

**IN THE FAMILY COURT**  
**SITTING AT NEWCASTLE-UPON-TYNE**

**Claim No. 12437956**

The Law Courts  
The Quayside  
Newcastle-upon-Tyne  
NE1 3LA

Monday, 16<sup>th</sup> November 2015

Before:

**DISTRICT JUDGE JACKSON**

Between:

**A Local Authority**

Applicant

-v-

**P**

First Respondent

-v-

**CARL MURTHA SENIOR (“CMS”)**

Second Respondent

Counsel for the Applicant:

MR McCORMACK

Counsel for the First Respondent:

MISS Richard

Counsel for the Second Respondent:

MR McCAIN

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**JUDGMENT APPROVED BY THE COURT**

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the transcriber has endeavoured to provide as accurate a transcript as possible.]*

## JUDGMENT

DISTRICT JUDGE JACKSON:

1. We are gathered here today to consider allegations of breach of an order made by this court in the context of P, who is an elderly gentleman, he is 78 now and he has disabilities and the case is in fact brought within the context of Court of Protection proceedings.
2. The historical development of the orders is, to use a neutral word, interesting, but in the final analysis, there are two orders in respect of which these allegations are made. The first one is dated 9<sup>th</sup> June 2015 and the second one is dated 7<sup>th</sup> July 2015. These orders are in like form and they were both made in CMS's presence at court. The terms that are alleged to have been breached are that: "CMS is forbidden to attend or enter the property at Address which is the home of P. The breaches fall into two categories as to which order they are alleged to have breached, but there is no suggestion, as I understand it, that there is any doubt that if those breaches were proved and the facts are accepted by the court, then they would be in breach of the respective orders. I think if I have understood it correctly, allegations 1 to 5 are in respect of the 9<sup>th</sup> June order and 6 to 21 are in respect of the 7<sup>th</sup> July order.
3. We have heard evidence today from four witnesses, from TY, GK, EZ and XO, all of which were involved with P through their caring support network of the local authority, the applicant in this case. The striking feature of this case, I think, is that the evidence in the main, the majority of the evidence, does come about in the context of first-hand hearsay, to use the expression, which we heard and that must be right. The only direct evidence that I heard today is from TY and that is in respect of allegation number 7 in the schedule. That is that CMS attended at the property at half past three on 14<sup>th</sup> August of 2015 and knocked on either the kitchen or the bedroom window, the evidence varies. TY observed this himself and I accept what he says to the court today. It seems that he had rather hoped that nothing more would come

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about it because he said that he thought that CMS was being rather silly. However, it seems to me that allegation 7 is conclusively made out to the appropriate standard based upon the direct evidence of TY. That is reinforced by the recording by the local authority in its "P Observation Record" of the following day, which was exhibited to the evidence. Therefore, there is no doubt on that one.

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4. The difficulty that we have is that the rest of it, as I have said, is by way of hearsay and I am directed to the appropriate provisions of s.4 of the Civil Evidence Act 1995. There is always to me a strange contradiction that one is expected to make findings to a criminal standard whilst allowing evidence to the civil standard, which would be in difficulties in the criminal jurisdiction. Mr McCain tells me, rightly, that suspicion is not enough. It seems to me, looking at these allegations, those which he specifically drew my attention to, which I think were 13, 17, 18 and 19, do not on the face of them appear to have been strictly breached within the terms of the order, certainly allegation 13 while he is at the gate. Whilst that might be completely contrary to the spirit of the order, he is not in breach of it, it seems to me and I cannot make an appropriate finding on that basis.

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5. In relation to allegations 17, 18 and 19, it seems to me that those cannot be said to be breaches, as Mr McCain submits. There is severe doubt in my mind whether they would actually constitute a breach. I am not making any findings upon those allegations. Coupled to that, there is a point about suspicion. This seems to be linked to some domestic disturbance and the loss of some meals on wheels equipment and to the presence of cigarette ash in the kitchen, all of which are said to be within the modus operandi, if that is the right expression, of CMS. It does not seem to me that evidence of that sort is going to get us past a beyond all reasonable doubt standard. Therefore, it seems to me that allegations based on that will have to go. It seems to me when I finish here I am going to ask you to look at the schedule and perhaps go to it in a revised way.

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6. As to the others, I have to evaluate the weight of the hearsay evidence. Nobody is suggesting to me that I cannot take it and that clearly it goes to weight. P, for reasons which have been expressed, is not prepared to be involved in this. He feels, if that is right expression, or he is concerned at least that he may be blamed if CMS is sent to prison.

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7. I have been directed to the provisions of s.4 of the Civil Evidence Act and the various elements which are set out therein. If I look at them briefly, P is not available to us to give this evidence. He is, after all, a man who lacks capacity and may be distressed, I think, if he were called to give evidence. He has however made his feelings very clear on numerous occasions to his carers. Those disclosures to his carers have been carefully noted, it seems to me, by the carers. There is a slight concern expressed by Mr McCain that they have not perhaps been verified in that sense and I do not think that is a point which moves me in any particular direction. It seems to me that those notes are contemporaneous, they have been given truth by the people who made those notes and it seems to me that that is enough for me to conclude that they reflect the position.

8. It is first-hand hearsay, which I think is important. Those who have given that evidence have no axe to grind, if that is the right expression. There is no reason why they should seek to enhance or conceal. It seems to me that I have no difficulty in accepting the evidence upon that basis. That is particularly so where at least one of the incidents is supported by TY and the other incidents are of the right type. The point is made that the allegations have the ring of truth and I think that is an unavoidable conclusion within these proceedings. I do not think that I can condemn CMS based upon previous breaches, but the point is made and noted that the alleged breaches appear to be the type on which he has been very happy to admit to me in this court on a previous occasion. Therefore, it seems to me that the evidence, which is of a hearsay nature, is of a sufficient weight for me to accept the truth and for me to conclude that those allegations are proved in that sense.

So, we may have to just look very carefully through the schedule to see where that leaves us in terms of my findings and I would invite the parties' assistance in that respect. So, this matter is proved to that extent. Allegation 13 and allegations 17 to 20 relate to allegations where CMS is alleged to have been at the gate rather than anywhere closer to the property than that and there is therefore no breach. I think that is absolutely right on a strict interpretation. I think we do have to take a strict interpretation within these proceedings.

Breaches are proved in respect of allegations 1 to 12, 14 to 16 and 21.

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At this stage, I would like to clarify where we are with the suspended sentence. CMS is not in breach of that and I therefore considering the pragmatic suggestion that I should discharge that as it appears to be a nullity anyway. There is no advantage or disadvantage either way because CMS could not be in breach of that. It is not doing any harm sitting there today that there is a suspended committal order. On 7<sup>th</sup> July, no doubt it was in the court's mind that it would have a salutary effect. It has not had one, but it may have some residual salutary effect and I am anxious that it might be better to discharge that in CMS's presence rather than without him being here so as not to, as it were, send the wrong message about what he has to do from today on. Given that, I am also saying it is an order that he cannot breach. It is a matter of record that it was made and when the court on 7<sup>th</sup> July decided to give him the final opportunity that effectively a suspended order is in those terms, six months suspended for a year, we know that that was the court's intention, but that is plainly going to be a highly relevant factor when deciding on penalty today.

Having made these findings against CMS I now have to come to the issue of how I might deal with him by way of sentence. I have had drawn to my attention the very helpful list of considerations in the two authorities which have been handed up. The difficulty with this case, I think, is that it has been in this court for a long time and my clear hopes that we might avoid, in reality, coming to today have rather been dashed on the rocks. It seems that even as I was being hopeful on the last occasion I think perhaps they had already been dashed, if that is the expression, and had we known what we now know at the hearing where the suspended sentence was imposed, that might well not have been the consequence. The suspended sentence, I think you have all agreed in one form or another, is defective in its expression and I do not think that there will be any prospect of activating it under any circumstances, but it does serve as a good guide as to the thinking of the court on the occasion when it was made. We are here talking about a significant number of breaches and I think given my findings today, if my maths is correct, it would be 15 breaches with which we have to deal.

My concern in this case is, first of all, I understand Mr McCain's submission. CMS is perhaps the basis of the submission, a man not without his own difficulties. He has a psychosis and he has not been violent as far as we are aware in these proceedings,

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there is no allegation to that effect and the previous prison sentence has been said not to have assisted him in the context of that psychosis. What is of concern to me in this case is, first of all, the frequency with which these breaches take place. They seem to be of a type by and large and that is that CMS is attending upon P for the purposes of taking his money, albeit in small tranches, but nevertheless he comes for money and he comes for food and it seems that he has drifted towards turning up on meals on wheels day in order that he might take his meal also. There is an element of calculation, it seems to me, about his attendances and there is no doubt in my mind that he fully understands the potential consequences of a breach of this order. I have made it clear to him on a number of occasions and indeed, when imposing the suspended sentence, I left him in no doubt whatsoever of what he might be looking forward to if he appeared back in front of the court on further breaches.

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It is one of those cases where one has to wonder what might be achieved by a custodial sentence, but frankly, we have got to the stage in this case where the court can do nothing else. It is faced with what I perceive to be frequent and deliberate breaches of the order to the detriment of a vulnerable, elderly gentleman who, frankly, could do without it. Therefore, it seems to me there has to be a question as to whether a sentence in custody will secure compliance with the order but, frankly, I think everything else has been considered and tried and it seems to me that an immediate custodial sentence is all that I can consider in these particular circumstances.

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Turning my mind to what that sentence might be. On the last occasion, in previous breaches, I considered a six months' custodial sentence to be appropriate, although I did, of course, suspend it on the last occasion. That suspended sentence has technically gone, but nonetheless it does give some insight into the view that the court was taking upon that occasion. Balancing all of these matters, it seems to me that the amount of custodial sentence I consider appropriate is going to be six months and I think that is giving him the very benefit of all that may be said on his behalf today.

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In the nature of things, I have to apportion the sentence between the various allegations and that clearly is not possible as the basis of the sentence is the totality rather than the individual matters. So the order I will make today is that I will impose a six months sentence in respect of 1 to 5 and a six months sentence in respect of 6 to 21, to be served concurrently. Clearly, I have overstated the numbers because I have kicked

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some of those out, but you understand the basic difference, before and after 9<sup>th</sup> July. That seems to me to be a proper discharge of my duties today.

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As far as this later application is concerned (to discharge the suspended sentence previously imposed), I perceive that Mr McCormack's response is that it might not be the time to proceed with that in the event that I impose an immediate custodial sentence. I am not prepared to proceed with it today. I think the best way to deal with it, as there is not an application to vary the order; I think the way to deal with it tidily is for the Council to make an application to vary the terms of the existing injunction and this ought to be included within that. That can come before the court and it will have to be listed and in the nature of things it may be that CMS would want to be in attendance, in which case we would have to do some kind of video hearing, or it may be that he is content to be represented.

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It will take some time to draw this committal order, I want from you a clean schedule. I would prefer to deal with this at 9 o'clock tomorrow in terms of drawing the order up because it is quite a long order. I will adjourn this matter until 9 o'clock tomorrow morning, but I do not expect anybody to come. I will issue a warrant.

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Thank you very much. Good afternoon to you.

*[Court adjourns]*

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