

Insights

WHEN APPEALING A CONTEMPT ORDER WILL BE AN ABUSE OF PROCESS

ANISH NAMBIAR V SOLITAIR LIMITED

Aug 19, 2022

SUMMARY

Our insight into a recent judgment of the Court of Appeal: the judgment provides valuable analysis from the Court of Appeal as to the legal principles and the policy considerations around what constitutes an abuse of process as well as a warning as to the limits to a party's entitlement to appeal as of right in contempt matters.

Mr Nambiar, who was in contempt for breaching an injunction (the Contempt Order), was committed to prison (the Committal Order). Here the Court of Appeal addressed whether his appeal, purportedly made against the Committal Order (and therefore as of right to the Court of Appeal without the need for permission) should be struck out as an abuse. It was not in fact an appeal against the Committal Order but instead a second appeal against the Contempt Order and permission to appeal against the Contempt Order had already been sought from the High Court and refused. This judgment is a valuable analysis from the Court of Appeal as to the legal principles and the policy considerations around what constitutes an abuse as well as a warning as to the limits to a party's entitlement to appeal as of right in contempt matters under the Administration of Justice Act 1960 (AJA 1960). Written by Rachel Ziegler, partner, and Sharon Kennedy, knowledge development lawyer at Bryan Cave Leighton Paisner.

Nambiar v Solitair Ltd [2022] EWCA Civ 1135

What are the practical implications of this case?

Appeal as of right

The right to appeal without permission in respect of a committal order (AJA 1960, s 13(1) and CPR 52.3(1)(a)(i)) is a circumscribed right. Permission is needed where the order does not in fact

commit the person to prison or the challenge is exclusively to a finding of contempt and there is no challenge to the nature and length of the sentence.

Abuse of process

If the court is satisfied that the process of the court is being abused, there is a duty (and not a discretion) absent some unusual circumstances, to strike out the appeal for misuse of the court's procedures.

Re-opening an appeal (in this case the application for permission to appeal the contempt finding)

Re-opening an appeal is possible only in truly exceptional circumstances. CPR 52.30 is drafted in highly restrictive terms with a high hurdle to be surmounted. The jurisdiction can only properly be invoked where the integrity of the earlier proceedings, whether at trial or first appeal, has been 'critically undermined'. The rule is not intended to cater for mistakes by the lawyers involved 'no matter how reasonable and understandable they may be'. A wrong earlier decision or result, fresh evidence or an issue being very important to a party, is not sufficient to displace the fundamental public importance of the need for finality. The injustice that would be caused if the appeal is not re-opened must be so grave as to overcome that pressing need.

What was the background?

Solitair Ltd had alleged that Mr Nambiar was in breach of his fiduciary duties as a director to Solitair by seeking to divert business, customers and employees from Solitair. It obtained an injunction prohibiting Mr Nambiar and his company Go Singles Ltd from using Solitair's customer lists or details. Subsequently Solitair brought contempt proceedings and the judge found Mr Nambiar to be in contempt (the Contempt Order) for breach of the injunction. The judge adjourned the question of sentencing for the contempt. At the sanction hearing, the judge handed down a suspended prison sentence (the Committal Order). Permission to appeal against the Contempt Order was refused. Shortly afterwards, Mr Nambiar commenced the present appeal.

Before proceeding with Mr Nambiar's appeal, the Court of Appeal addressed the following preliminary issues:

- whether the appeal, although purportedly against the Committal Order and pursued as of right (under AJA 1960, s 13(1) and CPR 52.3(1)(a)(i)), was in substance a challenge to the Contempt Order (since it was in fact targeted exclusively at the contempt finding, there was no challenge to the nature and length of the sentence imposed and the grounds of the appeal only challenged the finding of contempt)
- whether the appeal was therefore an abuse of process since Mr Nambiar had already previously sought to appeal the Contempt Order (on the same grounds) and permission to

appeal was refused by Lord Justice Males on all grounds, and

- whether the previous appeal against the Contempt Order could and should be reopened under CPR 52.30

What did the court decide?

The Court of Appeal considered that, although on the face of it directed at the Committal Order and purportedly pursued as of right to the Court of Appeal, Mr Nambiar's appeal was in substance a challenge to the Contempt Order—it was in fact targeted exclusively at the contempt finding and there was no challenge to the nature and length of the sentence imposed. His only grounds of appeal challenged the finding of contempt. The Court of Appeal found Mr Nambiar's appeal to be no more than an (improper) attempt to have a second appeal against what was a final contempt order. Mr Nambiar was seeking to re-litigate in circumstances where his appeal rights had been exhausted.

The appeal was found to be plainly abusive. If the appeal proceeded and was successful it would necessarily lead to divergent judgments bringing the administration of justice into disrepute. It engaged the twin interests of the abuse principle, namely that the other party should not be unfairly harassed twice, and the public interest in the finality of litigation, avoiding duplicated use of judicial resources and the risk of inconsistent judgments.

The application under CPR 52.30 was called a 'makeweight application made at the eleventh hour' and it was held that it did not surmount the high hurdle identified by CPR 52.30.

Case details:

- Court: Court of Appeal, Civil Division
- Judges: Lady Justice Simler, Lord Justice Popplewell and Lady Justice Carr

Date of judgment: 9 August 2022

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