

IN THE COUNTY COURT AT SLOUGH

Case No: H01RG382

Windsor Road,
Slough, SL1 2HE

Date: Thursday 11th August 2022

Start Time: 11.25 Finish Time: 12.09

Page Count: 19
Word Count: 5,540
Number of Folios: 77

Before:

HIS HONOUR JUDGE RICHARD CASE

Between:

WOKINGHAM BOROUGH COUNCIL

Claimant

- and -

DAMION DE BURGH

Defendant

MS LUCAS for the Claimant

The Defendant was not present or represented

JUDGMENT

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HIS HONOUR JUDGE RICHARD CASE:

1. This is my judgment in H01RG382. The claimant is Wokingham Borough Council, represented by Ms Lucas, solicitor, the defendant is Mr Damion De Burgh, who does not appear today.

2. The application before me today is an application for committal of the defendant for alleged breaches of an Anti-social Behaviour Injunction made by District Judge Nicholson on 14th December 2021, as varied by District Judge King on 17th February 2022. The chronology is as follows. On 14th December 2021 District Judge Nicholson conducted a hearing without notice to the defendant and granted the claimant an injunction against the defendant. The terms of that injunction were that the defendant was forbidden from entering an area of Wokingham marked on an attached plan. He was forbidden from entering an area coloured yellow on the same plan, and so far as is particularly material to this application, paragraph 3 provided:

“Not to communicate in any way by letter, telephone or in person with any officer engaged by Wokingham Borough Council, save in writing to Simon Price. Should circumstances arise where alternative communication is necessary then this will be communicated in writing only by Simon Price or a solicitor or barrister employed by Wokingham Borough Council”.

Paragraph 4: “When communicating with Woking Borough Council, as set out in paragraph 3 above, not to threaten violence, not to use language likely...” and then it should have read “to” and continues “cause fear, harassment, alarm or distress.”

Paragraph 5: “When communicating with Woking Borough Council, as set out in paragraph 3 above, not to use discriminatory or derogatory language based upon race, sexuality or gender.”

3. A power of arrest pursuant to the Anti-social Behaviour, Crime and Policing Act 2014 was attached to paragraph 2 of the injunction, but not the other paragraphs. The injunction was to remain in force until 14th December this year and permission was given to the defendant to apply on notice to vary or discharge the order. There was evidence of service personally on the defendant on 17th December 2021 and the matter came before District Judge King on 17th February 2022 at which hearing there was an agreed variation to paragraph 3 which became as follows: “Not to communicate in any way by letter, telephone or in person with any officer engaged by Woking Borough Council, save with Simon Price” and then it continued as before, the variation being that the defendant was entitled to communicate with Mr Price in writing, by telephone or in any other way.
4. By an application dated 1st March 2022 the claimant sought an order of committal against the defendant for alleged breaches of the injunction. That application came before me on 8th April this year. The defendant did not attend that hearing but I recorded in a recital to the order that I was satisfied he was aware of the hearing because he had written to the court by way of a handwritten letter received two days earlier on 6th April 2022 in which he had stated: “I won’t be in ur court 8 April so plz carry on”. He concluded that letter with the words: “Not guilty”.

5. The order I made that day gave permission to the defendant, if so advised, to file and serve a witness statement in response to the allegations by 3rd May 2022 and I listed the matter back before me for directions on 12th May. I made a direction that the defendant must attend that hearing and I attached a penal notice to it and directed the Local Authority claimant to arrange personal service of the order, together with a notice setting out his entitlement to obtain free legal advice by 19th April.
6. The defendant attended the hearing on 12th May and he sought an adjournment in order to obtain legal advice. The claimant agreed to prepare a list of local solicitors who might be able to assist him and I therefore adjourned allowing the defendant the time that he wished to 27th May at 2 pm to give directions. I dispensed with the need for personal service of that order, the defendant having been in court on that occasion and being informed by me of the date of the next hearing.
7. On the day the matter came back before me, 27th May 2022, I was informed that the defendant had indicated to the Local Authority claimant that he may not be attending the hearing because he was suffering from “headaches and viral symptoms”. I decided to proceed in the defendant’s absence that day on the assumption that he was denying the allegations, in light of what he had previously said, and I gave case management directions with permission to the defendant to apply to vary or set aside the order. I listed the matter back before me for half a day on 9th June and half a day on 10th June 2022. Again I directed the defendant must attend that hearing in person and attached a penal notice to it. Given the defendant was absent from court that day, 27th May, I directed

personal service by the claimant Local Authority of the order, together with a further list of solicitors and a hard copy of the bundle that had been prepared for the hearing. Again I gave permission to the defendant, if he wished to do so, to file and serve a witness statement in response to the allegations.

8. As a result of a communication from the Local Authority claimant I made an order on 6th June. It had not been possible for the claimant to personally serve the order as directed on 27th May and I vacated the hearing on 9th and 10th June. I listed the hearing today, 11th August 2022. Again I directed that the defendant must attend in person, and again I attached a penal notice to that order. I required the claimant to personally serve the order, together with a further list of solicitors, as previously directed, and a hard copy of the bundle for the hearing.
9. My order dated 27th May 2022 had set out in schedule form the allegations which the claimant made in their application for committal and that schedule of allegations was repeated in the order of 6th June which I have just referred to.
10. The matter then comes before me today. I have today been provided with a certificate of service. Although I had not seen it before the hearing started it is recorded on the court record as having been received but did not appear on the court file. The certificate of service is signed by Ms Partington who has attended court today to give evidence should it have been necessary. It was not necessary. She records in her statement that she personally served the documents that I had ordered to be served personally on the defendant at 19.32 or thereabouts on 7th June 2022.

11. The first matter that I have to consider is whether I should proceed today in the defendant's absence. He has not attended, he has not communicated with the court explaining why he has not attended or to ask for an adjournment and he has not, as I understand it, made contact with the claimant Local Authority to ask for an adjournment or to explain his absence today.

12. Ms Lucas on behalf of the Local Authority has helpfully referred me to a decision of Cobb J in the case of *Sanchez v Oboz* [2015] EWHC 235 (Fam). That was a case where an application for committal had been made and at the listed hearing the, as they were described in that judgment, respondents had not attended. At paragraph 4 of the judgment Cobb J said this:

"It will be an unusual, but by no means exceptional, course to proceed to determine a committal application in the absence of a respondent. This is so because:

(i) Committal proceedings are essentially criminal in nature...

(ii) Findings of fact are required before any penalty can be considered in committal proceedings; the presumption of innocence applies (Article 6(2) ECHR). The tribunal of fact is generally likely to be at a disadvantage in determining the relevant facts in the absence of a party;

(iii) The penalty of imprisonment for a proven breach of an order is one of the most significant powers of a judge exercising the civil/family jurisdiction; the respondent faces the real prospect of a deprivation of liberty;

(iv) By virtue of the quasi-criminal nature of committal process, Article 6(1) and Article 6(3) ECHR are actively engaged... Article 6(1) entitles the

respondent to a ‘fair and public hearing’; that hearing is to be ‘within a reasonable time’;

(v) Article 6(3) specifically provides for someone in the position of an alleged contemnor ‘to defend himself in person or through legal assistance of his own choosing’, though this is not an absolute right in the sense of ‘entitling someone necessarily to indefinite offers of legal assistance if they behave so unreasonably as to make it impossible for the funders to continue sensibly to provide legal assistance’... The respondent is also entitled to ‘have adequate time and the facilities for the preparation of his defence’.”

13. Cobb J then set out a list of factors which he suggested the court might adopt as a checklist in future cases. Those factors are as follows:

“i) Whether the respondents have been served with the relevant documents, including the notice of this hearing;

ii) Whether the respondents have had sufficient notice to enable them to prepare for the hearing;

iii) Whether any reason has been advanced for their non-appearance;

iv) Whether by reference to the nature and circumstances of the respondents’ behaviour, they have waived their right to be present (i.e. is it reasonable to conclude that the respondents knew of, or were indifferent to the consequences of the case proceeding in their absence);

v) Whether an adjournment would be likely to secure the attendance of the respondents, or at least facilitate their representation;

- vi) The extent of the disadvantage to the respondents in not being able to present their account of events;
 - vii) Whether undue prejudice would be caused to the applicant by any delay;
 - viii) Whether undue prejudice would be caused to the forensic process if the application was to proceed in the absence of the respondents;
 - ix) The terms of the ‘overriding objective’... including the obligation on the court to deal with the case ‘justly’, including doing so ‘expeditiously and fairly’ and taking ‘any ... step or make any ... order for the purposes of ... furthering the overriding objective’.”
14. Taking those considerations in turn, first of all, has the defendant been served with the relevant documents (I am taking the first and second point in the checklist together) and did the defendant have sufficient notice to prepare? I was satisfied that the defendant had been served when the matter was before me on 8th April and on that occasion I gave the defendant permission to file a witness statement if so advised by 3rd May. I directed personal service of that order and the defendant attended on 12th May. I told him of the date of the next hearing on 27th May. He did not attend on 27th May and I directed personal service of notice of the hearing listed on 8th and 9th June, together with a copy of the bundle. The hearing on the 8th and 9th June did not go ahead as the defendant had not been served in sufficient time. I have now seen a certificate of service indicating that he was in fact served on 7th June 2022 with notice of this hearing and a bundle containing all the evidence in support of the application. In those circumstances, I am entirely satisfied that the defendant

was served with the relevant documents and he has had ample time to prepare and to attend this hearing, at the very least from 7th June.

15. The next question is whether he has advanced any reason for his non-attendance. As I have indicated already, he has not.
16. Next, is it reasonable to conclude that he was aware of or indifferent to the consequences of proceeding in his absence? I answer that question in the affirmative. All the previous orders from 8th April onwards attach a penal notice in relation to his attendance at the next hearing and so he could have been in no doubt that a consequence of his non-attendance might be a term of imprisonment, quite apart from the fact that the application for committal itself, which I was satisfied had been served prior to 8th April, contains this warning, and it is in the bundle that is before me at page 24: “If you do not attend the hearing the court may proceed in your absence. Whether or not you attend, the court will only find you in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt. If the court is satisfied that you have committed a contempt the court may punish you by a fine, imprisonment, confiscation of assets or other punishment permitted under the law.” As I have indicated, in those circumstances I am satisfied it is reasonable to conclude that the defendant was aware of or indifferent to the consequences of proceeding in his absence.
17. Next, whether the adjournment, if there is to be one, would be likely to secure the attendance of the defendant or facilitate his representation. I answer that in the negative. The defendant has only attended one out of the four hearings. He has been provided with ample opportunity to obtain representation. He sought

and I agreed an adjournment on 12th May for that purpose. He has been handed a list of solicitors at court and he has been served with a list of solicitors by way of personal service on 7th June even if he had not been served on any other occasion

18. Next, the prejudice to the defendant in not being able to give his account. As I have said, I have given permission for him to file statements if so advised. That was in the order of 8th April, 27th May and 6th June. He has not taken advantage of that permissive order and there is no indication that he intends to present a substantive response to the allegations that are made. In those circumstances, there is perhaps little to no prejudice to him in not being present and therefore not able to give his account, given that it does not appear he intends to do so, as is his right, of course.
19. Next, is there any prejudice to the claimant? I conclude that there is not, except, as I go on to consider now, when I consider whether there is any potential prejudice to the forensic process. I accept that memories fade over time, but in this case the evidence is principally documentary in the form of recordings or letters and so the quality of the evidence is unlikely to be affected by the passage of time, particularly by the passage of a short period of time.
20. Lastly, I consider the overriding objective, and principally I consider that applies in the need to deal with cases expeditiously and fairly. It is now August 2022. Any further delay, except until next Thursday when I am available, would be until October this year if the matter was to come back to me, and I do not understand that the listing for other Circuit Judges in the Reading and Slough County Courts is likely to be any different. It seems unlikely that the claimant

Local Authority would be able to serve personally an order made by me today for him to attend a hearing next Thursday and so the reality is matters would be in abeyance, if I adjourned, until October, by which time the allegations which relate to February of this year would be eight months old. Bearing all of those matters in mind, I am satisfied that the defendant has had ample notice of this hearing, he has had sufficient time to prepare, he has presented no reason for his non-attendance and has not applied for an adjournment. Further delay would only give rise to the possibility of his future attendance in circumstances where he has failed to attend on a number of occasions, despite a penal notice being attached to the order requiring his attendance, it is a remote possibility that he would attend, he has either buried his head in the sand or he has actively decided to ignore these proceedings since May of this year. In those circumstances, I intend to proceed today in his absence.

21. I turn to set out the allegations that are distilled into the schedule that was attached to the order dated 27th May and 6th June 2022.

(1) In breach of paragraph 3 of the injunction (not to communicate with any officer except Simon Price):

(a) on 15th February 2022 the claimant's Housing Needs Department received a telephone call from a male purporting to be acting on behalf of the defendant, but actually the defendant.

(2) In breach of paragraph 4 of the injunction (when communicating not to threaten violence or use language likely to cause fear, harassment, alarm or distress):

(a) On 6th February 2022 Simon Price received a voicemail from the defendant in which he said that: “If some knobhead wants to have a go at me then they pay the consequences”. Further: “If they wanna mug me they’re the ones who are gonna get hurt”;

(b) On 7th February 2022 Simon Price received a voicemail from the defendant in which he said: “About this risk assessment. Well if someone wants to get heavy handed with me they pay the consequences don’t they?”;

(c) On 9th February 2022 the claimant received a letter from the defendant describing Simon Price as a liar, uses bad language and threatening that the defendant’s belongings should be returned by 10th February “or I do it my way”;

(d) On 15th February 2022 the claimant’s Housing Needs Department received a telephone call from a male purporting to be acting on behalf of the defendant but actually the defendant. The concluding words spoken by the male are: “My opinion between your Simon Price and Damien it is too dangerous for them in the same room”.

(3) In breach of paragraph 5 of the injunction (not to use discriminatory or derogatory language based upon race, sexuality or gender):

(a) On 9th February 2022 Simon Price was left a voicemail by the defendant in which he said: “And also if I was black, Paki, Muslim or one of them other fucking idiots crossing the channel I’d be in the rent by now wouldn’t I, in the BnB. Yeah, so come, on this is England, I’m white. I’m white and English, my country. Come on, put me up somewhere.”

22. I have indicated already I have got a bundle before me. I have read that bundle in its entirety. It includes an affidavit prepared by Mr Price in support of the application. That is to be found at page 32 of the bundle and it is dated 1st March 2022. It exhibits a number of documents, two letters which I will return to, and recordings of telephone conversations, all of which I have listened to.
23. So far as the law is concerned, the claimant has to satisfy me beyond reasonable doubt, that is the criminal standard of proof, I need to be satisfied so I am sure that the defendant has breached the terms of the injunction in the manner alleged. The defendant does not have to give evidence, in fact has not given evidence, he has the right not to prepare a statement, he has not done so, and I can attach no adverse inferences to that failure to do so and I do not attach such inferences. I need to look at each of the allegations separately and look at the entire evidential canvas. Evidence in support of one of the allegations may support another or other allegations as they may tend to show a course of conduct which may be relevant to the determination of whether they are made out to the criminal standard or not.
24. Turning then to the allegations, I am going to take them out of order. Before I do, it is important to record that in Mr Price's affidavit, which he confirmed on oath before me today, he identifies himself as Assistant Director, Neighbourhood and Communities at the claimant Local Authority. At paragraph 6 he says this: "To put some of the communication that I have had with the defendant into context, there is an ongoing issue with regard to some of his belongings that were placed in storage when he was remanded in custody." That I understand to be a reference to a previous period of time when he was detained

in prison. I do not know the circumstances of that; they are not relevant to this application.

25. The first allegation that I will consider is allegation 2(a) and that is that in breach of paragraph 4 of the injunction, when communicating with the Local Authority not to threaten violence or use language likely to cause fear, harassment, alarm or distress, on 6th February the defendant left a voicemail for Simon Price in which he used the words “if some knobhead wants to have a go at me then they pay the consequences” together with other words, which I will return to in just a moment. At page 33 of the bundle and within Mr Price’s affidavit he presents, as I find it, an accurate transcript of the voicemail that was left he says on 6th February 2022. The transcript starts in this way: “Simon. Damien, yeah. I’m getting a bit fed up with your slow, slow, slow service and I want my missing belongings that your so-called removal men nicked.” The transcript then records the alleged words: “If some knobhead wants to have a go at me then they pay the consequences” and “’cos I’m good and gone if they wanna mug me they’re the ones who are going to get hurt, see”. The caller identifies themselves apparently as “Damien”, addressing the message to Simon. I am satisfied beyond reasonable doubt that the “Simon” is reference to Mr Price and that the caller, “Damien”, is Damion De Burgh, the defendant. I am satisfied of that both because of the self-identification and also because the content of the message is consistent with matters which have concerned the defendant, namely his belongings. I am also satisfied on Mr Price’s evidence that it was a call to the claimant Local Authority. Having listened to the recording, as I have indicated, I am satisfied that the words alleged were used, as transcribed, and I am satisfied that they contain a threat of violence, in particular “they pay the

consequences” and “they’re the ones who are going to get hurt”. I am therefore satisfied beyond reasonable doubt that those words used in that voicemail message were in breach of paragraph 4 of the injunction.

26. Next allegation 2(b), which is that on 7th February the defendant left a voicemail which indicated “if someone wants to get heavy handed with me then they pay the consequences”. Again Mr Price has transcribed, as I find it accurately, the content of the message. At page 33 and into page 34 it is recorded in part as follows: “Damien again. Where’s my belongings? I want all my belongings back before the end of the month. About this risk assessment, well if someone wants to get heavy handed with me then they pay the consequences, don’t they.” Again the caller identifies themselves as “Damien”, the context is consistent with this defendant’s concern about his belongings and for those reasons I am satisfied beyond reasonable doubt that this was a call from the defendant. I am also satisfied on the basis of Mr Price’s evidence that it was a call to the claimant. Although the words used “they pay the consequences don’t they” do not, as I find it, satisfy me beyond reasonable doubt that there has been a threat of violence, nonetheless, those words amount to a breach of paragraph 4 of the injunction, as in the context of the message that had been left the day before the language is likely to cause distress and I therefore find allegation 2(b) proved beyond reasonable doubt.
27. The next allegation is 2(c) which is that on 9th February the claimant received a letter from the defendant using language which I will turn to in a moment. The document which is exhibited to Mr Price’s statement is principally a letter apparently from Mr Price addressed to Mr De Burgh, and it refers to “issues you

are facing with regard to your missing personal effects”. On the face of the letter there are a number of handwritten comments. In the top right-hand corner is the word “Exhibit 2” I don’t take that to be alleged to be the defendant’s writing, there is certification consistent with the evidence being given by way of affidavit that the document is confirmed to be true, and then at the bottom of the page in handwriting the words “Simon Price” are circled with a line to the word “liar” and someone has written “Bullshit. These workmen you employ stole, want my belonging back by 10 Feb or I do it my way.” It is clear from the context of the letter that it is a letter about the defendant’s belongings. It is clear from what is written at the bottom of the page that the person who has written it is concerned about those belongings. The use of the words “want my belonging back” suggest, and I find beyond reasonable doubt, indicating that the response was written by the defendant, in part because of that language but also because it is written on a letter that had been addressed to him. That, together with the context of the voicemail messages left on 6th and 7th February, as I have found proved, and noting that this was a letter date stamped received 9th February 2022, I find beyond reasonable doubt that these were handwritten comments appended to the letter by the defendant. Again, in light of the voicemail messages which I have found were left on the 6th and 7th February, whilst the handwritten comments do not threaten violence it is language that is likely to cause distress, and again I find that allegation proved beyond reasonable doubt.

28. I will leave allegation 2(d) and turn to allegation 3. That is an allegation that in breach of paragraph 5 of the injunction, not to use discriminatory or derogatory language based on race, sexuality or gender, on 9th February the defendant left

a voicemail for Mr Price. Mr Price again transcribes that voicemail, as I find it accurately having listed to it, at page 34 of the bundle. It reads as follows: “Simon, why don’t you ring me.” Then a bit further on: “And also if I was black, Paki, Muslim or one of them other fucking idiots crossing the channel? I’d be in the rent by now wouldn’t I, in the BnB, yeah, so come on, this is England, I’m white, I’m white and English, my country, come on put me up somewhere.” Mr Price’s evidence is that was also a voicemail call from the defendant. The recording itself does not indicate the caller identifies themselves as Damion or Damion De Burgh or Mr De Burgh and the context is slightly different from the previous messages, in that it is about housing rather than the return of goods. But, having listened to all of the recordings and compared the recording on 9th February with those other recordings, I accept the evidence of Mr Price that this is a message from Mr De Burgh and I am satisfied of that beyond reasonable doubt. Mr De Burgh accordingly refers to “black, Paki and Muslim people” as “other fucking idiots”. The injunction does not extend to discriminatory or derogatory language on grounds of religion but it does extend to derogatory language on grounds of race, and my judgment is that would cover the reference to somebody described as “black” and the reference to “Paki” which I take to be a reference to a person of South Asian race, and I find beyond reasonable doubt that the use of those words amounts to a breach of paragraph 5 of the injunction, in that they are derogatory language based on race.

29. I turn finally to the two allegations which relate to 15th February, first of all allegation 1(a) that in breach of the injunction at paragraph 3, not to communicate with any officer except Simon Price, the defendant called the Housing Needs Department and spoke to somebody else on 15th February, and

allegation 2(d), that in the course of that call the defendant said: “My opinion between your Simon Price and Damien it’s too dangerous for them in the same room”. The claimant must prove that this was a call from the defendant and that the content of the call, the words used, was likely to cause fear, harassment, alarm or distress or was a threat of violence. Mr Price in his affidavit says he “believed this to be a call from the defendant”. The transcript of the call, which I find is an accurate transcript, is at page 39 of the bundle. It starts with a female voice answering a call: “You’re through to Emily from Housing Needs. How can I help?” The caller after a short exchange says: “Yeah, I’m speaking on behalf of Mr Damien De Burgh” and then talks about a chance that it is said he has of moving into private rented accommodation and making enquiries about whether the claimant would pay for that. Then the same person at the end of the call says: “My opinion between your Simon Price and Damien it is too dangerous for them in the same room”. Having listened to all of the four recordings, I accept and find beyond reasonable doubt that, notwithstanding the caller asserts that they are calling on behalf of Mr De Burgh, that it is in fact Mr De Burgh. The tone and the manner of the speaker is consistent with the other recordings. I also find and I am satisfied beyond reasonable doubt that the reference to it being dangerous for Mr De Burgh and Mr Price to be in the same room, when taken in the context of the calls on 6th and 7th February and the letter on 9th February, is at the very least likely to cause distress, in other words it is a threat that something might happen to Mr Price if he was in the same room as Mr De Burgh and for those reasons I find that those two allegations are also proved beyond reasonable doubt.

30. In summary, therefore, I am satisfied that the claimant has proved all of the allegations beyond reasonable doubt and I turn to consider whether I should proceed to sentence Mr De Burgh in his absence today.