IN THE COUNTY COURT AT CENTRAL LONDON

Case No: F00WT5989

Courtroom No. 51

Thomas More Building
Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 30th July 2020

Before:
HIS HONOUR JUDGE LETHEM

B E T W E E N:

GULRAJ VASWANI
SAROJ VASWANI
KRITI VASWANI

and

RIZWAN HUSSAIN

MR REES PHILLIPS appeared on behalf of the Claimants
MR TEAR appeared on behalf of the Defendant

JUDGMENT
(Approved)

HHJ LETHEM:

1. On 21 January 2020, the claimants in these proceedings, ('the applicants'), made an application for the committal of the respondent for breach of a number of undertakings. The background to the application and events surrounding that case are more fully set out in a judgment that I gave following the trial of the application on the 1st July 2020 when I found the Respondent guilty of two contempts. I rely on that judgment and this judgment confines itself to sentence.
2. In summary, the background to the action is that the respondent is a banker / investment manager, and was the tenant of apartment 203 Riverlight Quay, London SW8. The rent reserved by the tenancy agreement was £1,950 per week, and accordingly the tenancy was not protected by virtue of the level of rent. The respondent ceased paying rent in January 2019 and accordingly the claimant took possession proceedings, which were disposed of by District Judge Parker by an order 2 October 2019, whereby an order for possession was made, a money judgment for £67,150 entered and a further order for monies for use and occupation at £277.80 per day was made.
3. The respondent sought to appeal that order by way of an appellant's notice dated 14 October 2019, which I dealt with on paper on 28 October 2019, when I refused permission to appeal the money judgment. That application has not been renewed and accordingly the money judgment remains in force at today's date.
4. I was, however, concerned about aspects of the paperwork in relation to the possession order, and also an application that had been made for stay of execution. Accordingly, I listed the stay application on 11 December 2019, the permission hearing in respect of the possession order was further listed for mention. Leading up to 11 December the respondent sought to adjourn that hearing in a number of emails and giving various reasons. None of those reasons persuaded me to adjourn the hearing, and accordingly on 11 December the respondent failed to attend the hearing and I dismissed the application for a stay, leaving the permission hearing in place in February 2020. The warrant arising from the possession order was due to be executed on 7 January 2020.
5. On 2 January 2020, the respondent appeared without notice before me, and renewed his application for a stay of execution, seeking to set aside the order that I had made on 11 December, under Rule 39.3. That application failed when I found that his explanation for his failure to attend conflicted with the previous documents that he had sent to the court

prior to 11 December. It seemed to me that one or both of the explanations was not honest. I made it clear that I was not therefore disposed to stay execution of the writ or warrant. At that stage the respondent drew my attention to his sixth witness statement and in particular to paragraphs 34 and 38 of the witness statement, where he told me that he intended to and was willing to ensure that the rental payments were settled in full and promptly, including the arrears, that he had the ability and the resources so to do, and the only reason why the payment had not been made was that the managing agents were refusing to accept payment. He told me on that occasion that payments were coming from an Isle of Man account. Critically, I asked him, 'You are telling me that you have £92,500 that is available to you now?' and he answered, 'Absolutely.'

6. I was sufficiently concerned to have the respondent affirmed and to take confirmation from him as evidence that indeed he had the money and could make payment within four days of being advised of the account into which the money was to be paid. Again, I gave him the necessary warnings in connection with an undertaking and I accepted an undertaking from him to pay the £92,500 within four days of receiving notification of an account.

7. Now, on that occasion, Mr Hussain omitted to tell me that in fact he had no funds whatsoever. That he was relying upon a company, Kilimanjaro Capital Management Ltd., who I refer to as Kilimanjaro, to make the payments on his behalf, and that they were said to be trustees of a discretionary trust sitting in the Isle of Man. He also completely forgot to tell me that he was an undischarged bankrupt whose automatic discharge had been suspended.

8. Again, my concern for the matter was sufficient that I re-listed it for 6 January 2020, i.e. the day before the warrant was due to be executed. On that occasion the respondent told me that he had met the terms of the undertaking and produced a document from Kilimanjaro that confirmed that that was the case. It was shown to Mr Rees Phillips, the counsel who appeared on behalf of the claimants, and to me. Mr Rees Phillips raised the issue of the ongoing rent and on that occasion, Mr Hussain gave a second undertaking that he would pay the rent as and when it fell due.

9. None of the monies due to be paid under either of the undertakings has been paid. The alleged reason advanced by the respondent was that the applicant now wished the monies to be paid into a personal bank account, that because they were non-domiciled this would infringe tax law and accordingly the sums could not be paid. Rather than seeking to return to this court, he in fact sought to appeal the undertakings that he had been given,

commenced a further action against the applicant for recovery of rent and other damages and sought to use that as a reason for the non-payment of the monies due under the application.

10. In those circumstances, the applicants sought the committal of the respondent by virtue of the notice dated 21 January 2020. Originally that notice proceeded on seven counts. Five of the accounts I dismissed, but I found that two counts were proved, namely that the defendant had breached an undertaking given on 2 January 2020 to me by failing to pay the sum of £92,500 to the claimants, and secondly that the respondent had breached an undertaking given on 6 January 2020 to pay further sums of rent as and when they fell due.

11. The findings that I made relevant to sentence were that I was satisfied that the respondent had no intention of honouring his commitments when he gave them on 2 January and on 6 January; that particularly on 2 January he omitted crucial information in respect of the source of the funds and the fact that he was an undischarged bankrupt. I went further and found that he had engineered with Kilimanjaro the situation that came to pass and that he had therefore achieved the end that he sought, namely the suspension of the warrant and the non-payment of any sums due to the claimants.

12. Critically, I found that there was an element of premeditation in the approach to the court, that when he came to court on 2 January with his sixth witness statement, saying that he could and would be paying the arrears, he knew that that was false, and secondly when he produced the letter of Kilimanjaro to Mr Rees Phillips and myself on 6 January 2020 he knew again that that was a false document.

13. I take into account that of course Mr Hussain had time to reflect on the course that he had embarked upon, between the undertaking that he had given on 2 January and when he gave the second undertaking on 6 January. There is no indication that he had any cause to reflect that he ought not to have been taking the course that he was and to draw back from it.

14. I thus take the view that Mr Hussain set out to deceive the court and that this was no spur of the moment decision made in the heat and angst of a difficult situation that he found himself in, particularly in relation to his housing. I take into account also that undertakings that he gave were aggravated by the fact that he gave evidence to me, which suggested that he could pay the monies. Further that, prior to giving evidence, I warned him as to the seriousness of the position that giving evidence necessitated. It is also relevant that the Respondent received warnings in respect of both undertakings. There could be no element of confusion in Mr Hussain's mind as to what was required of him and the seriousness of

the situation. Against that background, therefore, I turn to consider the sentence on the respondent.

15. I sentence for the two breaches of the undertakings given in 2 and 6 January respectively. I begin with a trite but important proposition, that undertakings are meant to be performed, and when they are not, the rule of law is undermined. In this respect, it has to be recognised that undertakings are an invaluable tool to achieve a fair result in cases. It affords the court an opportunity to adopt a flexible approach to achieve sensible and beneficial interim arrangements and indeed ultimate resolution of cases. Anything that derogates from the efficiency of undertakings hits the core of the availability of this important element in the justice system. I refer to the words of Mr Justice Norris recently in the *Centek Holdings Ltd and others v Giles* [2020] EWHC 1682, when he was talking of orders he said,: 'It seems to me that courts are to be presumed to make orders for a good reason. Where such an order is breached, the harm lies in the material and deliberate breach of the order. The harm lies in the damage to the authority of the court and the rule of law.' That is equally applicable to undertakings. In this particular case the gravity of the situation was brought home to the respondent on no less than three occasions.

16. Now Mr Tear has sought to suggest that in some way, because this undertaking did not relate to a world-wide freezing order, or something of that magnitude where there would be future hearings, that in some way the breach of the undertaking is of a lesser gravity. I utterly reject that notion. Any person who comes to a court is properly advised as to the requirements of an undertaking and the consequences of breach, and must abide by the rules and there is no gradation of the gravity of the breach simply according to the factual matrix sitting behind the undertaking that was given.

17. In terms of the breaches, I view the breach on 2 January 2020 as the more serious of the breaches. It was, as I have indicated, a calculated breach based on a witness statement that contained falsehood. It was part of a pattern of dishonesty that was conceived prior to the hearing itself, and there was no realistic prospect that Mr Hussain was going to meet that undertaking.

18. In respect of 6 January, I take into account that he had had the opportunity to reflect on his conduct between the second and the sixth, again there was evidence of premeditation and that this was part of a systemic attempt to achieve an end which Mr Hussain would not otherwise have achieved. Given the above, I find that there is a high level of culpability in the way in which the respondent engineered and executed a course of action designed to

achieve the suspension of the warrant without any payment of money.

19. In terms of the harm that had been caused to the claimants, I have to observe that of course Mr Hussain is, even at this day, still resident in the property in question. It might be argued that he has received, as a result of his deception of the court, a benefit that lasts to this day. I do not sentence him on that basis. It seems to me that in February of 2020 I dismissed the appeal relation to the possession proceedings, and on that occasion permitted the possession order to be transferred to the High Court for enforcement, and so the total totality of the extra benefit that Mr Hussain achieved was that to February. He certainly could not have foreseen the advent of the COVID pandemic and the issues that have frustrated the claimants in reclaiming possession subsequently. Accordingly, I leave those out of my consideration in deciding sentence. I do however take into account that Mr Hussain knew from, on or about 7 January 2020, that he could no longer afford to live in the property, that Kilimanjaro were not going to be responsible for any payment in that respect and that he has deliberately continued to reside in the property when of course he should have left it in accordance with the possession order that had already been made by District Judge Parker.

20. The result, therefore, is that the claimants are considerably out of pocket. It is said by Mr Rees Phillips that that amounts to some £200,000. I content myself with simply saying that the amount that they are out of pocket is £100,000 plus, and of course that has been continuing week on week while the respondent remained in the property. I know nothing of the circumstances of the claimants and so can go no further in terms of evaluating the harm that has been caused to them. I have to say that the indications are that this is an investment property and that they are a wealthy family, and that therefore the harm caused is perhaps not the most significant factor in sentence.

21. In terms, then, of aggravating factors, I take into account the circumstances and the aggravating factors which I have already identified earlier in this judgment. I am deeply concerned that it remains the case that no money has been paid to the claimants. In this respect I was urged by Mr Tear, following judgment on the application, to allow time to Mr Hussain to prepare his mitigation and that that might include the payment of the rent. That was not to be the case and in this respect the witness statement of 27 July exacerbates rather than ameliorates the situation for Mr Hussain. He simply recited in his written statement that the debt remains unpaid because Kilimanjaro are refusing to pay. No explanation for that refusal was given. Now, that is somewhat extraordinary bearing in mind that their sole objection to paying was that the money was being paid into the account of a non-domicile.

That issue was resolved at the last hearing and account details were given for a domiciled account which would have met the tax regulations. Therefore, the apparent impediment for payment no longer existed, certainly after the last hearing if not earlier.

22. Mr Hussain also made a spurious point, that apparently he has a general civil restraint order, and that prevents him from bringing an action to force Kilimanjaro to pay. That is not the case, of course he can ask for permission to bring that action and if the action is well founded, he may be granted permission.

23. I reject Mr Tear's submissions that the reality is that all the respondent has achieved is a 42 day extension, and also his rather bold submission that because the undertakings were time-limited and they had therefore expired that I should not take into account continued non-compliance following that date. He sought to distinguish situations such as in *Centek v Giles* where there was an ongoing duty of disclosure whereby, with this particular case, whereby the respondent was required to pay by a certain date, suggesting that there was no default thereafter.

24. It seems to me that Mr Tear was failing to make a distinction between the facts which support a breach of the undertaking, namely, that the date has expired and the payment has not been made, with matters which are relevant to sentence, which is the fact that the respondent has apparently taken no steps to achieve the payment that had to be made. Those, it seems to me, are all aggravating factors.

25. As I have indicated in terms of mitigation, I adjourned to permit the respondent time to prepare mitigation. He has filed a witness statement dated 27 July 2020, and paragraph one of that witness statement repeats an apology that the respondent has made throughout these proceedings. He tells me in the witness statement that he lost his ability to step back and look at events, that he has experienced and experiences medical issues, diabetes, blood pressure and anxiety, and that that is supported by a printout from his medical record. He makes the point in his witness statement that both the diabetes and the blood pressure issues are recognised as rendering him vulnerable within the coronavirus regulations. He has also argued that the finding will have serious implications for him professionally and that the press have already been in touch with him, enquiring about the matter.

26. In addition to the factors set out in the witness statement, Mr Tear has urged me not to punish Mr Hussain for being a poor litigator, and suggested that he is somebody who is superficially adept at litigation but the reality is more mundane. I utterly reject this submission as irrelevant. The focus of the court has to be on the fact that Mr Hussain gave

an undertaking, he understood that undertaking and he understood the consequences of that undertaking if he breached them. This is not a case of being a good or a bad litigator. It is a case of a member of the public coming before the court, making a promise and then breaking that promise. The punishment of the court is not concerned with being a poor litigator but being dishonest. Mr Tear has urged me not to take into account the fact that Mr Hussain has absented himself on a number of occasions as I identified in an earlier judgment that I gave today. I am with him in this respect, it is not my job in passing sentence today to punish him for his inability to come to court and I leave that matter out of consideration in terms of sentence.

27. I am bound to take into account the fact that there has been no plea of guilty in this matter and that the respondent has sought to contest it through to judgment. Indeed, I would go further and say that I am not satisfied that the respondent has shown any contrition or remorse for his conduct in connection with the matter. As I have indicated, the constant theme in his documents has been to make a guarded apology to the court. Thus in an earlier witness statement he said this: 'Without making any admission at all, the defendant makes it clear that he personally offers a full, deep and sincere apology to His Honour Judge Lethem if his conduct is found not to be of the required standard, whether it can be committed or not. The defendant has been barred from explaining the issues in this matter properly by the claimants' launching the committal application without considering other ways of resolving the matter.' It seems to me that that neatly encompasses the respondent's approach to the matter, which is to try and heap the blame for the difficulties that he is in upon the claimants, to make any apology that he is offering guarded and contingent on the findings of the court, and thus to obtain the benefits of the apology without any detriment to himself. I cannot accept that this or any of the other apologies are honestly meant.

28. I take into account in this respect that the reason for the non-payment of the monies was said to be the non-domiciled account. That was resolved on the last occasion and yet there is still no payment, worse still, there is still no explanation from the respondent. Therefore, I regard his apology as amounting to no more than an acknowledgement that he has breached the undertaking and has been caught doing so, rather than as a genuine reflection of remorse.

29. I turn to consider health issues, and I accept from the medical printouts that he does indeed have those health issues. I have not had the benefit of any medical report though it seems that one was contemplated at the last hearing but has not been filed. Accordingly, I have

had no real opportunity to develop the health issues beyond the simple printout that I have. However, health issues do have a traction in sentencing at this particular time, and in this respect I take into account 'The application of sentencing principles during the COVID-19 emergency' dated 23 June 2020 in which the Sentencing Council said this:

> 'In deciding whether a custodial sentence is necessary, the court must follow the approach set out in the Sentencing Council's Imposition guideline. This guideline requires the court to consider first, whether the custody threshold has been passed. It makes clear that even where the court decides that the custody threshold has been passed, it must go on to consider whether it is unavoidable that a custodial sentence be imposed. If a custodial sentence is unavoidable, the court must then decide what is the shortest term commensurate with the seriousness of the offence and must consider whether the sentence can be suspended.'

That, it seems to me adds nothing to the jurisprudence prior to the epidemic. However, the guidance goes on to refer to the comments in the Attorney General's reference, *R v Manning*, [2020] 4 WLR 77, where the court said this:

> 'The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon the offender, and where appropriate upon others as well. Judges and magistrates can therefore, and in our judgement, should, keep in mind the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods that would otherwise be the case - currently 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of COVID-19.'
>
> Paragraph 42: 'Applying ordinary principles where the court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant and further decisions as to the necessary length and whether it can be suspended. Moreover, sentencers can and should bear in mind the Reduction in Sentence Guideline that makes it clear that any guilty plea may result in a different type of sentence or enable a magistrates' court to retain jurisdiction rather than committing for sentence.'
>
> The guidance goes on: 'Throughout the sentencing process and in considering all the circumstances of an individual case, the court must bear in mind the practical realities of the effects of the current health emergency. The court should consider whether increased weight should be given to mitigating factors and should keep in mind that the impact of immediate imprisonment is likely to be particularly heavy for some groups of offenders or their families.'

30. That, it seems to me, very much mirrors the approach taken by Mr Justice Chamberlain in

Chelsea Football Club Ltd v Gary Nichols [2020] EWHC 827 (QB). I accept Mr Tear's analysis that the sentencing guidelines by and large relate equally to somebody who is healthy as opposed to somebody who is not healthy, or who is in a vulnerable category. Thus he has relied upon the decision of Mr Justice Chamberlain in the *Chelsea Football Club* case, to say that in that case the length of sentence was altered by the fact that the respondent was in a vulnerable category and that I ought to take that into account. Indeed, he submitted that this is a case that is suitable for a reprimand as opposed to a custodial sentence, but as a fall back situation, if a custodial sentence is inevitable then it should be a short custodial sentence and should be suspended. He suggested that will leave the sword of Damocles hanging over the head of Mr Hussain and encourage him to be honest and straightforward with the courts in future.

31. I turn then to consider my sentence and bearing in mind the approach laid out by the court of appeal in *McKendrick v The Financial Conduct Authority* [2019] WCA Civil 4524, I consider first whether the custody threshold is met. In my judgement the custody threshold is met and that the starting point for sentence must be 18 months. That reflects the cynical and premeditated approach of the respondent in connection with this matter. It reflects also the fact that the breach remains unremedied and I am not persuaded that that is due to Kilimanjaro as opposed to the obduracy of the defendant. It also reflects the lack of any plea or contrition in connection with the case.

32. I recognise that an 18-month starting point is towards the upper end of the maximum sentence of 24 months. I bear in mind also that of course the sentence has to be the minimum necessary to meet the facts of the case. I do take into account the passage from *McKendrick* referred to by Mr Tear, that 'because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt, which can be imagined, rather it will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and therefore justifying sentence at or near the maximum.' For the reasons that I have already indicated, this really was a particularly egregious breach of undertakings, particularly bearing in mind the circumstances in which the undertakings were given.

33. In terms, then, of considering the 18-month sentence, I take into account the mitigation urged upon me by Mr Tear. The COVID references to which I have already made are important not only in relation to suspension but also in relation to the length of sentence. As Mr Tear correctly points, out, the sentence will be less onerous for somebody who is

healthy and well as opposed to somebody who is in a vulnerable category, and it is easy to see that the latter category are likely to have heightened degrees of anxiety because of their increased risk and vulnerability. That is, it seems to me, an important factor to take into account. I also take into account the *Chelsea Football Club* case, and that in appropriate cases the length of the sentence can be reduced because of the vulnerability of a particular respondent, and in those circumstances, weight attaches to those considerations.

34. I accept, also, Mr Hussain is a man of good character, and that the shock of incarceration would be one to have a salutary effect upon him. I take into account also, the effect upon his reputation, the fact that he has been found guilty of a breach of his undertakings and in contempt of court. I take into account also, that reputation and integrity are important in the world of banking, and that this potentially has significant ramifications for his ability to earn an income. Mr Tear has deliberately refrained from mentioning any aspects of Mr Hussain's family life, and I cannot therefore take that into account.

35. I must therefore step back and balance the aggravating factors that I have identified, together with the mitigating factors that I have taken into account. Balancing those factors out and particularly taking into account the COVID situation, I have decided that the sentence in this matter should be one of 12 months.

36. Now, the question is, how that is apportioned. In *McKendrick*, the court of appeal made it clear that in an appropriate case it was important when sentencing to differentiate between the punitive / deterrent element and the coercive aspects of the sentence. I bear in mind particularly that this is a case where there is an ongoing default, and therefore the coercive powers of the court are engaged. Accordingly, therefore, I find that the punitive element if the sentence is eight months and the coercive element is four months. It follows therefore that Mr Hussain can apply to court to purge his contempt and in this particular case I am quite satisfied that it is in his gift to pay the monies that are due to the claimants.

37. The question therefore becomes whether I can suspend this sentence. I have decided that this is not a case where the sentence can be suspended. I take into account that this was a serious breach of an undertaking, involving premeditation and planning, that it was not an isolated incident but one which took place over several days and two hearings, the complete lack of contrition of the respondent and the fact that the contempt continues. In those circumstances the respondent is sentenced to a term of imprisonment of 12 months.

38. The 12 months will attach to the breach of the 2 January order. I said I impose a like sentence in respect of the 6 January order to run concurrently. I take the view that the two

breaches are part of the same enterprise. Accordingly, the respondent will serve one half of that sentence, namely six months.

End of Judgment

Transcript from a recording by Ubiqus
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com

Ubiqus hereby certify that the above is an accurate and complete record of the proceedings or part thereof