleged, a necessary ingredient of offence. I agree with the submissions of counsel for the Claimant that the Respondent, upon his appointment as Commissioner was the appropriate person to be named as Respondent in this matter. I find that the Respondent upon his appointment was deemed to have the knowledge of his predecessor with respect to issues directly affecting the force. I am fortified in my view particularly since the Orders in question were directed specifically at the force. I take judicial notice of the fact that the Respondent was, immediately prior to his appointment as Commissioner, the Deputy Commissioner of Police. It would be shocking indeed if at the time of his appointment and thereafter he was unaware of orders of the court which directly affected the operational activities of his officers. Further, it is clear from the judgment of Mrs. Justice Cockerill DBE in **XL INSURANCE COMPANY SE** (supra) that personal knowledge is not necessary for the *contemnor to know that his actions put him in breach of the order once it is proved that he knew of the* order. In this case the Respondent is not alleged to have personally breached the order. It is urged that he is vicariously liable for the acts of his officers in the alleged

breach. I accept as accurate the statement of law as set out by the learned author in Arlidge on Contempt (supra), in the following terms:

> ***"Where a judgment or order is binding upon an employer or principal, and a servant or agent failing to comply with the judgment or breaches the order, this may lead to a finding of liability on the basis of vicarious liability. The test in this context would appear to be whether the servant or agent w acting on behalf of and within the scope of authority conferred by the employer or principal...."*** *(emphasis added)*

3. Accordingly, I am satisfied that the Respondent is an appropriate party to this action, and if there was a breach of the Orders or either one of them, he could be held in contempt. Neither the "preservation Order "nor the "access Order "mentions what is to transpire at the conclusion of the investigation with respect to the copies of the PMFs. Mr. Lynch K.C. submits that the order by necessary implication prevents the unilateral destruction of the said documents particularly since the learned justices of the Supreme Court went to great lengths to restrict access to and security of them. Mr. Adamson argues that one cannot be held in contempt based upon an "implication ". He relies once again upon the Arlidge text (supra) and specifically upon paragraph 12-61 and 12-62 where the learned author quotes the dicta of Jenkins J in **Redwing Ltd v Redwing Forest Products Ltd.** ,(the principle enunciated therein also adopted by Dame Elizabeth Butler-Sloss P **in Atty-Gen v Greater Manchester Newspapers Ltd.**) and concludes as follows :

> ***"The burden should thus lie upon those who seek to obtain an order, or negotiate an undertaking, to obtain clear restrictions to the extent required at the time when the defendant's obligation arises. An order should be clear in its terms and should not require the person to whom it is addressed to cross refer to other material in order to ascertain his precise obligation. Contempt proceedings based on such a defective order may well founder. There is clearly no scope for reading implied terms into an injunction....."***

4. I adopt that conclusion in its entirety as being wholly applicable to this application. Mr. Lynch K.C. having agreed that his case is based solely upon an implied term, I find that no such term or terms should be implied in either of the two said Orders. Accordingly, the action of the officers in incinerating the PFMs did not constitute a breach of the said Orders and no vicarious liability attaches to the Respondent. For those reasons I find that here was no breach of the said Orders by the Respondent or by any member of the BPS and accordingly I dismiss the Claimant's application.

5. If I am wrong in my aforesaid findings I would in any event have dismissed the application as I am satisfied that if, contrary to my findings there was a breach by

officers of the BPS, such breach was trivial or blameless and that a committal for contempt would be wholly disproportionate. (See: **Adam Phones Ltd v Goldschmidt and others** [1999] 4 All ER 486)

6. In light of the foregoing, I am minded not to award costs to either party. However, if either of the parties wish to be heard on the question of costs, please advise the Registrar within seven (7) days.

Dated this 24 day of November 2022

Saul M. Froomkin CBE, K.C.
A/Justice