



Case No: B2/2019/1176

Neutral Citation Number: [2019] EWCA Civ 1299
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LEEDS COUNTY COURT
(HIS HONOUR JUDGE SAFFMAN)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 20 June 2019

Before:

LADY JUSTICE ASPLIN
and
LORD JUSTICE MALES

Between:

ISIS HOUSING COOPERATIVE

Respondent

- and -

EVELYN

Appellant

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(Official Shorthand Writers to the Court)

The **Appellant** appeared via video-link

The **Respondent** did not appear and was not represented

Judgment

(Approved)

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LORD JUSTICE MALES:

1. This is an application by Mr Steven Evelyn for an extension of time within which to appeal against an order committing him to prison for a period of 14 months for contempt of court, with the appeal to follow if the extension of time is granted.
2. Mr Evelyn was taken into custody on 14 December 2018 and is currently a prisoner serving the sentence of 14 months imposed on him for his contempt. He is due for release at the halfway point of his sentence, which will be reached within the next month. He has appeared on this application by video-link from prison and has made his submissions to us.
3. The respondent, Isis Housing Cooperative, has not appeared on this application. We have a letter and a written skeleton argument from its solicitor resisting the appeal and explaining that it does not have sufficient financial resources to instruct a solicitor or barrister to attend and present formal submissions. That is entirely understandable. Isis must have incurred substantial legal costs over the years in its dispute with Mr Evelyn. Although a number of costs orders have been made against him, nothing has been paid.
4. The order committing Mr Evelyn to prison was made by HHJ Saffman in the Leeds County Court on 4 July 2018. Although Mr Evelyn had been given notice of the hearing, he did not attend and the order was therefore made in his absence.
5. This matter has a long history. Much of it is set out in the judgment of Henderson LJ in this court In *Evelyn v Isis Housing* [2017] EWCA Civ 130, an unsuccessful appeal from a previous order by HHJ Saffman by which Mr Evelyn was committed to prison. I refer to [11] to [25] of Henderson LJ's judgment:

“11. Mr Evelyn is the freehold owner and registered proprietor of a small property at 53 Reginald Street in Leeds. He acquired the property in 2000. It is situated at the rear of the garden of 53 Sholebroke Avenue, which runs parallel to Reginald Street. 53 Sholebroke Avenue and two adjoining properties are owned by Isis.

12. In 1953, Mr Evelyn's predecessor in title, a Mr Lidgard, bought the property at 53 Reginald Street from the then owners of 53 Sholebroke Avenue. At that date, 53 Reginald Street consisted of shop premises where Mr Lidgard carried on business as a fishmonger and greengrocer. By the conveyance dated 2 April 1953, he and his successors in title were granted two easements over an L shaped area of land immediately adjacent to the side and rear walls of the property, thereby permitting access from Reginald Street to the back of the premises. One easement was a right of way on foot and the other was a right of carriage for vehicles delivering goods to the premises. The L-shaped area was coloured brown on the plan annexed to the conveyance.

13. After the words of grant of the easements, there followed a qualification in the following terms: 'Such rights to be exercised only for the purposes of carrying goods to and from the rear of the said premises in the course of the purchaser's business of a fishmonger and greengrocer and for no other purpose whatsoever.'

14. A question arises whether the limiting proviso which I have just quoted was intended to apply to both of the easements or only to the right of carriage with vehicles. When Mr Evelyn became the owner of the property, he thought that the latter view was correct and that the right of way on foot was, therefore, unlimited. Isis disagreed with this interpretation of the conveyance.

15. Eventually, Mr Evelyn brought proceedings against Isis alleging interference with his right of way. A trial took place in the Leeds County Court, as it then was, on 9 May 2011. His Honour Judge Grenfell gave judgment in favour of Isis, and a copy of that judgment is included in our bundle. He held that both of the rights, which are referred to in the plural in the proviso, were subject to the same limitation. Reading the conveyance as a whole, he said, it was clear that what was being conveyed was a small shop which was to be run as a fishmonger and greengrocery business. The purpose of the easements was to allow access to the rear of the property for deliveries.

16. There was no appeal from that decision, which seems to me to have been clearly correct as a matter of construction of the conveyance. Must unfortunately, however, Mr Evelyn has never felt able to accept that the court has determined

this issue against him. At various times and in various ways, he has tried to reopen the question without success, meanwhile frequently treating the right of way on foot as if it were unlimited. As a result, he has trespassed on the land belonging to Isis at the rear of 53 Sholebroke Avenue because, under the conveyance, he had no right to be there.

17. This conduct led to Isis applying to the court for an injunction against Mr Evelyn. On 21 August 2012, His Honour Judge Langan made the first of the orders upon which the present application is based. The order prohibited Mr Evelyn from entering upon the property of Isis: 'save for the purposes as set out in the conveyance dated 2 April 1953, namely in exercise of his rights of way and/or carriage solely in relation to the conduct of business as a fishmonger and greengrocer.'

18. The order also contained a prominent penal notice warning Mr Evelyn that, if he disobeyed it, he might be held to be in contempt of court and might be imprisoned or fined.

19. Regrettably, this order did not lead to a change in Mr Evelyn's behaviour and on no fewer than three occasions over the next two years, he was found to be in breach of the injunction and sentenced to terms of imprisonment.

20. First, on 12 April 2013, he was sentenced by Her Honour Judge Belcher to 56 days' imprisonment. Secondly, on 31 July 2013, Judge Saffman sentenced him to a term of six months.

21. The matter then came back before the court again on 21 August 2014, when Judge Saffman ordered him to remove a number of items which he had deposited on Isis' land and to take down a metal fence which he had erected. He was also once more restrained from entering or being on the Claimant's land at any time thereafter, save for the purpose of complying with the mandatory orders made against him and with a further saving in the same terms as before relating to the 1953 conveyance. That was the second of the injunctions on which the present application is based. In addition, it was on that third occasion that Mr Evelyn was found guilty of further breaches of Judge Langan's order and was sentenced to the

12 month term suspended for two years which I mentioned at the start of this judgment.

22. That, in short, is the background to the present application, which was prompted by a further incident on 8 May 2016 when Mr Evelyn was allegedly seen once more in the garden of Isis' property pacing up and down and conversing on a mobile phone. A video record of the incident was taken by Ms Sandra Wiles, who is the secretary of Isis. She exhibited three frames from that video to her affidavit in support of the application, which was issued on 13 May, seeking the committal to prison of Mr Evelyn for further breach of the injunctions.

23. The effective hearing of that application took place on 25 August last year, but it had by then been before the court three times, as the judge records in paragraph 4 of his judgment. On those previous occasions, the judge had first committed Mr Evelyn to prison in his absence, being satisfied on the evidence that he was guilty of the breach alleged and that he had been served with the application. Mr Evelyn then applied to have that order set aside. The judge suspended his previous order pending a hearing on 1 August, when directions were given which led to the hearing on the 25th.

24. Mr Evelyn apparently said on 1 August that he had a defence to the application because he was in business as a grocer and he said he intended to call witnesses to support his case. The judge says he advised Mr Evelyn of the need to obtain legal representation if he could, but he was unable to do so before the adjourned hearing, when the judge decided that the case should proceed with Mr Evelyn acting in person. According to the judge, Mr Evelyn said he had no difficulty with the matter proceeding in that way.

25. There are no appeals before us relating to any of the judge's previous orders, but on the information before us, I have to say I feel some misgivings about the procedure which the judge adopted. I find it hard to understand how it could have been appropriate to begin by making a committal order in Mr Evelyn's absence without at least giving him a realistic opportunity to obtain legal representation. Criminal legal aid is available as of right for civil contempt proceedings, and the Practice Direction to CPR Part 81 emphasises the need to allow a reasonable time

for legal aid to be obtained: see PD 81, paragraphs 15.5 and 15.6. In the event, however, no serious harm seems to have been done because Mr Evelyn was given a reasonable opportunity to prepare his case.”

6. At the hearing on 25 August 2016 to which Henderson LJ referred, the judge rejected Mr Evelyn's attempt to resurrect his contention that his right of way on foot was unrestricted and rejected also his case that he was in fact on the land in the capacity of a greengrocer. As a result he was satisfied beyond reasonable doubt that Mr Evelyn was in breach of the injunction. He sentenced him to an immediate term of imprisonment of 28 days and activated in part a previous suspended sentence of twelve months by adding a consecutive term of four months' imprisonment to the 28 days, making a total sentence of five months. The Court of Appeal dismissed Mr Evelyn's appeal in the judgment to which I have referred. That takes the story up to January 2017.
7. On 9 August 2017 HHJ Saffman ordered Mr Evelyn to vacate the property at 53 Reginald Street. There was no appeal from that order, which appears to have been sought as a preliminary to Isis obtaining an order for sale of the property with a view to recovering something in respect of the various costs orders made in its favour. It had already obtained a writ of possession. However, Mr Evelyn did not vacate the property. He continued to occupy it and moreover entered upon the land owned by Isis, causing alarm and distress to the tenants and impeding their use of the rear garden. The details are set out in two witness statements of Ms Angela Mayne, a member of the cooperative, dated 25 April and 17 May 2018. It is unnecessary to set them out here.
8. This led to a further application to commit Mr Evelyn which came before the judge on 6 June 2018. Mr Evelyn had been served with notice of the application but did not attend the hearing. He accepted before us that he had indeed received notification. The judge proceeded in his absence and heard oral evidence in support of the application from Ms Mayne, presumably to confirm on oath the content of her witness statements. Having done so, he made an order recording that he was satisfied that Mr Evelyn had been duly served and that there was no good reason of which the court was aware for his non-attendance. He found applying the criminal standard of proof that Mr Evelyn was guilty of contempt of

court by breaching the orders of 21 August 2012, 21 August 2014 and 9 August 2017 in four respects. These were set out in the schedule to the order as follows:

- "1. The defendant has failed to vacate the property at 53 Reginald Street, Leeds LS7 3HL in breach of paragraph 1 of the order of 9 August 2017.
2. The defendant has on various times between 17 August 2017 (being the date of service of the order of 9 August 2017) and 17 May 2018 re-entered 53 Reginald Street, Leeds in breach of paragraph 2 of the order of 9 August 2017.
3. The defendant has on various times between 17 August 2017 and 17 May 2018 entered the claimant's property to reposition solar panels serving 53 Reginald Street in breach of paragraph 2 of the order of 21 August 2012 and the second paragraph 1 of the order of 21 August 2014.
4. On or about 10 May 2018 the defendant replaced a kitchen sink on the claimant's premises, which constituted an entry onto the claimant's premises in breach of paragraph 2 of the order of 21 August 2012 and the second paragraph 1 of the order of 21 August 2014."

9. We do not have a transcript of the judge's judgment, but his reasoning is clear from the detailed terms of the order. The judge then adjourned the matter until 4 July 2018 for sentence. Mr Evelyn was notified of the date of the adjourned hearings by the solicitor acting for Isis, who warned him that if he did not attend the court would deal with the matter in his absence and that any sentence might include a custodial sentence of significant length. The solicitor's letter emphasised that it was in Mr Evelyn's interest to attend and advised that legal aid was available to him in order to obtain legal representation.
10. However, Mr Evelyn did not avail himself of the opportunity to obtain legal aid and did not attend the hearing. He has not sought legal aid for this appeal either. He did not deny to us that he received notice of this hearing. He said that he had another matter to attend to, a probate matter relating to the death of his mother which he regarded as more important. He did not suggest however that there was anything in the nature of a direct clash of dates or indeed that any problem was communicated to the court. No doubt if there had been a genuine problem, something could have been done to adjust the date of the hearing of the sentencing in order to avoid a direct clash. However, that simply did not arise.

11. In his absence, the judge sentenced Mr Evelyn on 4 July 2018 to a total of 14 months' imprisonment. This comprised a sentence of 14 months for failing to vacate the premises at 53 Reginald Street and re-entering in breach of the 9 August 2017 order; nine months for entering Isis's property at various times between 17 August 2017 and 17 May 2018 in breach of the earlier orders of August 2012 and August 2014; and six months for entering Isis's property in breach of these orders on or about 10 May 2018. All of these sentences were to run concurrently.
12. The proposed appeal by Mr Evelyn, so far as his written grounds go, appears to be primarily focused on a submission that he was not aware of the hearing before the judge, who should not have dealt with the matter in his absence. There is absolutely nothing in this point, and in fairness Mr Evelyn has not denied knowing of the hearings in his oral submissions to us. I have no doubt and neither did the judge that Mr Evelyn was properly served with notice of both hearings, the hearing of 6 June 2018 at which the issue of whether Mr Evelyn was in contempt was dealt with and also the hearing of 4 July 2018 at which he was sentenced. It was his choice not to attend on each of those occasions, just as he has chosen not to attend many of the previous hearings in this long history. The evidence against him was overwhelming, and it is not apparent that Mr Evelyn even denies the allegations against him. I shall come in a moment to what he does say.
13. I can see no valid criticism of the way that the judge dealt with the matter. He was right to proceed in the absence of Mr Evelyn. The findings of contempt are unimpeachable. It is impossible to say that the sentence was excessive in view of the repeated defiance of court orders extending now over a period of years with no sign that Mr Evelyn is prepared to change his ways and comply with the orders which have been made. If anything, the sentence was lenient.
14. In his oral submissions today, Mr Evelyn has reiterated his complaint about the original judgment of HHJ Grenfell against him back in 2011. He said that he believes the injunction against him is illegal. It is clear that he does not accept it. While he says that he has not disobeyed the court order, he has made clear that he continues to insist that he is entitled to use the right of way on foot at all times,

but that is something which has now been decided finally against him, not only back in 2011 but also by the judgment of this court to which I have referred.

15. If matters had ended there, I would have refused the extension of time which Mr Evelyn seeks. However, because the appeal bundle did not contain a sealed version of the order made on 4 July 2018 and did not contain any warrant for Mr Evelyn's arrest, which did not take place until December 2018, over five months after the making of the order, we were concerned to ensure that the proper procedures had been carried out and therefore caused some enquiries to be made. As a result of those inquiries, we have been provided with copies of the sealed order made by the court and of the warrant committing Mr Evelyn to prison. It is apparent therefore that both the order and the warrant are in order. It was this warrant which was executed when Mr Evelyn was arrested in December 2018. Mr Evelyn accepts that he was informed of the existence of the warrant when he attended the court at Leeds in connection with another matter (probably the probate matter to which I have referred) in September 2018. On that occasion he was informed by court staff that there was a warrant for his arrest. However, no steps were taken then to execute the warrant upon him. It is not apparent however whether the order for committal was actually served upon Mr Evelyn. Perhaps it was, but there is no evidence before us to show that it was served before his arrest or even at the time when he was arrested.

16. CPR 81.30 provides that:

"81.30

- (1) If a committal order is made, the order will be for the issue of a warrant of committal.
- (2) Unless the court orders otherwise—
 - (a) a copy of the committal order must be served on the respondent either before or at the time of the execution of the warrant of committal; or
 - (b) where the warrant of committal has been signed by the judge, the committal order may be served on the respondent at any time within 36 hours after the execution of the warrant.
- (3) Without further order of the court, a warrant of committal must not be enforced more than 2 years after the date on which the warrant is issued."

17. It appears that the judge was never asked to make and did not make an order that the committal order need not be served. Thus the order ought to have been served upon Mr Evelyn. However, it is apparent from the decision of this court in *In re Scriven* [2004] EWCA Civ 683 that a failure to serve the order will not invalidate the proceedings if there is no injustice or prejudice to the contemnor as a result. The relevant rule in that case was Order 29 of the County Court Rules, which was in materially the same terms as CPR 81.30. Although there was some doubt about the matter, the court proceeded on the basis that the order had not been served and that the arrest of the contemnor had taken place pursuant to a warrant which was issued under the authority of the unserved order: see [22]. That is essentially the position in this case.
18. In that context, Sedley LJ, giving the judgment of the court, quoted what Lord Woolf MR had said in *Nicholls v Nicholls* [1997] 1 WLR 326:

"Today it is no longer appropriate to regard an order for committal as being no more than a form of execution available to another party against an alleged contemnor. The court itself has a very substantial interest in seeing that its orders are upheld. If committal orders are to be set aside on purely technical grounds which have nothing to do with the justice of the case, then this has the effect of undermining the system of justice and the credibility of the court orders. While the procedural requirements in relation to applications to commit and committal orders are there to be obeyed and to protect the contemnor, if there is non-compliance with the requirements which does not prejudice the contemnor, to set aside the order purely on the grounds of technicality is contrary to the interests of justice. As long as the order made by the judge was a valid order, the approach of this court will be to uphold the order in the absence of any prejudice or injustice to the contemnor as a consequence of doing so."

19. The court concluded on the facts of *In re Scriven* that there was no such prejudice or injustice:

"35. But what is far more important, in our judgment, is this. It is one thing for Ms Rayne to establish in principle the reasons for serving a committal order. It is another to establish in fact – as she has conspicuously not been able to do – that any of the intended purposes would have been served by formal service of the order. Nowhere does Mr Scriven, or Ms Rayne on his behalf, begin to suggest that had

he had notice of the committal order he would have had grounds for appealing it or setting it aside, or that he would have taken any step whatever to purge his contempt and agree to enter the witness box. His attitude has throughout been one of contumacious defiance of the court's process in bankruptcy. Nor does Mr Scriven suggest at any point that he did not know why he was being arrested. In our judgment he knew perfectly well. He had deliberately stayed away from the committal proceedings; he must have known through Ms Rayne, long before the date of his arrest, that a warrant was out for him; and he is unable even now to suggest that it would have made any difference to his course of conduct up to the moment of arrest had the committal order been physically served upon him."

20. I would reach the same conclusion on the facts of this case. Mr Evelyn knew what the allegations against him were. He knew that the hearing would take place on 4 July 2018, at which he would be sentenced for the contempts found against him. He was warned in terms that a prison sentence might be imposed, and in view of the previous history of this matter he cannot reasonably have expected any other outcome. He nevertheless chose not to attend. Nor does it appear that he made any attempt to find out what had happened. While he was not obliged to do so, that does underline the technical nature of any objection based on a failure of service. Certainly he knew by September 2018 that a warrant of committal had been issued, but again he took no steps to find out more or to appeal. Moreover, it is clear that he would not have taken any step to purge his contempt and clear also that service of the order would have had no effect on his conduct. Indeed, it appears that he continued to occupy the premises even after the findings of contempt made against him and after the sentencing hearing had taken place. It was at those premises that he was eventually arrested. He has insisted to us that it is his home. Accordingly, even on the assumption that the order for committal was never served, I would hold that this does not invalidate Mr Evelyn's arrest and committal to prison.
21. In these circumstances I would with some doubt grant the necessary extension of time for appeal. I would do so only because of the uncertainty about whether or when the order was served and because it would be disproportionate to seek to investigate this matter further. The simplest course is to grant an extension of

time to avoid any possible difficulty. However, I would dismiss the appeal, which for the reasons I have given has no merit.

22. Before parting with this appeal, I would wish to reiterate that Mr Evelyn has demonstrated over a number of years that he has no intention of complying with court orders made against him. Repeated short sentences have had no effect. His conduct has caused alarm and distress to Isis's tenants. It must stop. It is indeed well past time for his attitude to come to an end. If he continues after his release to defy these orders and to ignore the fact that his case as to the meaning of the covenant in the conveyance has been finally rejected by the courts, he can expect to be dealt with severely. He needs to understand that.

LADY JUSTICE ASPLIN:

23. I agree with the entirety of the judgment of Males LJ, and I would reiterate the warnings that he added at the end of his judgment about Mr Evelyn's conduct and his understanding of the situation. He must understand that he must comply with court orders unless they are successfully appealed or set aside.

Order: Appeal dismissed