

Neutral Citation No: [2023] NICH 2	Ref: SIM12117
<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	ICOS No: 17/42455
	Delivered: 24/03/23

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

ASSURED ENERGY LLP

Plaintiff/Applicant

and

[1] RAYMOND POLLOCK

First Defendant/Respondent

[2] MARTHA ELIZABETH POLLOCK

Second Defendant

Patrick Good KC with Keith Gibson (instructed by Cleaver Fulton Rankin, Solicitors) for the Plaintiff/Applicant

Peter Hopkins (instructed by McCay Solicitors) for the First Defendant/Respondent

SIMPSON J

Introduction

[1] This judgment relates to two applications by the plaintiff in the action to commit the first defendant for contempt of court as a result of his failures to abide by undertakings given to the court on 19 September 2017. The second defendant is not involved in these applications. Both applications ask that the first defendant “be committed to prison and/or fined” for identified breaches of the undertakings.

[2] For the context of the applications in this case it is fortunately only necessary to set out very brief details of the background facts.

[3] The plaintiff is involved in the production and sale of electricity through anaerobic digester plants, generally constructed and operated in conjunction with third party landowners, such as the first defendant. In 2014 the plaintiff agreed a lease for 21 years of lands owned by the first defendant in County Tyrone. On that land the plaintiff built an

anaerobic digester supplying electricity into the national grid. Disagreements arose between the parties, particularly about access to certain lands, leading to litigation.

[4] The action was commenced by the plaintiff by Writ of Summons dated 2 May 2017. The plaintiff claimed, *inter alia*, damages for trespass, breach of covenant, derogation from grant and unlawful interference with the plaintiff's property contained in Folio TY97838L, Co. Tyrone. The Writ also included a claim for an injunction restraining the first defendant from trespass. By Notice of Motion dated 15 September 2017 the plaintiff made an application to the court for an injunction pending the trial of the action. That application came on for hearing on 19 September 2017. Following discussions between counsel the injunction application was compromised by the first defendant providing undertakings to the court.

[5] The order of the court records that the first defendant:

- (i) Undertakes pursuant to the Protection from Harassment (NI) Order 1997 and common law whether through his own acts or omissions or the acts or omissions of a third party not to assault, harass, annoy, molest or otherwise interfere with the plaintiff's employees, servants and agents;
- (ii) Undertakes not to enter onto or remain on the plaintiff's premises as outlined in red in the map annexed hereto to (sic) this application at Schedule 3, save that the plaintiff will, pending further order of the court and without prejudice allow and permit access over that portion of the plaintiff's lands coloured pink on the map...

[6] On foot of an application dated 14 November 2019 the plaintiff sought an order of committal of the first defendant for failing to honour the undertakings given to the court. The particulars of the three breaches of undertaking relied on by the plaintiff are that the first defendant:

- (i) ... on or about the 15 January 2018 entered into the aforementioned area referred to above and deposited farm machinery to include various tractors and telescopic handler, shear grab, compressor and other pieces of equipment;
- (ii) ... on or about the 30 April 2019 entered into and remained upon the area demised and more specifically the cattle shed ...;
- (iii) ... on or about the 29 May 2019 entered into and remained upon the area demised and more specifically the cattle shed...

[7] By a further application, dated 3 June 2021 the plaintiff sought an order of committal alleging further failures to abide by the undertaking. The particulars of those breaches are that the first defendant:

- (iv) On or about 29 March 2020 ... obstructed the plaintiff's agents from carrying out their work ... [by attending] at the entrance to the cattle shed which is within the area outlined on the map...;

- (v) On or about the 28 October 2020 ... placed certain items including tractors and a trailer in the aforementioned area
- (vi) On or about the 7 November 2020 ... entered into the area he specifically undertook not to enter;
- (vii) On or about the 2 April 2021 ... entered into the area he specifically undertook not to enter;
- (viii) On or about the 7 April 2021 ... entered into the area he specifically undertook not to enter.

[8] In relation to each of the 8 charges against the first defendant the underlying factual matters are explained in some detail in two affidavits sworn by Mr Paul Kingston, the plaintiff's Operations Manager.

[9] The matter first came before me in February 2020, just prior to the first lockdown caused by the outbreak of Covid19. At that time the first defendant was not legally represented. The matter was adjourned by me on two or three occasions in an effort first, to persuade the first defendant to obtain legal representation because of the potential serious repercussions for him on foot of a committal application and second, to allow him to obtain such representation. I express my gratitude to the solicitors, particularly Mr Gareth McCay, and counsel, Mr Hopkins, who now represent the first defendant. The first defendant should equally be grateful that such an experienced solicitor and counsel have represented him in relation to the plaintiff's applications.

Contempt of court

[10] Order 52 of the Rules of the Court of Judicature of Northern Ireland provides the High Court with the power to punish for contempt of court by making an order of committal. Where the contempt is a civil contempt of court, committed in connection with any proceedings in the High Court, an order of committal may be made by a single judge.

[11] These proceedings relate to a civil contempt of court. As is stated in *Valentine: Civil Proceedings in the Supreme Court*, paragraph 16.63:

"It is civil contempt by a party to proceedings to breach an undertaking given by him to the court or by his advocate on his behalf in open court. [citing *R v Devereux* (1838) Cr & D ANC 157]. Undertakings are usually given as part of a settlement between parties, or as an alternative to an injunctive order which the court might otherwise make..."

[12] The undertakings in this case fall into the latter category identified by the author.

[13] In the current edition of *Arlidge Eady & Smith on Contempt* the following is stated in para 12-5:

“It is obvious that any civilised society depends upon the authority and effectiveness of orders made in its courts. There is thus a public interest in seeing that orders are enforced. Civil contempt cannot be considered therefore merely as a means by which individual litigants can enforce orders in their favour. The court has an interest, on behalf of the community at large, in ensuring that orders are not disobeyed at the option of one party, or even of both. It has been said that:

‘... civil contempt bears a two-fold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the state, a penal or disciplinary jurisdiction to be exercised by the court in the public interest.’”

(the reference is to Halsbury’s Law of England)

[14] At para 12-8 the authors cited the decision of Jackson LJ in *JSC BTA Bank v Solodchenko* [2011] EWCA Civ 1241 at para [45] as identifying the public policy rationale underlying punishment for civil contempt.

“The sentence for such contempt performs a number of functions. First, it upholds the authority of the court by punishing the contemnor and deterring others. Such punishment has nothing to do with the dignity of the court and everything to do with the public interest that court orders should be obeyed. Secondly, in some instances, it provides an incentive for belated compliance, because the contemnor may seek a reduction or discharge of sentence if he subsequently purges his contempt by complying with the court order in question.”

[15] At paras 12-20 the authors say that committal is the “court’s ultimate weapon in securing compliance with its orders.”

These proceedings

[16] The applications for committal came on for hearing before me on 22 March 2023. Mr Hopkins, on behalf of the first defendant, indicated that his client was prepared to admit the eight charges of contempt. Accordingly, the hearing proceeded by Mr Good KC outlining the background to and the nature of the particulars of the breaches of undertaking.

[17] Having done so Mr Good, as one would always expect of him, very fairly informed the court that since the instruction of the solicitors in this case by the first defendant, matters as between the first defendant and the plaintiff “have calmed.”

[18] I have read the affidavits of Mr Kingston setting out the evidential basis relating to all the charges. Very briefly, these are:

- Charge 1: the first defendant parked two tractors and put some other machinery on the lands of the plaintiff;
- Charge 2: in a dispute about fertiliser, the first defendant became verbally aggressive over a period of some minutes and removed the plaintiff's fertiliser;
- Charge 3: the first defendant came onto the lands and took photographs of the plaintiff's operatives;
- Charge 4: the first defendant came onto the lands and made a nuisance of himself by videoing the plaintiff's workmen and attempting to interrupt them;
- Charge 5: the first defendant attended on site and appeared to be interfering with a pipe, leading Mr. Kingston to say that the interference was presumably with the intention of causing a pollution incident;
- Charge 6: the first defendant appeared to be inspecting a pipe in the cattle shed;
- Charge 7: the first defendant attended at the entrance to the cattle shed and videoed the plaintiff's workmen;
- Charge 8: the first defendant entered into the cattle shed and videoed the plaintiff's workmen.

[19] Although all of the charges are clear breaches of the first defendant's undertaking to the court, they are what might reasonably be termed low level harassment and nuisance. There was one occasion on which the first defendant was verbally aggressive but none of the charges involved any violence on the part of the first defendant. It also appears that while the first defendant may have been a nuisance on those occasions, there is no suggestion that the plaintiff's business was adversely affected by the breaches.

[20] In mitigation, Mr Hopkins indicated that he was instructed to offer his client's humble apologies to the court for the breaches of the undertaking given to the court and to say to the court that the first defendant undertakes to comply with those undertakings in the future. He was instructed to say that his client solemnly promises not to breach the undertakings in the future. The first defendant understands that the undertakings must be abided by, and he has learned his lesson in relation to these matters. He understands the warnings given to him by his advisers that further breaches of the undertakings render him liable to a sentence of imprisonment for contempt of court.

[21] Specifically, in relation to charge 2, the first defendant accepts that he was mistaken about the ownership of the fertiliser and apologises to the plaintiff for its removal.

[22] Mr. Hopkins says, and I accept from my reading of the papers in this case, that there are issues between the parties, some of them very significant issues and that the question of maps and what was demised by the first defendant to the plaintiff is at the core of the matters in dispute. The breaches of the undertakings all have a connection with the first defendant's presence in an area in respect of which there is a substantial dispute. There was, at least, an element of confusion on the part of the first defendant, who believed that he was entitled to be on the land. Further, in relation particularly to charges 5 and 6, the first defendant would say that he was concerned, as landowner, about the possibility of enforcement proceedings in relation to discharges. While none of this excuses the breaches, it places them in context.

[23] The first defendant is 79; he will be 80 next month. He is now a farmer, and was formerly an electrical contractor. He has been married for 58 years and has three adult children. I note from a substantial affidavit sworn by him in the proceedings that he has never previously been involved in any litigation.

[24] I also take into account that although the lease is dated 2014, it was not until 2017 that proceedings were issued. Further, although the undertakings were given in September 2017, the first application for committal was not brought until November 2019. I also take into account that the issue of committal – for a variety of reasons, by no means all the first defendant's fault – has been hanging over the first defendant's head now for a period in excess of three years.

[25] In his submissions in mitigation the first defendant relies on a series of testimonials as to his character. These come from (i) the then Mayor of Derry City and Strabane District Council; (ii) a then Member of the Northern Ireland Legislative Assembly; (iii) a then Alderman; (iv) a businessman who had dealings with the first defendant. Those testimonials speak of the respect in which he is held in the local community; his positive work ethic; his integrity, honesty, commitment and dedication; his trustworthiness and professionalism. I take into account both the content of the testimonials, and also the fact that it is a matter of importance that such people would go to the trouble of providing testimonials for the first defendant.

[26] As part of the resolution of these applications the first defendant has agreed to pay the costs incurred by the plaintiff. Since these costs are likely to be substantial, it is clear that the first defendant already faces a significant financial penalty, and I am entitled to take that into consideration.

Penalty

[27] The limited range of options in an application to commit for contempt of court was identified by Hale LJ in *Hale v Tanner* [2000] 1 WLR 2377, 2380H-2381G. She said, *inter alia*,

“These cases have to come before the court on an application to commit... Not surprisingly, therefore, the court is directing its mind to whether or not committal to prison is the appropriate order. But it does not follow from that that imprisonment is to

be regarded as the automatic consequence of the breach of an order. Clearly it is not...

The full range of sentencing options is not available for contempt of court. Nevertheless, there is a range of things that the court can consider. It may do nothing, make no order. There is a power to fine. There is a power of sequestration of assets and there are mental health orders."

[28] In *Danchevsky v Danchevsky* [1974] 3 WLR 709 Lord Denning MR stated (at 712E/F):

"Whenever there is a reasonable alternative available instead of committal to prison, that alternative must be taken."

I also note that in *Robinson v Murray* [2005] EWCA Civ 935 Lord Woolf LCJ, said (para [20]):

"In this area, as in other areas, imprisonment needs to be reserved for those cases where imprisonment is necessary."

[29] When determining the appropriate penalty for contempt of court I have to consider the objectives of the exercise. These were identified by the Court of Appeal in England and Wales in *Willoughby v Solihull Metropolitan Borough Council* [2012] EWCA Civ 699. Although that case involved breaches of anti-social behaviour orders, the approach of the court is a useful guide. At para 20 Pitchford LJ said:

"In my view, of particular relevance, to the present case were the following principles. (1) There are three objectives to be considered: the first is punishment for breach of an order of the court; the second is to secure future compliance with the court's orders if possible; the third is rehabilitation, which is a natural companion to the second objective. (2) The committal order should reflect the aggravating and mitigating features of the breaches. Aggravating features will include deliberate flouting of the court's order on repeated occasions and in breach of a suspended order for imprisonment. Mitigating features may comprise personal inadequacy, admissions of breach, a low level of anti-social behaviour and efforts to reform."

[30] Taking all of the above into account, I consider that the custody threshold has not been crossed in the circumstances of this case, and that a sentence of imprisonment is not appropriate. However, I do not consider that it is appropriate simply to make no order. In my view it is necessary to impose a monetary penalty on the first defendant in order to mark the seriousness of the breaches of undertaking.

[31] Accordingly, in relation to each of charges 1 and 3 there will be a fine of £500. I consider charge 2 to be slightly more serious, involving as it did verbal aggression on the part of the first defendant. In relation to charge 2 there will be a fine of £750.

[32] The 2020 and 2021 breaches – that is charges 4 to 8 inclusive – all occurred after the first application for committal had appeared in court, after which the seriousness of the breaches had, or should have, become clear to the first defendant. In the circumstances, in relation to each of those charges there will be a fine of £750.

[33] The fines imposed total £5,500. In view of the fact that the first defendant has agreed to pay the substantial costs of these applications I will allow 20 weeks for payment of the fines.

[34] Finally, the order will record that the first defendant pay the plaintiff's costs of these applications, such costs to be taxed in default of agreement.