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IN THE CENTRAL FAMILY COURT

No. BV16D10214

First Avenue House  
42-49 High Holborn, WC1  
Thursday, 21<sup>st</sup> December 2017

Before:

HIS HONOUR JUDGE HESS  
**(In Private)**

B E T W E E N :

JOHN ANTHONY O'CONNELL

Applicant

- and -

ALEXANDRA LOVELL

Respondent

\_\_\_\_\_  
MS J. TOWNEND (instructed by Pennington Manches LLP) appeared on behalf of the Applicant.

MR D. MERRIGAN (instructed by Messrs Freemans Solicitors) appeared on behalf of the  
Respondent.

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**J U D G M E N T**

**(Transcript Approved by HHJ Hess on 17<sup>th</sup> January 2018)**

JUDGE HESS:

1 I have before me an application brought by John Anthony O'Connell, to whom I shall refer as the husband, against Alexandra Lovell, to whom I shall refer as the wife. They were married, and they then became divorced and a decree absolute was ordered on 7<sup>th</sup> February 2017. There were financial remedy proceedings arising out of that divorce and that led to a hearing before his Honour Judge Everall which took place on 24<sup>th</sup> April 2017.

2 There are quite a number of features of that order but for the purposes of this hearing the relevant ones are as follows. The wife was able to remain in the flat which she occupied, the first floor flat, at 78 Cornwall Gardens, until the earlier of 24<sup>th</sup> October 2017 or the completion of the sale of the ground floor flat of the same property.

3 The first floor flat is owned by the husband. The ground floor flat is and was in the joint names of the parties.

4 The parties have set out to try and sell the ground floor flat at 24<sup>th</sup> October but for whatever reason that has not been successful, so the operation of the undertaking at paragraph 15 of the order of 24<sup>th</sup> April is that the wife agrees and undertakes to vacate the first floor flat by 4.00 p.m. on 24<sup>th</sup> October 2017.

5 The scheme of the order is that there were also lump sum payments to the wife of three tranches totalling £225,000 between May and June 2017 and some periodical payments which were payable from that order for six months. I am told, albeit with some modest amounts of lateness, all of those payments have been made, so the husband has paid something approaching £250,000 over the period to the wife, although she says that she has significant debts and that money has gone.

6 The scheme was that the ground floor flat would be sold and that she would receive money from the sale and under the terms of the order if it sells for something like £1.18 million she would get something like £1.4 or 1.5 million, so a very substantial asset, but it has not sold

yet and, therefore, she does not have that money. The way the order is structured is that she took the risk of having to leave before she got access to her capital sum.

7 That she did take that risk is perfectly clear on the face of the order and there is no argument in this case that all the formalities required by Part 37 and Part 33 and of Practice Direction 37A and Practice Direction 33A were complied with here. All the appropriate warning notices were given, and the wife signed the appropriate undertaking forms. She perfectly well understood that she had to be out of the first floor flat by 24<sup>th</sup> October 2017. It seems to me perfectly plain that she took the risk that by then she would not have access to her principal amounts of money. If there was a problem with that, then she had plenty of time to sort that problem out and she must have known as the months passed approaching 24<sup>th</sup> October 2017 that the ground floor flat was not going to sell in time for her departure from the first floor flat and, therefore, she would have to make some other arrangements.

8 It is not for the court or for the husband to say what she should have done but there were a number of things that she could have done. One is that she is the owner of a different property, 315 Point West, which I am told is a studio flat currently occupied by her daughter, but it seems to be plain on the face of the legal title anyway that the wife is the owner of that property and it seems fairly clear that that was the conclusion of the court on 24<sup>th</sup> April. It may not have been attractive, but she might well have agreed to move in with her daughter or asked her daughter to live elsewhere for a period while the matter was being sorted out. Alternatively, she could have used the quarter of a million pounds or so that she received from the husband to secure some rental. I appreciate that that might have meant incurring interest charges on her outstanding debts but that seems to me something she could and should have borne in mind when she was deciding what to do with that money which she had received.

9 So, we reached 24<sup>th</sup> October 2017 and she did not move out. It is plain from the correspondence that I have seen that various attempts were made by the husband's solicitors, Pennington Manches, to try and persuade her to move out and that she declined to do so. In

the course of today I have been provided with a statement which has annexed to it a “without prejudice” letter from the husband. Mr Merrigan, on behalf of the wife, accepts that it was inappropriate to annex a “without prejudice” letter to a statement of this sort and for the purposes of this hearing, as he accepts, it is right and proper for me to put that letter out of my mind. The fact is that the wife had obligations which were clear on the face of the order, she had plenty of time to put them into operation and she knew it was coming. It seems to me that she had various options open to her to ensure that she could comply with that order.

10 She has not complied with that order, she has not left the property and she is still in there, so this application was made on 14<sup>th</sup> November 2017 for her committal to prison. I have looked at the documentation and I have looked carefully at Ms Townend’s notes and it seems to me (and it is conceded by Mr Merrigan) that it is perfectly clear that she is in breach of the order and that all of the technically important compliant rules have been complied with here; for example, service of documents in good time and clarity of what was sought. Mr Merrigan accepts that there is a breach of this order.

11 The way the hearing has proceeded today has not been to challenge the fact that there has been a breach but effectively to seek my discretion to be exercised not to enforce the undertaking and that is where the debate has taken place today.

12 A number of propositions arise out of that and the first one is that the order is clear and that a person who gives an undertaking should, in the first instance, comply with it. The second, and this is something that I turned my mind to, is whether or not there is a human and practical answer to this which would be to allow the wife to use the ground floor flat pending the sale of the ground floor flat. That is met with some hostility from the husband’s side and I have heard that there have been difficulties between the parties and he does not wish to allow her to use the ground floor flat. At one point in the argument, I wondered whether the fact that she is a joint owner of that flat means that she would be entitled to do that in any event which would provide a practical solution, but I have been persuaded by Ms Townend in the end that the order of His Honour Judge Overall, albeit not entirely unambiguous, is in the end clear that the purpose of the order was to give the husband complete control over

who occupied the ground floor flat pending its sale, so in particular at paragraph 25F of the order it allows, if he wishes, to let it out to retain the entirety of the rent and it seems that that order would be impossible for him to deploy if the wife moved in, so I am satisfied that he is entitled to keep her excluded from the ground floor flat.

13 It seems to me that that in reality is an order under s.24A of the Matrimonial Causes Act subsidiary to the order for sale. She is not entitled to go to that property. That does not provide an answer and, even if I felt it was appropriate, I do not feel I can impose anything in relation to that on the husband. Even if I could, then from what I have been told, there is a great deal of history of bad feeling between these parties which probably made that impractical and inappropriate.

14 That being the case, I am left with the wife who is effectively saying, "I cannot move out. I will not move out because I cannot move out." It seems to me that that is not a tenable position for her to take and I must enforce the order of His Honour Judge Overall. The husband is entitled to that remedy, that is the bargain which was struck on 24<sup>th</sup> April 2017.

15 The breach having been conceded, it seems to me that I should make a committal order, but I have a discretion whether to suspend it and in relation to the terms of that suspension and I do propose to suspend it. I am invited by the husband to suspend it on the basis that the wife moves out within 48 hours. That seems an unreasonably short period of time, particularly given the time of year that we are at and that it is reasonable for her to have a longer period of time than that, but not an indefinite period of time. I am going to suspend my order on the basis that she moves out within 28 days of today. By my calculations that would be 18<sup>th</sup> January. I think I should put a time on it, so I am going to say 4.00 p.m. on 18<sup>th</sup> January 2018 she must move out.

16 If she does not, there will be an order for committal and I am invited to fix the period of that. In that context Ms Townend has provided some authorities in which similar issues have arisen. It seems to me that there is no need to impose a very long sentence here, so the sentence I am going to impose is one of two months. The period of suspension perhaps is a

little immaterial here because of the nature of the structure of this order but there should be a period and I am hoping that the ground floor flat will sell well within this period so that it may become immaterial, but it seems to me that I should suspend it effectively preventing the wife from moving back into the property for a period of two years.

- 17 I am going to make an order for a committal to prison for two months suspended for two years and also suspended on condition that by 4.00 p.m on 18<sup>th</sup> January she has vacated, and she has also vacated in compliance with the original undertaking which was that she would only remove her personal possessions and art and will leave the other contents in the property, including the applicant's portrait of a half-clothed woman, and will leave the property in good condition. I will come to the question of costs in a moment, but I do not in the circumstances propose to impose any additional financial penalty on top of that.

(After a short time)

- 18 I am now dealing with a costs application in relation to this matter. I have already made the substantive order and the effect of that substantive order was for me to accept the husband's application that there should be a suspended committal order. I am now asked to make an order for costs against the wife and, in particular, I am asked to make a summary assessment according to a schedule which I have in front of me, the total of which is £24,085.20. That is what the husband asks me to order. He does ask me to order that that should be paid out of the wife's share of the proceeds of sale of the ground floor flat, so that its payment should be more than covered by the sums of money which will come from that.

- 19 In terms of what order, I should make, I start off with the principle of costs. This is not an application where the 'no order for costs' principle applies. It is a clean sheet case and on that clean sheet it is often said, and I think it is the case here, that the first thing that I am inclined to put on is that the husband has succeeded in his case. There is no doubt that the wife should not have done what she has done, and she has not made any proposals to deal with that which were sufficient to deal with the gravamen of the accusations against her. The husband has plainly won the case and there must, it seems to me, to be an *inter partes* costs'