Case No: PT-2018-000030

Neutral Citation Number: [2019] EWHC 3962 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Friday 19th July 2019

BEFORE:

MR JUSTICE MARCUS SMITH

- -

BETWEEN:

COLIN SUCKLING

Claimant/Applicant

- and -

JILL MARGARET SUCKLING

Respondent

- -

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(Official Shorthand Writers to the Court)

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MR GEORGE WOODHEAD (instructed by **Bawtrees LLP**) appeared on behalf of the **Applicant**

The **Respondent** did not attend and was not represented

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JUDGMENT APPROVED

MR JUSTICE MARCUS SMITH:

1. By an application notice dated 1 March 2019, the Applicant, Mr Suckling, applies to commit the Respondent, his sister, Ms Suckling, for contempt of court. The committal application arises in relation to the alleged breach of an order of the court to do or abstain from doing an act and is, therefore, made under Part 81.10 of the Civil Procedure Rules ("CPR").

2. The committal application arises out of proceedings brought under CPR Part 8 in the Chancery Division of the High Court under claim number PT-2018-000030. In those proceedings, Mr Suckling sought an order pursuant to section 50 of the Administration of Justice Act 1985 that Ms Suckling be removed as executor de son tort of the estate of the late Roy Thomas Suckling (the "Deceased") and that a solicitor be appointed as executor in Ms Suckling's place. The Deceased, I should say, was the father of Mr Suckling and Ms Suckling. There is a further sibling, who has played no role in these proceedings or in this application.

3. On 15 November 2018, Master Price made an order (the "Order"), paragraph 1 of which provided that:

> "Pursuant to section 51A of the Administration of Justice Act 1985, Ms Donna Smy of Bawtrees Solicitors LLP shall be appointed as personal representative of Roy Thomas Suckling, the Deceased, who died on 9 July 2016 in place of the executors named in the will of the late Roy Thomas Suckling dated 19 August 1993."

4. Pausing there, I have, in addition to the committal application I have already referred to, an application for a further substitution of a personal representative. That is because Ms Smy is leaving Bawtrees Solicitors and her new firm does not permit her to act as personal representative. In these circumstances, it is appropriate that there be appointed a new partner in Messrs Bawtrees Solicitors LLP. The solicitors have identified Mr Adam Shirley as the appropriate solicitor to take over from Ms Smy and I have indicated that I am prepared to make an order in those terms.

5. Going back to the Order, paragraph 2 is not material for today's application. Paragraph 3 provides that:

> "The Respondent shall, within 14 days of service of this Order, deliver up to the substituted personal representative all books, records, vouchers, correspondence and any other document belonging to the Deceased in her possession or control."

6. The next paragraph, paragraph 4, further provides that:

> "The Respondent shall make, file and serve an account of all property of the Deceased which has come into the hands of the Respondent or any other person or persons by the order or for the use of the Respondent, such accounts to be verified by a witness statement with a statement of truth."

7. Pausing again, I note that paragraph 4 of the Order does not explicitly mention a date. However, I consider that the natural and proper reading of paragraph 4 is that it should be complied with within the same timeframe as paragraph 3: that is to say within 14 days of the service of the Order personally on Ms Suckling.

8. Paragraph 5 of the Order provides that:

> "The Respondent shall pay the Applicant's costs to be subject to a detailed assessment, if not agreed, and shall pay on account of that liability the sum of £6,000 within 14 days of the date of this Order."

9. Paragraph 6 of the Order is not material for present purposes. Paragraph 7 provides for personal service of the order on the Respondent, Ms Suckling.

10. I note the Order is properly endorsed with a prominent penal notice indicating to Ms Suckling the consequences of a failure to comply with its terms.

11. Mr Suckling has provided an affidavit in support of the application for committal, which I have read with great care. I have also had the benefit of hearing sworn evidence from Mr Suckling. That evidence was not very substantial, but it served a helpful purpose of confirming that the state of affairs described in his affidavit continues to this date. Essentially, the substance of Mr Suckling's affidavit is this: he confirms that Ms Suckling has taken no steps whatsoever to comply with the Order (that is paragraph 3). In paragraphs 13 and following, he makes clear that the Order was personally served on the Respondent on 29 November 2018 and that, accordingly, the date for compliance with paragraphs 3 and 4 of the Order was 13 December 2018.

12. Mr Suckling also describes, fairly fully, the efforts his instructing solicitors made to draw the Order to the attention of Ms Suckling. I will not set out in this Judgment the entire history of the matter. But it is quite clear that considerable efforts have been undertaken by Mr Suckling's solicitors on his behalf to draw the Order and its importance to Ms Suckling's attention. I refer, but without reading it out, to the letter to Ms Suckling dated 7 December 2018 and, equally, the letter following the Christmas break of 7 January 2019. I make clear this correspondence is fully and properly addressed in the substance of Mr Suckling's affidavit.

13. The application was last before this court on 16 May 2019. On that occasion, Nugee J adjourned the matter because it was clear that the requirements of personal service under CPR Part 81 were not satisfied. The court also emphasised the importance of drawing to Ms Suckling's attention that she had the right to avail herself of legal advice and that legal aid would be provided for that purpose. Following the hearing before Nugee J, steps were taken to ensure personal service of Ms Suckling, and I shall come back to that. This, I should make clear, is the hearing of the adjourned application.

14. Ms Suckling is not present before me today. The hearing was listed for 10.30am today, 19 July 2021. In order to be sure that Ms Suckling's non-attendance was deliberate and not accidental, this hearing started not at 10.30am but at 11.00am. In other words, the Applicant and the Court waited 30 minutes for Ms Suckling to attend.

15. Nevertheless, Ms Suckling did not appear, notwithstanding the serious nature of this application and the fact that personal service of the Order on Ms Suckling has been effected. There is a statement of service by a process server.

16. As I have noted, the application notice in relation to this application for committal was not initially served on Ms Suckling. That was, as I have described, the subject of comment by Nugee J and it is no doubt because of that hearing before Nugee J on 16 May 2019 that the deficiency of personal service was rectified on 7 June 2019. Then personal service was effected and there is a statement of service by the process server confirming this.

17. There have been, since then, a series of attempts to ensure that the Respondent, Ms Suckling, has been notified of the hearing that is taking place now. Again, I will not summarise the very strenuous efforts that have been made by Mr Suckling and his solicitors, but I do note for the record they have gone to considerable lengths and that every effort has been made to ensure this application and the hearing of it has been drawn to Ms Suckling's attention. These efforts have culminated in efforts yesterday to bring the matter further to Ms Suckling's attention and I have before me the witness statement of Mr Sean Kirk of Messrs Bawtrees LLP, the solicitors instructed by Mr Suckling, where he describes very briefly the efforts he made yesterday to ensure Ms Suckling was aware that a hearing would take place on 19 July at 10.30am at the Royal Courts of Justice in Court 11 before me, Marcus Smith J. That letter contains the important notice that there are penal sanctions consequent upon this application and that the Respondent, Ms Suckling, must attend court on the listed date. This letter was not personally delivered to Ms Suckling. She was not present at her home or quite possibly declined to answer the door. The letter was pushed through the letterbox and also affixed to the front door. It is, having seen a photograph, I consider impossible for Ms Suckling to be unaware of this document and if she has not opened it, then she has wilfully decided she does not want to know about this hearing.

18. In these circumstances, I have considered whether it is appropriate to adjourn this application with a view to issuing a warrant for Ms Suckling's arrest or whether it is more appropriate to proceed with the application in Ms Suckling's absence. As to this, clearly where a court is not satisfied that notice of a hearing has been brought to a respondent's attention, the only proper course is to adjourn; this is not such the case. In this case, for the reasons I have given, I am completely satisfied so that I am sure that Ms Suckling has notice of this application and of this hearing. I am satisfied she has deliberately absented herself. I base that not merely on the strenuous efforts to draw this hearing to her attention but on her track record. The fact is that over months, efforts have been made to serve Ms Suckling. Sometimes those efforts have succeeded in that documents have personally been served; sometimes they have failed because Ms Suckling, as I find, has sought to evade service.

19. Whilst in the ordinary course, where a respondent to a committal application fails to appear, the usual course is to adjourn the application whilst issuing a bench warrant for the arrest of the respondent, so that the respondent is present at the adjourned application, I have carefully considered whether this is the appropriate course in the present case and I conclude that it is not. The alleged contempts are extremely straightforward and I consider that I can, to the requisite standard, which is beyond the reasonable doubt, determine whether or not the contempts are established. As I have noted, I am satisfied Ms Suckling has deliberately absented herself and that she has quite deliberately not participated in the entire process beginning with the application for substitution of a personal representative going through to the Order and, since the Order, in relation to the attempts to enforce the Order.

20. I am concerned that the course of adjourning and issuing a bench warrant is inappropriate in this case. In the first place, it is potentially disproportionate in light of a possible penalty that I might impose. Naturally, that is a matter I yet have to consider but, given that fact, it seems to me more appropriate to proceed to determine whether or not the contempts have been committed. I also bear in mind that, to be colloquial, that Ms Suckling is gaming the system. She knows this hearing is taking place, she knows Mr Sucking is incurring costs in relation to this application, yet she declines to engage. The formalities of personal service and advice as to the possibility of paid legal representation have been met pursuant to the order of Nugee J. It seems to me, therefore, I ought to proceed to determine this application.

21. The final factor I bear in mind, which indicates strongly in favour of this course, is the fact that this is an order that is in continuing breach. This is not a question of a past breach where the prejudice is, as it were, crystalised. The prejudice to the estate continues day-by-day for as long as Ms Suckling fails to comply with the Order of Master Price. That is, to my mind, a very compelling factor that obliges me, in my judgment, to hear the matter today.

22. Of course, I appreciate that whilst Ms Suckling might have no answer as to whether the contempts were committed (but I say now it is very difficult to see what answer there could be) she might very well have a great deal to say on the question of mitigation. In particular, were I to proceed, Ms Suckling would be able to say nothing about the impact, for instance, of an immediate order of imprisonment. In my judgment, whilst I can proceed with this application, and will do so, I must take great care to take account of the fact that Ms Suckling cannot speak for herself. With those cautionary notes sounded, and on that basis, I proceed with this application for committal.

23. I begin with the procedural requirements that apply in relation to this application. The first requirement is that the application notice must contain a prominent notice stating the possible consequences of a court making a committal order. This is a requirement under CPR Part 81 PD 13.2(4). I am not satisfied this requirement has been met, formally speaking, in this case. The application notice itself contains no penal notice. There is nothing anywhere in the application itself making clear the consequences of a committal order being made, yet the form of penal notice is clearly stated at the end of the Practice Direction. I do, of course, have the power to waive this defect under CPR Part 81 PD 16.2, but only where I am satisfied that no injustice has been caused to the respondent by the defect. The penal notice serves a serious purpose and its

omission is a serious matter. The purpose, obviously, is to bring home to a respondent the very serious implications of a committal application.

24. The application notice was served personally on Ms Suckling on 6 June 2019. Looking at the statement of service, it is clear two other documents were also served along with the application notice: first, the Order, which does of course contain itself a prominent penal notice, as I have described; and, secondly, a letter dated 23 May 2019. This letter is very clear in that it describes precisely what happened before the court on 16 May 2019 and contains itself a penal notice in the requisite form. I have read the letter with the notice with great care, and it seems to me that in these circumstances, although the application notice is technically defective, the 23 May 2019 letter which was personally served on Ms Suckling cures this and that there will be no injustice to Ms Suckling if I waive this deficiency, which I hereby do. Accordingly, I find by this somewhat roundabout route that the first requirement is met.

25. I turn to the second requirement, which is that the written evidence in support of the application, as well as that in opposition, must be by way of affidavit. Here, I have heard the evidence of Mr Suckling, which is sworn as an affidavit. I have also received a witness statement from Mr Kirk, which is not in the form of an affidavit. However, I heard sworn evidence from both gentlemen and I consider that I am perfectly entitled to take into account the affidavit of Mr Suckling, the witness statement of Mr Kirk and, most importantly, their (sworn) oral evidence. Accordingly, I find the second requirement is met.

26. The third requirement is that the committal application must be personally served unless this is dispensed with. As I have described, the application was personally served on Ms Suckling on 7 June 2019. Accordingly, I find that the procedural requirements in relation to this application have all been met.

27. I turn then to the formal requirements that need to be established in order to find a contempt before going onto the substance. The formal requirements are, again, threefold. First, the order that is said to have been breached must have been endorsed with a penal notice in the requisite form. This requirement, as I have already described, is satisfied as can be seen from a brief examination of the Order itself.

28. The second requirement is that the Order must have been served personally on Ms Suckling. Again, this requirement is satisfied in the present case, and I have already referred to the evidence of the process server.

29. The third requirement is that the Order must have been served before the end of the time fixed for the doing of the relevant acts. That requirement is self-evidently necessary for one must be in deliberate breach of an order for the contempt jurisdiction to be triggered. The Order was personally served on Ms Suckling on 29 November 2018. The time for compliance with paragraphs 3 and 4 of the Order was, therefore, 13 December 2019 and that is confirmed by Mr Suckling in his affidavit. Accordingly, so far as paragraphs 3 and 4 of the Order are concerned, the third requirement is satisfied and, indeed, I have no doubt that the learned Master, in causing the time for

compliance to be triggered by personal service, had well in mind the significance of the Order and the significance of the penal notice on the Order.

30. The third requirement is not satisfied so far as paragraph 5 of the Order is concerned. This contains an obligation to pay a certain amount of costs on account within 14 days of the date of the Order. It is clear that Ms Suckling would have been in breach of this Order at the time of its service. I am satisfied, however, that this does not render the third requirement satisfied. That is because I consider that using the committal process to enforce a costs order is not permissible, and I refer in this regard to CPR Part 81.4(1) and the notes of the current edition of *Civil Procedure* at paragraph 81.4.3. I am not satisfied that I can properly make an order for committal in relation to paragraph 5 of the Order and, to be fair to Mr Suckling, his counsel made entirely clear this ground for contempt was not being proceeded with. Accordingly, I do not need to deal with the permissibility of the third ground of contempt at all but I will, as I indicated to counsel, strike out the third ground of committal which is set out at paragraph 18C of the grounds of committal. Accordingly, with that qualification stated, I am satisfied to the criminal standard, which is the standard I must apply, that the procedural requirements have been met.

31. I turn to the substance of the application. In this case, I have considered all of the material before me. The Order was personally served on Ms Suckling and I am satisfied to the requisite standard she had notice of its terms. Those terms are clear and unequivocal. Ms Suckling can be in no doubt what the Order requires her to do, and she has done quite literally nothing in response to the Order. A botched compliance would be one thing; total non-compliance is very much another. It is self-evident that Ms Suckling must know that the Order requires her to do something, and I am afraid her failure to do anything leads to the inevitable inference that this is a case of deliberate and not inadvertent breach. In conclusion, I find it established beyond all reasonable doubt that Ms Suckling is in contempt of court and that the first two grounds of contempt have been proved to the requisite criminal standard. The third ground of contempt I have, for the reasons given, struck out.

32. I should make clear that, in reaching this conclusion, I have taken fully into account the legal test in *FW Farnsworth v. Lacy*, [2013] EWHC 3487 (Ch), where Proudman J sets out the material requirements for substantive breach of an order of the court:

> "3. The burden of proof is on the claimants to establish the contempt and the standard of proof is the criminal standard. In other words the claimants have to satisfy me so that I am sure that the alleged contempts have been established. In the time-honoured phrase, the matter must be beyond reasonable doubt. So if I conclude that the respondents' explanations might be true I must accept them. In this case the relevant defendants, who are represented by solicitors and counsel, admit breaches of the Consent Order.
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> ...
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> 17. The second question is whether there was a clear breach of the Consent Order. Again, this is a point taken by the court not by the respondents, who admit and apologise for the contempt. They accept that they understood precisely what it was they had promised not to do. I have, however, to be satisfied that the Consent Order was unambiguous.

...

> 20. A person is guilty of contempt by breach of an order only if all the following factors are proved to the relevant standard: (a) having received notice of the order the contemnor did an act prohibited by the order or failed to do an act required by the order within the time set by the order; (b) he intended to do the act or failed to do the act as the case may be; (c) he had knowledge of all the facts which would make the carrying out of the prohibited act or the omission to do the required act a breach of the order. The act constituting the breach must be deliberate rather than merely inadvertent, but an intention to commit a breach is not necessary, although intention or lack of intention to flout the court's order is relevant to penalty."

33. I turn, therefore, to the principles relating to mitigation and penalty. First, I should consider whether it is appropriate, at this stage, having made the findings of contempt that I have done, to proceed or not proceed with the question of penalty. It seems to me it is appropriate on this occasion to proceed to the penalty stage. I have not invited counsel to address me on the matter because, as it seems to me, it is a matter for the court, not for Mr Suckling, as to what would be the appropriate course, but it does seem to me I should not, in this case, adjourn the matter to a further hearing on penalty, but should deal with the matter now. The reason I consider I should do so is I am quite satisfied it is necessary to complete matters today in order to bring matters to a head so I can ensure that Ms Suckling, at long last, complies with the Order she is in breach of. I regard it, particularly near the beginning of long vacation, as entirely undesirable that this present situation continue unremedied. It seems to me that Ms Suckling has had every opportunity to appear, every opportunity to address the court, and she has declined to do so. It seems to me it would be an entire waste of time for me to adjourn the matter for yet a further pointless hearing at which Ms Suckling cannot attend at which sentencing will be discussed. I, of course, take fully into account that when I consider what would be the appropriate penalty that Ms Suckling is not present and I will bear that continuously in mind.

34. Turning then to the principles relating to mitigation and penalty, I begin with the relevant principles. I begin with the purpose of this jurisdiction. A sentence for contempt has two functions. First, it upholds the authority of the court by punishing the contemnor and deterring others. Such punishment has nothing to do with the dignity of the court and everything to do with a public interest that court orders should be obeyed. As Norris J said in *Commissioners for Her Majesty's Revenue and Customs v. Munir*, [2015] EWHC 1366 (Ch) at [9(i)]:

> "A contempt of court is not a wrong done to another party to the litigation. It is an affront to the rule of law itself and to the court."

35. Secondly, in some instances, the contempt jurisdiction provides an incentive for belated compliance because the contemnor may seek a reduction or discharge of sentence if he or she subsequently purges his or her contempt by complying with the court order in question. I have that jurisdiction particularly in mind in the present case.

36. I move on to the relevant factors I should take into account when sentencing for contempt. A number of cases have helpfully set these out, but I remind myself the list is not a closed one. The relevant factors include the following.

37. First, whether the claimant has been prejudiced by the contempt and whether the prejudice is capable of remedy. Here, in short, there has been prejudice. The administration of the estate of the Deceased is being compromised and I consider the making of an order today will enable that prejudice to be remedied.

38. The second factor is the extent to which the contemnor has acted under pressure: there is no evidence of that whatsoever.

39. The third factor is whether the breach of the order is deliberate or unintentional. In this case, I am satisfied so that I am sure that the breach is deliberate and I base myself on both the fact that the Order is clear and easy to follow and Ms Suckling's behaviour since the Order was served on her at the end of 2018.

40. Fourthly is the degree of culpability. In this case, in addition to being in deliberate breach of a formal order of this court with a penal notice attached, Ms Suckling has chosen not to engage and is, even now, flouting an order of this court. There is in this case present non-compliance.

41. Fifthly, I must consider whether the contemnor was placed in breach by reason of the conduct of others and here, again, there is no evidence of that at all. Ms Suckling is the cause of her own breaches.

42. Sixthly, I must ask whether the contemnor has appreciated the seriousness of the breach. Of course, I have not heard from Ms Suckling but given the communications she has, in fact, received from Mr Suckling's solicitors, she can be in no doubt that the breach is a serious one.

43. Seventhly, there is the question of whether the contemnor has co-operated. A genuine offer following judgment but before sentence to co-operate and the provision of information is capable of being a serious mitigating factor, and in this case that mitigating factor is entirely absent.

44. Eighthly, I must consider whether the contemnor has admitted his or her contempt and has entered the equivalent of a guilty plea. Again, that has not occurred in this case.

45. Ninthly, I must consider whether there has been a sincere apology for the contempt. Shortly answered, there has not been.

46. Tenthly, I must consider the contemnor's previous good character and antecedents. Here I assume, to be absolutely clear, good character on the part of Ms Suckling.

47. Finally, I must consider any personal mitigation advanced on Ms Suckling's behalf. I make it clear that I have heard nothing on this point – entirely unsurprisingly, given Ms

Suckling's wilful absence and failure to engage. But I obviously take into account that Ms Suckling might have a great deal to say about the sentence, were she here.

48. I turn to consider whether the custody threshold in this case has been passed. That has been discussed in a number of cases. The custody threshold is not defined but in *R v. Montgomery*, [1995] 2 Cr App R 23, Potter LJ said:

> "An immediate custodial sentence is the only appropriate sentence to impose upon a person who interferes with the administration of justice, unless the circumstances are wholly exceptional."

49. In *International Sports Tours Ltd v. Shorey*, [2015] EWHC 2040 (QB), in which the defendant had admitted knowingly proffering false evidence in an affidavit, Green J said at [46]:

> "I start by considering the intrinsic severity of the contempt. In the present case, the defendant has admitted proffering knowingly false evidence in an affidavit. This was part of the perpetuation of a series of false and misleading statements designed to subvert the due administration of justice. My necessary starting point is that this was a serious infringement committed deliberately and with knowledge, with the specific intent of undermining judicial proceedings. A court would be remiss if it did not conclude that this is the sort of conduct where in many instances the custody threshold will *prima facie* be passed."

50. Of course, I accept that a term of imprisonment must be as short as possible commensurate with the gravity of the contempt and the need to deter the contemnor and coerce compliance. In this case, we have the breach of a straightforward court order. Court orders, it goes without staying but I say it nonetheless, are made to be obeyed. When they are not obeyed, there is very serious risk of disrespect to these courts and undermining of the rule of law. The fact is that orders, even if they are minor, must be treated as extremely serious matters to be complied with strictly.

51. In these circumstances, I consider the custody threshold has been passed and that a custodial sentence would be appropriate. I consider a custodial sentence of six months' imprisonment would be appropriate. I make clear that the bulk of the sentence would be to procure compliance with the Order and that were Ms Suckling to be imprisoned, but to successfully purge her contempt by complying fully and properly with paragraphs 3 and 4 of the Order, I would reduce the sentence from six months to two months. Naturally, in accordance with the Criminal Justice Act, that period would be reduced by half, whether it was six months or two months.

52. The two months' imprisonment, were Ms Suckling to purge her contempt, reflect that: court orders are meant to be obeyed; in this case the failure to comply has caused and is causing real prejudice to the administration of the Deceased's estate; that this failure is an intentional and continuing one continued in the face of repeated efforts by Mr Suckling to obtain compliance and to point out the seriousness of non-compliance.

53. I turn then to the question of suspension of a custodial sentence. It is necessary, having determined the appropriate sentence, to ascertain whether that sentence requires

immediate imprisonment or whether the sentence can be suspended. In *The Official Receiver v. Brown*, [2017] EWHC 2762 (Ch), the following is said at [20] and [21]:

> "20. Further, in line with general sentencing principles, the appropriate period of imprisonment under consideration is 12 months or less. A court should further consider whether a shorter term would sufficiently meet the sentencing objectives, especially if the contemnor has not previously experienced imprisonment."

Pausing there, I assume that to be the case here:

> "21. If the court has decided that a prison sentence is necessary and has also decided on the appropriate term, it should then consider whether that sentence should be suspended. A feature of suspending a sentence is that the deterrent effect is emphasised, at least over the period of suspension. Suspension may be for up to 2 years, but not usually more than 18 months for a prison sentence of 12 months or less."

54. In my judgment, in this case, a suspended sentence is appropriate. I reach that conclusion for two reasons: first, because Ms Suckling is absent today and I have not heard from her on the question of mitigation; secondly, though, it does seem to me that a suspended sentence will be as effective as an actual sentence, in procuring compliance with the Order. I consider that Ms Suckling's imprisonment should be suspended on terms that Ms Suckling comply and comply fully with paragraphs 3 and 4 of the Order within 14 days of the date on which the order that I make today is served personally on Ms Suckling. I make clear that the activation of the sentence is not automatic but that in the event of non-compliance, Mr Suckling will have to return to court to obtain a warrant committing Ms Suckling to prison. I make it clear that such an application will be appropriate for vacation business.