Case No: BL-2021-000401

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 07/08/2024

Before :

Sir Anthony Mann, sitting as a judge of the High Court

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Between :

STEPHEN ALBERT FINBAR O'LEARY	**Applicant**
- and -	
TERRY ALAN DANIEL	**Respondent**

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- -

Mr David Brounger (instructed by Debidins & Co) for the Applicant
Mr Vikas Mehta, solicitor advocate, of Taylor Rose for the Respondent

Hearing dates: 18th July and 1st August 2024

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JUDGMENT

Sir Anthony Mann:

1. This is an application by the claimant, Mr O'Leary, to commit the defendant (respondent) Mr Daniel to prison for his breaches of what are said to be undertakings given to the court. The undertakings were all undertakings not to dispose or deal with a list of properties owned by Mr Daniel or his companies. On this application Mr O'Leary was represented by Mr David Brounger of counsel and Mr Daniel by Mr Vikas Mehta, a solicitor-advocate with higher rights of audience.

The undertakings

2. The undertakings are contained in an order in quasi-Tomlin form, adjusted to accommodate the undertakings which are said to be given to the court and which are not in the schedule to the order. I use the expression "quasi-Tomlin form" because the order contains elements going beyond the contents of the original "Tomlin order", but nothing turns on that and I will call the order which lies at the heart of this application "the Tomlin order".

3. There is a background to the order which is said to be significant. The parties were for a period business associates in property development. In 2008 Mr O'Leary lent money to Mr Daniel in the sum of £220,000, with interest of £90,000 to be paid. Mr Daniel accepts that this was not paid on time. However, there then arose a wider dispute in which Mr O'Leary made wider ranging claims which are said by him to have been claims to over £4m. Apparently there were claims to some sort of partnership, disputed by Mr Daniel, and Mr Daniel disputed the moneys owing. At the hearing before me Mr Mehta sought to make much of the fact that there was no partnership agreement as if this meant

there could be no partnership. That is, obviously, a fallacy, but as will appear nothing turns on that for the purposes of this application, contrary to the suggestions of Mr Mehta and his client.

4. Be that as it may, the dispute obviously involved claims going beyond the loan. After it was intimated the parties mediated in July 2020 and the result was a Compromise Agreement in settlement of the dispute. Among the terms of that agreement was that Mr Daniel would pay Mr O'Leary the sum of £1.5m and charge a number of properties (being some of the properties which are the subject of the present application) with payment of that sum.

5. Mr O'Leary then complained that Mr Daniel was in breach of that Compromise Agreement and issued proceedings within which he applied for summary judgment. Those proceedings were compromised by the Tomlin order and a Settlement Agreement annexed to it.

6. It is important at this stage to note the following facts about those settlements. First, Mr Daniel was represented by solicitors in the first dispute, at the mediation and for the purposes of the Compromise Agreement. Second, when there was litigation after the Compromise Agreement Mr Daniel filed a Defence which took various points but did not complain about duress or any other factors which might have vitiated the Compromise Agreement. Third, when the Tomlin order was negotiated and signed Mr Daniel was again legally represented by solicitors and counsel. The Tomlin order, or at least its substance, was agreed between counsel; Mr Daniel said he did not doubt that he had counsel representing him, the Tomlin order records in a recital that he did, and I find that he did have that representation.

The Tomlin order and Settlement Agreement

7. These documents, and particularly the Tomlin order, are the documents on which the current application is based, so it is necessary to set out their terms, so far as relevant. The Tomlin order reads as follows:

> "UPON the application of the Claimant by application notice dated 12 May 2021
>
> AND UPON hearing David Brounger of Counsel for the Claimant and Joshua Hedgman Counsel for the Defendant
>
> AND UPON the Defendant undertaking to the Court:
>
> 1. By no later than 30 June 2022:
>
> (a) to transfer to the Claimant the dwelling house known as and situate at 4 Freelands Gate, Freeland, Witney Oxon OX20 8GD constructed on part of the land [described] free from encumbrances; or
>
> (b) to pay the sum of £600,000 to the Claimant.
>
> 2. (whether on his own part or as director of any company that has legal and/or beneficial title to the following properties) not to sell, charge or deal with (save in respect of the grant and management of any assured short hold tenancies) the following properties without the Claimant's consent:
>
> (a) 4 Freelands Gate, Freeland …
>
> (b) 84 Mount Pleasant Lane, Brickett Wood …
>
> (c) 89 Bridgwater Road, Ruislip …
>
> (d) 3a Thurlstone Road, Ruislip …
>
> (e) 2a Tiverton Road, Ruislip …
>
> (f) 3 Freeman Close, Stoke Poges …
>
> (g) 16 Nought Common Road, Uxbridge …
>
> (h) Clear Farm Cottage …
>
> (i) Church Farm, Crowhurst …
>
> (j) 28 Rogers Lane, Stoke Poges …

(k) 1 The Birches, Dorney Wood …

(l) Great Oaks, Green Lane …

…

And to be bound by this undertaking until all payments under this order, the Settlement Agreement attached as a schedule hereto and pursuant to the undertakings herein have been made;

AND UPON the Court giving notice to the Defendant that he may be held to be in contempt of court and imprisoned or fined, or his assets may be seized, if he breaks the promises he has given to the court in the Undertakings herein;

AND UPON the Claimant and Defendants having agreed to the terms set out in the Settlement Agreement attached as a Schedule hereto;

IT IS BY CONSENT IT IS ORDERED THAT [sic]

1. All further proceedings in the claim herein be stayed except for the purpose of carrying the terms of the agreement into effect and for that purpose the parties have permission to apply.

2. The defendant shall pay the Claimant's costs of the claim agreed in the sum of £30,000 plus VAT…

3. This order shall be served by the Claimant on the Defendant.

4. The court has provided a sealed copy of this order to the serving party's solicitor…"

8. The order is then signed by Mr O'Leary and Mr Daniel personally and it goes on:

"I understand the undertakings that I have given and that if I break any of my promises to the court I may be sent to prison, or fined, or any assets may be seized, for contempt of court."

That statement is then followed by a further signature of Mr Daniel plus the date (14th January 2022), making it his statement.

9. The Settlement Agreement, which is the schedule to the Tomlin agreement, is a relatively short document. It recites the Compromise Agreement, a dispute as to whether Mr Daniel was in breach of it and proceedings taken by Mr O'Leary to enforce it, and in recital (F) it records that the parties had settled their differences and had agreed terms for the full and final settlement of their "Dispute" and wished to record the terms of settlement on a binding basis in that agreement and in the Tomlin order. Its relevant terms can be summarised as follows:

i) Mr Daniel was to pay Mr O'Leary £29,250 by 28 February 2022.

ii) Until payment of the sum of £600,000 referred to in the Tomlin order, Mr Daniel was to pay Mr O'Leary £2250 per month.

iii) "As further security for the payment of £1.5 million due under the Compromise Agreement" Mr O'Leary was to provide legal charges over the properties numbered (h) to (l) in the Tomlin Agreement. The £1.5 million was to be paid in three £500,000 instalments. In the event of a failure to pay in instalments the total sum became due immediately.

10. This agreement again bears the personal signatures of Mr O'Leary and Mr Daniel.

11. A Deed of Variation dated 24 June 2022 varied the Tomlin order and the Settlement Agreement. The significant variation for present purposes is a

variation to "Undertaking number 2 of the order" by adding, immediately prior to the words "And to be bound by this undertaking…" The following words:

> "And the net proceeds of sale of each of those properties (following deduction of any reasonable costs of sale, reasonable legal costs and redemption of financial charges) shall be paid to the Claimant within 5 working days of completion of the sale of each of those properties (such sums to be accounted for against the sums payable in this order and settlement agreement)"

12. The combined effect of the terms of the Tomlin order itself and the scheduled agreement has a significance to this application. The two documents obviously provide for Mr Daniel to pay money to Mr O'Leary. They also provide a measure of security. The Settlement Agreement actually provides for some specific security. Otherwise the documents do not technically create actual security, and Mr Mehta was correct to observe that the order contained no power of sale. However, it is apparent, particularly after the deed of variation, that the parties apparently intended that properties could be sold in order to reduce the debt, but subject to that they were not to be sold until the debt was paid. I reject Mr Mehta's submission in his final written submissions that Mr O'Leary was obliged to give consent to sales. There is nothing express or implied in the order or the Settlement Agreement which had that effect. He would doubtless wish to do so if he was satisfied with the fate of the net proceeds of sale, and indeed several properties were sold with his consent on that basis; but there was no obligation on him to give his consent.

Whether the undertakings in the Tomlin order are enforceable by committal

13. The claim on this application is that Mr Daniel disposed of some of the properties identified in the Tomlin order without the consent of Mr O'Leary.

Before turning to the facts of that matter it is appropriate to get some prior issues out of the way.

14. The first is whether the undertakings are enforceable by committal at all. It was not disputed that undertakings given to the court can be enforced as if they were matters actually ordered by the court. However, Mr Mehta maintained that the undertakings in this case did not fall within that category. He submitted that the undertakings were contractual because they appeared in a Tomlin order, and Tomlin orders take effect as a contract and are only enforceable as such, albeit with the benefit of being able to apply directly within the Tomlin order proceedings without having to start fresh proceedings.

15. Mr Mehta is correct in how he analyses how Tomlin orders work, but his submissions apply only to the terms appearing in the schedule which are subject to the permission to enforce given by the order. The undertakings in this case do not appear in the schedule. They appear in the body of the order. Furthermore, it is as plain as a pikestaff that the undertakings are undertakings given to the court, and not undertakings operating purely contractually. The recital says "AND UPON the Defendant undertaking to the Court …" (my emphasis) make that clear and apply as much to paragraph 2 (containing the bar on disposal) as to paragraph 1. If there were any doubt about that (and in fact there is not) then the closing acknowledgment, signed separately by Mr Daniel, confirmed the status of the undertakings. There is therefore nothing in this somewhat surprising point taken by Mr Mehta. It is technically open to Mr O'Leary to enforce the undertakings given to the court by a committal application.

16. Next it is useful to get formality points out of the way. At the opening of the application Mr Mehta expressly accepted, on behalf of his client, that there were no formality challenges in relation to the application to commit (form and service). Nor was any point taken about service (or non-service) of the Tomlin order. The matter proceeded on the basis that either the order was properly served or that service was unnecessary (because Mr Daniel knew about the order – see his signatures on its face and the circumstances in which it was entered into).

17. However, having clearly said in opening there was no point about the form of the application, in his written final submissions Mr Mehta submitted that there was a defect in that the application notice failed to contain a statement as to whether a penal notice was endorsed on the Tomlin order as apparently required by CPR 81.4(e), so the application notice was deficient. He is wrong about that. The application notice did contain such a statement. Paragraph 9 of the standard form used by Mr O'Leary has the question: "Did the order include a penal notice?", and below it the "Yes" box is ticked. So the application notice complies.

18. Mr Mehta's real point was apparently that the order did not contain a penal notice. He is wrong about that. While the order does not contain a penal notice in the traditional form in the traditional place at the head of the order, it does contain the equivalent in the paragraph beginning "AND UPON the court giving notice …". That is the equivalent of a penal notice. Furthermore, the purpose of adding a penal notice in any form (which is to draw attention to the important terms of the order and to warn of sanctions) is rendered unnecessary by Mr

Daniel's signature of the paragraph at the end in which he acknowledges that he is aware of the effect of the order. There is therefore nothing in this point about penal notices.

The witnesses

19. Both Mr O'Leary and Mr Daniel gave evidence. Mr Daniel put in both an affidavit and a witness statement. They both covered essentially the same ground and in the end Mr Daniel relied only on his affidavit. Much of the cross-examination of Mr O'Leary turned on matters which I consider to be peripheral to this case (the history of the relationship between the two men), but insofar as his evidence was contested I found Mr O'Leary to be a basically credible witness. Mr Daniel was less credible. He was prone to what seemed to me to be wild allegations of pressure and was evasive about the motivation and effect of some of his actions.

20. I make one further observation about the oral evidence. Because this was a committal application I allowed a considerable degree of latitude to Mr Mehta in his cross-examination of Mr O'Leary. Much of it turned out to be, in my view, not relevant or useful, but I considered it right to allow it because of the nature of this application.

The legal requirements for a contempt

21. There was no dispute as to the basic requirements for establishing a contempt of court on a committal application. The three requirements are set out in the now oft-quoted judgment of Christopher Clarke J in *Masri v Consolidated Foods* [2011] EWHC 1024 (Comm):

> "150. In order to establish that someone is in contempt it is necessary to show that (i) that he knew of the terms of the order; (ii) that he acted (or failed to act) in a manner which involved a breach of the order; and (iii) that he knew of the facts which made his conduct a breach."

22. Mr Mehta's written submissions suggested that there was a further mens rea element in that it was required that the contemnor should actually intend to breach the terms of the order. However, in his final submissions he agreed with Mr Brounger that that was not an additional element – see *Masri* at paragraph 155 and *Isbilen v Turk* [2024] EWCA (Civ) 568 at para 45.

23. It is trite law that a finding of contempt must be based on findings of fact beyond reasonable doubt. Mr Brounger accepted that that was his burden. All my findings below are on that basis.

Mr Daniel's knowledge of the undertakings

24. It is plain, and I find, that Mr Daniel knew of the terms of the undertaking. His affidavit, in referring to the mediation, does not in any way suggest ignorance of the document that was the outcome, or its contents, and the terms of the undertakings are obvious. Furthermore, he actually signed the terms of the order himself to signify his agreement, and the order recites that the Court explained its effect. Stronger still, Mr Daniel signed the separate acknowledgment that he understood the effect of the undertakings. From time to time thereafter his solicitors sought, and in some cases obtained, the consent of Mr O'Leary to dispose of certain of the properties in the list. So it is quite clear that Mr Daniel knew of the order, and knew of the consequences of breaking it. Vague attempts (and they were no more than that) to suggest otherwise at the hearing before me are to be rejected.

The alleged breaches

25. The alleged breaches arise out of transactions in relation to some of the restrained properties, whose essential facts are not in dispute. The application notice clearly sets out what the alleged breaches are said to be in relation to each property in relation to which the point arises.

Great Oaks, Green Lane (property (l) in the undertakings)

26. This property was owned by Great Oaks Cottge Ltd. Mr Daniel was a director of that company. It was therefore a property covered by the undertakings because of that status – see the reference to director in the undertaking. The company, through Mr Daniel, granted a charge in favour of London Bridging Finance Ltd ("LBFL") which was registered on 19th December 2022. It was not denied that Mr Daniel procured this charge as director of the company (he admitted control of the company) and I find that he did. An email of 23rd January 2024 send by his solicitor which purported to explain what had happened to each of the restrained properties ("the January email") said that the charge was to enable a payment under the Tomlin order, but in his cross-examination Mr Daniel resiled from that and said the charge was to enable refurbishment of an otherwise derelict property. It is also right to say that the refurbishment version was alluded to in a later email of 14th March 2024. I accept this second version, which means that in this case Mr O'Leary received no part of the proceeds of this charge. (I observe that this explanation falsifies a clear statement in Mr Daniel's affidavit to the effect that all moneys raised out of the restrained properties were given to Mr O'Leary and were not for his own use – see paragraph 25.) Mr Daniel accepted that consent to this charge was not

sought. Mr O'Leary did not know of this transaction at the time and it was only discovered later when his solicitors conducted land registry searches.

27. All those facts are established beyond reasonable doubt. Unless there is some other defence to the charge of contempt, they amount to a clear breach of the order and contempt of court. In the light of my findings as to Mr Daniel's knowledge of its terms, and having seen him in the witness box, I am satisfied that this breach was a deliberate one which flouted the undertaking that he knew he had given to the court.

28. Mr Mehta sought to argue that this ground was not made out because the company made the disposition and the company was not bound by the bar on dispositions. This point misunderstands the nature of the undertaking. Mr Daniel undertook that he would not do certain acts as director of any company, and in this case he did one of those acts as director of the company. The order bound him personally and he infringed personally. Nor is there anything in the somewhat confused points that Mr Mehta sought to make about conflicts of interest and duty between Mr Daniel as director and Mr Daniel personally.

Church Farm (property (i)), 28 Rogers Lane (property (j)) and 16 North Common Road (property (g))

29. The January email admits that these three properties were charged by their owners on 9th January 2023 to LBFL to secure a loan facility in order to pay £510,000 to Mr O'Leary. Church Farm and Rogers Lane are owned by companies of which Mr Daniel is a director, and it is not disputed that as such he procured that they enter into the charges over their properties. North Common Road is owned by Mr Daniel jointly with his ex partner and he is

therefore the joint legal owner. Again, as such he participated in the grant of the charges.

30. Mr Mehta confirmed that these charges were admitted. Consent to the charges was not given, nor was it sought. Consent to release 3 other properties had been sought on 19th December 2022 to secure a facility from LBFL of £500,000 in order to pay the next instalment of £500,000 under the Tomlin order arrangements at the end of the month. That consent was refused, with no reasons given.

31. In his evidence Mr Daniel explained that in the circumstances, with moneys due under the Tomlin order, he felt under pressure and therefore charged the above three properties with a loan sufficient to pay the December instalment of moneys due, and paid that sum to Mr O'Leary. The evidence is equivocal as to whether what was paid was £510,000 or a lesser sum of £506,490, but that does not matter for present purposes.

32. Thus far, and subject to any other defences, the facts which constitute a contempt are established. Mr Daniel knew of the prohibition in the order and yet procured and entered into the charges without the consent of Mr O'Leary. That is on its face a deliberate breach. I deal below with possible mitigating aspects which have to be taken into account when considering how bad the breach was.

33. If it be said that no harm is done because Mr O'Leary received the proceeds of the charges, there are a number of answers. The first is that it is not absolutely plain that all the money raised was paid over. Second, Mr O'Leary may well have had objections to charges as opposed to sales. Charges would not be likely

to raise as much as a sale, and the amendment to the Tomlin order clearly anticipated sales.

84 Mount Pleasant Lane (property (b))

34. Thjs property was and is owned by Mr Daniel. In September 2022 Mr Daniel, through his solicitors, sought consent to sell this property along with one of the others (2 & 4 Freelands Gate). By an email of 21st September 2022 his solicitor said his client expected to be able to pay the balance of £600,000 due on 30th September and had agreed to dispose of his interest in those two properties in a transaction due to complete on 29th September. It was expected that the net proceeds of sale would be around £416,000, and the solicitor asked for confirmation that Mr O'Leary would remove his charges on completion. It is not clear to what charges that referred, but it may be a reference to restrictions on the register, and it is not clear how there could be a sale (to pay sums due to Mr O'Leary) without the removal of securities, a point taken by Mr Daniel's solicitors in an email dated 27th September.

35. That email pointed out that the two properties had to be sold to pay the sums about to fall due. A further email of 29th September from Mr Daniel's solicitors reiterated the point and said that a refusal to release the security would mean that his client could not perform his financial obligations and threatened litigation. That seems to me to be a good point. On the same date Mr O'Leary's solicitors asked (in relation to each property) for a copy of the sale contract, a copy of the redemption statement from the existing lenders and a breakdown of the expected net proceeds.

36. Mr Daniel's solicitors responded on the same day with copies of the sale contracts and redemption statements (not appearing in the evidence before me) and explained that the combined purchase price was £1,755,000, out of which Mr Daniel had to pay £1,327,490, yielding net proceeds of £423,510. The solicitor explained that he "[held] funds and [was] instructed to simultaneously exchange and complete" on receipt of confirmation that the "securities" would be released. In response the next day (30th September) Mr O'Leary's solicitors pointed out the unsatisfactory lateness of the information and the misgivings they had over the lack of transparency over dealings, but nonetheless consented to the sale of the two properties "on the basis set out in the draft contract" on condition, inter alia, that their client received £423,705.41 in accordance with the calculation previously provided, an additional £900 in respect of their costs, draft documents of release that were required and information about 8 other properties . It would seem that the sum of £424,605.41 was received, according to an email from Mr Daniel's solicitor timed at 4.29pm on 30th September. So in terms of money Mr O'Leary got what he expected on the basis of what he was told.

37. The alleged breach of the undertakings comes from the fact that while the Freelands Gate property was sold, No 84 was not sold and was in fact charged in favour of LFBL. That is not the disposition that was consented to. The charge was not entered into until 11th January 2022, some 3½ months later. Mr O'Leary was not informed of this at the time. He only discovered the position when he received documents at some point before a hearing on 24th January 2024 (that hearing is the hearing before a Deputy Master to which I refer below). As late as 24th January 2024 itself Mr Daniel's solicitors described what had happened

as a sale "by agreement with the Claimant and all money transferred 22nd September 2022" (see the January email).

38. Mr Daniel advanced no explanation for any of this until his oral evidence in chief in this application. His affidavit, whose content he affirmed in the witness box, complained about a failure on the part of Mr O'Leary to release a restriction on No 84. He said that an undertaking to release had been given:

> "and by way of concession from my part, significant sums of monies were sent to the applicant's solicitor (£424,605.41) in September 2022 as consideration for that undertaking"

And he referred to the correspondence which I have described.

39. That is not at all what the correspondence shows as actually happened. The version is made stranger by the fact that the affidavit actually draws attention to the bundle of correspondence which demonstrates its falsity.

40. Mr Daniel's oral evidence in chief advanced a completely different explanation. He explained that he needed to raise cash and did not have a sale of the house (No 84) so he approached his usual lender (LBFL) for £224,000. That entity advance an amount which was equivalent to the entire equity in the house. Mr Daniel gave them a second charge to secure that. In that way, he said, the equity in the house effectively passed to lender and he regarded this as a "technical sale" which meant that he no longer owned No. 84. He felt compelled to do that because if had not paid the money when he did a much greater sum would have fallen due, all his mortgages would have been called in and he would have been bankrupted. Mr Daniel did not remember how the matter was presented in correspondence; all he knew was how he arranged matters. He did not proffer

an explanation of why the charge was executed so long after the moneys were paid.

41. It is impossible to accept this story at face value. If his story is to be believed he must have made his arrangements some time before 29th September. The arrangement was not one which could have been made lightly and quickly. He would have had to explain it to his solicitors who would not have needed to draw the contract of sale in favour of a purchaser (a Mr Kotechka, who is apparently heavily interested in LBFL), which was then presented to Mr O'Leary's solicitors as a genuine contract. If his story is correct then the probity of the conduct of his solicitors would be called into question, because they must have known they were presenting a false transaction on the basis of false documents. That is not a conclusion which I can fairly reach in their absence, but their position is unexplained. Mr Daniel's story that he could not get a sale is inconsistent with what his solicitors were saying – they were saying there was an imminent sale. Furthermore, Mr Daniel's latest version of events is not one which he advanced in his affidavit when he was referring to No. 84.

42. None of this bears on the question as to whether there was a breach of the undertaking. There plainly was, and I so find. There was a disposition (the charge) which was not consented to by Mr O'Leary, and he was not asked to consent to it. The difference between the two transactions is not some tiresome technical conveyancing difference. In the circumstances a request to consent to what Mr Daniel now says happened would be likely to have attracted a lot more scrutiny than the ostensible sale transaction because it is so odd. There was a real and significant breach of the undertaking in this respect, and it was

deliberate and, I find, contumacious even if one accepts Mr Daniel's latest explanation. If one does not then his behaviour is even worse because he has concealed what was really going on. The only thing that might be said in favour of Mr Daniel in respect of this part of the reasoning is that Mr O'Leary did at least get the same amount of money as he was promised from a sale that did not happen, but that is not much of an answer when that money was agreed on the basis of a sale that did not happen and on the basis of dealings that either have never been properly described, or if they have would have attracted a degree of scrutiny which might have meant that consent was not forthcoming, or which might have meant that Mr O'Leary would have been entitled to more moneys.

Further dealings in respect of 28 Rogers Lane (property (i)) and dealings in respect of 1 The Birches, Dorneywood (property (k))

43. I can deal with this claims briefly, because by the time of his final submissions Mr Brounger accepted that he could not maintain a case that breach of the undertakings was established beyond reasonable doubt here, though he sought to reserve his position in relation to the latter dealings (1 the Birches). Accordingly I need say no more about this ground of committal.

Further dealings with 16 North Common Road and Church Farm

44. Both these properties have been put on the market and the first of them has, it is said, been sold subject to contract. Mr Brounger submitted that marketing a property was a " dealing" within the undertaking and therefore a breach because it was done without Mr O'Leary's consent.

45. He made this submission about marketing being a dealing on the basis of one paragraph of the judgment of the High Court of Australia in *Gye v McIntyre* (1991) 171 CLR 609. That case involved the bankruptcy set-off provisions of section 86 of the Australian Bankruptcy Act 1966. Its terms have a similar effect to the parallel English provision. It operates where there have been "mutual credits, mutual debts or other mutual dealings" and required an account of what was due "in respect of those mutual dealings". One of the issues faced by the court was what was meant by "dealings", and in the particular context of that case and the court pronounced the following paragraph, which is relied on (in isolation) by Mr Brounger:

> "24. The word "dealings" is used in a non-technical sense in s.86. It has been construed as referring to matters having a commercial or business flavour: if "one man assaults another or injures him through negligence, that gives rise to a claim, but is not a dealing" (per Lord Esher M.R., Eberle's Hotels, at p 465). The word is, nonetheless, one of very wide scope which embraces far more than a legally binding contract or "deal". Even if it be correct to construe "dealings" in s.86 as confined to a commercial or business setting, it covers the communications, the negotiations, verbal and by correspondence, and other relations which occur or exist in that setting. Whatever may be the outer limits of the word "dealings" in s.86, it encompasses, as a matter of ordinary language, commercial transactions and the negotiations leading up to them. Where a fraudulent misrepresentation is made in the course of such negotiations, the fraudulent misrepresentation is itself part of the relevant "dealings" (cf. In re Mid-Kent Fruit Factory (1896) 1 Ch 567, at pp 571-572; Tilley v. Bowman Limited (1910) 1 KB 745, at p 753)."

46. In reliance on the apparent breadth of that statement Mr Brounger submitted that the words "or deal with" in the Tomlin order covered marketing the properties concerned and selling "subject to contract".

47. I do not consider that the paragraph gets Mr Brounger home and the relevant words in the undertaking do not cover marketing without a binding transaction. First, the words used in the undertakings are "deal with", and the object of those words is property. That suggests a narrower activity than the word "dealings" which more naturally also encompasses non-binding activities as between two persons. Next is the difference in context. The expression "deal" or "dealing" is inevitably governed by its context. In *Gye* the context was the very different context of the Bankruptcy Act and mutual set-off provisions. In the present case the context is an arrangement under which Mr Daniel has undertaken to preserve property until a debt is paid. That context more naturally requires that a dealing be of a transactional nature resulting in an encumbering of the property or a disposal of an interest, to the detriment of the legal or beneficial interest. Sales and charges are already expressly covered. Gifts, declarations of trust and carving out other interests (for example, easements and covenants) would also be covered, as would a contract for sale. They all fall naturally within the meaning of the word "deal with" in their context. It is not so natural to describe the marketing of a property as something which "deals with" that property, at least in the present kind of context.

48. In my view it is unnecessary, and indeed inappropriate, to hold that to "deal with" a property in this undertaking covers the non-final activity of marketing a property bearing in mind the context of this order. There is nothing finalised or detrimental to the interests of Mr O'Leary in marketing a property. Indeed, it might be thought to be sensible to do so, in order that a formulated proposal for actual disposal can in due course be put before Mr O'Leary for his consent under the terms of the undertaking. There is no need, in my view, to require

some sort of advance consent for marketing. Why should consent be required for an activity which is not, of itself, detrimental to the interests of Mr O'Leary under the settlement documentation? He has no legitimate interest in preventing marketing of itself even though he has a legitimate interest in the result if the marketing results in a proposed transaction. The marketing is not, in my view, the sort of "dealing" which the undertakings forbid.

49. *Gye* does not compel a different conclusion. The court's findings in that case were made about, and in the context of, a particular provision of the bankruptcy legislation, so it does not necessarily assist in the present case. As I have pointed out, while the root of the word may be same ("deal") the two words have different boundaries. While the case does demonstrate that "dealings" between people can encompass bilateral contacts not resulting in a finalised transaction, that concept is different from the verbal expression "deal with" in relation to property. Furthermore, even in *Gye* the ultimate expression was used to give a character to finalised transactions that went beyond mere non-binding contacts. That is apparent from paragraph 20:

> "20. … The phrase "or other mutual dealings" (emphasis added) does, however, give rise to a linguistic problem in that "credits" and "debts" will ordinarily represent the outcome of dealings rather than the dealings themselves. Conversely, "dealings" commonly do not, of themselves as distinct from their outcome, represent credits or debts susceptible of direct set-off. That being so, s.86 necessarily speaks of a set-off of what is due "in respect of those mutual dealings" (emphasis added). In that context, the requirement of mutuality in respect of "other ... dealings", as distinct from "credits" or "debts" susceptible of immediate set-off, is directed not so much to the relationship between the dealings as such but to the relationship between the claims which have arisen from them. There will, for the purposes of s.86, be mutual dealings at the date of the sequestration order if there existed at that date "dealings" which involved the bankrupt and the other party and which were capable of giving rise to, and

> subsequently did give rise to, "mutual" claims between them in the sense in which the word "mutual" is used in s.86." (my emphasis)

50. It is also apparent from paragraph 25:

> "On that approach, dealings in which a creditor and a bankrupt have been involved before the making of a sequestration order and which give rise to mutual claims between them - that is to say, commensurable claims between them in their own interests - are mutual dealings for the purposes of s.86 notwithstanding that other parties may have been involved in the dealings, that either the creditor or the bankrupt may have been involved in the dealings in more than one capacity or that those dealings also give rise to different claims between other parties or between the same parties in different beneficial interests. The critical matters for the purposes of s.86 are that there had been dealings in which the creditor and the bankrupt were both involved and that those dealings gave rise to mutual claims between them in the relevant sense." (my emphasis again)

51. None of this supports the notion that in the context of the undertakings the expression "deal with" should be taken as broadly as Mr Brounger requires. I find that "deal with" requires a transaction with a degree of commercial finality and does not include mere marketing. This ground of committal therefore fails.

The position thus far

52. The position thus far is therefore that the factual matters necessary to establish some of the grounds have been established beyond reasonable doubt. However, there are matters of defence, both substantive and procedural, which have been raised by Mr Mehta and with which it is necessary to deal before arriving a final decision. I therefore turn to those matters.

Impossibility

53. Mr Mehta sought to make much of this. He relied on what Briggs J said in *Sectorguard plc v Dienne plc* [2009] EWHC 2693 (Ch):

> "30. By contrast, I accept the thrust of Mr Grant's second submission that failure to perform an impossible undertaking is not a contempt. The mental element required of a contemnor is not that he either intends to breach or knows that he is breaching the court order or undertaking, but only that he intended the act or omission in question, and knew the facts which made it a breach of the order: see Adam Phones v. Goldschmidt [1999] 4 All ER 486 at 492j to 494j.
>
> 33. Nonetheless, even a mental element of that modest quality assumes that the alleged contemnor had some choice whether to commit the relevant act or omission. An omission to do that which is in truth impossible involves no choice at all. Failure to comply with an order to do something, where the doing of it is impossible, may therefore be a breach of the order, but not, in my judgment, a contempt of court."

54. Mr Mehta's submission was that where his client effected a disposition without the consent of Mr O'Leary that was a situation where he had no choice and it was impossible to comply with the undertaking. That was because he was under "extreme pressure" to pay the moneys due under the Tomlin order and his choice was to infringe the order by not paying money or infringe the order by effecting a disposition which would enable him to pay the money. That was said to be no real choice and it made it impossible to comply with the bar on dispositions. He had to infringe in order to pay the moneys that he was due to pay.

55. While not necessarily accepting the dichotomy of Briggs J between breaches of the order and contempt of court, I would accept that one way or another it would not be right to visit the consequences of a contempt on a person where it is impossible to comply with an order. I do not need to go into what the analysis actually is, because I do not have to, because there is no impossibility here. It was not impossible to comply with the restraint on dispositions. All Mr Daniel had to do in order to comply was not effect a disposition. There was nothing

impossible about that. He may have found himself in a commercially difficult position, but he was not entitled to treat that as giving him carte blanche to ignore the order on the basis of impossibility.

56. I also observe that even if there were something in the point in the way it was put, it could not apply to the Great Oaks property where the money was used for refurbishment and not to pay the debt to Mr O'Leary.

57. In this context Mr Daniel raised various allegations about making requests for consent (on other properties) which were refused, which was said to have led to commercial pressures on him when it came to paying sums due under the Tomlin order. These allegations were not properly presented or analysed as presenting unavoidable commercial pressures, and as such do not assist this part of his case or mean that the claimant has not made its case out beyond reasonable doubt. In any event, commercial pressures do not justify Mr Daniel ignoring the bar on disposals without consent.

58. In the circumstances impossibility does not arise as an obstacle to a finding of contempt.

Challenges to the Tomlin order

59. In his evidence Mr Daniel made much of what he said was the history of his relationship with Mr O'Leary which involved Mr O'Leary making up a case that more was owed than just the original loan, pressurising Mr Daniel into paying those moneys in terms of frequent harassing claims and even threats of violence, and Mr Daniel feeling under duress when he came to agree the Tomlin order. Mr Mehta submitted that the case for a partnership, on which Mr

O'Leary's money claims turned, had not been made out in this application, partly because no partnership deed had ever been produced. Mr Mehta's skeleton argument (paragraph 5.7) indicated that these matters would be relied on to found a challenge to the Tomlin order. I assume that the challenge would be based on duress, or something like that.

60. I was not asked to rule on the question of whether the Tomlin order should be set aside, or should otherwise be regarded as unenforceable, but in Mr Mehta's final submissions it seemed to be his case that I should not decide the contempt questions until questions about the sustainability of the Tomlin order had been decided. This point is said to have been made to arise in an application which has already been made by Mr O'Leary in this litigation, in which Mr O'Leary seeks liberty to lift the stay imposed by the Tomlin order and to have judgment on it (or its scheduled terms). That application came before Deputy Master Moraes and he delivered judgment on 24th January 2024. The Deputy Master granted judgment to Mr O'Leary, enforcing the financial terms of the order.

61. There were a number of issues before the Deputy Master, one of which was a further application, this time made by Mr Daniel (it was effectively a counter-application) to set aside the Compromise Agreement and the Settlement Agreement, as recorded in the Deputy Master's judgment at paragraph 45. This counter-application was issued late (the day before the Deputy Master's hearing) and was said (in the judgment) to contain 3 bases:

i) Mr O'Leary misrepresented the original loan agreement in his Particulars of Claim in the original action.

ii) In alleging a partnership Mr O'Leary failed to act uberrimae fidei and failed to give full disclosure in relation to all aspects of the alleged partnership.

iii) The Compromise Agreement and the Settlement Agreement were obtained under duress. Mr Daniel is recorded as saying that he felt pressurised into entering into the two sets of agreements, he was in fear and felt he had no option but to agree.

62. The Deputy Master rejected these arguments. He recorded that the only ground advanced at the hearing related to an application to set aside the Tomlin order for duress, though he went on to deal with the other matters. He recorded that setting aside the Tomlin order for duress would require separate proceedings to be issued, so the application before him could not succeed. The deed of variation (which was not sought to be set aside) amounted to an affirmation, as did a confirmation that the Settlement Agreement would continue given in an email from Mr Daniel's solicitors' dated 10th January 2023. Misrepresentation was ruled out by clause 6.2 of the Settlement Agreement (a "no reliance" provision) and there was no real evidence before him of improper and unlawful pressure sufficient for a duress argument. The most he had was evidence of commercial and litigation pressure. Furthermore, Mr Daniel had legal representation at the relevant times. There was no obligation of disclosure in relation to the Compromise Agreement. Accordingly he dismissed the application of Mr Daniels.

63. On the main application of Mr O'Leary the Deputy Master decided a number of other points raised by Mr Daniel as being reasons why the Tomlin order should

not be enforced. They were based on alleged defaults by Mr O'Leary himself under the terms of the order. Those points, too, were decided against Mr Daniel.

64. Mr Daniel has sought permission to appeal that decision, but only in relation to the matters referred to in the preceding paragraph of this judgment. There was no appeal in relation to the dismissal of Mr Daniel's application and the grounds of appeal make no reference to the points which were said to give rise to a challenge to the validity of the Tomlin order. The skeleton argument in that appeal makes no reference to them either.

65. Permission to appeal was granted by Meade J on 24th January 2024, and the appeal is due to be heard in a 3 day window commencing on 21st October 2024.

66. Mr Mehta's submissions about this were shortly advance and well buried in the middle of more voluminous points on other things. There was no attempt to say much more than that a decision on the committal application should await the outcome of the appeal, with little attempt to argue why save to say that it would be wrong to find contempt and sentence Mr Daniel if it later turned out that he should not have been sentenced. I assume that this refers to an invoked (ie not suspended) prison sentence.

67. On analysis, what lies behind this submission is in essence a submission that this application should be adjourned until the result of the appeal is known. If that is what this is about then the application should have been made at the outset of this application so that time and costs were not wasted if it turned out to be well-founded. It was not made at all. There was a mention, without any elaboration or description, of the application to enforce the Tomlin order, its fate and the appeal, but nothing was said about its effect on this application. In

Mr Mehta's final submissions (paragraph 1.4) it was said in three sentences, without elaboration, that proceeding with this application in the face of the appeal is the wrong course of action and this court should defer from judgment until those proceedings (and another set to which I will come) have been decided. That submission is submerged in extensive submissions about all sorts of other things in a manner which makes it look incidental. A later reference has a similar characteristic.

68. That is not a satisfactory way of approaching this point. However, since it has been raised, and since this is a committal application, I should deal with it, so far as I can in the absence of any elaboration from Mr Mehta.

69. I do not consider that it raises grounds for adjourning this application. The application before the Deputy Master decided various points about the enforceability of the Tomlin order based on its construction and alleged obligations of Mr O'Leary under it. Those are the matters which are independent of whether Mr Daniel is in breach of the undertakings that he gave to the court and are not a reason for adjourning this application

70. So far as the duress/pressure/misrepresentation points are concerned, the factual background did feature (quite heavily) in the presentation of the Mr Daniel's case. However, as such they provide no defence to the claim for breaches of the clear undertakings given to the court. The Tomlin order stands until set aside and, as the Master rightly observed, there has been no application to set it aside. Even now there do not seem to be any draft proceedings to that end. On the evidence there appears to be nothing in the point anyway. The allegations of being physically frightened are largely general. The allegations of other

pressure are of commercial pressure which cannot found a duress argument. Furthermore, these arguments can be seen to be doomed to failure in the light of the fact that at all material times Mr Daniel was legally represented. Arguments that there was no partnership, and therefore no money due beyond the (repaid) loan cannot work against a background of compromise (twice) of the claims in which those issues arose. And the order and Settlement Agreement have been constantly affirmed by the acts of Mr Daniel in operating under them in terms of seeking consent and paying money. These lurking allegation are no defence to the committal application and to allow them to be raised now would be to give effect to a pure smokescreen.

71. The same is true of other proceedings briefly alluded to by Mr Mehta. These proceedings are apparently First Tier Land Tribunal proceedings brought by Mr Daniel and claiming a wrongful refusal by Mr O'Leary to release a restriction of No.84 Mount Pleasant. I was given virtually no details of these proceedings but whatever they are they do not provide a defence to Mr Daniel on this application

Other miscellaneous points

72. Mr Mehta submitted, in one sentence, that Mr Daniel had been denied a fair trial by virtue of Mr Brounger's not allowing him to answer his questions in cross-examination fully. There is nothing in this point on the facts of the matter. What Mr Mehta described did not happen.

73. Mr Mehta submitted that the Tomlin order should be construed so as to contain a requirement that Mr O'Leary was required to provide a consent to sell. That argument, thus stated, is unsustainable. It contains no such provision. If it did

then there would be no point in the bar on selling without consent – consent would always have to be given. He also pointed out that the order gave no power of sale over the properties. That is true, but irrelevant.

Conclusions

74. I therefore draw all those strands together as follows:

i) Mr Daniel is in significant and serious breach of the undertakings in relation to his charging of the Great Oaks property. His breach was wilful and contumacious. Furthermore, Mr O'Leary had no direct benefit from this transaction.

ii) Mr Daniel is in significant and serious breach of the undertakings in relation to his charging of Church Farm, 28 Rogers Lane and 16 North Common Road. Although technically that amounts to three separate breaches they were in substance all part of the same breach and I shall treat them as one for these purposes, though its practical significance may be magnified by the number of different properties involved. This breach was deliberate and contumacious. There is the mitigating factor that, on the current evidence, the proceeds of this breach went towards reducing the debt owing to Mr O'Leary. However, that does not exonerate Mr Daniel because Mr O'Leary was entitled to have his consent sought so that he could consider the proposed transactions from his point of view rather than just have them foisted on him. They may, for example, be charges which secure loans on a very high interest rate which will rapidly reduce the equity in the property.

iii) Mr Daniel is and was in significant breach of the undertakings in relation to 84 Mount Pleasant Lane. This breach was serious and contumacious. It was accompanied by a significant element of misleading as to the nature of the transaction on the part of Mr Daniel, and I am still not satisfied that a full picture of the facts has emerged. The only mitigating factor in relation to this transaction is again that on the evidence the proceeds of the transaction (which included the consented to sale of Freelands Gate) went to Mr O'Leary (or so it would seem).

iv) No other breaches of the undertaking have been established. In particular, the marketing of properties was not a breach of the undertakings.

75. However, I do note that Mr Daniel does not seem to be a serial flouter of undertakings on all occasions when they are relevant. He did not ignore them in relation to other properties where consent was sought and given. That will need to be borne in mind when it comes to sentencing.

76. Having found those breaches of undertaking established, I will turn to the question of sentencing after the hand-down of this judgment and after the parties have had an opportunity to consider it.