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Egeneonu v Egeneonu (2017)

[2017] EWHC 2336 (Fam)

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Barristers
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Court
Family Division

Practice Areas
International Children Law

Judgment in proceedings for committal of a father for breach of orders in relation to his retention of the parties' children in Nigeria. David Williams QC, sitting as a Deputy High Court Judge, considers the principles and procedural issues involved in committal applications.

Over three days, in September 2017, David Williams QC, at that time sitting as a Deputy High Court Judge, considered an adjourned committal application, previously before MacDonald J.

The background to the application is set out in the summary of the decision of MacDonald J previously reported (Egeneonu v Egeneonu (Adjournment of Committal Application) [2017] EWHC 2451 (Fam)).

The application contained 13 grounds but a number of grounds were not pursued for reasons of duplication and or procedural defect, and the court therefore proceeded on the basis of those pursued, which might be broadly be summarised as follows: breach of wardship (ground 2); breach of the non-molestation order made in the inherent jurisdiction (ground 4); failing to attend hearings (ground 8); filing documents with a false statement of truth (ground 9); failing to provide information (10, 12, 13) and failing to facilitate telephone contact (ground 11). The remainder were dismissed.

The judge sets out the case law [20] before summarising the principles as follows [21]:

a) The contempt which has to be established lies in the disobedience to the order.

b) To have penal consequences, an order needs to be clear on its face as to precisely what it means and precisely what it prohibits or requires to be done. Contempt will not be established where the breach is of an order which is ambiguous, or which does not require or forbid the performance of a particular act within a specified timeframe. The person or persons affected must know with complete precision what it is that they are required to do or abstain from doing. It is not possible to imply terms into an injunction. The first task for the judge hearing an application for committal for alleged breach of a mandatory (positive) order is to identify, by reference to the express language of the order, precisely what it is that

the order required the defendant to do. That is a question of construction and, thus, a question of law.

c) 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).

d) The burden of proof lies at all times on the applicant. The presumption of innocence applies (Article 6(2) ECHR).

e) Contempt of court involves a contumelious, that is to say a deliberate, disobedience to the order. If it be the case that the accused cannot comply with the order then he is not in contempt of court. It is not enough to suspect recalcitrance. It is for the applicant to establish that it was within the power of the defendant to do what the order required. It is not for the defendant to establish that it was not within his power to do it. That burden remains on the applicant throughout but it does not require the applicant to adduce evidence of a particular means of compliance which was available to the accused provided the applicant can satisfy the judge so that he is sure that compliance was possible.

f) Contempt of court must be proved to the criminal standard: that is to say, so that the judge is sure. The judge must determine whether he is sure that the defendant has not done what he was required to do and, if he has not, whether it was within his power to do it. Could he do it? Was he able to do it? These are questions of fact.

g) It is necessary that there be a clear finding to the criminal standard of proof of what it is that the alleged contemnor has done that he should not have done or in this case what it is that he has failed to do when he had the ability to do it. The judge must determine whether the defendant has done what he was required to do and, if he has not, whether it was within his power to do it.

h) If the judge finds the defendant guilty the judgment must set out plainly and clearly (i) the judge's finding of what it is that the defendant has failed to do and (ii) the judge's finding that he had the ability to do it.

The judge then examines the procedural issues and sets out the principles that emerge from the authorities confirming [23] that the need for compliance is based on rules of natural justice in that:

a) A person needs to know in advance of committing an act or omitting to do an act that there are potentially penal consequences in acting or omitting to act and,

b) A person accused of contempt of court is entitled to a fair hearing both under the European Convention and in domestic law.

In addition to the court's duty, counsel and solicitors have their own independent duty to assist the court, particularly when considering procedural matters where a person's liberty is at stake.

The judge sets out the principles as follows [24]:

a. There must be complete clarity at the start of the proceedings as to precisely what the foundation of the alleged contempt is: contempt in the face of the court, or breach of an order.

b. Prior to the hearing the alleged contempt should be set out clearly in a document or application that complies with FPR rule 37 and which the person accused of contempt has been served with. The question is 'would the alleged contemnor, having regard to the background against which the application is

launched, be in any doubt as to the substance of the breached alleged'? Provision of particularisation of allegations in an attached affidavit is insufficient, and the application itself must include the pleaded assertions. There is an important distinction between the charges made and the facts supporting them.

c. Autrefois acquit and convict applies.

d. If the alleged contempt is founded on breach of a previous court order, the court must be satisfied that the person accused had been served with that order, and that it contained a penal notice in the required form and place in the order.

e. Whether the person accused of contempt has been given the opportunity to secure legal representation, as they are entitled to. 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". 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", The accused is also entitled to "have adequate time and the facilities for the preparation of his defence" (Article 6(3)(b)).

f. Whether the judge hearing the committal application should do so, or whether it should be heard by another judge.

g. Following the conclusion of the applicant's evidence, the respondent is entitled to make a submission of 'no case to answer'.

h. Immediately prior to the commencement of the defence case the person accused of contempt must be advised of the right to remain silent. The court must inform the accused of the possibility of adverse inferences being drawn against them if they choose not to give evidence.

i. 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. The court must inform the accused of the possibility of adverse inferences being drawn against them if they choose not to answer any questions.

j. Before the court moves to sentencing the contemnor must be given an opportunity to mitigate or to purge his contempt.

The judge confirms [25] that pursuant to paragraph 13.2 of PD37A, the court is empowered to 'waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice has been caused to the respondent by the defect'. Per Lord Woolf in Nicholls v Nicholls [1997] 1 FLR 649.

The judge was invited to consider the applicability of s.103 of the Criminal Justice Act 2003 [26 – 30] the mother submitting that the courts' previous findings in 2015 were relevant both:

i. to his propensity to commit further breaches court orders or the law generally (CJA 2003 103(1)(a)) and,

ii. To his propensity to be untruthful (CJA 103(1)(b)).

The judge considers R v Hanson [2015] EWCA Crim 824 but concludes that as the father had chosen to give evidence and to answer all questions that were put to him, there was no need for the court to

consider further the circumstances in which inferences might be drawn.

The judge was also invited to consider the need for permission to apply for committal, in respect of the allegation that the father had made false statements of truth pursuant to r.37.17 FPR 2010 (Ground 9). He confirms that it is evident from the FPR and the authorities that permission is anticipated to be sought as a preliminary issue and before any substantive application is issued [31] however, ultimately, no finding was no necessary, ground 9 being linked to the subsequent grounds 10, 12 and 13.

In making findings, the judge found that the father had been guilty of contempt broadly in respect of grounds 4 (specific incidents); 8 (specific hearings), 10, 11, 12, and 13, and he sentenced the father accordingly [87 – 88].

Ultimately, the decision clarifies the importance of ensuring that orders in respect of which committal is likely to be sought, are properly made, drafted and served.

In addition, if committal proceedings are envisaged in respect of a wardship order, it would be prudent to seek either at the outset, or at such later point, a penal notice or warning notice and for the order to specify what is permitted and what is forbidden [49].

Permission