

Coram: Chambers as Open Court

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
PROBATE AND ADMINISTRATION DIVISION**

CAUSE NO. P0004 OF 1999

IN THE ESTATE OF LAYMAN HOPKIN EBANKS (DECEASED)

BETWEEN: RONNIE EBANKS

Petitioner

**AND (1) EFFIE MITCHELL-JOHNSON
 (2) JEANNIE EBANKS GREEN**

Respondents

**Appearances: Mr. David Lewis-Hall of Priestleys for the Petitioner
 The 1st Respondent failing to attend**

Before: The Hon. Justice Richard Williams

Heard: 15 October 2019

Ex Tempore Ruling: 15 October 2019

**Transcript of ruling
circulated: 16 October 2019**



HEADNOTE

*Probate - committal proceedings for breach of consent court order by 1st Respondent - formalities
- committal proceedings in the absence of the Respondent.*

PERFECTED TRANSCRIPT OF EX TEMPORE RULING

The Background

1. The Petitioner was appointed to be the Administrator of the Estate of Layman Hopkin Ebanks ("the Estate") by the Consent Order dated 21 September 2015



("the Order"). By the Order it was agreed that the 1st Respondent would be removed as Administratrix of the Estate.

2. By Notice of Motion dated 8 August 2019, issued on 9 August 2019, the Petitioner seeks an order for the committal to prison of the 1st Respondent. This application arises in relation to the 1st Respondent's failure to fully comply with the Order. The affidavit in support of Notice is one sworn by the Petitioner on 31 July 2019 in which it is contended that the Respondent has wilfully refused or neglected to comply with the Order.
3. On 21 September 2015 orders were made by agreement in relation to a property known as Registration West Bay Block 4D Parcel 277 ("the Property"), in which the Estate has an interest. At paragraph 3 in the Order, by agreement, the Court ordered that all existing charges against the Property were to be removed by the 1st Respondent within 90 days of the Order. At paragraph 4 in the Order, by agreement, the Court ordered that the title to the Property was to be transferred from the 1st Respondent into the Estate, within 90 days of the Order or within 7 days of a final order, whichever date was later.
4. The Final Order was filed on 21 September 2015, and therefore the date for compliance was within 90 days of 21 September 2015, sometime in December 2015, almost 3¾ years ago. As it was a consent order, Mangatal J who approved the Order and this Court are entitled to take the view that the 1st Respondent, who



was represented by Counsel at that hearing, was indicating to the Court in September 2015 that she was willing and able to comply with the terms of the Order within the agreed time frame. No evidence has been placed by the 1st Respondent before this Court to refute that.

5. In breach of the Order, the 1st Respondent has failed to remove the charges from the Property and has failed to transfer the Property into the Estate. It is contended that the 1st Respondent has allowed further debt to accrue against the Property and has diminished the value of the Estate's equity in the Property.
6. The Petitioner, due to periods of incarceration at HMP and due to the lack of meaningful communications from the 1st Respondent, did not discover until 2019, when he attended at the Land Registry, that the 1st Respondent was in breach of the Consent Order. He wrote to the Land Registry seeking a transfer of the Property into the Estate. On 6 February 2019 he received a reply from the Registrar of Lands confirming that the charge in the amount of US\$182,927 had not been removed and that the Property had not been transferred.
7. Further communications between the parties' attorneys did not resolve the issue. In June 2019, the Petitioner became aware of recently served s.64(2) and s.72¹ Notices in respect of defaults on a loan with JN Cayman (formerly known as National Building Society) by the 1st Respondent which was secured against the Property. Correspondence was also received by the Petitioner's attorneys from JN

¹ Notices under the Registered Land Law (2018 Revision).

Cayman's attorney on 30 July 2019 stating that it was hoped that a sale of Block 1D, Parcel 58 would generate sufficient funds to redeem the mortgage which would leave the Property unencumbered. It appeared that JN Cayman would be obtaining valuations and would be advertising Parcel 58 for sale on the CIREBA Multiple Listing System after September 2019. This evidence establishes that after 21 September 2015 the 1st Respondent could and should have sold Parcel 58, which did not have negative equity, thereby releasing the charge on the Property as agreed in the Order. She would thereby have had the ability to have the charge removed and to transfer the Property if she had acted accordingly.

Procedural Formalities

8. In *Re L; In the Matter of Gous Oddin* [2016] EWCA Civ 173 the Court of Appeal stressed the need for strict compliance with procedural rules. In his judgment at para. 75, Vos LJ said:



"The process of committal for contempt is a highly technical one, as this case shows, but it is highly technical for a very good reason: namely the importance of protecting the rights of those charged with a contempt of court. In cases of an alleged breach of a previous court order, persons should not be at risk of being sent to prison for contempt of court unless:

- (i) they have been served or otherwise made fully and properly aware, in accordance with the rules, of the order they are said to have breached before the alleged breach occurs;*
- (ii) the fact that they have been served or so made aware is established before the committing court*
- (iii) they have been informed before the hearing of the precise details of the breach they are alleged to have committed;*
- (iv) they have been informed of their right to remain silent before they give evidence if they choose to do so; and*
- (v) the allegation of contempt is proved to the criminal standard. The principles as to the need for service have always been axiomatic in civil proceedings where injunctions are frequently*



made against defendants in their absence. It can be no different in family proceedings.”

9. When considering whether the 1st Respondent has had enough information and notice to meet the charge, I note the following. The Notice of Motion and affidavit in support were served on the 1st Respondent's then attorneys, Dentons, on 29 August 2019. The Petitioner's attorneys also served a copy of the same, by email to the 1st Respondent, on 11 October 2019. I am aware that the 1st Respondent receives emails at the email address used because there is recent email correspondence from her using that address in the affidavit filed by Dentons in support of their successful 10 October 2019 application to come off the record. The 1st Respondent has been appropriately served and with sufficient notice.
10. On 10 September 2019 the Notice of Motion along with the affidavit in support were provided to the 1st Respondent by her attorneys by email. From the correspondence provided by Dentons in relation to their application to come off the record, it appears that the 1st Respondent failed to engage with her attorneys or to put them into funds and/or discharge outstanding legal fees owed to them. Therefore, on 2 October 2019, Dentons emailed the 1st Respondent. In that email, under the heading in bold print *“Notice of Motion filed by Priestleys and scheduled for 15 October 2009”* they stated:

“(i) You will need to carefully review their letter, the Notice of Motion and supporting documentation that were sent to you on 10 September 2019 (see my below email)



(ii) We strongly recommend that you appoint attorneys to represent you in the matter and to seek immediate advice as to the appropriate response and to prepare for the hearing immediately. They are seeking, amongst others, an order for your committal to prison. This is not to be taken lightly and requires your utmost and immediate attention."

11. On 2 October 2019, the 1st Respondent acknowledged, by email, receipt of the emails sent to her by Dentons. I am satisfied that the Notice of Motion set out the precise details of the breaches that she is alleged to have committed. From the emails sent by Dentons the 1st Respondent was aware of the importance of the documentation served on her and the need for her to promptly address the same was clearly spelt out to her by her then attorneys.
12. On 10 October 2019 the 1st Respondent was served with a copy of the Order granting leave to Dentons come off the record as her attorneys.
13. On 14 October 2019, in an email sent to the Petitioner's attorneys, the 1st Respondent confirmed that she was in receipt of the documents, but added that she was applying for Legal Aid for representation in this matter. It appears that she had approached Mr. Philip Ebanks concerning representation, but I am told by Counsel that Mr. Ebanks confirmed today to the Petitioner's attorneys that he has not heard back from her.
14. I have this morning, during this hearing, checked with the Director of Legal Aid to see whether any Application for Legal Aid has been filed. The Director



informed me that no application has been filed by the 1st Respondent. If an application had been properly filed, especially if the Respondent had also communicated with the Court to explain about (non) attendance at today's hearing or to seek an adjournment, it may have been a factor for me to have borne in mind if I was considering whether to adjourn the hearing of the Notice on my own motion.

15. Having regard to the above, I am satisfied that the 1st Respondent is fully aware of today's proceedings. I am satisfied that the 1st Respondent is aware of the serious nature of these proceedings. I am also satisfied that, due to the email sent by Dentons to her on 2 October 2019, the 1st Respondent was made aware that she must immediately address the Notice of Motion and seek legal representation.
16. The 1st Respondent has failed to attend today's hearing or to communicate with the Court. She has failed to contact the Court to ask for an adjournment or to seek leave to attend today's hearing by video-link as she is currently living in Florida.² Although she left the Cayman Islands to reside in Florida since possibly 2017, she has not sought to explain to the Court why she is unable to attend today's hearing. She has failed to file any response to the Notice of Motion. The only indication she has given is one given to the Petitioner's attorneys that she is applying for Legal Aid, but up until the time of this hearing she has failed to do that. Even if I were to adjourn the matter I am not convinced that the 1st Respondent would

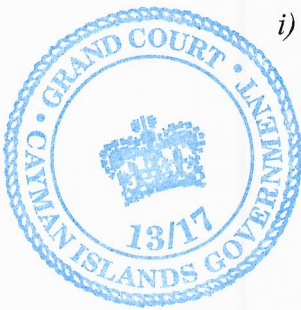
² In the affidavit sworn by David Dinner on 25 September 2019 in support of Dentons' application to come of the record he states that "On 30 January 2019 the First Respondent advised us that she had moved to Florida to be with her fiancé."

properly engage in these proceedings whether by attending herself or by arranging legal representation.

17. I have considered whether I should adjourn this matter as the 1st Respondent is absent. When making that determination I am aware of the guidance given by Mr. Justice Cobb in *Sanchez v Oboz & Anor* [2015] EWHC 235 (Fam) (06 February 2015). At paragraph 4 Mr. Justice Cobb stated:

“It will be an unusual, but by no means exceptional, course to proceed to determine a committal application in the absence of a respondent. This is so because:

- i) *Committal proceedings are essentially criminal in nature, even if not classified in our national law as such (see Benham v United Kingdom (1996) 22 EHRR 293 at [56], *Ravnsborg v. Sweden* (1994), Series A no. 283-B); in a criminal context, proceeding with a trial in the absence of the accused is a course which will be followed only with great caution, and with close regard to the fairness of the proceedings (see *R v Jones (Anthony)* [2003] 1 AC 1, approving the checklist provided in *R v Jones*; *R v Purvis* [2001] QB 862);*
- ii) *Findings of fact are required before any penalty can be considered in committal proceedings; the presumption of innocence applies (Article 6(2) ECHR). The tribunal of fact is generally likely to be at a disadvantage in determining the relevant facts in the absence of a party;*
- iii) *The penalty of imprisonment for a proven breach of an order is one of the most significant powers of a judge exercising the civil/family jurisdiction; the respondent faces the real prospect of a deprivation of liberty;*
- iv) *By virtue of the quasi-criminal nature of committal process, Article 6(1) and Article 6(3) ECHR are actively engaged (see *Re K (Contact: Committal Order)* [2002] EWCA Civ 1559, [2003] 1 FLR 277 and *Begum v Anam* [2004] EWCA Civ 578); Article 6(1) entitles the respondent to a “a fair and public hearing”; that hearing is to be “within a reasonable time”;*
- v) *Article 6(3) specifically provides for someone in the position of an alleged contemnor “to defend himself in person or through legal assistance of his own choosing”, though this is not an absolute right in the sense of “entitling someone necessarily to*





indefinite offers of legal assistance if they behave so unreasonably as to make it impossible for the funders to continue sensibly to provide legal assistance” (per Mance LJ (as he then was) in Re K (Contact: Committal Order) (reference above)). The respondent is also entitled to “have adequate time and the facilities for the preparation of his defence” (Article 6(3)(b)).”

18. At paragraph 5 Mr. Justice Cobb outlined a useful checklist that may be used in all such cases, stating:

“As neither respondent has attended this hearing, and in view of Mr. Gration's application to proceed in their absence, I have paid careful attention to the factors identified in [4] above, and, adapting the guidance from R v Jones; R v Purvis, have considered with care the following specific issues:

- i) Whether the respondents have been served with the relevant documents, including the notice of this hearing;*
- ii) Whether the respondents have had sufficient notice to enable them to prepare for the hearing;*
- iii) Whether any reason has been advanced for their non-appearance;*
- iv) Whether by reference to the nature and circumstances of the respondents' behaviour, they have waived their right to be present (i.e. is it reasonable to conclude that the respondents knew of, or were indifferent to, the consequences of the case proceeding in their absence)*
- v) Whether an adjournment for would be likely to secure the attendance of the respondents, or at least facilitate their representation;*
- vi) The extent of the disadvantage to the respondents in not being able to present their account of events;*
- vii) Whether undue prejudice would be caused to the applicant by any delay;*
- viii) Whether undue prejudice would be caused to the forensic process if the application was to proceed in the absence of the respondents;*
- ix) The terms of the 'overriding objective' (rule 1.1 FPR 2010), including the obligation on the court to deal with the case 'justly', including doing so “expeditiously and fairly” (r.1.1(2)), and taking “any ... step or make any... order for the purposes of ... furthering the overriding objective” (r.4.1(3)(o)).”*

19. I am satisfied in the circumstances of this case already outlined by me, and having regard to the above guidance and the Overriding Objective set out in the Grand

Court Rules, that it has been appropriate for the Court to today go on and hear the Notice of Motion in the absence of the 1st Respondent.

Conclusions

20. Having reviewed the affidavit in support of the Notice, I find, and I am certain so that I am sure, that the 1st Respondent has failed to comply with paragraphs 3 and 4 of the Order, namely she has failed (i) to remove all existing charges against the Property and (ii) to transfer the Property into the Estate within the agreed time frame or at all. I find that, over the past 3¼ years, there has been ample opportunity for the 1st Respondent to comply with the Order which she had agreed would and could be complied with within 90 days of 21 September 2015. Having regard to the 30 July 2019 correspondence from JN Cayman, it is evident that there was sufficient equity in the property at Block 1D, Parcel 58, which if she had sold the same, would have enabled her to comply with the Order and release the Charge and then transfer the Property. She has had the ability to comply with the Order after September 2015.

21. Having regard to her non-compliance with the terms of the Order over many years and having regard to the information before me, I am satisfied that the 1st Respondent has wilfully failed to comply with the Order.

22. The 1st Respondent has had knowledge of this hearing since 10 September 2019. On that same date she was made aware that her attorneys could no longer



represent her. She has failed to engage appropriately in these proceedings despite having five weeks in which to do so.

23. Accordingly, I make an order committing the 1st Respondent to prison for 28 days or until lawfully discharged if sooner.

24. I note from the email from JN Cayman's attorneys that, due to loan defaults, they have recently stepped in and are selling Block 4D, Parcel 277. With this in mind and noting that it may have a knock on effect in the short term to the removal of the charge:

(i) I suspend the Committal Order until 15 November 2019 to afford one further opportunity to the 1st Respondent to comply with paragraphs 3 and 4 of the Order; and

(ii) I give leave to the 1st Respondent to apply on 3 days' notice to the Petitioner's attorney to discharge the Committal Order or to apply to extend the period of the suspension of the Committal Order. It will then be a matter for the 1st Respondent to decide whether she now properly engages in these committal proceedings.



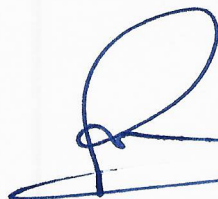
Costs

25. As there appears to be no good reason for a departure from the principle that costs ordinarily follow the event, and as the Petitioner has been successful in the current proceedings, my preliminary view is that the 1st Respondent should pay the Petitioner's costs occasioned by the Notice of Motion. Having regard to the

Petitioner's conduct and non-compliance with the relevant Consent Order since September 2015, my preliminary view is that costs should be on the indemnity basis. However, the Respondent should be afforded the opportunity to make submissions on the issue of costs before the final costs order is made. With this in mind, if the 1st Respondent wishes to be heard on the issue of costs, then she must notify the Court in writing no later than 21 days after service of this Order upon her that she seeks a costs hearing. If she fails to do so, an order will then be made for the 1st Respondent to pay the Petitioner's costs on the indemnity basis.

Footnote

26. Although this hearing has taken place in my Chambers, it has been in chambers as open court. The listing was properly reflected in the Court Lists. I have delivered my decision and these *ex tempore* reasons for that decision in open court. The name of the 1st Respondent, the nature of the contempt in respect of which the suspended Committal Order has been made and the punishments being imposed have all been given in open court.
27. Once perfected, a copy of the transcript of this Ex Tempore Ruling will be provided to the parties.



THE HON. MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT

