

IN THE COUNTY COURT AT KINGSTON-UPON-HULL

IN THE MATTER OF AN APPLICATION BY JUDITH ANNE BELL TO COMMIT MARC
ALAN BERGER TO PRISON FOR CONTEMPT OF COURT

Case No: E00GG394

Lowgate
Kingston-Upon-Hull
HU1 2EZ

Friday, 1st November 2019

Before:
HER HONOUR JUDGE SARAH RICHARDSON

B E T W E E N:

MS JUDITH ANNE BELL

and

MR MARC ALAN BERGER

MISS LLOYD (COUNSEL) appeared on behalf of the Applicant
THE RESPONDENT appeared In Person

APPROVED JUDGMENT

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HHJ SARAH RICHARDSON:

1. The application before the Court is an application by Judith Anne Bell who is the claimant and (in relation to the present application) the applicant in proceedings against Marc Alan Berger. Mr Berger is the defendant in the original proceedings and is the respondent to the current proceedings. The proceedings before the Court are committal proceedings brought pursuant to Part 81 of the Civil Procedure Rules. Those proceedings have been issued by Ms Bell and pursuant to the application she seeks a finding from this court to the criminal standard of proof, that is beyond reasonable doubt, that Mr Berger is in breach of an order made by this court on 10 May 2019. That order was typed by the Court on the 15 May 2019. It was made by me and it was made against a background of prior proceedings under the Trusts of Land and Appointment of Trustees Act 1996.
2. Within those TOLATA proceedings, as they are often referred to by lawyers, Deputy District Judge Armitage as he then was made an order on 18 February 2019. That order related to a property known as Beam End, Munckton, Louth, LN11 8NU, which I shall refer to as “the Property” in this judgment.
3. Pursuant to his order the Deputy District Judge ordered that the property be sold and that the net proceeds of sale be divided between the claimant and the defendant. That was an order. The application had been resisted by Mr Berger, he made it clear to the Deputy District Judge and he has made it clear to me today, as he did on 10 May 2019, that he does not accept that the Court has jurisdiction to make such an order pursuant to the Trusts of Land and Appointment of Trustees Act 1996.
4. The order the Deputy District Judge was the subject matter of an application for permission to appeal, issued by Mr Berger. Permission to appeal was refused and the order of the Deputy District Judge remained extant. I acknowledge that Mr Berger does not accept that it binds him but nevertheless it is an order of the Court, and at the risk of stating the obvious, orders are what they say. They are orders, not polite invitations.
5. On 10 May 2019 I was faced with an application by Ms Bell for an order seeking to enforce the order for sale. I do not intend for the purposes of this short judgment to set out in full the

evidence that the Court considered on that occasion, save to say, that it was very clear that Mr Berger not only did not accept the jurisdiction of the Court to make an order but was engaging in a course of conduct which was clearly detrimental to any potential sale of the Property. The acts that were relied upon in support of the injunction and order application culminating in the 10 May order included, amongst other matters, Mr Berger painting in large letters on the side of the property, 'not for sale' and Mr Berger attending upon the nominated sales agent when he attended the property. Mr Berger was carrying a container in which there was an unidentified clear liquid. He asked the sales agent to confirm which vehicle he had arrived at the Property in.

6. On 10 May 2019, the Court made an order ("the May order"), which amongst other orders included the following:
 - (1) Paragraph one was a definitions clause which amongst other matters defined the property.
 - (2) Paragraph two of the order states as follows; 'the defendant shall give up to the claimant vacant possession of the property by 12 noon on the 24 May 2019 by delivering up all the keys of and relating to the same in his possession custody in control to the conveyancing solicitor's offices at 25A Northgate Louth by the said date and time.'
 - (3) Paragraph three provided as follows, 'except with express written permission from the claimant or her solicitors, the defendant is prohibited from remaining on, visiting or attending upon the property after 12 noon on the 24 May 2019'.
 - (4) By paragraph four the defendant was 'forbidden, whether by himself or by through any other person or in any way or manner whatsoever from interfering with, obstructing, impeding or preventing the sale or marketing of the property by or on behalf of the claimant or interfering with impeding or obstructing access to the property'.
7. A penal notice was attached to paragraphs two, three and four of the May order. The penal notice was endorsed in prominent position on the face of the order as is required by the civil procedure rules. That order was personally served on Mr Berger.
8. It is said today that Mr Berger has breached the May Order and the particulars of breach are set out in a document signed by Ms Bell and dated 10 September 2019. There are a number of allegations of breach. In the course of the hearing today, some of those allegations have

not been pursued by Ms Bell.

9. At the outset of this hearing today Mr Berger, who has represented himself, was asked by this court whether he would like an opportunity to obtain the legal representation before the Court considered whether there had been breaches of May order. He indicated that he did not wish to have such an opportunity. I should say for the sake of completeness that the matter had been listed prior today on an earlier date, however the Court adjourned that earlier hearing. Firstly, because the evidence in support of the application was not in affidavit form, but secondly because the Court was not satisfied that Mr Berger had been informed of his right to seek legal representation. The order listing the matter for today's hearing was served on Mr Berger together with a document provided by this court inviting him to seek legal representation and giving him information how to do so.
10. At the outset of this hearing Mr Berger was advised by the Court that he had a right to silence and that in addition to that right of silence if he chose to say anything, he had a right against self-incrimination. Mr Berger was taken to the May Order and taken to the relevant provisions that I have already recited. He was then taken to the particulars of breach and invited to make comments, it being stressed to him that he was not obliged to do so.
11. The first allegation that Ms Bell has made, in which is still being pursued, is that at about 3pm on 24 May 2019, Mr Berger was present on the property when he ought to have left it and given vacant possession by 12 noon on that day. There is a further allegation in relation to an incident on that day that is not being pursued today. That involves an allegation of the throwing of water over two of Ms Bell's friends; that is the subject of a criminal investigation and Mr Berger, in my view, is entitled to his right against self-incrimination in respect of that allegation. Furthermore, if found proven it is not necessarily going to take matters any further, as Mr Berger accepts that he was present on the Property in breach of the May Order. The throwing of water over the friends of Ms Bell may be an assault. That is a matter for another court on another day. Such an act is however not of itself a breach of the May Order.
12. Ms Lloyd, in the face of that indication, indicated to the Court that Ms Bell would not pursue that particular allegation. In relation to the allegation that Mr Berger was present at the property at 3pm on 24 May, Mr Berger indicated to the Court that that was indeed the case. He indicated that he had delivered up the keys as ordered to Ms Bell's conveyancing solicitors

and as far as he was concerned that meant the vacant possession of the Property had been delivered up. He also indicated that he needed to return to the Property to complete an archaeology report, which he was in the process of writing.

13. The second allegation is no longer being pursued, that is 2.1 in the particulars of breach. The third allegation, paragraph 2.2, is that on or about 9 June 2019 Mr Berger attended the property when Ms Bell and their son was present, that he took one of the keys to the property without Ms Bell's consent and he drove his van at Ms Bell when she attempted to retrieve the key.
14. In relation to this allegation Mr Berger again on invitation, but having been reminded of his right to silence, informed the Court that he had been given the keys to the Property by Ms Bell. In this context he drew the Court's attention to a document which is a handwritten document. It was confirmed by Ms Bell in evidence that it was written in Mr Berger's handwriting. It is dated 2 June 2019 and says as follows, 'Hello Judy. Please could I borrow the electric chainsaw and trailer and can I connect into the electricity? Love Marc. P.S. Can I have access to the property to retrieve goods?'. Endorsed on that note by Ms Bell is the following; dated 2 June 2019, 'Marc, yes you can have access to Bean End to retrieve your goods and to use the electric to sort out the property' and then it is signed by Ms Bell. Mr Berger's case is that he remained in the Property pursuant to that consent, and that on the 9 June he was still at the Property pursuant to that consent, and he had been given the keys as I indicated by Ms Bell.
15. The fourth allegation, that is being pursued by Ms Bell, is that between 17 June 2019 and 12 July 2019, Mr Berger returned to the Property and resided there. Mr Berger informed the Court today that he had indeed lived at the Property between those dates and in fact has continued to live at the Property since 24 May with the exception of some periods of absence when he has visited family. He has been open about that and I do note that the process server who served documents on Mr Berger on 28 October of this year, effected that personal service on Mr Berger at the Property. That is clearly consistent with Mr Berger's own case.
16. The next allegation pursued by Ms Bell is that on or about 15 July 2019, Mr Berger entered onto the Property and, according to the allegation, smashed a lock on the front door. Mr

Berger accepts that on a date, not necessarily 15 July 2019, he unscrewed a mortice lock to the front door of the Property. That is a lock which on the evidence of Ms Bell was a lock to which only Ms Bell was in possession of the key. The parties regularly used a Yale lock on that particular door and Ms Bell's evidence was that she had forgotten that she had that key for the mortice lock and it was not until on or around 14 July that she remembered that that key was available to her whereupon she attended at the Property and used it to lock the Property and secure the Property. Her evidence goes on to state that on attending the Property on 15 July she found that the lock had been removed. She said in evidence that she believed that it had been smashed because there was an implement on the floor that led her to believe that. However, she accepted under questioning from Mr Berger that it may have been the case that the lock had been unscrewed rather than smashed and forcibly removed from the front door. Be what it may, Mr Berger does accept that on a date he entered onto the Property and unscrewed the lock to the front door.

17. The final allegation which is pursued is that on the same date, 15 July, Mr Berger came upon the Property in his van and deliberately parked his van in front of Ms Bell's car. Mr Berger does accept that he drove his van on to the Property on that date, that his van was parked in front of Ms Bell's car for a brief period whereupon his van was reversed and removed away from Ms Bell's car.
18. I heard evidence under oath from Ms Bell and Ms Lloyd and they were both subjected to questioning by Mr Berger. It is apparent, not only from that which Mr Berger volunteered to the Court but also his questioning of Ms Bell, that his case is that whilst he has remained at the Property it has been with the consent of Ms Bell; written or implied.
19. The May Order is clear insofar as it requires written consent from Ms Bell or her solicitors. I accept that on 2 June, such consent was given by Ms Bell to Mr Berger. That consent states that Mr Berger could have access to Bean End to retrieve his goods and to use the electric to sort out the Property. It is ambiguous insofar as it does not certainly in its written form seem to limit or attempt to limit Mr Berger simply to sorting out the exterior of the Property as Ms Bell maintained in evidence. Sort out the Property could, on a reasonable reading, apply to the interior as well as the exterior of the Property. For that reason, I cannot be satisfied that

between 2 June and 9 June, Mr Berger was present on the Property without the written consent of Ms Bell. However, having heard the evidence of Ms Bell on the questions put by Mr Berger, it is quite clear that on 9 June Ms Bell made it very clear to Mr Berger that any consent that she had given to him had been revoked. In his questions to Ms Bell, Mr Berger put it to Ms Bell that she had said to him and used to him the words key and that she had demanded that he hand back the key that he had to the Property. He also accepted during his questions that he had removed the Yale lock key from the bundle of keys that had been given to him by Ms Bell earlier that month.

20. Ms Bell's evidence was, 'I gave the keys to you a few days before', that is before 9 June, 'when you were all nicey, nicey. When you became difficult and started to take things out of the skip, I took the bunch and I tried to use the key which is when I realised it wasn't there.' She said in evidence that Mr Berger was attempting to drive away with the house key and it is quite clear from what Mr Berger has told the Court that indeed he did have that one Yale key on the key ring to the key for his van on the date in question. Mr Berger also accepted that Ms Bell demanded that he hand back the key to the Property. It is therefore very clear on the evidence that any permission that Ms Bell had given to Mr Berger to be on or about the Property was brought to an end on 9 June 2019, and Mr Berger can have been under no doubt at all following what was referred to during submissions as "the van incident" that Ms Bell did not wish him to remain on the Property and his consent to do so had been revoked.
21. Mr Berger accepts that he continued and continues to this day to reside at the Property. That is in clear breach of the order and it is in clear breach of paragraph three of the order, and I find beyond reasonable doubt that between on or about 17 June 2019 and 12 July as pleaded Mr Berger has been present upon the Property in breach of paragraph three of the order.
22. I also find based on Mr Berger's own admission and based on the evidence from Ms Bell and her witness that Mr Berger was present on the Property at about 3 o'clock on 24 May 2019. Mr Berger is, with the greatest respect to him, clearly an intelligent individual and the May Order is very clear that except with the written permission of the Claimant (or her solicitors) he is prohibited from remaining on, visiting or attending upon the Property after 12 noon on 24 May. That is clear beyond doubt. Being present on the Property at 3 o'clock on 24 May

without express written permission was a breach of paragraph three of the order. I therefore make that additional finding. I also find beyond reasonable doubt on the basis of Mr Berger's own admission and on the basis of evidence of Ms Bell, and her witness, that on or about 15 July Mr Berger did enter upon the Property and he unscrewed the lock to a door at the property. I also find that on that date Mr Berger entered upon the Property with his van. How long you parked his van in front of Ms Bell's car is neither here nor there insofar as he drove upon the Property in his van and that was a breach of paragraph three of the May Order.

23. I. therefore, find beyond reasonable doubt that Mr Berger has breached the injunction order. That being the case I need to consider sentencing. Mr Berger, let me make this clear to you. In your submissions to the Court today you said, and my note is, 'I stood in front of you before and told you that I am contemptuous of these orders that were made under TOLATA'. You also stated that as far as you are concerned the CPR is a judicial system which is matrimonial and that you consider that you have the power to delay the sale of the Property indefinitely without liability and the Court does not have the power to remove a trustee or to appoint a trustee. In light of those indications and my findings of breach, my preliminary view, subject to anything that will be said by you on your behalf is this is a case that passes the custody threshold. This is a case where only custodial sentence would suffice.
24. If that preliminary view pertains I would then have to consider what the length of the sentence was and then whether to suspend it. You need to be offered the opportunity to obtain legal representation for the purposes of sentencing, including offering up informed and focussed mitigation.
25. Mr Berger has indicated that he does not require an adjournment, he has been invited to ask for one so that he can obtain legal representation to provide properly informed and focused mitigation in relation to sentencing. I intend to deal with sentencing today.

[Defendant mitigating on his own behalf]

26. Mr Berger has declined the opportunity to obtain legal representation so he can obtain properly informed and focused mitigation. He has been invited by this court to provide

mitigation and inform this court whether there is any personal mitigation which would assist the Court in deciding whether the custodial threshold is passed and if so, what length of period of imprisonment to impose and whether that period of imprisonment should be suspended or not.

27. Mr Berger is a man of good character; he has confirmed that. He has told me that his mitigation is found in Section 4 of the Trusts of Land and Appointment of Trustees Act 1996 in the abolition of the doctrine of conversion, and he has said to me that I obviously understand that he wishes to make a point. Whether or not Mr Berger wishes to make a point, that is not something that on this exercise I intend to take into account. It is for today's purposes neither an aggravating nor a mitigating factor.
28. I turn first when considering the appropriate sentence in this case to consider issues of culpability and harm. In relation to culpability, Mr Berger has persistently breached the order of 10 May and the first breach occurred within three hours of the final date and time by which he was to provide vacant possession of the Property. He has on his own admission continued to breach the order and he continues to reside in the Property. He informed this court earlier in the day that he, in his view, has the power to delay the sale of the property indefinitely without liability on his part.
29. This is a gentleman who has displayed a high level of culpability. Not only are the breaches persistent, he has today stated his view that he is entitled to breach the order and by inference will continue to breach the order without liability or responsibility. This is a case where Mr Berger's actions have sought to frustrate the order that the Court made back in February of this year for the sale of the Property. The breaches of the order of 10 May are part of a pattern of behaviour which commenced with the activities that lead to the application and the order of 10 May being made.
30. It is apparent to me that Mr Berger has and will continue to do whatever is available to him to frustrate the order of the Court because he does not accept that the Court have the power to make that order, and I note that he is nodding his head in agreement; as I make those observations. I take into account that there have been no previous applications in relation to allegations of breaches of the order, that militates in Mr Berger's favour, and he is a man of

good character.

31. I am of the clear view that this is a case where the custody threshold is met. That being the case I must consider the appropriate period of imprisonment. When I use the phrase imprisonment, I make it quite clear that that is in the context of it being a penalty for contempt of court. In considering the appropriate period of imprisonment I must consider each finding of breach and pass a sentence in relation to each finding and then consider the issue of totality to ensure that any sentence is not excessive in regard to the totality of the findings of the Court.
32. In relation to the first finding, that Mr Berger was present at the property at 3pm on 24 May, I pass a sentence of 28 days. In relation to the finding that between 17 June and 12 July Mr Berger has resided in the Property, I pass a sentence of eight months'. In relation to the finding that Mr Berger attended at the Property on 15 July and unscrewed a lock to a door at the Property, I pass a sentence of 28 days, and in relation to the final finding that on 15 July, Mr Berger entered upon the Property and parked his van in front of the claimant's car, again, I pass a sentence of 28 days. Taking into account the issue of totality, those sentences will be concurrent with the result that the total sentence overall will be eight months' imprisonment.
33. I must now consider whether it is appropriate to suspend that sentence. Mr Berger has made it very clear to this court that he does not accept the order of the Deputy District Judge and that he does not accept that the Court has jurisdiction to require him to leave the Property as a result of enforcement of that order. He is an individual who has not only indicated that he has breached the order but whose actions and words indicate that he will continue to breach the order moving forward.
34. In those circumstances, suspension of a sentence would not act in any way, shape or form as a deterrent and the sad reality is that this matter will be back in court, I am sure, in short order with further allegations of breach. Mr Berger is nodding his head in agreement as I say that. In the circumstances of this case and taking into account the culpability and harm, taking into account the need to ensure the Court orders are compliant with and that Ms Bell has the

opportunity to benefit from the order made back in February 2019; the sentence will not be suspended. The result is that Mr Berger is now subject to a committal order for eight months' imprisonment immediate.

35. Mr Berger, will you surrender to the dock please.

End of Judgment

Transcript from a recording by Ubiquis
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