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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **21/10/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN: 17/087307/01/A01

MC

Appellant;

-and-

RB

Respondents.

Before: Morgan LCJ, Treacy LJ and Huddleston J

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal from a decision of His Honour Judge Kinney who found on 29 June 2017 that the appellant had been guilty of contempt of court by failing to comply with the terms of an Interim Contact Order ("the Order") made on 12 May 2017 in respect of her 2 year old daughter. The Order provided that the respondent father was to have weekly contact with the child each Sunday from 2 pm until 6 pm under the supervision of his partner and now wife. A penal notice had been attached to the Order.

Background

[2] Contact proceedings in respect of the daughter have unfortunately been protracted. Part of the background concerns the conviction of the respondent on 25 February 2014 for an offence of child cruelty in respect of the care of his five week old son by a previous relationship. The offence had been committed on 6 November 2010 and he was sentenced to a suspended period of imprisonment. He had been seeking contact with that child and an order for supervised contact with that child was made in May 2016.

[3] Despite the conviction the respondent had substantial access to the child the subject of this appeal from July to October 2016. The appellant became concerned about the respondent's presentation and, in particular, the issue of anger management. She stopped contact at that stage and the respondent had no access to the child between November 2016 and January/February 2017 after which an Interim Contact Order for 2 hours supervised contact at a contact centre was made by the Family Proceedings Court.

[4] The case was transferred to the Family Care Centre as a result of the difficulties over contact. The appellant suspended the supervised contact after an incident on 22 April 2017 which she maintained gave rise to concerns about anger management. That led to a hearing before Judge Kinney. The appellant's case before Judge Kinney was that she had concerns about the respondent's ability to control his anger and she sought a return to supervised contact at the contact centre. The respondent maintained that he had completed anger management work with Terry Cromey, a Cognitive and Behavioural Therapist. His solicitor shared a report from Mr Cromey on 10 May 2017 which detailed the anger management work carried out to date and concluded:

> "I believe the respondent could be trusted to have unsupervised contact with his son and that he should be allowed to collect his son from school on Thursdays if this arrangement is feasible."

The Judge made the Order on 12 May 2017.

[5] Contact in accordance with this Order which was served with a penal notice proceeded until 11 June 2017. On that day the respondent arrived with his partner to collect the child. His partner was driving the car. The child ran to her father and the respondent put her in the car. The appellant said that she had noticed the respondent's partner looking haggard and exhausted. She went back into her house and then rushed out because she was concerned about the partner's fitness to drive. The appellant claimed she looked really dishevelled, ill and tired looking.

[6] The appellant said that she asked the respondent to step away from the car because she did not want the child to see or hear their conversation. She asked if the partner was fit to drive and told him that she was not trying to start anything but claimed that the respondent started to swear at her and was waving his arms about in an agitated fashion. The appellant also claimed that the respondent looked dishevelled, as if he had not slept. The conversation did not last long as the respondent walked away to the car and he and his partner drove off with the child.

[7] The appellant contacted the duty social worker and raised her concerns about the safety of the child. He made contact with the respondent by telephone later that afternoon. The respondent was annoyed about the call. He was, however, cooperative. He did not sound as though he was under the influence of any substances and was clear and coherent on the phone. The social worker spoke to the child who sounded chirpy and happy. He contacted the appellant to advise her that

he had no information to suggest that the child was at immediate risk of any harm. The child was returned to her mother at 6 pm that day as arranged. The respondent raised an issue about a cut on the child's foot which he clearly blamed on the care of the child by the appellant. She explained in her evidence that it was an accident and the circumstances had been caught on CCTV.

The contempt proceedings

[8] In light of what had occurred the appellant decided not to make the child available for contact on the next two Sundays, 18 and 25 June 2017, because she considered the child would be at risk. The respondent issued proceedings for committal for contempt which came on before Judge Kinney on 29 June 2017. He heard evidence from the appellant as set out at [5]-[6] above. The respondent's evidence was that the appellant had suggested to him after the child had been put in the car that his partner looked a bit the worse for wear. He said that he told her that she was "starting this" and walked away. He denied that he had responded in an aggressive fashion. Soon afterwards his partner drove him and the child off. He agreed with the description of the call with the social worker.

[9] Shortly before the hearing of the contempt summons before Judge Kinney the appellant became aware that a social worker who had received a package from the respondent at her office said that she noticed a smell of cannabis from him as she was escorting him to the door. He maintained that there were a number of other people in the vicinity who could have been responsible for the smell. He did not take issue with the fact that he had smoked cannabis earlier in his life but said that he had not used drugs in three years. He was pressed as to why he would not undergo a drugs test but said that he had already proved that any such allegations were lies. Although the use of drugs was not raised with the social worker in respect of the contact on 11 June 2017 the mother at the hearing contended that it explained the aggressive behaviour and appearance of the respondent at the handover.

[10] The trial judge had available to him CCTV footage which covered an area in the vicinity of the door leading into the appellant's home. He also had the benefit of dashcam audio from the respondent's car which contained some evidence of the child laughing in the back of the car during this incident. He recognised that because a criminal sanction was involved he had to be satisfied beyond reasonable doubt that there had been a deliberate breach of the Order. He concluded that the appellant's characterisation of events was not supported by the CCTV evidence and that there was no evidence of any heated or lengthy discussions between the parties. There was no lengthy observation of the partner by the appellant to enable her to form any opinion about her fitness.

[11] He accepted that the social worker had satisfied himself that the contact was safe and secure. He noted that he should exercise some care on the evidence about the smell of cannabis given that it was hearsay and he had to concentrate on the events that were the basis for the breach of the Order. He concluded that neither the appellant nor the respondent covered themselves in glory in their evidence. He was satisfied beyond reasonable doubt that there was no basis for the mother's concerns

and no welfare issues in respect of the child arising from contact. He was satisfied that the child was very happy at contact and that there had been a deliberate breach of the Order.

[12] Sentencing did not take place until 6 September 2017. That was partly because the appellant was not available as a result of the illness of her father. Around that time in July 2017 a contact was missed but the judge accepted that there were extenuating circumstances. He noted that the sentencing objective was to mark the serious consequences of deliberately disobeying an order of the court and ensuring compliance with orders in future. He considered that the appropriate way to achieve that was by the imposition of a sentence of one month's imprisonment suspended for one year.

Further events

[13] Contact proceedings affecting this child and two other children of which the respondent is the father proceeded thereafter without any disruption to the Order made by Judge Kinney. On 22 August 2018 the respondent and his wife were arrested at their home in connection with their possession of a number of cannabis plants found there. On 11 October 2018 there was a hearing before Her Honour Judge Loughran dealing with contact issues between the appellant and this child and another recently born child. At that hearing the respondent stated that the cannabis plants that were found were for personal use and that he had been using cannabis for a period of two years. That, of course, contradicted his assertion before Judge Kinney on 29 June 2017 that he had not used drugs for three years.

[14] In May 2016 the respondent had also been pursuing contact proceedings in relation to his oldest child in respect of whom he had been convicted arising from the incident in 2010. As part of those proceedings he arranged with his solicitors to undergo three anger management sessions with Mr Terry Cromey, a cognitive and behavioural psychotherapist. Mr Cromey provided a report dated 9 June 2016 in the course of which he stated that he believed that the appellant could be trusted to have unsupervised contact with that son and that he should be allowed to collect him from school on Thursdays.

[14] In support of his position before Judge Kinney on 12 May 2017 the respondent produced an updated report from Mr Cromey dated 14 February 2017. Mr Cromey swore an affidavit on 15 April 2019 stating that the report had not been prepared by him but appeared to be a re-dating of a draft of the report prepared by him for the court on 9 June 2016. There were some modest differences in the wording between the two reports but no difference of substance. The implication was that the respondent had crafted the report in order to contend that Mr Cromey still supported unsupervised contact.

The present proceedings

[15] Armed with this new information the appellant lodged an out of time appeal on 24 April 2019 against the finding of contempt arguing that if the evidence of the respondent's drug use, the related involvement of the respondent's partner in

possession of drugs and the doctoring of the report of Mr Cromey had been available to the appellant at the time of the hearing on 29 June 2017 she would have demonstrated a reasonable justification for breaching the contact order which was the basis for her defence to that charge.

[16] The appellant rejected the suggestion that all that was required to prove the contempt of court was service of the Order and the subsequent doing by the party bound of that which was prohibited. Ms Quinlivan QC relied upon a line of authority commencing with In Re A (Abduction: Contempt) [2008] EWCA Civ 1138 where the alleged contempt was the father's failure to return to the United Kingdom the child that he had abducted for reasons which he said were beyond his control. That case and those that followed it established the principle that in committal proceedings the applicant had to prove to the required criminal standard that compliance with the order was possible in the circumstances of the particular case.

[17] In Re A Lord Justice Hughes explained that what had to be established was the disobedience to the order of return rather than in the original abduction. Contempt of court lay in a contumelious, that is to say, a deliberate disobedience, to the order. If the father could not have caused the return of the child he was not in contempt of court, however disgraceful and/or criminal the original abduction may have been.

[18] In Re L-W (Enforcement and Committal: Contact) [2010] EWCA Civ 1253 the court held that 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 was that the order required the defendant to do. The next task for the judge was to determine whether the defendant had done what he was required to do and, if he had not, whether it was within his power to do it.

[19] Although Lord Justice Hughes equated contumelious with deliberate in the sense of conveying that the person accused of contempt knows the terms of the order and understands that their actions are a breach of that order it was submitted that the meaning goes further and describes conduct that is blameworthy or contemptuous. No authority, however, was produced to support that submission.

[20] On behalf of the respondent Mr O'Donoghue QC submitted that it was accepted at the hearing before Judge Kinney that the appellant had breached the Order but she submitted that the breach was justified in the circumstances. The respondent relied on the observations of Lord Oliver in Attorney General v Times Newspapers Ltd [1992] AC 191 (at 217/218) that a civil contempt is committed by an intentional act which is in breach of the order of a competent court. The intention with which the act is done would, of course, be of the highest relevance in the determination of the penalty to be imposed by the court but the liability was a strict one in the sense that all that required to be proved was service of the order and the subsequent doing by the party bound of that which was prohibited.

Consideration

[21] The general principle governing the proof of contempt of court consisting of the breach of court orders is found in Hadkinson v Hadkinson [1952] P 285. That was a case in which a mother was ordered to return a child from Australia. Romer LJ said:

> "It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

[22] The uncompromising nature of the obligation has come under some scrutiny in the context of the disclosure of journalistic sources where arguably the necessity test established in section 10 of the Contempt of Court Act 1981 has not been met. That clearly does not arise in this case. There is no suggestion that the order was irregular. The submission that in addition to establishing failure to comply with the order a complainant must also demonstrate blameworthy or contemptuous conduct on the part of the respondent is contrary to the general principle and unsupported by any authority.

[23] We accept, however, the appellant's submission that in a positive obligation case it falls upon the complainant to establish to the requisite standard that it was possible for the respondent to do that which was required. This is a case in which there was a positive obligation to provide the child for contact. The child was not resisting contact. Quite the reverse, as it is common case that the child ran to the respondent at the commencement of contact on 11 June 2017.

[24] The circumstances surrounding the appellant's concerns about the safety of the child were fully investigated at the hearing before Judge Kinney. He was satisfied beyond reasonable doubt that there was no basis for the mother's concerns and that there were no welfare issues for the child with contact continuing. He had available not just the evidence of the parties and the other witnesses but also the CCTV. Insofar as the appellant contended that the circumstances of the contact on 11 June 2017 made it impossible for her to make the child available for contact for the following two weeks it is clear from Judge Kinney's findings that he was satisfied that the appellant had demonstrated that it was possible for the child to be provided for contact.

[25] It is important to distinguish between those matters relevant to the decision made by Judge Kinney on 12 May 2017 and those relevant to his decision on 29 June 2017. There is no doubt that the evidence relating to the find of cannabis and the doctoring of the report from Mr Cromey are material to the issue of the contact arrangements. No doubt those matters have been considered in the course of these continuing proceedings.

[26] The argument on impossibility on behalf of the mother was based on what she saw and heard on the occasion of the contact. The subsequent emergence of allegations around cannabis and the therapist's report did not bear on the argument that it was impossible for the mother to provide the child for contact on 18 or 25 June 2017. Those subsequent matters are not relevant, therefore, to the issue of whether it was impossible for the appellant to comply with the Order on both dates. They do not provide a proper basis for setting aside the conviction for contempt.

[27] Although the out of time appeal lodged in April 2019 referred only to the conviction an application was made in the course of the hearing for the court to extend time in relation to sentence. We start by recognising the limited circumstances in which committal orders should be made in family cases. The principal was set out by Butler-Sloss LJ in M (Minors) (Access: Contempt: Committal) [1991] 1 FLR 355 (at 358-9):

> "Committal orders in family cases are remedies of last resort and should only be considered where there is a continuing course of conduct and where all other efforts to resolve the situation had been unsuccessful. The court would take that measure where it was clear that there has been deliberate and persistent refusal to obey a court order."

It was not suggested that there was any failure by the trial judge in this particular case to adhere to those principles.

[28] The approach of this court in cases where there has been considerable delay in lodging an appeal in criminal cases was set out in R v Brownlee [2015] NICA 39. In a case of this kind time would only be extended if it was clear that the appeal was likely to be successful. In considering that issue there are a number of factors to take into account:

(i) The refusal to produce the child for contact has to be seen against the background of a long history of difficulty in securing the consent of the appellant to contact arrangements for the child.

(ii) The appellant has a criminal record for breach of court orders and harassment as a result of her activity on the internet.

(iii) It was open to the appellant to ask for the case to be brought back to the Family Court in order to express her concerns after the contact on 11 June 2017. This was not a case where the appellant was faced with having to make an urgent decision about the child.

[29] Although we recognise that the conduct of the respondent may well have been utterly reprehensible the aggravating factors in this case do not suggest that the imposition of a sentence of one month's imprisonment suspended for a period of one year was either manifestly excessive or wrong in principle.

Conclusion

[30] For the reasons given the appeal is dismissed.