Case No: J01BM473

IN THE BIRMINGHAM CIVIL AND FAMILY JUSTICE CENTRE
COUNTY COURT

33 Bull Road
Birmingham
B4 6DS

Date: 30 September 2022

Start Time: 12.08 Finish Time: 12.35

Before:
RECORDER VERDUYN

- -

Between:

BIRMINGHAM CITY COUNCIL

Claimant

- and -

PHILIP GEORGE McKENZIE

Defendant

- -

- -

MR SANGHERA appeared on behalf of the **CLAIMANT**
There was no appearance on behalf of the **DEFENDANT**

- -

Approved Judgment

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RECORDER VERDUYN:

1. Birmingham City Council has applied to the court for the committal of Mr Philip George McKenzie. The circumstances are that Mr McKenzie is a tenant of flat 27 Wyrley House, it is the sixth floor flat in a high rise block, which is used to house people in need of sheltered accommodation, and people over the age of 50. I believe his approximate age is 62. There is no known current medical condition, although, when he was granted the tenancy, it appears that he had a history of some depression. The tenancy was granted in August 2015.

2. The Council were in receipt of complaints about his behaviour, and a substantial litany of complaints led them to apply to this court for an injunction for his anti-social behaviour. An interim order was made on 23 August 2022, and the application eventually came before Her Honour Judge Truman, who made a final order on 2 September 2022. The interim order was properly served upon Mr McKenzie, and there is an affidavit of service in relation to that showing service was on 26 August 2022.

3. On 11 September, after having been served with the interim order, but not yet served with the final order, he proceeded to breach the order in a number of ways. I will come to that in a moment.

4. The interim order was in the following terms, firstly: "Not to use or threaten violence, harass or intimidate Amanda Mallett of Flat 31, 7th floor, Wyrley House, or Beth Lloyd, or any person lawfully present at Wyrley House, Scafell Drive, Stockland Green, Birmingham". Secondly, not to enter the seventh floor of Wyrley House. For the avoidance of doubt, this does not include being in the lift travelling through or stopping at the seventh floor, although I know that the evidence is that, as a sixth floor occupant, his lift would only go to even numbered floors only. Thirdly, behaving in a manner likely to cause nuisance or annoyance, including, but not limited to, banging, shouting, screaming noises so as to be audible beyond the boundaries of flat 27. Or being verbally abusive to any person in Wyrley House. And a power of arrest was attached to that. The interim order was made without him being on notice. The final order was made on notice, but he did not attend the hearing. As I say, he was served with the interim notice.

5. The allegations which are brought before me were: One, that on 11 September 2022, at approximately 9.50 am to 10.05 am, in breach of term one of the orders, the respondent harassed or intimidated Amanda Mallett by following Amanda Mallett into the common room at Wyrley House and coming very close and into her personal space. Two, repeatedly saying to Amanda Mallett, and getting louder as he did so, words, including "you got everyone involved, the fucking Council, fucking police, fucking support workers, you think I'm stupid, you got your friends to lie for you." Three, following Amanda Mallett into the laundry room, standing in the doorway, and, as the automatic door closed behind him, the respondent continued harassing and intimidating Amanda Mallett by standing in a position so that she could not leave the room, and by being abusive and entering her personal space. Four, following Amanda Mallett to the door of the flats, that is the external door, whilst

continuing to be abusive. Those are the allegations that were made, and resulted two days later in him being arrested and brought before District Judge Rouine, a very experienced judge of this court. The District Judge produced an order on that occasion. He had heard counsel for the claimant. The defendant appeared in custody, as I have said, having been arrested under the power of arrest. The Order related the following: Upon the defendant requesting legal representation and no duty advice/solicitor being available at court; and upon the Council making an application for committal following the breaches alleged of 11 September 2022; and upon it being clear to the court that the defendant denies the allegations made against him in absolute terms, the court not being prepared to deal with the substance of the application in the absence of any representation of the defendant; and the court adjourning the committal application to enable the defendant to obtain legal advice; and upon the court stressing to the defendant the real significance and importance of the need to obtain such advice before the next hearing; and upon the defendant confirming to the court he understood fully the terms of both the injunction and power of arrest and did not require any further explanation; and upon the defendant being personally served with the final injunction and power of arrest order dated 2 September made by Her Honour Judge Truman; the matter was then adjourned to 30 September 2022, that is today, at 10.30, to be heard at Birmingham Civil and Family Justice Centre, 33 Bull Street, with a time estimate of one hour. That address is the address, of course, that Mr McKenzie was at at the time that this order was made, and he was then released from custody forthwith, and costs were adjourned.

6. I note that there was no suggestion from Mr McKenzie that he was unaware of the injunction that had been made against him.

7. Furthermore, as will become clear, I accept the evidence before me, which includes Mr McKenzie not only being abusive and swearing, but reference to Miss Mallet involving the Council, police and support workers. The application that is before the court is consistent with him understanding that he was being pursued to control his conduct. That seems to have been a major source of his complaints at the time of 11 September.

8. This matter came before me this morning. Mr McKenzie did not attend. I heard evidence, which I accept, that he was seen to leave the property in his car, from his flat, that is to say the block of flats at Wyrley House, at 9.10 this morning. That is the evidence which I entirely accept from Miss Mallett, who was watching out for him going before leaving the building to be collected by the representative, the housing officer, of Birmingham City Council. She heard his car door slam and saw him driving away as she had been on the phone to that representative, who also said to her that he had left. I accept that evidence.

9. I also accept the evidence of the process server that the door to Mr McKenzie's flat had been used. He marked the door after he had put the materials relating to this hearing through the letter box. When he came back to make a further attempt at personal service, he saw that the door had been opened in the meantime judging from the state of the marker. He made three

attempts to serve Mr McKenzie personally without success. I am satisfied that I can dispense with personal service in relation to this hearing in the circumstances described by the process server in terms of the efforts he made, but also because Mr McKenzie was present and was told of the time and place and date of this hearing by District Judge Rouine. In those circumstances, I am satisfied that I can dispense with further service, and I am satisfied that it is proper to continue today.

10. Mr McKenzie, on the evidence, was well able to attend court should he have chosen to do so, and it is his choice to fail to attend court. Matters can then properly and justly continue in his absence. If he has got any good reason for not being here, I bear in mind that the Civil Procedure Rules would allow him to apply back to the court to set aside this judgment, were he to make out those reasons in the event. But, being satisfied of service, and being satisfied that he had been present in his home this very morning (the home where papers had been delivered by the process server) and he had absented himself, I am satisfied that it is proper to continue without further attempt at service and, even though there is nothing expressed in terms in the Order of District Judge Rouine saying that the court would proceed in his absence. It was implicit in what the district judge said, it was implicit in the covering letter with the papers from the Council (which fairly warned Mr McKenzie of the seriousness of this matter) and which had been put with the documents which were served by the process server at his address.

11. The allegations which I have read out were supported in two ways by evidence. Miss Mallett has come to court and she has given sworn evidence. She had confirmed her witness statement which detailed these matters, but she had also been orally taken carefully through that evidence. I have paid careful attention to her demeanour and I am satisfied that what she was telling me was the truth. That is, as set out in the particulars of the breach, namely that she had gone that morning to do her washing, that she had left her flat and taken the lift down to the ground floor and had fobbed the door to allow her into the corridor leading to the common room, beyond which was the laundry, Mr McKenzie was at the other end of that corridor, in the doorway to the common room. There was nothing wrong with him being there, but it was a surprise to Miss Mallett and she stepped back, letting him pass down the corridor, out of the door and past her. Had that been all that he had done, then there would be no complaint.

12. However, when she walked down the corridor, switching the light on as she went, he followed her, and he followed her into the common room and ultimately, even though the description of the laundry is that it is a small room with very limited space, he followed her into the laundry room. The door to the laundry also being automatic, closed behind him, leaving Miss Mallett very conscious that she had been followed by this man with whom she had had considerable disagreements, and whose behaviour had been unacceptable and had led to the making of an injunction order. She had been followed by him down the corridor, through the common room, and now was in a very confined space with him.

13. During none of those events does it appear that Mr McKenzie was silent. He spoke to Miss Mallett throughout, and the second piece of evidence corroborating what she says to me, is that she had made a recording on her phone of what he was saying. She says, and I accept, that it was her habit that when she left the flat, she switched her mobile phone on to record in order to offer herself some protection or reassurance in terms of being believed in respect of any conduct which might happen thereafter. I have listened to that tape recording from the closing of the doors at the entry of the lift, and one can hear the lift announcement. You can determine the door opening, and you can hear the sequence of events, over about five minutes after that. During that time, and it would appear from the point at which Mr McKenzie had started to follow her into the corridor, Mr McKenzie is speaking to her in very forthright terms about complaints that she had made; complaints which he was saying were unwarranted. He was making complaints about the noise which he claimed was coming from Miss Mallett's flat directly above his flat. He increased the tone and loudness of his voice over times, to the point where he was raising his voice, had a raised voice, or was shouting. At one point it sounds as though he was shouting. He was swearing, and he was increasingly working himself up, both in terms of volume, the content of expletives and the apparent anger which he was expressing.

14. This was audible on the tape in the clearest of ways and in the following description of it. It was plainly very distressing for Miss Mallett to be followed closely in that way, and then enter into a confined space with somebody raising their voice in the manner that I heard. It is plainly a very distressing and threatening circumstance. It is an intimidating situation, and it was a sustained course of conduct. It was not a question of somebody passing in the corridor and making a comment; it was somebody being deliberate and determined, following down the corridor, through rooms, into a confined space, and then indeed following her out of the building. Miss Mallett says that she tried to avoid any eye contact with him while he was speaking; I accept that. There is no suggestion that this was a conversation within the tape. She had loaded up the laundry machine and left as quickly as she could, being followed to the exterior of the building. I accept that that is a course of conduct that is harassing and was deliberately harassing of Miss Mallett by the defendant, Mr McKenzie.

15. Given the way in which she gave her evidence, the consistency of her evidence, the detail of her explanation and the corroboration of that evidence by the recording, which was in every particular way consistent with the evidence I have heard, I am satisfied beyond a reasonable doubt that what she was telling me was the truth and these four breaches have indeed been made out in front of me.

16. I do not consider that it is necessary to adjourn sentencing for breach in this case. The evidence against Mr McKenzie is overwhelming and he should have expected sentence to be considered today, if the allegations were proven as they have been. In deciding to proceed, I also have regard to cost to the council and the stress to Miss Mallett that would result from delay. It is

important to emphasise to people who breach injunctions that punishment will be swift and sure.

17. On that basis, I then proceed to consider what the sentencing options are before me. Counsel has taken me to the guidelines in relation to this issued by the Sentencing Council for a breach of a criminal order. There is authority that I should have regard to those guidelines, with modifications: firstly in the criminal court it is a maximum of five years' sentence, whereas in this court it is a maximum of two years' sentence, and so one has to look at the recommended sentencing proportionately to that difference; and, secondly, the options in the criminal courts of primarily custody or community order, high level or low level, are unavailable in this court but a fine can be ordered.

18. The sentencing works on a matrix. On one level the matrix looks at the culpability of the offence. Culpability A is a very serious, more consistent breach. Culpability C is a minor breach. Culpability B is between the two. I find this case lies firmly within Culpability B. By that I do not intend to trivialise what has taken place, it is a serious matter, but it is not a persistent breach, it was one sustained incident, obviously of a serious nature, and I would put it at the top end of Culpability B.

19. In terms of harm, the categories are Category 1, breach causing very serious harm or distress; breach demonstrating continuing risk of serious criminal anti-social behaviour. Category 3, breaches causing little or no harm or distress; breach demonstrating continuing risk of minor behaviour. Category 2 falling between the two. In terms of the category of harm, I am satisfied that it is a Category 1. The reason for that is that this is the context of the particular building being sheltered accommodation. It is for people who are vulnerable, and Miss Mallett has her vulnerabilities and she was very plainly very distressed. It was a very distressing circumstance for her, particularly in terms of proximity with Mr McKenzie and volume of his speech. She described how she left the building rather than risk going back to her flat, and she went to a social group she was attending. That level of distress was consistent with the serious nature of what had taken place, and it had a particular impact or effect in the context of housing; she did not feel safe to return to her own home. That is a matter which must demonstrate the distress that she felt, and it does underline the seriousness of the breach.

20. Looking at the matrix for a Culpability B, the starting point is up to a year in custody on that five-year range, but, with a bracket down to a high level community order.

21. There are other ways of considering offences in cases of this sort and other approaches which can be taken into account. Although not referred to by name by counsel for Birmingham City Council, he nevertheless referred quite properly to the matters which were raised in *Leicester City Council v Lewis* [2001] HLR 37 (CA). The Court of Appeal there suggested that when considering matters of sentence, one should look at who the order was to protect and from what. Miss Mallett is one of the people who is named in the first part of the injunction for requiring protection of this sort, and she is specifically to be protected from harassing and intimidating behaviour, both

of which I think are an appropriate description of what took place in this case. I can consider whether that sort of order is framed as generic, general or specific, this is plainly specific; whether the offence was deliberate, it was; whether it was serious, and I do consider it serious; whether the defendant was of good character. I find that a little difficult to apply. Obviously, he is not in the sense of being a character who has been subject to an injunction order on the basis of behaviour. On the other hand, this is not a case of repeated breaches of an injunction which would be a particularly serious matter. There is an aggravating feature. The aggravating features which have been impressed upon me is that this offence took place not long after the making of the interim order; he was served on 26 August and this was on 11 September. I do take that into account.

22. I also take into account that there is no mitigation. Mr McKenzie has deliberately, it seems, absented himself from today's hearing. When he was in front of Judge Rouine, instead of doing what he should have done (admitting that he had committed the offences in question) and instead of throwing himself on the mercy of the court, he denied the offences. That, therefore, leaves me with a situation where I have to decide, having regard to those guidelines, what the appropriate penalty should be in these circumstances, and that is no easy decision.

23. It is made more difficult as a decision because it is very difficult to know the wherewithal of Mr McKenzie. Fundamentally here we have a choice between a custodial sentence, which would be short, given this is a first offence and serious, but not in the most serious category and, in the alternative, a fine, which would also mark the disapproval of the Court and the seriousness with which the court takes this matter.

24. I bear in mind that the practical issues which arise in circumstances of this sort in the sense that, for example, if there was an immediate term of imprisonment, then that would be followed in fairly short order, after a short sentence, with Mr McKenzie returning to his property immediately beneath the property of Miss Mallett.

25. Having said that, of course any penalty which I impose is going to have an impact on the relationship between these neighbours, but there is an injunction in place to protect, and it is important that the force of that injunction is maintained. It is also important that the person who has committed a serious breach in relation to an injunction should know that that breach is going to result in punishment. It is through that salutary reminder that court orders are to be obeyed: punishment will follow if broken. Through punishment, defendants who are guilty of breaching an Order are encouraged to respect orders, to mend their ways and to behave in future.

26. Taking matters in the round, I consider that the appropriate penalty in this case is a fine, something which Mr McKenzie will have to pay over a significant period of time, particularly since he is on benefits. He has a car, so he can afford to insure that car and tax that car, and drive that car, even if it is an old model, and it seems to me that, notwithstanding that he is on benefits, with an asset of that sort, the fine is not required to be a small one. I

think this is a case which is very much borderline in terms of the custody threshold, and it is for that reason that I prefer a fine on first offence. I am going to fine Mr McKenzie the sum of £500 in relation to the conduct which has taken place. I want to make sure there is a recital within the order that he remains at very serious risk, in circumstances of any further breach, of a term of imprisonment.

(This Judgment has been approved by the Judge.)

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