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Case No: 1359042T

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: Monday, 7 September 2020

Start Time: 2.52 p.m. Finish Time: 3.22 p.m.

Before:

HER HONOUR JUDGE HILDER

Between:

AB

Applicant

- and -

(1) HB

(2) NB

Respondents

MR JOHN McKENDRICK QC, (instructed by Ms Nicola Bushby of Irwin Mitchell LLP),
for the **Applicant**

The First Respondent appeared as a Litigant-in-person
The Second Respondent was not present and was not represented

APPROVED JUDGMENT
& CONSEQUENTIALS

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[Transcriber's note: transcript prepared without access to case documents.]

HER HONOUR JUDGE HILDER:

1. The Applicant in this matter is AB and the Respondents are HB and NB. They are all siblings.
2. The application before the court is for committal for HB for breach of a court order made on 24 April, reissued with a minor typographical correction on 27 April.
3. The application for this committal was made on (*inaudible*), dated 16 July 2020, and it was issued the following day with an order listing a hearing on the 14 August. It is important to make clear at the outset that there is no application for committal of the Second Respondent, and that is explained at page 115 of the bundle. The Applicant says he is taking a pragmatic approach, based on considerations of Ms B's welfare. If both Respondents were committed, there may be an impact on the provision of care.
4. I have already made an order, on 1 May, page 42 of the bundle, which records that the court has been satisfied that the order which is alleged to have been breached was appropriately served. If there were any doubt, Mr HB has today confirmed that he received it. The service of this application was not easily acquired, but I am amply satisfied, on the basis of the evidence filed – and in particular the affidavits of Raymond Finch and Nicola Bushby, dated 12 August – that this application has been appropriately served. If there was any doubt, Mr HB is here.
5. I have regard to the principles related to committal, set out by the Court of Appeal in a case called *Hamilton v Hamilton*, at page 9, paragraph 9. I am not going to read the whole of them, but I am going to summarise them. I bear in mind that it is unlawful for a court, as a public authority, to act in a way that is incompatible with the Defendant's rights, but proceedings for committal are a criminal charge for the purposes of Article 6, that the burden of proving guilt lies on the person seeking committal, that a Defendant to committal proceedings is not obliged to give evidence. In the event that facts constituting contempt are proved, the seriousness has to be marked by reference not merely to the intrinsic gravity, but also to secure compliance in the future.
6. I also have regard to the principles set out by Williams J in the case of *OPG v Stalter*, at paragraph 23. Again, I am not going to read them out in full, but I will summarise. There must be complete clarity at the start of the proceedings as to precisely what the foundation of the alleged contempt is. Before the hearing, the alleged contempt should be set out clearly in a document. Following the conclusion of the applicant's case, the respondent is entitled to make a submission of 'no case to answer'. Immediately prior to the commencement of the defence case, the person accused of contempt must be advised of the right to remain silent. If the person accused of contempt chooses to give evidence, the court must warn them about self-incrimination and their right not to incriminate themselves, and before the court moves to sentencing, the contemnor must be given an opportunity to mitigate or to purge his contempt.
7. This morning, I considered whether this committal hearing should proceed today in light of the fact that Mr HB is unrepresented. Mr McKendrick urged that it should go ahead for three principal reasons: essentially, this is the third hearing of the same issue, the protracted nature of these proceedings having been caused by Mr HB's actions or

inactions; secondly, that there is an ongoing need for cooperation in this matter; and thirdly, that the indications are that that cooperation is still, at best, reluctant and perhaps not forthcoming.

8. When pressed, Mr HB did seem to ask for a further adjournment, so that he could try to borrow money to fund legal representation. I was not persuaded that there was a genuine wish for legal representation, bearing in mind that at the last hearing he told me he had not wanted representation because he did not think the situation was serious enough. Nonetheless, he had had three weeks to obtain representation and he was given every assistance to do that, including via a list of legal firms with the relevant expertise.
9. I bear in mind that the assessment which was the point of these proceedings has been achieved, that there remains a pressing need to clarify the importance of ongoing cooperation with court orders, and so the hearing has proceeded.
10. The father of all three parties, who I shall refer to as “P”, out of privacy considerations, is 96-years-old. The Applicant says, and it has not been disputed, that P has, in the present tense, a significant estate, including outright ownership of the property where he lives with both Respondents, and other assets held over a number of jurisdictions. The Applicant lives in the USA. P has lived in the UK since about 1980.
11. In, or around, December 2018, when the Applicant visited P, he appeared not to recognise him. In late 2019, when the Applicant tried to visit again, it is said that HB refused to let him in. Thereafter, the Applicant sought legal advice, particularly concerned that P had lost capacity to manage his property and affairs and was being financially exploited. The Applicant’s solicitors contacted HB by phone, asking him to facilitate an assessment of P’s mental capacity and HB refused. The Applicant’s solicitors wrote HB a letter, on 8 January, with the same request, which is at page 97 of the bundle. No response was received.
12. On 28 January 2020, the Applicant’s solicitors spoke to each Respondent separately and they confirmed that they were not willing to cooperate with the proposed assessment. So at that point, there was little option but to turn to the court, and a COP1 application was made, which appears at page 4 of the bundle, dated 2 April 2020. It sought orders for assessment of P’s capacity to manage his property and affairs, and to decide who he sees, and it proposed the instruction of Dr Andrew Barker.
13. On 8 April, I made an order, which appears at page 33 of the bundle, where I joined both of the Respondents as parties in this matter for a hearing to be conducted remotely, in view of the pandemic.
14. At the hearing on 24 April, the Applicant was represented by Mr McKendrick QC. Neither of the Respondents attended. I was satisfied that the Respondents had been given appropriate notice of the hearing and documentation had been served on them, and that it was appropriate to proceed in their absence. The order made starts with a declaration, pursuant to section 48 of the Mental Capacity Act, which says, “The court has reason to believe that P lacks capacity to consent to being subject of an assessment”, and on that basis, I went on to order that it was lawful and in P’s best interests to be the subject of assessment of his capacity, to be carried out, as specified in an appendix, which specifically addressed Covid-19 considerations. Paragraph 4 of that order is the relevant provision for these proceedings. It required HB and NB to permit Dr Barker

entry to P's home for the purposes of the Capacity Assessment and not to interfere with Dr Barker's assessment. A penal notice is attached to that paragraph and appears in capital letters right at the front of the order. The order went on to make provision for the Respondents to have some input into the instructions for Dr Barker, paragraph 7, and to file evidence in response to Dr Barker's report, and to make an application, if they felt it appropriate. As I have said, I had already made an order and I am satisfied that the order was appropriately served.

15. So, I turn to the alleged breaches, and I remind myself at this point that the standard of proof is beyond reasonable doubt and the burden of proof is on the Applicant. There are seven alleged breaches, they were updated in the proceedings. It is accepted by the Applicant that no finding is sought on number 5.
16. The first one is that on or around 18 May, HB failed to arrange to permit Dr Barker entry to the property where P lives by telephoning Dr Barker and cancelling the appointment. In his own evidence, Mr HB accepts that that is what he did. In any event, I accept the evidence of Dr Barker in his affidavit of 15 July, paragraph 17.
17. Secondly, it is alleged that on 26 May 2020, HB failed to permit Dr Barker entry to his home, despite Dr Barker ringing the bell several times and the date having been previously arranged. Dr Barker's evidence is at paragraphs 19 and 20 of his affidavit, and then at 2.6 of his report. Mr HB has told the court today, essentially, that he did agree to that appointment, but only because Dr Barker insisted, and at the same time Mr HB did tell Dr Barker that his father did not want to have that appointment. I am satisfied, and I accept the evidence of Dr Barker, as to what occurred on 26 May when he turned up at the house.
18. The next account refers to the same date, that HB failed to permit Dr Barker entry, and the account on both sides is as I have already outlined.
19. The tranche of allegations refers to the second part, paragraph 4(b) of the order, and they focus on the interference, rather than the failure to permit entry. Essentially, they refer to the same telephone call and conversations.
20. The last two, at paragraph 6, refer to HB interfering with Dr Barker's assessment, by not permitting entry on the 26th. Mr HB has told the court that he was not there, he went to work instead because he told Dr Barker that the assessment was not wanted, and he did not dispute the fact that he failed to provide a landline telephone number when asked.
21. So, all of this boils down to two things: firstly on or around 18 May, HB cancelled an appointment for an assessment the next day. I accept the evidence of Dr Barker. I am satisfied that HB made clear he would not cooperate with an assessment for the next day. I find that was a breach of the court's requirement that he permit entry and also that he would not interfere with the assessment. However, in the second telephone call, also on 18 May, HB did agree to an alternative date for assessment, namely 26 May. I find that on or around 26 May, HB denied Dr Barker entry to his house when Dr Barker turned up there. I further find that HB failed to provide the house telephone number and thereby interfered with Dr Barker's assessment. Both of those amount to a breach of the court order.

22. In the Applicant's written evidence, there is reference to a number of other alleged breaches of court orders beyond those seven itemised in the current application. I make clear that although I have read the written evidence, I do not take into account any of those further allegations in the findings today.
23. The result of these breaches is that no assessment of P took place as envisaged in the April order and proceedings for contempt were required. Again, the process of serving that application has been protracted, but on 14 August, Mr HB did attend court. On that occasion, the court was mindful of the desirability of him being represented and did arrange for the application to be adjourned, but in the meantime, Mr HB agreed a new appointment date. Very sensibly, Dr Barker was able to complete his assessment and has now filed a report, dated 2 September. The conclusion he draws is that P lacks capacity to litigate these proceedings to manage his property and affairs and to make decisions about who he sees.

(Hearing continues)

JUDGE HILDER: Mr McKendrick, those are the findings I have made. Is there anything at this stage that I need to address?

MR McKENDRICK: In terms of the findings, Your Honour, no. I do not know whether the court would want any assistance on the consequences, or really that is a simple matter for Your Honour, after having heard from Mr HB.

JUDGE HILDER: Thank you. I do not.

MR McKENDRICK: I am obliged, madam.

JUDGE HILDER: Thank you.

Mr HB?

MR HB: Yes.

JUDGE HILDER: I have concluded that you have failed to comply with court orders. Those orders were directed at you. It is your name at the beginning of the paragraph. I have understood you to say you did not think it was anything to do with you and that it was not serious, and I previously, on 14 August, explained to you that it is the court who decides how serious these things are.

Having decided that you failed to comply with the orders, I next have to decide what penalty to impose. Before I do that, you must have an opportunity to say what you would like to report to mitigate the contempt. In other words, to explain why, or to explain why the court should be lenient, or even to apologise. Is there anything further you would like to say? Do you want some time to think about it?

MR HB: Well, I apologise for not understanding the whole situation, because the way I thought about it, it is between the Applicant and my father. So, even I showed the

letter to some friends, they said, “It is nothing to do with you. It is between your father and the Applicant.” So, there was a misunderstanding there. I was always very confused from all the situation and even the most important point was so many, sometimes I receive a letter from Ms Bushby, and I thought it is just a threat, it is not serious. Even I told her, well, she can remember also, I told her, “Are you threatening me because it is to go to prison, or there is a court?”, and I did not realise that it is that serious. That was the main reason. So, it was ignorance, but it was not on purpose, but also because I thought it is somebody else’s case. I am here to help, but if it is going to make him confused and it is not going to – it is just simply it was not my case. I was drawn into it in a way, because the man is 96 and maybe he cannot be treated the same as me, for example going to prison. So, I have kind of been used I thought. I said, “Well, it is not my business”, so I left it. That is the thing. So, I thought it is like a trap to make me cooperate with Ms Bushby. That was the reason I just sometimes did not take it that seriously, because my understanding was wrong. So, people can make mistakes.

JUDGE HILDER: What is your understanding now about the court order which directs you to do something?

MR HB: It is serious, but at that time, I did not understand, and I did not take it seriously. Still, I do not understand if somebody is the Applicant with my father has got some situation. It is sometimes, I do not understand why I am here.

JUDGE HILDER: Mr HB, you live with your father ---

MR HB: Yes.

JUDGE HILDER: --- and you have told me in the witness box that you and your sister care for him.

MR HB: Yes.

JUDGE HILDER: So, that gives you a position of responsibility in respect of your father.

MR HB: Yes.

JUDGE HILDER: Right. So, this court is concerned with your father and has powers to make sure that his best interests are given effect, so that as the person who lives with your father, even if the case is about your father, not you, that means it is quite likely that orders will require you to do something. Do you understand that now?

MR HB: Yes.

JUDGE HILDER: If this court makes further orders requiring you to do something, what is your intention?

MR HB: I will do as – I will follow it but if something is not something to do with me, I do not, how can I say, follow the order, and if something is nothing to do with me, I do not see why I should do something about it.

JUDGE HILDER: Mr HB, we have got to get past this. As I have just said, you are in a position of responsibility for your father. The order which names you, tells you to do something, is very much to do with you. Do you understand that?

MR HB: I am sorry, I do not understand it.

JUDGE HILDER: If the order says, “HB shall do this or shall not do that”, it is to do with you. Do you understand that?

MR HB: Okay, yes.

JUDGE HILDER: Right. So, the next time a court order comes out and says, “HB must do this”, what is your intention?

MR HB: So, I have to do it.

JUDGE HILDER: You do, and what will happen if you do not do it?

MR HB: I am not sure.

JUDGE HILDER: You may go to prison for up to two years. You may be fined. You may have your assets seized. It does not get much more serious than this. Do you understand that?

MR HB: Yes, but even – okay, all right. It is just, I thought somebody who has to go to prison has to commit something.

JUDGE HILDER: The thing that you are committing is breaking a court order. That is a serious matter. This court takes it seriously and this court has the power to send you to prison. So, I am needing to make sure that you understand how serious it is when a court orders you to do something, because I do not want you to be in this position again.

MR HB: Okay.

JUDGE HILDER: Yes?

MR HB: Okay, yes. Yes, Your Honour.

JUDGE HILDER: Is there anything else you want to say to me about how I should mark the breaches of the order which I have found?

MR HB: Since I do not have a lawyer, I do not even understand a lot of things, but I think it is – no.

JUDGE HILDER: Okay. Can you remain standing, please?

(Further judgment)

24. There are a number of factors which I take into account. For Mr McKendrick's purposes, I explain that I am referring here to the cases of *Re Whiting & Hope v Taft* [?] I bear in mind the range of possible orders available to the court. I bear in mind that the main objective is to mark the court's disapproval of breach of its orders and to secure compliance. I bear in mind that the sentence should be reasonable, having regard to the maximum of two years' imprisonment, and that suspension is more commonly appropriate in the Court of Protection and the Family Court than in a criminal setting. I bear in mind that aggravating and mitigating factors should be taken into account, and I bear in mind the effect on P or P's family being taken into account as well.
25. Having sat through today's hearing, I consider that Mr HB does now understand that he has to comply with court orders, that when they have his name on them, they are to do with him, and that they will not go away if he chooses to ignore them. In fact, things will just get more expensive and more threatening to him personally.
26. I have found facts of breach in this matter and those findings will remain part of the background of this case. Should there be any future occasion to have proceedings of this nature, those findings will be there. On the other hand, I bear in mind that since the hearing on 14 August, the objective of this application has been achieved and that P has been assessed by a medical expert.
27. Taking all of those things into consideration, I am satisfied that on this occasion, it is not necessary to impose any custodial sentence, immediate or suspended, and neither is it necessary to impose a fine. I do not propose to make any penalty, because I intend to give Mr HB the opportunity to demonstrate that he has learnt the importance of compliance with court orders.
28. Do you understand, Mr HB?

MR HB: Yes, Your Honour.

JUDGE HILDER: Thank you. Take a seat.

(Hearing continues)

This transcript and Judgment have been approved by HHJ Hilder.