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Case No: BL-2021-000401

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Wednesday, 7 August 2024

BEFORE:

SIR ANTHONY MANN
(Sitting as a Judge of the High Court)

BETWEEN:

STEVEN ALBERT FINBAR O'LEARY

Claimant

- and -

TERRY ALAN DANIEL

Defendant

MR D BROUNGER appeared on behalf of the Claimants
MR V MEHTA appeared on behalf of the Defendant

APPROVED JUDGMENT

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(Official Shorthand Writers to the Court)

1. SIR ANTHONY MANN: This morning I handed down judgment in this matter on the application of Mr O'Leary to commit Mr Daniel for contempt for breaching of undertakings. I found that Mr Daniel was guilty of contempts on, effectively, three separate occasions, although covering a slightly greater number of properties than three. I will not repeat the content of that judgment, and I will not repeat the findings that I have already made, as to the extent to which the breaches of Mr Daniel were deliberate and contumacious.

2. It suffices for present purposes to say that the contempts I found were deliberate breaches of undertakings given by Mr Daniel to the court not to sell, charge, or otherwise deal with a list of properties. In relation to the properties where I had found a contempt, Mr Daniel in each case executed a charge and in each case in favour of London Bridging Finance Ltd, a company with which he would seem to be very seriously enmeshed.

3. Having delivered that judgment, I now have to turn to the question of sentencing. I have received submissions on the sentencing criteria from Mr Brounger, who has taken me to a number of cases, to some of which I will refer in due course. He pointed out how this case fits into the various criteria for sentencing, which have been laid down by the cases and so far as it falls for him to do so, he would submit that this is a case which is appropriate for a custodial sentence, failing which it should be a custodial sentence suspended on conditions.

4. Mr Mehta for Mr Daniel has, understandably, opposed all that and made his submissions, both in writing and supplemented orally this morning, as to what the sentence on Mr Daniel should be. I do not propose to recite Mr Mehta's voluminous and, to some extent, mis-directed submissions, though I record that some of his submissions were more helpful than others.

5. In the course of his submissions, Mr Mehta sought to introduce two items of further evidence into the fray. The first is a psychiatric report relating to the psychiatric state of Mr Daniel when the underlying transactions in this case were entered into, and also dealing with his current psychiatric and mental health states. There is no opposition from Mr Brounger to the admission of that document.

6. The second is a rather more extraordinary attempt to introduce additional evidence. In relation to one of the properties in respect of which Mr Daniel was in breach, I found that contrary to prior statements as to why a charge over that property took place, that property being the Great Oaks property, Mr Daniel admitted in the witness box that the purpose of the loan was to fund refurbishment of the property. Whatever the purpose of the loan, I found that there was a breach based on the timing of the charge.

7. Despite the fact that he had ample opportunity to explain further in the witness box and, indeed, before going into the witness box, it turns out that Mr Daniel did not reveal his entire case on the charging of that property. The further evidence which Mr Mehta sought to introduce this morning was material which is said to show that the charge, which was dated November 2022, was in fact pursuant to arrangements which had been made as long ago as 29 September 2020, when London Bridging Finance agreed "subject to formal facility and mortgage documentation" to lend monies on condition inter alia that a charge over Great Oaks was provided.

8. There was then a further variation of that facility letter on 17 May 2021. Mr Mehta relied upon these documents as demonstrating that, in fact the charge was not a new charge entered into, as it were, on a whim by Mr Daniel, but was a charge which was fulfilling a prior obligation. The introduction of that evidence in that way is extremely unsatisfactory. As Mr Brounger pointed out, he did not have the opportunity to test that material in cross-examination. Furthermore, it is information which had been sought in March of this year by Mr O'Leary's solicitors in correspondence addressed to Mr Daniel's solicitors, and it was refused in terms by an email which, as it happens, Mr Mehta was the author of. In those circumstances, it is really rather extraordinary that the material is sought to be introduced at this stage.

9. Mr Mehta puts it on the basis of it being a mitigation matter, that is to say it demonstrated that when Mr Daniel did what he did, he was fulfilling a prior obligation, which he felt he had to fulfil, rather than entering into a fresh obligation. It is on that limited mitigation basis that, with some reluctance, I admitted the evidence this morning. It will have whatever effect it has in relation to mitigation. In fact, I consider it has very little effect in relation to mitigation. It shows that Mr

Daniel went ahead with this charge after the Tomlin order and, indeed, after the variation agreement. He cannot have failed to be aware of these transactions, having signed off on the basic facility agreement and the variation agreement.

10. Equally significantly for present purposes, it contains a provision which allows London Bridging Finance Limited, to purchase the property at 70% of its mortgage value in certain events of non-payment. That is a potentially very significant provision in this mortgage, because it is capable of reducing the equity available to satisfy the debt which the documents currently show was owed to Mr O'Leary and which repayment was intended to be protected by the undertaking not to charge.

11. The material produced by Mr Mehta does not really make the matter much better and, if anything, it might be said to make it worse. However, I have allowed it in, and Mr Daniel will have to put up with its consequences, for better or for worse.

12. Against that background, I turn to the considerations, which it is necessary for me to take into account in passing sentencing in this case.

13. Mr Brounger has taken me to a number of authorities which, in some cases, rather repetitively set out the factors which need to be taken into account. I record that they were as follows, and I shall not refer in terms to all of them. I confirm, I have taken everything said in the relevant paragraphs into account. First, *Attorney General v Crosland* [2021] 4 WLR 103 at paragraph 44. I shall come to that in detail. Second, *Asia Islamic Trade Finance Fund Ltd v Drum Risk Management Ltd & Ors* [2015] EWHC 3748 (Comm), third *Solicitors Regulation Authority Ltd v Khan & Ors* [2022] EWHC 45 (Ch) at paragraph 52 and fourthly, *Khawaja v Stefanova & Ors* [2023] EWCA Civ 1201 at paragraphs 31 to 40. In the *Asia Islamic* case, it was paragraph 7 which Mr Brounger relied on. He drew my attention to those paragraphs in advance of the hearing this morning, and referred to most of them in his oral submissions.

14. I will start with the *Crosland* case. At paragraph 44 the judgment of Lloyd-Jones LJ, Hamblen LJ and Stephens LJ says as follows,

> "General guidance as to the approach to penalty is provided in the Court of Appeal decision in *Liverpool Victoria Insurance Co Ltd v Khan*

[2019] EWCA Civ 392; [2019] 1 WLR 3833, at paras 57 to 71. That was a case of criminal contempt consisting in the making of false statements of truth by expert witnesses. The recommended approach may be summarised as follows:

1. The court should adopt an approach analogous to that in criminal cases where the Sentencing Council's Guidelines require the court to assess the seriousness of the conduct by reference to the offender's culpability and the harm caused, intended or likely to be caused.

2. In light of its determination of seriousness, the court must first consider whether a fine would be a sufficient penalty.

3. If the contempt is so serious that only a custodial penalty will suffice, the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt.

4. Due weight should be given to matters of mitigation, such as genuine remorse, previous positive character and similar matters.

5. Due weight should also be given to the impact of committal on persons other than the contemnor, such as children of vulnerable adults in their care.

6. There should be a reduction for an early admission of the contempt to be calculated consistently with the approach set out in the Sentencing Council's Guidelines on Reduction in Sentence for a Guilty Plea.

7. Once the appropriate term has been arrived at, consideration should be given to suspending the term of imprisonment. Usually the court will already have taken into account mitigating factors when setting the appropriate term such that there is no powerful factor making suspension appropriate, but a serious effect on others, such as children or vulnerable adults in the contemnor's care, may justify suspension."

15. That was developed and, to some extent, repeated in the *Asia Islamic* case by Popplewell J sitting in the Commercial Court, in which he said the following in paragraph 7:

"I was referred to a number of relevant authorities [and he sets them out]. From those authorities I derive the following principles which are applicable to the present case:

(1) In contempt cases the object of the penalty is to punish conduct in defiance of the court's order as well as serving a coercive function by

holding out the threat of future punishment as a means of securing the protection which the injunction is primarily there to achieve.

(2) In all cases it is necessary to consider(a) whether committal to prison is necessary; (b) what is the shortest time necessary for such imprisonment; (c) whether a sentence of imprisonment can be suspended; and (d) that the maximum sentence which can be imposed on any one occasion is two years.

(3) A breach of a freezing order, and of the disclosure provisions which attach to a freezing order, is an attack on the administration of justice which usually merits an immediate sentence of imprisonment of a not insubstantial amount.

(4) Where there is a continuing breach the court should consider imposing a long sentence, possibly even a maximum of two years, in order to encourage future cooperation by the contemnors.

(5) In the case of a continuing breach, the court may see fit to indicate (a) what portion of the sentence should be served in any event as punishment for past breaches; and (b) what portion of a sentence the court might consider remitting in the event of prompt and full compliance thereafter. Any such indication would be persuasive but not binding upon a future court. If it does so, the court will keep in mind that the shorter the punitive element of the sentence, the greater the incentive for the contemnor to comply by disclosing the information required. On the other hand, there is also a public interest in requiring contemnors to serve a proper sentence for past non-compliance with court orders, even if those contemnors are in continuing breach. The punitive element of the sentence both punishes the contemnors and deters others from disregarding court orders.

(6) The factors which may make the contempt more or less serious include those identified by Lawrence Collins J as he then was, at para.13 of the *Crystal Mews* case, namely:

(a) whether the claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy;

(b) the extent to which the contemnor has acted under pressure;

(c) whether the breach of the order was deliberate or unintentional;

(d) the degree of culpability;

(e) whether the contemnor has been placed in breach of the order by reason of the conduct of others;

(f) whether the contemnor appreciates the seriousness of the deliberate breach;

(g) whether the contemnor has co-operated;

to which I would add:

(h) whether there has been any acceptance of responsibility, any apology, any remorse or any reasonable excuse put forward."

16. In *SRA v Khan*, Leech J rehearsed some of those principles and added the following, to which I have had particular regard in this case. At paragraph 52 he observed that the court should bear in mind the desirability of keeping offenders, in particular, first time offenders, out of prison. He re-emphasised that imprisonment was only appropriate when there was a serious contumacious flouting of orders of the court, and he pointed out that sequestration is also a remedy for contempt. I do not need to set out any of the other matters to which he referred; nor, in my view, do I need to revisit any of the other observations made in the other cases, save to observe that from the authorities it is now apparent that, particularly bearing in mind the current over-crowding of the prison estate, the court must be even more cautious than normal about sending a contemnor to prison.

17. Mr Mehta referred me to other authorities. They were, in fact, either repetitive of points which had already been made, or they were merely examples of sentencing which do not assist me in the present cases. I would also point out that Mr Mehta's written submissions seem to suggest a community sentence might be appropriate but, of course, this court has no ability to sentence an offender to a community sentence for contempt of court. Mr Mehta did not repeat that in his oral submissions.

18. I turn back to consider the sentencing in this case, by reference to the *Crosland* decision factors. The first thing I need to consider is whether a fine is a sufficient penalty. It is quite clear to me that a fine in this case would not be a sufficient penalty, for the reasons that I have given in my main judgment. These breaches were serious, significant and contumacious. It is not appropriate to stop at the level of fining. More is required to mark the court's disapproval of such serious breaches. Second, I therefore consider that a custodial sentence is indeed appropriate. I will

come to length in due course. The third factor is matters of mitigation. In relation to the various factors which arise in relation to that, I find the following.

19. Mr Daniel, through Mr Mehta did, indeed, express a form of remorse and a form of apology in a form which I am afraid I frankly found formulaic, and less fulsome than one would expect. However, I nevertheless acknowledge that a degree of remorse, to some extent, was expressed.

20. Next, I do take into account that in respect of two of the three instances of contempt, monies flowing from the transactions did, in fact, go to pay Mr O'Leary. The purpose of the restraint on dispositions was to do what could be done, short of taking actual security, to ensure that Mr O'Leary was paid the debt, which the Tomlin order reflects. It was obviously anticipated that properties would be sold, or otherwise disposed of, in order to raise the monies necessary to pay Mr O'Leary. To the extent that the transactions did generate money which went to Mr O'Leary, to that extent, they were not transactions which Mr Daniel was somehow wilfully entering into for his own purpose and diverting the resulting funds for himself. That is a significant point, which goes to the question of the seriousness of a breach. It does not, of course, as I have already observed, apply to the Great Oaks property.

21. Next, as I have already observed in my main judgment, Mr Daniel did seek consent for other dispositions and, indeed, did seek consent for two of the three dispositions in the present case. He is not somebody who, apparently, simply completely ignored the undertakings and the need to get consent. He is someone who seems to have decided that he could do what he wanted if consent was not forthcoming, but at least he acknowledged the need to get consent.

22. As far as taking into account the needs of family members who need to be supported, there is something iin a case for giving effect to that in the present matter, but perhaps not much. Mr Daniel, according to the psychiatrist’s report, has three children. One is a child of five with whom he has no contact. That child does not form part of the picture for present purposes, despite Mr Mehta's somewhat ambitious attempts to say that she might come into a care picture in the future. Of his other two children, one is a son aged twenty-one who is working, but who apparently needs some psychological

support from his father, and a daughter of seventeen, who has dropped out of school and probably needs some financial and, one would think, some psychological support from him as well. I acknowledge that has to be taken into account.

23. Next is the question of previous good character. This was not, in fact, relied on by Mr Mehta, so one does not know what Mr Daniel's previous character might be in a material respect. He told his psychiatrist, and it appears in the psychiatrist's report, that he was challenged by the DTI about his running of a previous company, but his evidence was that that was not pursued in court. Somewhat oddly, he told his psychiatrist he could not remember whether he had a criminal record or not. One would have thought that if he had one he would remember, but that was his evidence. At any rate, Mr Daniel cannot positively present himself as being of previous good character, save in relation to the undertakings where he has actually sought consent to effect disposals.

24. Factor six in the *Crosland* guidelines, requires me to make a reduction for an early admission of a contempt. There was absolutely no such thing in the present case, save that by the time it got to the hearing Mr Daniel was not disputing the underlying key facts in relation to any of the transactions, although it turned out that there had been prior misrepresentation of what the nature of the transaction was (see my earlier judgment). Mr Daniel is not entitled to a discount for that.

25. I next need to take into account the question of prejudice to Mr O'Leary. Mr Mehta, somewhat remarkably, submitted that there was no prejudice to Mr O'Leary in relation to these transactions. If it could be shown that the finance produced on each of the three dispositions was the best finance that could be realised from the property, and that it was all paid to Mr O'Leary, then there would, indeed, probably be no prejudice in relation to those particular matters. However, that cannot be demonstrated at all. We do know that on two of the three instances of contempt, the proceeds of the transaction did find their way to Mr O'Leary, but those proceeds are not obviously the same proceeds as would have been realised, had there been, for example, a sale of the property; it turned out, in fact, there was a charge. I consider there has been prejudice to Mr O'Leary in relation to these acts.

26. I next need to take into account whether Mr Daniel committed these offences under some pressure. It is true that, literally speaking, he probably did. He was under commercial pressure to produce money for Mr O'Leary. That sort of pressure is the inevitable consequence of entering into an agreement to pay money, and then seeking to consent for transactions at the last minute, which is what happened in this case. I do not think that pressure, in this case, has in any way a mitigating effect.

27. Were the breaches deliberate? Yes, they were, but probably without the full consequences in mind. Were the breaches required or procured by the conduct of others? No, they were not, and I also find that Mr Daniel has not been particularly cooperative in sorting out the consequences.

28. All those matters are a serious gathering of points, which do not allow for much of a qualification of the custodial sentence which would otherwise be justified in these circumstances. I consider that an appropriate term of custody for Mr Daniel in this case is six months in the light of the above, and in light of the other factors which arise from the cases. However, there is a question of continuing compliance to be addressed.

29. There is a question of future compliance in relation to at least two properties, which have not yet been disposed of. I consider that a suspended custodial sentence would have the useful effect of making sure that Mr Daniel does comply with his obligations to seek consent for the disposal of those properties. Furthermore, there is useful work, and proper work, which can be done by conditions attached to a suspension in relation to setting about undoing the consequences of what has happened, so far as they can be undone. It is, of course, the case that once the properties have been charged, as the properties subject to this application has been, that charge cannot simply be undone. Mr Daniel does not propose to do so. However, the consequences of that can, to a degree, be undone by providing some information about the situation.

30. Mr Brounger has, very sensibly and helpfully, provided a list of conditions which he submits would be appropriate to be attached to any suspension of the prison sentence. I will not recite them, because after a useful discussion with Mr Mehta, Mr Mehta

accepts they are all appropriate or can be made appropriate, and I do not need to lengthen this judgment by reciting their detail. I can summarise them as follows.

31. In relation to all the properties subject to the undertakings, except three properties which have been sold by consent, and as to which no issue arises, Mr Brounger proposes that details of all trust deeds and other documents affecting those properties be produced, along with details of the transactions and proposed transactions. Those are particularly appropriate to properties which have not yet been disposed of, but the provision of information applies to all of them.

32. In light of properties which have not yet been disposed of, that information will provide a useful warning about a future application for contempt that will, no doubt, be sought if there is a breach, and will enable a more informed judgment to be formed by Mr O'Leary as to whether to consent or not to the sale. Mr O'Leary is highly unlikely to refuse consent wilfully to a sale, when the whole purpose of the disposition is to make the property available for disposal, so that he can be paid. However, in order to be in a position to form a judgment, Mr O'Leary, obviously, needs information which he has not been provided within any of the transactions under dispute. I consider that provision of the information would be an appropriate condition of suspending the prison sentence, and in relation to those details, Mr Mehta did not disagree.

33. Mr Mehta did mount some objections to the provision of some further details in relation to a dispute about Rogers Lane, in a manner which suggested an unacceptable degree of caginess on the part of Mr Daniel, but in the end Mr Mehta did not resist the provision of that information as well. The provision relates to an apparent dispute which is going on in relation to 28 Rogers Lane which may, apparently, affect its value.

34. Mr Brounger proposes that information be provided about other properties owned by Mr Daniel, which are not subject to the undertaking. This information is said to be justified, so that Mr O'Leary can form a judgment as to the seriousness of his position now that there has been a breach of the undertakings in the manner to which I have referred. Mr Mehta did not oppose these conditions either, although he started by

saying that there were no such properties. It had previously been stated in these proceedings that there was one property in the form of a property known as Grove Farm. However, at this point of the debate, Mr Mehta revealed that Grove Farm was no longer one of Mr Daniel's properties, because it had been taken over and title transferred to London Bridging Finance Limited. Therefore, on that point, the undertaking was to provide information about a property which was no longer in Mr Daniel's ownership. Subject to that, Mr Mehta indicated no objection to the imposition of those conditions.

35. It then transpired at the very last minute that there was yet another property known as 8 St Anne's, Newquay, which is in Mr Daniel's ownership. It was a property referred to in financing documents, but about which Mr O'Leary knew nothing. On instructions, Mr Mehta told me that that property was, indeed, owned by Mr Daniel. That, on its face, falsified the clear assurances which I had been given, that the only property not covered by the undertakings owned by Mr Daniel, was the Grove Farm property. However, the impact of that was lessened by the fact that Mr Daniel, again through Mr Mehta, said that he thought that property was indeed covered by the undertakings, and judging by the exchange in court, which I could observe but not hear, it would seem that Mr Daniel's surprise that it was not covered by the undertaking was genuine.

36. In any event, it is another property owned by Mr Daniel which is not covered by the undertaking and, therefore, the information about properties will be appropriate in relation to that. Once we had established that, Mr Mehta no longer opposed the imposition of the conditions as a condition of suspending sentence.

37. Third, under the heading of information which the claimant seeks, in order to establish what his position now is under the Tomlin order and associated agreement, is information about the full scope of what is described as a loan of £2.3 million from London Bridge Finance Limited. I take that figure to be an aggregate of all the bits and pieces loaned which have otherwise featured in the narrative of this case, together with some additional monies. The conditions there run to conditions numbered 1 to 10, and after some debate with Mr Mehta in relation to condition 7, which requires details of bank accounts into which proceeds of the loan were paid, Mr Mehta did not oppose the imposition of those conditions as a condition of suspending a sentence either.

38. Lastly, there is a specific provision governing Grove Farm, which again was not opposed by Mr Mehta. I consider that suspension of a prison sentence will achieve the purpose of, in no particular order, enabling Mr Daniel to fulfil his care and responsibilities to his family. Second, that he does comply properly with the consent provisions going forward and thirdly, producing a situation in which Mr O'Leary has a better picture of the effect of what has been done to him by breaches of these undertakings. My decision in that respect has been much assisted by Mr Mehta and Mr Daniel's acceptance of the terms of the conditions for these purposes.

39. In those circumstances, therefore, my decision on the sentencing exercise is that I sentence Mr Daniel to a term of six months' imprisonment, but I suspend it for a period of two years, on the conditions to which I have referred. The conditions will be the subject of probably further drafting and refinement as between Mr Brounger and Mr Mehta. In the absence of a finalisation of what those conditions are, then I will rule on any such dispute, and I will do so as soon as possible. I shall require the form of order which encapsulates for this to be agreed within seven days and if not agreed within seven days, I require the matter to be placed back in front of me, with points of agreement and points of disagreement, so I can rule on matters of disagreement.

40. I very much hope that there will be no disagreement about these things. There should not be in these circumstances, bearing in mind the level of agreement, at least on conditions, which was achieved in court today. If there is any dispute, I shall rule on it. Mr Daniel should consider himself very fortunate not to be departing from here in a prison van, because my first views in relation to this were to impose an immediate custodial sentence, but I have been persuaded that the interests of justice can be better achieved by the suspended custodial sentence which I have decided to impose.