



Neutral citation [2020] EWCA Civ 544

Case No: B2/2020/0178

IN THE COURT OF APPEAL (CIVIL DIVISION)
On appeal from Kingston-upon-Hull County Court
HH Judge Richardson

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 11 February 2020

BEFORE:

LORD JUSTICE BEAN
and
LORD JUSTICE BAKER

BETWEEN:

MARC ALAN BERGER

Appellant

- and -

JUDITH ANN BELL

Respondent

The Appellant appeared in person
The Respondent did not appear and was not represented

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

LORD JUSTICE BAKER:

1. This is an appeal against a committal order made on 1 November 2019 by HHJ Richardson in the County Court at Kingston-Upon-Hull, whereby she committed the appellant to prison for a total of eight months for a series of breaches of injunctive orders she had previously made on 10 May 2019. As the order was for his committal, the appellant appeals to this court as of right. His notice of appeal, however, was filed on 29 January 2020, some nine weeks out of time, and it is therefore necessary by way of preliminary issue for this court to deal with the question of an extension of time for filing the notice.
2. The background can be summarised as follows. The appellant and the respondent, Ms Bell, were partners in a long-term relationship, which started in about 1990 and finally ended in 2017. They never married but had two children, both now grown up. In 1993, they purchased a property in a village called Muckton in the East Lindsey region of Lincolnshire, lying some five miles south east of Louth. Thereafter they occupied the property as a family home until the relationship came to an end. It seems there is a dispute about exactly when that was, although it is unnecessary for this court to consider that issue in any detail. At that point or sometime after, the respondent moved out and purchased another property with the aid of a mortgage. She then started proceedings in the county court under the Trustee of Land and Appointments of Trustees Act 1996 (“TOLATA”) seeking a sale of the property on the basis that it had been purchased for the purpose of providing a family home and that the purpose had now come to an end. The appellant opposed the claim on the grounds that the purpose had not come to an end.
3. The claim was heard by Deputy District Judge Armitage at a hearing in February 2019 at which the respondent was represented but the appellant appeared in person. At the end of the hearing, the judge delivered a judgment in which he accepted the respondent's case that the purpose of the trust had ended and ordered that the property be sold with the proceeds of sale divided equally between the parties. The deputy district judge further ordered the appellant to pay the respondent's costs summarily assessed at about five and a half thousand pounds. The appellant's application for permission to appeal was refused by the deputy district judge.
4. According to the respondent, the appellant refused to cooperate with the sale of the property, and she therefore applied for an order to enforce the sale. That application came before Judge Richardson on 10 May 2019. At the conclusion of the hearing, the judge made an order which included the following terms: under paragraph 2, that the appellant should give up to the respondent vacant possession of the property by twelve noon on 24 May 2019 by delivering up all the keys of and relating to the same in his possession, custody and control to the

conveyancing solicitor's office; under paragraph 3, that, except with the express permission of the respondent or her solicitors, he was prohibited from remaining on, visiting or attending the property after twelve noon on 24 May; under paragraph 4, the appellant was forbidden whether by himself or through any other person or in any other way or manner whatsoever from interfering with, obstructing, impeding or preventing the sale or marketing of the property by or on behalf of the respondent or interfering with, impeding or obstructing access to the property. A penal notice was attached to those three paragraphs on the face of the order. The order was personally served on the appellant.

5. It was the respondent's case that the appellant did not comply with that order in a number of respects. In particular, she made the following allegations:
 - (1) He was still present at the property on 24 May 2019 at 3 pm at a time when, under the order, he ought to have left.
 - (2) On 9 June 2019, he attended the property when the respondent and her son were present. He took one of the keys without her consent and drove his van at her when she attempted to retrieve the key.
 - (3) Between 17 June and 12 July 2019, he returned to reside at the property.
 - (4) On or about 15 July 2019, he entered the property and smashed a lock on a front door.
 - (5) On or about the same date, 15 July 2019, he visited the property and parked his van in front of the respondent's car.
6. As a result of these alleged breaches, the respondent filed and served an application for the appellant's committal to prison for contempt of court. Her notice of application and statement in support included other allegations in addition to those recited above. Those additional allegations were not pursued by the respondent at the hearing, and it is unnecessary to refer to them further.
7. At the hearing of the committal application on 1 November 2019, the respondent was represented by counsel. The appellant again appeared in person. According to the judgment, at the outset of the hearing the judge asked the appellant if he wanted an opportunity to obtain legal representation. The appellant declined the offer. Furthermore, according to the judgment, the appellant was advised by the judge that he had the right of silence and the right not to incriminate himself. It has not been suggested to this court that the judgment is inaccurate in recording these matters.
8. The judge proceeded to hear oral evidence from the parties. In the course of the hearing and in particular in his oral evidence, it became clear that the appellant's case, broadly put, was that he

accepted that he had been at the property after the dates proscribed in the order. It was his case that he had done so with the express consent of the respondent.

9. With regard to the specific allegations recited above on which the respondent relied, the appellant's case before the judge was as follows. First, he accepted that he had indeed been at the property at 3 pm on 24 May. It was his case that he had handed the keys to the conveyancing solicitor's office as required, that he had therefore complied with the obligation to deliver up vacant possession, and that he had not been in breach of the order by returning to the property later that afternoon.
10. With regard to the second allegation relating to the incident on 9 June, the respondent told the judge that on 2 June she had given written consent to the appellant to return to the property for the purposes of collecting his goods. The written consent also permitted him "to use the electric to sort out the property". As the judge noted in her judgment, there was a degree of ambiguity in that part of the written consent and, as a result, she could not be sure that the appellant's presence at the property for seven days between 2 and 9 June was without the respondent's consent and thereby in breach of the order. Having heard the evidence, however, the judge said that it was quite clear that on 9 June, the respondent had told the appellant that any consent she had given had been revoked. In the course of the hearing the appellant, according to the judge, had accepted that he had removed the house key from the respondent's bunch of keys.
11. With regard to the third allegation, the appellant freely accepted before the judge that he had returned to reside at the property on 17 June, that he had continued to reside there up to 12 July, as alleged in the application, and indeed that he was still residing there at the date of the hearing on 1 November.
12. With regard to the fourth and fifth allegations, having heard the evidence, the judge accepted that, on 15 July, the appellant had entered the property with his van and unscrewed the lock on the door.
13. The judge therefore concluded, applying the appropriate criminal standard of proof, that the appellant was in breach of the order of 10 May. She then addressed the appellant again before passing sentence, warned him that her preliminary view was that a custodial sentence was necessary, and again offered him the opportunity to obtain legal representation. Once again, the appellant declined the offer. He then addressed the court again on the question of mitigation, after which the judge concluded the judgment with the following paragraphs:

"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 led 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 has 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 3 pm 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 complied 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."

14. From prison the appellant attempted to appeal against the committal order. As noted above, the appeal notice was eventually sealed on 29 January of this year, nine weeks out of time. It is therefore technically necessary for the appellant to obtain an

extension of time. It seems from what I have read in the papers that there was some confusion in the appellant's mind as to how to proceed with an appeal and, as a result, the papers may have been sent initially to the wrong court. In those circumstances, for my part, given that the appellant is a litigant in person, I would be prepared to extend time for appealing.

15. I therefore turn to the merits of the appeal. In his grounds of appeal and submissions to this court today, the appellant's case has on occasions been difficult to follow. He is plainly an intelligent man with strong convictions about what he believes to be his rights. It has been difficult at times during the hearing today to encourage him to focus on the issues we have to decide. At times in answering our questions, the appellant was distracted by other issues and as a result did not give a full answer. Ultimately, however, he expressed his case in the following terms. He said that he was the "beneficial trustee" of the property and that he did not think any judge has the right to remove him. In his opinion no judge has jurisdiction over any relationships outside matrimonial relationships. He said that in his heart he owned the property and it is his intention to carry on owning the property for the rest of his life. In his view, where two persons such as himself and the respondent own a property and only one of them wants to sell it, the other is entitled to object. Unless both parties agree, the property therefore cannot be sold. In other words, he simply does not accept the validity of the deputy district judge's order. On the specific and most serious finding made by Judge Richardson, that he was residing at the property between 17 June and 12 July, the appellant's position to this court was that he was certainly not present throughout that period.
16. In my judgment, none of the grounds or arguments advanced by the appellant establishes that the judge was wrong either in any of her findings or in the sentence passed. It is plain from her impeccable judgment that she conducted the hearing with due regard to the strict procedural requirements of committal proceedings and that she took particular care to offer the appellant every opportunity to obtain legal advice and representation. As for her findings, they were based in part on statements made by the appellant himself in the course of the hearing. In particular, it is clear from Judge Richardson's judgment that the appellant did not deny that he had been residing at the property between 17 June and 12 July. Indeed, he told the court that he was still

residing there at the date of the hearing. Before us, as set out above, the appellant said he had not been present for the whole of that period, but nothing he said to this court indicated that the judge had been wrong to find that he had been resident at the property during that period.

17. The main issue before the judge was whether he was there with the respondent's consent. On that issue, having heard the respondent's evidence, the judge accepted that the respondent had revoked her consent on 9 June. The assessment of evidence is a matter for the trial judge, and an appeal court will rarely intervene with such assessments. In this case the appellant has provided no grounds for this court interfering with the judge's assessment of the evidence she heard. Accordingly, on the most serious allegation in relation to the occupation of the property between 17 June and 12 July, there is no basis on which this court could properly overturn the judge's findings. Similarly, the judge's other findings were all based quite properly on her assessment of the evidence, and in those circumstances, they too cannot be impeached before this court.
18. I turn to the question of sentence. It is plain that the judge's decision to impose a custodial sentence and the length of that sentence was influenced to a considerable extent by the appellant's defiant attitude. He does not accept the validity of the order made in the TOLATA proceedings and believes that he was entitled to disregard it. He indicated to the judge in the course of her sentencing judgment that if he had been allowed his liberty, he would have continued to defy the order. In those circumstances I consider the judge's sentence of eight months' immediate imprisonment to be entirely appropriate.
19. I listened carefully today to see if there was any contrition in the appellant or any recognition that he needed to accept the validity of the TOLATA order. Regrettably there was no evidence of any contrition or any acceptance of the legal reality. He remains defiant. In those circumstances I see no merit in this appeal, which, if my Lord agrees, will be dismissed.

LORD JUSTICE BEAN:

20. I agree with the judgment of Baker LJ. Accordingly, the order of the court will be as follows: an extension of time for lodging the notice of appeal is granted, but the appeal itself is dismissed. We make no order as to costs.

Order: Application for extension of time granted; appeal dismissed

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