



Neutral Citation Number: [2024] EWCA Civ 698

Case No: CA-2023-002246

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**MEDIA AND COMMUNICATIONS LIST**  
**IN THE MATTER OF A CONTEMPT APPLICATION**  
**MR JUSTICE NICKLIN**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/06/2024

**Before :**

**LORD JUSTICE BEAN**  
**LADY JUSTICE ASPLIN**  
and  
**LORD JUSTICE DINGEMANS**

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**Between :**

**OLIVER SMITH**  
**- and -**  
**EMIL KIRKEGAARD also known**  
**as WILLIAM ENGMAN**

**Appellant**

**Respondent**

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**Oliver Smith in person**  
**Emil Kirkegaard did not appear and was unrepresented**

Hearing date: 5 June 2024  
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**Approved Judgment**

This judgment was handed down remotely at 12.30 on 21/06/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## **Lord Justice Dingemans :**

### **Introduction**

1. This is an appeal against an order dated 13 November 2023 made by Mr Justice Nicklin (the judge) refusing to grant relief from the sanction imposed by order of 3 October 2023 dismissing a contempt application dated 23 June 2023.
2. At the end of the appeal Lord Justice Bean announced that the appeal would be allowed for reasons to be given later. These are my reasons for allowing the appeal.

### **Relevant facts**

3. Mr Smith and Mr Kirkegaard are both bloggers. They have disagreed online. On 11 January 2018 Mr Smith published a tweet which referred to Mr Kirkegaard. On 3 February 2018, a blog was written by a third party, Anatoly Karlin, criticising things that Mr Smith had written. The blog attracted a significant number of comments from internet users, including Mr Smith. Mr Smith published three posts which referred, among others, to Mr Kirkegaard. Each of the posts described Mr Kirkegaard as a supporter of child rape or paedophilia.
4. On 7 December 2018, Mr Kirkegaard brought a claim for libel against Mr Smith for these four publications, being the tweet and the three posts. On the claim form Mr Kirkegaard provided his address as: Silkeborgvej 53; 8800 Viborg; Denmark. On the attached Particulars of Claim, verified by a statement of truth signed by Mr Kirkegaard, it was pleaded at paragraph one that Mr Kirkegaard was a data scientist.
5. Mr Smith contends that Mr Kirkegaard was not living at the address provided on the claim form, and that Mr Kirkegaard was living in the United States of America at the time. The address was relevant because, as the address given was in the European Union and at that time the UK remained part of the EU, it affected Mr Smith's ability to seek security for the costs of Mr Kirkegaard's claim. Mr Smith also contends that Mr Kirkegaard was not a data scientist.
6. There was a trial on 26 November 2019 of preliminary issues as to the meaning of the four publications and whether they were fact or opinion before Mr Justice Julian Knowles. Both Mr Smith and Mr Kirkegaard were represented by counsel and solicitors at the hearing. By a judgment dated 11 December 2019 ([\*Kirkegaard v Smith\* \[2019\] EWHC 3393 \(QB\)](#)) Mr Justice Julian Knowles set out the meaning of the posts and found that they were expressions of opinion defamatory of Mr Kirkegaard.
7. An order was made on 10 December 2019 that Mr Kirkegaard pay half of Mr Smith's costs of the trial of a preliminary issue, summarily assessed in the sum of £13,500, and payable within 14 days of the date of the order. The sum was not paid. Mr Smith stated that the costs order was amended on 23 March 2020 to provide that Mr Kirkegaard would pay the amount owing in monthly instalments of £500, but the amended order is not in the bundles before the court.
8. In practical terms, the effect of Mr Justice Julian Knowles' finding that the posts were expressions of opinion meant that, in the light of previous publications on sexual relations with children by Mr Kirkegaard on the internet, Mr Kirkegaard's action for

libel was very likely to fail. Mr Kirkegaard discontinued his claim on 21 May 2020, meaning that Mr Smith was entitled to his costs of the action.

9. A final costs certificate was issued by the Senior Courts Cost Office on 28 September 2021 in the amount of £26,668.43 to be paid by Mr Kirkegaard to Mr Smith. This was endorsed with a penal notice.
10. Mr Kirkegaard failed to make any payments under the costs orders. Mr Smith has made various attempts to enforce the costs order and, it appears, instructed attorneys in Denmark and Germany. These attempts include: initiating enforcement proceedings in Denmark; investigating from public records Mr Kirkegaard's real address; initiating enforcement proceedings in Germany; obtaining a garnishee order in Germany; serving Mr Kirkegaard through his company address under the German Commercial Code; applying to the Copenhagen City Council for a requisition against Mr Kirkegaard's bank account; and filing an application that Mr Kirkegaard attend court for questioning about his assets.
11. In response, Mr Kirkegaard is alleged by Mr Smith to have: evaded service by hiding his location generally and removing his name from the mailbox and vacating the property he was living in in Kiel; deregistered from his German company address in July 2023; closed his Nordea Bank account on 15 March 2024 and transferred the savings; and failed to attend in answer to a summons.
12. Mr Smith has also alleged that Mr Kirkegaard was living in the USA in 2018 when the proceedings commenced, based on a Facebook post entry. Mr Smith alleges that Mr Kirkegaard has repeatedly moved addresses in Denmark and Germany so as to evade enforcement and bailiffs. It appears that the authorities in Denmark found that Mr Kirkegaard had changed his name from Emil Kirkegaard to William Engman and moved to Germany on 1 May 2021.

### **The application to commit for contempt**

13. On 23 June 2023 Mr Smith, who was by then acting in person, made a contempt application. It appears from later orders made by the judge, that the application was filed with the court on 7 July 2023. The contempts were alleged to be that Mr Kirkegaard: (1) made a false statement verified by a statement of truth regarding Mr Kirkegaard's named address; (2) failed to pay a costs order dated 10 December 2019 for £13,500; and (3) failed to pay a final costs order dated 28 September 2021 for £26,668.43.

### **The orders made by the judge and further applications**

14. On 21 July 2023 the judge made an order on the papers that the contempt application be listed for a directions hearing on 24 October 2023 and that Mr Smith: "(3) ... by 4.30 pm on 25 August 2023 ... must: (a) file a sworn affidavit in support of the Contempt Application; and (b) personally serve a copy of the Order upon the Defendant together with a further copy of the Contempt Application and the sworn affidavit; (4) by 4.30 pm on 1 September 2023, .... must file a certificate of service confirming compliance with paragraph 4(b) above". As this was an order made without a hearing, permission was given to either party to vary or discharge the order by application notice.

15. The judge recorded under “Reasons” in the 21 July 2023 order that:

“(C) ... the applicant is alleging two things (1) a false statement verified by a statement of truth; and (2) failure to comply with costs orders. In respect of (1) the applicant requires the court’s permission before he can proceed with a contempt application. The Court will consider whether the applicant should be given permission at the directions hearing. In respect of (2) the Court does not usually permit costs orders to be enforced by way of contempt application. As a preliminary step, before permitting such enforcement, the Applicant would have to show that the relevant costs order was endorsed with a Penal Notice – see CPR 81.4(2)(e).

(D) More generally, the Court will want to address the question of the jurisdiction in which the Defendant is domiciled and whether, in the circumstances, there is any prospect of the Court being able to exercise jurisdiction over him for the purposes of the Contempt Application.

(E) The “affidavit” filed by the Applicant does not comply with the requirements for an Affidavit. These are set out in CPR PD 32 paragraphs 4-9...

(F) I have ordered the applicant to serve personally the documents ... That is because contempt applications are important, and the defendant to such an application must be kept informed of the court’s proceedings”.

16. On 18 August 2023, Mr Smith submitted a request of the court’s permission to proceed with the contempt application under CPR 81.3(5b) and filed a document exhibits bundle.
17. Also on 18 August 2023, Mr Smith made a second affidavit, in which he apologised for the incorrect form of his first affidavit and for his failure to seek permission before making his committal application. He set out details of his attempts to locate Mr Kirkegaard. That affidavit was not witnessed by a solicitor or commissioner for oaths until 15 March 2024, pursuant to the order of Lord Justice Warby referred to below, which was after the judge had dismissed the contempt application.
18. On 21 August 2023, Mr Smith made a written application requesting service by an alternative method or at an alternative place under CPR 6.15(1). In his evidence set out on the application notice, Mr Smith stated that it had been impossible to serve the contempt order on Mr Kirkegaard by personal service within the deadline. This was said to be due to Mr Kirkegaard’s evasive actions and failure to notify the court of his changes of address. Mr Smith said he had sent the contempt application, order and affidavit electronically to three of Mr Kirkegaard’s known email addresses, as well as by post to Mr Kirkegaard’s mother’s house and to Mr Kirkegaard’s vacated property in Kiel. Mr Smith further stated that he had alerted Mr Kirkegaard to the contempt proceedings on social media.

19. On 18 September 2023 the judge made an order on the papers, having reviewed CE file (the court's digital filing system) and recorded "that the claimant has failed to comply with the order of 21 July 2023" the judge directed that "unless the claimant complied with paragraphs 3 and 4 of the order of 21 July 2023 by 4.30 pm on 2 October 2023, the contempt application will be dismissed ...". Under "Reasons" the judge recorded that "it appears that the claimant has failed to comply with paragraphs 3 and 4 of the order of 21 July 2023". It is not clear whether Mr Smith's second affidavit or the application for alternative service had been uploaded to CE file or seen by the judge.
20. On 3 October 2023 the judge again reviewed CE file and made an order on the papers. The judge noted that "the claimant (1) has sent an email to the court on 2 October 2023 which attached a further "affidavit", but which has not been witnessed by a solicitor, commissioner for oaths or other person authorised to swear affidavits; and (2) failed to file a certificate of service confirming compliance with paragraph 3(b) of the order of 21 July 2023". The judge therefore dismissed the Contempt Application and vacated the 23 October 2023 hearing. Under reasons the judge recorded that "the defendant can apply for relief from sanction ... any such application must, as a bare minimum, be supported with evidence of belated compliance with the court's order". The order recorded that there had been some misinformation about the date of the directions hearing for permission to bring contempt proceedings (either 23 or 24 October 2023) but that was now irrelevant. It is also apparent that in the order Mr Smith was sometimes referred to as the claimant and sometimes the defendant, but this does not seem to have caused any confusion.
21. By an application dated 6 October 2023, which the judge later recorded was undated and unissued but apparently filed with the court on 6 October 2023, Mr Smith made an application for relief from sanctions for failure to comply with the 21 July 2023 and 18 September 2023 Orders, in which he referred to his application made on 21 August 2023 for an alternative method of service. Mr Smith made a witness statement dated 6 October 2023 in support of that application. In the witness statement Mr Smith set out the impossibility of effecting personal service on Mr Kirkegaard. Mr Smith further stated that he did not receive the 18 September 2023 Order from the court.
22. On 13 November 2023 the judge dealt with the application for relief from sanctions without a hearing (as requested by Mr Smith) and made an order refusing the application for relief from sanctions. The judge stated under "Reasons" at (B) "The main reason that I have refused the application is that there is no point in permitting the proceedings to be restored. The underlying contempt application is, at this time, hopeless; it is bound to fail." The judge stated: "The Applicant's fundamental problem is that he has no reliable method of communicating with the Defendant. As such, and because the Court must be **sure** that contempt proceedings have come to the attention of the relevant defendant, the Court will never permit him to proceed with a Contempt Application (even if he surmounted the permission requirement)" (emphasis in the original order). The judge identified a further problem, which was that the court cannot exercise its contempt jurisdiction over someone who is not within the jurisdiction and that unless Mr Kirkegaard voluntarily submitted to the contempt jurisdiction by coming to England and Wales, the proceedings would be pointless. Finally the judge noted the ongoing enforcement proceedings in Germany and stated "the Defendant's failure to pay costs cannot be enforced by contempt proceedings".

### **The issues on the appeal**

23. Warby LJ granted permission to appeal by order dated 14 March 2024, on condition that Mr Smith's second affidavit be sworn in the manner specified by the rules. This affidavit has now been sworn.
24. When granting permission Warby LJ identified some authorities relevant to the grounds on which Mr Smith sought to appeal, and referred to some Australian cases about contempt proceedings relating to non-payment of costs orders. Warby LJ also made an alternative service order authorising service by email of the appellant's notice and all further documents which Mr Smith was required to serve for the purposes of the appeal to each of the addresses identified in Mr Smith's second affidavit.
25. Mr Smith filed a skeleton argument, and at the hearing made helpful oral submissions. Mr Smith's submissions focussed on the issue of service; the issue of jurisdiction; and the issue of breach of costs orders as contempt. Mr Smith emphasised that he is owed £50,490.20, including interest, by Mr Kirkegaard. Mr Kirkegaard did not appear and was not represented.
26. It was apparent by the conclusion of the hearing that the following matters were in issue: (1) whether the contempt proceedings were hopeless because the court could not be sure that the proceedings would come to the attention of Mr Kirkegaard; (2) whether the court could exercise its contempt jurisdiction over Mr Kirkegaard if Mr Kirkegaard had not submitted to the contempt jurisdiction of the court; (3) whether the failure to pay costs can be enforced in contempt proceedings; and (4) whether Mr Smith should be granted relief from sanctions.

### **Whether the contempt proceedings were hopeless because the court could not be sure that the proceedings would come to the attention of Mr Kirkegaard (issue one)**

27. Mr Smith submitted that Mr Kirkegaard can be served by email (as his main email address is in use and on file) and by social media, through which Mr Smith has already alerted Mr Kirkegaard to the contempt proceedings, and that the judge should have granted the application for an alternative method of service by email. Mr Smith noted that the judge's clerk had sent court orders by email address during the contempt proceedings. As noted above, Warby LJ had made an order for alternative service for the purposes of the appeal.
28. In respect of the need for service of notice of the contempt proceedings, CPR 81.5.1 states: "(1) Unless the court directs otherwise in accordance with Part 6 and except as provided in paragraph (2), a contempt application and evidence in support must be served on the defendant personally."
29. Part 6 deals with service of documents. CPR 6.15.1 provides: "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place."
30. It is clear that alternative service may be ordered in contempt applications, see for example *Field v Vecchio* [2022] EWHC 1118 (Ch) where service by email and post

was allowed following the refusal of the defendant to accept the envelope of papers served on him by a process server.

31. In my judgment there were in this case good reasons to authorise service by an alternative method of email and social media. These were that Mr Kirkegaard seems to have been taking active steps to avoid service. He had removed his name from mailboxes and he deregistered from a company address. The email addresses proposed are known to be used by Mr Kirkegaard. Further, since Mr Kirkegaard is an active user of social media, service via these electronic communication means is very likely to bring the proceedings to Mr Kirkegaard's actual notice, although whether it will do so will be a matter for the court determining any contempt proceedings.
32. In these circumstances the proceedings were not hopeless because, on the information currently available, the court might properly make an order for alternative service, although whether a court will do so is a matter for the court at first instance on the material then before it. Further a court might be sure, if an order for substituted service were to be made, both that service was lawful and that the proceedings had come to the attention of Mr Kirkegaard. Again whether a court would be so sure is a matter to be determined on the evidence then before the court.

**Whether the court could exercise its contempt jurisdiction over Mr Kirkegaard if Mr Kirkegaard had not submitted to the contempt jurisdiction of the court (issue two)**

33. CPR 81.4 has extraterritorial effect, see *Dar Al Arkan v Al Refai* [2014] EWCA Civ 715; [2015] 1 WLR 135 at paragraphs 42-43. In *Vik v Deutsche Bank AG* [2018] EWCA Civ 2011; [2019] 1 WLR 1737 at paragraph 55 it was confirmed that a foreign national who invokes the court's substantive jurisdiction is subject to its contempt jurisdiction in respect of matters incidental to the claim, without the need to obtain permission to serve the contempt proceedings outside the jurisdiction.
34. The Court's jurisdiction has already been established in this case in *Kirkegaard v Smith* [2019] EWHC 2947 (QB). Mr Kirkegaard invoked the jurisdiction of this Court in order to bring the proceedings, and the contempt jurisdiction relates to the libel proceedings commenced by Mr Kirkegaard. It is apparent that there is no need for Mr Kirkegaard to make a further submission to this jurisdiction before the court can exercise its contempt jurisdiction over him.
35. In these circumstances establishing jurisdiction over Mr Kirkegaard is not a bar to the continuation of the contempt proceedings.

**Whether the failure to pay costs can be enforced in contempt proceedings (issue three)**

36. The judge stated that a failure to pay costs orders could not be pursued by contempt proceedings. Mr Smith submitted that Mr Kirkegaard's failure to pay the sums due under the costs orders is a contempt of court. Mr Smith relied on Warby LJ's reference when granting permission to appeal to some cases from Australia, including *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2020] FCA 685. That judgment showed that in some states in Australia the court may treat failure a deliberate failure to pay a judgment debt as contempt if satisfied that the judgment

debtor had the means to pay. This seems to be consistent with a previous line of authorities from Australia, which have noted the different statutory position in England and Wales, see *Mahaffy v Mahaffy* [2013] NSWSC 245. Mr Smith submitted that there was a deliberate failure to pay, and that Mr Kirkegaard had the means available to pay, pointing out that Mr Kirkegaard stated to the Court on 23 March 2020, when making an application to vary a costs order so that he could pay £500 monthly instalments, that he had an annual income of £72,000. Mr Smith also pointed out that there was a sum equivalent to £4,240 in a bank account before Mr Kirkegaard transferred his savings to prevent seizure by a third-party debt order.

37. In my judgment the cases from Australia do not assist Mr Smith. This is because there is a different procedural and statutory regime relating to non-payment of judgment debts (and a costs order is a judgment debt) in England and Wales, as appears below.
38. CPR rule 81.4 provides as follows: ““(1) If a person (a) required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or (b) disobeys a judgment or order not to do an act, then, subject to the Debtors Acts 1869 and 1878 and to the provisions of these Rules, the judgment or order may be enforced by an order for committal.”
39. Committal to prison for non-payment of judgment debts and debtors’ prisons were, in effect, abolished by the Debtors Act 1869 (the 1869 Act). There was an interesting discussion about the effect of the 1869 Act by Arnold LJ in *Hussain v Vaswani* [2020] EWCA Civ 1216 at paragraphs 22 to 30.
40. Section 4 of the 1869 Act provides as follows:

“4 Abolition of imprisonment for debt, with exceptions.

With the exceptions herein-after mentioned, no person shall be arrested or imprisoned for making default in payment of a sum of money.

There shall be excepted from the operation of the above enactment:

(1) Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract:

(2) Default in payment of any sum recoverable summarily before a justice or justices of the peace:

(3) Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control:

(4) Default by [a solicitor] in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order:



(5) Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorized to make an order:

(6) Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made:

Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money.”

41. Section 5 of the 1869 Act empowered courts in certain types of cases to commit to prison for a term not exceeding six weeks any person who defaults on the payment of a debt due pursuant to a court order where it is proved that the person in question has or has had the means to pay the debt:

“5 Saving of power of committal for small debts.

Subject to the provisions herein-after mentioned, and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court.

Provided—

...

(2) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.

[Proof of the means of the person making default may be given in such manner as the court thinks just.

For the purpose of considering whether to commit a debtor to prison under this section, the debtor may be summoned in accordance with the prescribed rules.]

...”

42. It appears that section 5 of the 1869 Act was the product of a need to maintain systems of flexible credit that emerged through the latter half of the nineteenth century. It seems that Parliament was concerned that without the sanction of imprisonment for debtors

who failed to pay their debts when they could pay, others would be unable to obtain credit. The effect, however, of section 5 of the 1869 Act was further reduced by section 11 of the Administration of Justice Act 1970. That left its application relevant only to proceedings in what is now the Family Court.

43. Halsbury's Laws of England (Volume 24 (2019)), Section 3. Civil Contempt, Part 5, stated of the Debtors Act 1869 s 4, as amended: "Though default in payment of a sum ordered to be paid cannot be punished by committal, the default remains a contempt and the court has a discretion whether or not to allow the party in default to take any further proceedings in the action in which payment was ordered: see *Leavis v Leavis* [1921] P 299; *Gower v Gower* [1938] P 106, [1938] 2 All ER 283."
44. In my judgment Mr Kirkegaard's non-payment of a costs order does not fall within any of the exceptions set out in section 4 of the 1869 Act, and section 5 of the 1869 Act does not apply. The failure to pay the costs may be a contempt of court, but it cannot be enforced by imprisonment for contempt. As indicated in the notes in Halsbury's Laws, some courts have exercised a discretion not to permit a party in default to take any further part in proceedings, but that does not arise in this case. The courts have developed other remedies, such as the freezing order, to assist judgment creditors to enforce judgments. This means that the judge was right to conclude that the failure to pay costs could not be enforced by committal proceedings in this case.

#### **Whether Mr Smith should be granted relief from sanctions (issue four)**

45. For the reasons set out above, the judge was wrong to find that the contempt proceedings were hopeless because there was no reliable method of communicating with Mr Kirkegaard, this is because an order for alternative service might be made and the court might be sure that Mr Kirkegaard had notice of the contempt proceedings. Further Mr Kirkegaard had submitted to the jurisdiction of England and Wales when commencing the libel proceedings against Mr Smith in this jurisdiction, and the contempt application relates to those libel proceedings.
46. The judge was right to find that non-payment of costs proceedings could not be enforced by a committal for contempt. There was, however, another relevant basis for the application to commit, namely the contention that Mr Kirkegaard had given a false address on the claim form which had been signed with a statement of truth. Proceedings for contempt of court may be brought against a person if he makes a false statement in documents verified by a statement of truth, see CPR 32.14. In *Jet 2 Holidays Ltd v Hughes* [2019] EWCA Civ 1858, [2020] 1 WLR 844, [2019] All ER (D) 66 (Nov), a witness statement, verified by a statement of truth, made by a prospective claimant before the commencement of proceedings, was held to be able to give rise to a contempt application even though the proceedings for substantive relief were never issued.
47. It is apparent that because the judge concluded that the proceedings were hopeless, the judge did not go on to consider whether Mr Smith should be granted relief from sanctions by reference to the test set out in *Denton v TH White* [2014] EWCA Civ 906; [2014] 1 WLR 3926. This court must therefore undertake that task and consider the three stages of the test.
48. The first stage of the test addresses the seriousness and significance of Mr Smith's failure to comply with the unless order. This required him to file a sworn affidavit and

to effect and certify personal service. This is a serious breach of the rules because the court had made an unless order. The significance of the breach is reduced because Mr Smith had produced a further affidavit, albeit one which was not properly sworn, and because Mr Smith had applied promptly for an order for alternative service. It is apparent that such an order might be made by the Court, and was made by Warby LJ for the purposes of the appeal.

49. As to the second stage and why the default occurred, it is apparent on the information before the court that Mr Smith did not understand the need to swear the affidavit before an authorised person, and did everything that he could reasonably be expected to do in order to serve the proceedings. Those efforts in relation to service were frustrated by Mr Kirkegaard's successful efforts to avoid service and to move his assets before they could be seized.
50. The third stage of the test is evaluating all of the circumstances of the case so as to enable the court to deal justly with the application. It is necessary to recognise that Mr Smith cannot enforce costs orders by pursuing proceedings for contempt, but he is able to pursue contempt proceedings by seeking permission to show that Mr Kirkegaard provided a false address on a document verified by a statement of truth. It is apparent that Mr Smith did not make an affidavit in the proper form, and did not (until after being granted permission to appeal) swear that affidavit before a person authorised to witness the oath. On the other hand it is apparent that the court has a principled interest in ensuring obedience to its orders, and a principled interest in ensuring that misleading statements are not made in court documents. The information now available suggests that Mr Kirkegaard has made extensive efforts to avoid service, and to ensure that his assets are not seized. If a Court were sure that Mr Kirkegaard had given a false address and thereby avoided an order for security for costs, an order for committal might properly be made. These are all good reasons for permitting Mr Smith relief from sanctions in this case.
51. In my judgment it is appropriate to grant Mr Smith relief from sanctions. The main reason that the judge gave for not granting relief from sanctions was the hopelessness of the application to commit because of the issues with service, but it is apparent that service might be properly effected in this case. The information suggests that Mr Kirkegaard has taken numerous steps to avoid complying with court orders, and if it can be shown that Mr Kirkegaard gave false information about his address from the beginning, an order for committal might be made.

### **Other matters**

52. I should record that in the course of his submissions Mr Smith referred to Mr Kirkegaard not being a data scientist. That, however, was not an issue in the committal application before the judge. There would need to be an amendment of the application before that matter could be considered as part of the committal proceedings.
53. It is apparent that Mr Smith has had difficulty in ensuring compliance with formal rules relating to the affidavit. Compliance with rules for applications for committal is insisted on by courts for good reason, because such proceedings involve the liberty of persons. It is apparent that Mr Smith would benefit from legal assistance, and there was discussion at the hearing about the possibility of him making contact with

Advocate, the Bar Pro Bono advocacy service, and other pro bono suppliers of legal services.

**Conclusion**

54. I would allow the appeal against the order refusing Mr Smith relief from sanctions and grant Mr Smith relief from the sanction of failing to comply with the order dated 18 September 2023. I would remit the hearing of Mr Smith's application for service by an alternative method or at an alternative place, and for any further directions in relation to the order dated 21 July 2023, to be determined by a judge in the High Court.

**Lady Justice Asplin**

55. I agree.

**Lord Justice Bean**

56. I also agree.