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IN THE CROYDON COUNTY COURT

2-8 Altyre Road,
Croydon CR0 5LA

Friday, 22 January 2016

Before:

HER HONOUR JUDGE DOWNEY

WATSON

Claimant

- v -

HOLMAN & HOLMAN

Defendants

MISS C JONES appeared on behalf of the Claimant.
The Defendants appeared in person.

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JUDGMENT
(As Approved)

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Friday, 22 January 2016

JUDGMENT

JUDGE DOWNEY:

1 (From beginning of recording..) This is an application for committal dated 19 May 2014, and subsequently amended on 5 November 2015, and it was initially listed before me on 30 November 2015, but then re-listed for today.

2 The application is made by the claimant, Miss Watson, who has been represented today by Miss Jones of counsel, for committal in relation to an order dated 14 December 2012, which was for removal of a garage wall. I shall read the relevant paragraphs of the order in full. Paragraph 1.1 of the order said:

> "The flank wall of the garage of No 16 as aforesaid shall be removed along its whole length down to the level of approximately 500 mms above the floor level, where the width of the base of the wall becomes thicker.
>
> 1.2 The removal of the flank wall shall be effected in such a manner so as to avoid (as far as practical) causing any damage to any structure on the claimant's property at No 18 Vincent Road, Coulsden, Surrey.
>
> 3. Liberty to each party to apply on notice with regard to the implementation of that injunction."

The requirement of the order was that by 31 March 2013 the wall should be removed. That order was then subsequently extended on two occasions, the last of which was 27 January 2014, which gave the defendants an extension to 20 February 2014. The claimant says the removal of the wall has still not taken place.

3 The defendants appeared in person today. Unfortunately they have been unable to secure legal representation. They accepted they had not complied with the order in the terms, because (I paraphrase) they say that to remove the wall as required would cause more damage, by causing damage to their own garage, consequential damage to the claimant's garage at No 18, and to the garden wall at No 18, and that the task could not be done safely. In other words, they say that it is unreasonable to expect them to comply with this order as drawn.

4 There are two preliminary points which I was asked to deal with. The first was that the application should not proceed because of the absence of legal representation. Unfortunately, the defendants are not eligible for legal aid, as a result of the change in the legal aid provisions. I, and many others involved

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in the court system, consider it unacceptable that defendants find themselves unrepresented in quasi criminal proceedings, where their liberty is at stake, but that is the position. When the case came before me on 13 November, I accepted, as had His Honour Judge Ellis previously, that every effort should be made to secure help for the defendants via the Bar Pro Bono Unit, and indeed the claimant conceded that every effort should be made. So in the intervening two months, a referral was made to the Bar Pro Bono Unit, and indeed they did accept the referral, and I understand that Mr and Mrs Holman had some advice from a barrister via the Bar Pro Bono Unit, including a conference and some general advice. Indeed, the barrister in question made contact with the claimant's instructing solicitors. But unfortunately the barrister in question had to pull out yesterday, for reasons we do not know about, and a replacement could not be found (understandably at such short notice). Mr and Mrs Holman did not today seek an adjournment, but Mrs Holman in her evidence expressed her unhappiness at having to proceed unrepresented. I had indicated on the last occasion that the case should proceed today, even without legal representation, given the delay and the passage of time since the original order was made. It seemed to me that a careful balance had to be struck.

5 I have reminded myself today of the case of Brown v London Borough of Haringey [2015], where the court concluded that in cases of committal strenuous steps should be taken to consider issues of representation and to try to secure legal representation for defendants, but in this case, given that it is now over 3 years since the original order was made, I am satisfied that, as unsatisfactory as it is, it was proper to proceed today, given that there was no reasonable prospect of securing legal representation for the defendants in any reasonable timeframe for any replacement counsel. In serving, we have been given no timeframe for the Bar Pro Bono Unit. In the end, Mr and Mrs Holman have represented themselves and have done so eloquently and carefully.

6 The second preliminary point that I should deal with today is the defendants' application to dismiss the application for a committal. Mr and Mrs Holman submitted that the application for a committal was defective, and that the amendment that I subsequently allowed in November should not have been allowed, firstly because the application was defective and the mandatory nature of the requirements of an application for committal meant that no amendment was allowed; and, secondly, because there had been so much delay from the initial application for committal in June, and the subsequent amendment in this hearing, that it was unfair to allow the application to proceed.

7 Miss Jones, on behalf of the claimant, accepted that the application was defective, and I allowed the amendments. I am satisfied that, notwithstanding what Mr Holman submitted, neither Miss Jones nor I were aware of any authority which said that, just because of the nature of these proceedings, no amendments could be allowed. Indeed, at paragraph 13.22 of the practice direction to Part 81 (page 2474 of the 2015 White Book), it says:

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> "If the application for permission to make a committal application or the committal application is commenced by the filing of an application notice...
>
> (2) an amendment to the application notice may be made with the permission of the court but not otherwise."

Miss Jones invites me to conclude that the amendments I made in November were properly made, with the claimant seeking the court's permission, and I am satisfied that I had the power to give permission to the claimant to the application. They did so, and the application therefore to dismiss the application for committal made by the defendants is refused.

8 The second point I should deal with is that Mr Holman said that the delay in seeking to amend the application was so excessive that it was unreasonable to allow it, and that it left Mr and Mrs Holman unclear as to whether the committal would ever proceed, given the time it took between the first application in June 2014 and the application to amend in November 2015, and he said that the delay between making the application meant that it was unfair to have allowed the amendment. Whilst I have some sympathy with that point, there are two factors which I consider mean that there was no prejudice to the defendants in allowing the amendment, notwithstanding the delay. The first point is that the claimant accepts there was a significant delay, but points to the fact that between June 2014 and early 2015 there was considerable lack of clarity about where and whether this case could proceed, in part because there was no certainty about whether there would be a civil circuit judge at this court to deal with it. Thus, the case was transferred to Central London, and that coincided with Central London moving from its premises at Regent's Park to the Royal Courts of Justice, and there was what is termed by Miss Jones a "black hole", where many files fell into in Central London during that period, and I accept that point, having had several cases where the files have literally disappeared into that black hole.

9 The second point I consider in relation to the delay is that whilst there may have been delay in progressing the committal application, this is not a case where there has been no activity since the first order in 2013. If it was the case, when the first order was made on 14 December 2013 telling Mr and Mrs Holman to remove this wall, that nothing had happened until this application for committal between those periods, then there may be merit in what Mr Holman was arguing. But in fact there has been fairly consistent activity on this case. Firstly, there have been two applications to extend the time for compliance with the order. This is the second lot of committal proceedings, albeit the previous applications were defective or flawed. But it cannot be said that this was a case where Mr and Mrs Holman were thinking that the case had died a death and that Miss Watson had forgotten about it. They must have been under absolutely no illusions that the claimant wanted the order complied with.

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10 Mr and Mrs Holman point to a reference in the papers to Miss Watson possibly considering an alternative route, i.e. applying to the court for an order where she be permitted to do the work under the order. They pointed to that to say that they did not expect committal proceedings, because they were expecting those kind of proceedings. There is nothing to prevent the claimant issuing those kind of proceedings, but equally there was nothing to prevent her issuing committal proceedings. If an order has not been complied with, it is within her right to do whatever she can to see the order complied with. The point is that the claimant has always, since the order was made on 14 December 2012, made it clear to the defendants that she wanted the order complied with. It was not her wish to bring committal proceedings, which may see the defendants going to prison. She simply wanted the wall removed, and Mr and Mrs Holman have always known that that is her wish, and so I do not accept that they have been prejudiced by the delay, which in any event the claimant accepts.

11 I now turn to the substantive application. For the purposes of this hearing, I have read a large pile of papers, including excerpts of the original judgment, the expert's report upon which the judge decided the case, and a transcript of some discussions which led to the order which His Honour Judge Ellis made in December 2012. I have heard evidence in relation to the alleged breach from both the claimant and both defendants, and I have heard submissions.

12 The order, as I have already mentioned, is for removal of the southern flank wall of the garage at No 16 Vincent Road, a neighbouring property to the claimant's property. I have seen photographs of the index properties and the wall in question, and I have considered the evidence in the case. I remind myself, when looking at the substantive committal application, of the test that I must apply. It is for the claimant, Miss Watson, to prove that the order dated 14 December 2012 has been breached, and she must prove that it has been breached beyond reasonable doubt. A breach will only be established if I am satisfied that the terms of that injunction or order are clear and unambiguous, and I must be satisfied that the defendants had proper notice of the order and, as I say, that the breach has proved beyond reasonable doubt. The claimant has to show that the defendants have deliberately breached the order.

13 I heard from the claimant. She gave her evidence in a straightforward manner and set out that the garage wall was leaning on the lattice garden wall in her property. She acknowledged that there may be some consequential damage to her wall and, through her counsel, she said she would take the risk of what might follow from removal of the garage wall at No 16. She seeks to enforce the order and told me that absolutely nothing had been done to comply with the order since 14 December 2012.

14 The defendants' case is that they have not complied with the order, because (in the words of Mr Holman) the claimant has not given him a legally binding assurance that, if there is consequential damage to her garage, she will rectify that. He said to the court that if he was given clear assurance that she would take the risk and deal with the repercussions, he would take the wall down.

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Mrs Holman said, "We haven't taken the wall down, because our safety is at risk". She also said that if the claimant guaranteed she would foot the bill for any damage which occurred, she would help her husband comply with the order. Both Mr and Mrs Holman say that the garage at No 18 is unstable, because it was not properly built, and they say that that is the real cause of the instability.

15 I have read the expert's report. Mr Pal, the engineer (who was a single joint expert appointed by the court, although instructed by Lyons Davidson, the solicitors for the claimant), concluded (page 358) that:

> "The flank wall to the garage of No 16 Vincent Road is leaning on the garden wall to No 18 and has displaced a coping stone. The centre of gravity of the wall is now outside the line of its base, and as such the garage wall must be considered unstable."

He then sets out that the wall should be removed, and gives a method and system as to how it could and should be rebuilt.

16 There are only excerpts of the judgment in the bundle, but I have found the full judgment in the court file and read that, and I notice that during the trial there was a site visit to the properties to view the wall in question. It was a detailed trial, which considered many of the issues and, in particular, at page 267 I notice that at paragraph 15 His Honour Judge Ellis took account of a concession made by the expert in the course of cross-examination, which was that the garage of No 18 was constructed in a way which did not comply with building regulations, in that they had not put in a sufficient depth of concrete. He agreed that concrete should have gone down to the depth of the adjacent footing, and that had not been done. His Honour Judge Ellis went on to say in paragraph 16 that Mr Pal, the expert, did not consider that failure had contributed to the leaning of the flank wall of the defendants' garage, described in his report.

17 I also notice that in the discourse and discussion with the judge and counsel (a transcript of which is also available in the bundle at page 240 onwards), the judge specifically considered Mr and Mrs Holman's point about the instability of the neighbouring garage at No 18. Indeed, on page 241 Mrs Holman says, in terms, "Their garage is going to collapse on us". At page 240 Mr Holman points out that taking the wall away will take away their support and, as I say, Mrs Holman says "It will collapse on us". Later on at page 243 the judge says in his discussion with counsel for the claimant:

> "Yes, I would give the parties liberty to apply, so that would mean without anyone having to issue an application you could simply apply back to the court and you could say, 'We have taken, or we are in the process of taking the wall down to 500 mms. We've got to this level, and it is clear to us now that there is this problem. What do you

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> want us to do about it?' And the matter would then have to come back to court, which will incur costs et cetera."

The judge goes on to look at the issues and says at page 244H:

> "Mr Holman will do his best to comply. He believes he needs the permission of the local authority, and he needs to consult. If he does that, it is perfectly sensible and no-one is going to criticise him for doing that. If they come along and say, 'No, you cannot go any further', or, 'X, Y and Z has got to be done first', and that is something that is not envisaged in the order, then he has liberty to apply that without incurring any court fee."

Over the page, Mr Strutt, counsel for the claimant during that trial, is asked by the judge:

> "It does seem it is clear from Mr Pal's evidence that Mr Holman is absolutely right. Mr Pal's final position was that whoever it was that was responsible for the foundations of the garage at No 18 did not follow good building practice in putting the concrete down as low as they should have done."

Mr Strutt, for the claimant, says: "Yes." The judge then says:

> "And your clients are accepting that, if that is right (which they are quite prepared to accept Mr Pal's evidence about) and it becomes apparent that it is necessary for them to do more work along those lines, then they will do that."

Mr Strutt accepted that and said:

> "I think that encapsulates it."

In other words, His Honour Judge Ellis considered all the points that the defendants are now making to me in relation to this committal application. It is absolutely clear that the apparent or possible instability of the garage at No 18, and the consequences for that garage if the flank wall of No 16 was removed, was always known to be an issue and, notwithstanding that, the judge made the order.

18 So having considered all of the evidence and submissions, I am satisfied that the order made on 14 December 2012 was clear and unambiguous. I am clear that all the points made now by the defendants were considered by His Honour Judge Ellis at the original hearing of this case, in which, as I say, a site visit was conducted and expert evidence was considered. Notwithstanding all of those points, the order was made in the terms I have already set out. I am absolutely satisfied that the defendants have made no significant or meaningful attempts to comply with the order. Mr and Mrs

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Holman told me that they had made an effort to try and remove a piece of the wall, and they rely on page 253 of the bundle, in which they say they removed a small section of the garage wall and found that instead of earth and rubble behind the wall, what they say is

> "The owner of No 18 had increased the size of his garage,
> had raised the level to accommodate the new larger garage,
> that he had used concrete to raise the new base."

In short, what they say is that the problems previously identified are now more serious than anticipated. They say that that removal of a piece of the wall amounts to the "attempt" that the judge anticipated and, therefore, it is not unreasonable for them, not to have proceeded any further.

19 I do not accept that that was a significant and material attempt to comply with the order, and I am, therefore, satisfied that the defendants have breached this order. The reason I do not consider that is a reasonable attempt is because it was clearly not removing the wall to a level, and then getting expert advice to say that, to do so any further, would put them and/or the neighbouring property at risk, which is what His Honour Judge Ellis anticipated, or something of that ilk. All they did was remove a very small section of the wall, and decide that it really confirmed their earlier arguments to the judge, and they would not do what they were required to do.

20 I am satisfied that the defendants did know what this order meant, and that their evidence to this court today shows that they are simply repeating the arguments they made before His Honour Judge Ellis. They simply do not accept the terms of the court order made, and they are, as Miss Jones put it, in mutinous refusal of the order. They knew what the terms of the order were, they lost the case, and yet they have still failed to comply with it. I consider that the claimant has been very patient. The order was granted over 3 years ago. Two extensions of time have been granted, and not one bit of progress has been made. So I am absolutely satisfied that the claimant has proved beyond reasonable doubt that the defendants have breached the order His Honour Judge Ellis made on 14 December 2012, and I must now consider what to do by way of sentence for breach of the orders.

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