IN THE HIGH COURT OF JUSTICE No. FD98D03022

FAMILY DIVISION

Royal Courts of Justice

[2014] EWHC 1801 (Fam) **Monday, 12th May 2014**
[2014] EWHC 2032 (Fam) **Thursday 12th June 2014**
[2014] EWHC 3818 (Fam) **Friday 19th September 2014**

Before:

MR. JUSTICE MOSTYN

B E T W E E N :

SHELLEY MANN Applicant

- and -

DAVID MANN Respondent

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Official Court Reporters and Audio Transcribers
One Quality Court, Chancery Lane, London WC2A 1HR
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

THE APPLICANT appeared in person.

MR. J. WARSHAW (instructed by Sears Tooth) appeared on behalf of the Respondent.

J U D G M E N T S

(As approved by the Judge)

MR. JUSTICE MOSTYN:

1 This is the restored application for enforcement. I refer to my previous judgment given on 5th March 2014 which sets out the background to this case. By my previous order I adjourned the matter for mediation to take place and ordered further disclosure to be given. Although formal mediation has not taken place, the parties have attended a joint "without prejudice" meeting - in the case of the wife unrepresented, in the case of the husband represented by the solicitors. That has not led to any kind of agreement. I do not propose to set out any more of the background. Anybody reading this judgment should read, first, my earlier judgment of 5th March 2014.

2 The parties have given disclosure. The husband has not given complete disclosure. This is admitted by Mr. Warshaw, who represents him. The disclosure that he has given makes interesting reading. Although Mr. Warshaw produces a schedule which purportedly suggests he is hopelessly insolvent, the fact is that the husband's lifestyle, as demonstrated by where he lives free of charge and how he spends his money extensively, is inconsistent with a person who is *de facto* bankrupt, if not *de jure* bankrupt. His credit card statements from Allied Irish Bank show that via a company called Hexstar, which is owned by his girlfriend, he receives substantial sums in cash. The credit card with American Express, the Harrods American Express card, which is joint to him and his girlfriend, shows a lavish lifestyle.

3 The wife, to her credit, has been able to point out a number of inconsistencies in the way the husband has presented the case which is, as Mr. Warshaw put it in his note, "He has no resources from which he is able to pay the debt." She was able to point out to me, for example, that the medium through which his cash is transacted, namely the Hextar Visa Business Card, is not supported by bank statements of Hextar of which, although he may not have any shares, he is certainly a director. She was able to point out to me that in relation to loans that he receives from benefactors, including people of enormous wealth like Mr. Imerman, he makes representations that he will repay loans very shortly, while at the same time saying to this court and to his ex-wife that he has not got the means to make any payments to alleviate her position. In relation to an entity called United Capital Incorporation, a company incorporated in Panama, on which he has been granted a loan of £500,000, she was able to point out that, contrary to the schedule put in by Mr. Warshaw that stated that he was indebted to that company to the tune of £478,754, he was in fact indebted to that company to the tune of £231,972 against a facility of half a million pounds; and that while it says on the annual confirmation of the loan agreement

that "as the value of the shares assigned has dropped, we cannot allow any further draw-downs for the time being" that is not to be taken seriously in circumstances where only a few weeks later on 20th February, as his bank statements show, he received £10,000 (less £6 bank charges) from United Capital.

4 It seems perfectly clear to me that Mr. Mann has the means to make payments that would prevent Mrs. Mann and the children, when they are with her, from suffering hardship and potentially being rendered homeless.

5 It is important that I remind myself that until October 2013 the husband was paying the wife's rent and £4,000 a month. It is true that in my previous judgment at paragraph 32 I stated that "... it was not implicit in the agreement that the husband would pay rent for an alternative property. I agree he has complied with its financial terms." The fact is, however, that he was, until October, paying for her rent (just over £6,000) a month at 4 St. Barnabas Mews, SW1.

6 The wife's position now is truly dire. Although the husband has continued to pay the £4,000 a month, the arrears of rent since October have mounted and now stand at £42,000.

7 The landlord has been told by the wife that there is this enforcement procedure today and on that basis he has stayed his hand. The wife, however, believes that if something concrete does not emerge from today, possession proceedings would inevitably follow. If possession proceedings do follow, in circumstances where neither child is under the age of 18, it is hard to imagine what the wife would do in order to accommodate herself. She would not be entitled to emergency housing under the Housing Act. What she would have to do, according to Mr. Warshaw, is take the £4,000 a month which the husband says he will continue paying and go off to some far-flung remote part of the metropolis and find very cheap rented accommodation, and then with the balance of the £4,000 pay for her daily bread.

8 I am satisfied today, having heard the case carefully, that this is a case where the numeric tabular presentation of the husband's circumstances does not accord with the reality; that he has ample resources through his spidery network of friends and offshore entities not only to meet his own needs in a very comfortable way, but to meet the needs of the wife in the way that he was doing until last October.

9 Now that the mediation agreement has come to an end, the order of Charles J. revives; that by its terms discharged the spousal maintenance order and replaced it by a lump sum, which the husband has not paid in full by any

means. There was no formal dismissal of the wife's claim, which means that her periodical payments claim is capable of revival.

10 I have decided that the proper way of proceeding is for me to make an interim periodical payments order which I am fully able to do. Mr. Warshaw does not, as a matter of jurisdiction, argue otherwise. The order will be expressed to be without prejudice to the wife's rights under the order of Charles J. of 11th May 2005. It is an emergency order designed to ensure that her property is not possessed and she is rendered homeless; that she can carry on living in the way that she was prior to last October. I therefore make an order that with effect from 1st November the husband is to pay the wife interim periodical payments of £10,000 per month, payable monthly in advance with credit for £4,000 a month to be given between then and 1st May. That gives rise to seven months of arrears, or £42,000 which is just about enough to pay the arrears. The arrears will be payable within seven days.

11 The periodical payments will then continue from 1st June at the rate of £10,000 so that the wife can live as she was before, and the matter will be reviewed by me on a date to be fixed with the Clerk of the Rules when I am sitting in the vacation in the second half of September with a time estimate of one hour. I want to make it absolutely clear to the husband that this court has available to it a full range of enforcement measures. Having regard to the fact that the husband presents himself as a man with means but without assets, the likely means of enforcement if he does not comply with this order will be proceedings under the Debtors Act 1869 seeking his imprisonment.

Later:

[2014] EWHC 2032 (Fam) **Thursday 12th June 2014**

MR. JUSTICE MOSTYN:

12 This matter first came before me on 26th February 2014, and I refer to the judgment which I gave on that date which sets out the background to this case. Anybody reading this judgment should now at this point refer to my judgment following the hearing on 26th February, which in fact is dated 5th March. The relevant background is set out there.

13 The matter returned before me on 12th May 2014. Again on that occasion, I gave a judgment, which is in bundle 4, p.47A. Anyone reading this judgment should, again, refer to the judgment I gave on that day. On that day

I concluded that, on clear evidence, the husband had the means to alleviate the desperate situation in which the wife finds herself, where the arrears of rent on her property had aggregated to a sum then of £42,000.

14 In order to meet the mounting emergency I made an order which was framed as an interim periodical payments order. I expressly asked the husband's counsel, Mr. Warshaw, if there was jurisdiction to make an interim periodical payments order and he conceded that the court had such jurisdiction. However, notwithstanding the terms of that order, the husband has failed almost entirely to comply with it, and the emergency continues.

15 The matter was restored to me on 23rd May, when I indicated that the time had come for the respondent to answer for his defaults, and I directed that on 4th June he should attend before me to be examined as to his means as to show cause why he should not be committed to prison pursuant to s.5 of the Debtors Act 1869, which expressly provides for an examination of means and, if default is proved, for sentence to take place on the same occasion.

16 On that occasion Mr. Warshaw produced a note. He sought to argue in it that my recent decision of *Bhura v. Bhura* [2012] EWHC 3633 (Fam) was wrong. In that decision of *Bhura*, I endeavoured to follow faithfully the very clear and lucid judgment of Richards LJ in the recent case of *Karoonian v. CMEC* [2012] 3 FCR 491. Today Mr. Warshaw, who has told me that is instructed to take every technical point in his client's favour, argues that the relevant parts of the decision in *Karoonian* are *obiter dicta*. I unhesitatingly reject that submission. It is plain that paras.56 to 58 of the judgment of Richards LJ provide the core ratio of the decision in question.

17 In the note to which I have referred, produced by Mr. Warshaw on 23rd May, he did not argue, notwithstanding that he had had plenty of time to reflect, that the order that I made on 12th May was made without jurisdiction.

18 In his note at para.26 he stated this:

> "The periodical payments order made on the last occasion was plainly not made in addition to the lump sum provision. To avoid any future argument, it should be recorded that any liability under that periodical payments order will be credited against any liability under the lump sum order, if there be any."

I should say that for reasons which I have been defeated in trying to understand, the respondent appears to be suggesting that he does not owe any

general arrears of lump sum when it is perfectly plain that he owes a vast amount to the wife.

19 On 23rd May, para.26 of Mr. Warshaw's note was discussed in these terms:

> "MR. WARSHAW: My Lord, there is a lingering issue that I wanted to ventilate in para.26 of my document, just to clarify in case there is any future argument about this. The order that you made ----
>
> MR. JUSTICE MOSTYN: If he makes any payments under the emergency order, then they are to be subtracted from the overall lump sum that he owes you."

I am of the view that that exchange altered the character of the order of 12th May.

20 An order for periodical payments obviously cannot count as payments towards a lump sum. Therefore, in acceding to Mr. Warshaw's submission, I agreed to a re-characterisation of the order of 12th May so that it was not interim periodical payments pursuant to s.23(1)(a) of the Matrimonial Causes Act, but rather was a scheduled court directed part payment of the outstanding lump sum.

21 I make this finding in order to deal with the latest technical point taken by the husband through Mr. Warshaw in order to try and avoid his obligations, which is this: notwithstanding that Mr. Warshaw was before me on 12th May and 23rd May, and on neither occasion did he suggest that I did not have power to make an interim periodical payments order, in an appellant's notice filed on 30th May 2014 in the Court of Appeal, it says in section D beginning at para.37, that in fact I had no power to make an order under s.23(1)(a) of the Matrimonial Causes Act because the right of the wife to receive such a payment had been discharged with effect from 8th June 2005. If that is right it is incomprehensible to me why legal counsel of such experience did not take the point before me. However, I do not need to decide the arguments that Mr. Warshaw now advances as to whether the court in fact had jurisdiction to make an order under s.23(1)(a) of the Matrimonial Causes Act 1973 on 12th May because, in the light of my ruling which I have just made, the effect of the application made by Mr. Warshaw to which I agreed on 23rd May was to re-characterise the order as a court directed scheduled part payment of the arrears under the lump sum.

22 The appellant's notice to which I have referred was placed before Gloster LJ. She issued an order on 3rd June in these terms:

> "Order that there be a stay of enforcement of 12th May order by means of a judgment summons under s.5 of the Debtors Act 1869 (but not otherwise) pending the determination of the appellant's application for permission to appeal the 12th May order. It will be for the Lord or Lady Justice dealing with such an application to decide whether such stay should be continued pending appeal if permission is granted.
>
> Reasons: An appeal could be rendered nugatory if a stay is not granted."

23 It is obvious to me that Gloster LJ was ordering that there should be a stay on any warrant of execution of a prison sentence, should one be ordered in judgment summons proceedings. Only that interpretation is consistent with her reason, because a stay of the judgment summons procedure generally would not render the appeal nugatory. The only thing that would render the appeal nugatory would be if a prison sentence were executed. I, therefore, take the view that is within this court's power to hear the judgment summons to determine if the respondent is guilty, and to deal with the question of sentence, but must, in fidelity to the order of Gloster LJ of 3rd June 2014, if a prison sentence is imposed, stay execution of the warrant pending consideration of the permission application. I am clear that the interpretation which Mr. Warshaw seeks to put on that order, namely that the judgment summons proceedings as a whole are stayed, is erroneous.

24 I am, therefore, directing that the judgment summons should be heard, but that, if a prison sentence is awarded, no execution of that sentence can take place until the permission application is determined in the Court of Appeal.

25 However, I agree with Mr. Warshaw that, in view that I had earlier stated on 3rd June that the hearing today would be for consideration of other means of enforcement only, it would be unfair to spring, so to speak, the judgment summons back on the husband today. I should also say that the reason the case is being heard today, on 12th June, rather than on 4th June, as my previous order provided, is because I acceded to a request that the case on 4th June should be adjourned to today in order that the respondent could engage in religious rituals.

26 Therefore, I direct that the hearing under the Debtors Act, as provided for in my order of 23rd May, will be heard on 30th June, but I reiterate that if I find the husband guilty and if I award a prison sentence there will be a stay of execution of the warrant pending the determination of the permission application in the Court of Appeal if it has not by then already been dealt with.

27 On 30th June I will also consider, and give the husband due notice now, whether a writ of sequestration should be issued against him in the light of the

continued default. The husband, who is listening to this judgment and anybody who reads it, should be under no illusions as to the scale of crisis that is faced by the wife today. She has just received a letter dated 5th June from Boodle Hatfield, who are instructed by the Grosvenor Estate in Belgravia, who assert that there are rent arrears totalling £49,572.94, and who state that they have on that day sent a claim form to the Northampton County Court in the sum of £50,282.94, inclusive of court fee and solicitors' costs. As things stand, it is hard to see what defence the wife could have, and so the legal process has now been put in train which has a foreseeable consequence of bankruptcy and eviction for her.

28 Notwithstanding this, the husband continues to be in gross default. He has paid only £3,000 in respect of my order of 12th May. He has paid an almost corresponding amount on 10th June to his solicitors, and in February and March paid his solicitors a total of £5,500. It is an affront to the court's sense of justice that he should be paying his lawyers significant sums to seek to escape his responsibilities.

29 In those circumstances, I reach for the well known decision of Bodey J in *Mubarak v. Mubarik* [2007] 1 FLR 722, where he ordered in para.89 that for every £1 that the husband in default there paid to his lawyer, he must now pay £1 into a fund for the benefit of the wife. That seems to me to be a perfectly appropriate order to make in this case, and so an additional order I make today is that the husband is only permitted to pay monies to his solicitors if he pays a corresponding amount on each occasion to the wife in partial discharge of his debt to her.

***L A T E R*:**

30 There is an application for permission to appeal all three limbs of my order. Permission can only be granted if the court considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard. I am completely satisfied that any appeal would have no prospect of success, let alone a real prospect of success. I am equally satisfied that there is no other compelling reason why the appeal should be heard.

31 That application is dismissed.

Later:

[2014] EWHC 3818 (Fam) **Friday 19th September 2014**

MR. JUSTICE MOSTYN:

32 This is the restored application for enforcement. I refer to my previous judgments. There has been some activity in the Court of Appeal. The previous order I made for periodical payments, which I re-characterised as a court directed, scheduled, part-payment of the overall lump sum, has been appealed to the Court of Appeal. In addition, my pound for pound order, where I followed scrupulously the decision of Mr. Justice Bodey in *Mubarak v Mubarak*, has also been appealed. The Court of Appeal has granted permission in relation to these various appeals and has stayed any enforcement of what Mr. Warshaw would say is still an illegitimate periodical payments order but which I would contend is a direction as to part-payment of the lump sum order. The Court of Appeal has, as I say, stayed enforcement under the Debtors Act of that order. The appeals are going to be heard later this year.

33 I have to say I am frankly extremely surprised that Lord Justice McFarlane gave permission to appeal in relation to the pound for pound order, where Mr. Warshaw candidly tells me he is going to challenge the correctness of the decision of Mr. Justice Bodey, one of our most experienced financial judges, but there we are. We will have to await to see what the fates of those appeals are.

34 It seems to me that, in relation certainly to the dispute about the periodical payments order which I have re-characterised as a part-payment of the outstanding sum the appeals are a complete dead letter, for reasons which I will explain.

35 According to para.10 of Mr. Warshaw's note for today, as at February £681,679 of principal of the lump sum was outstanding. I have asked Mr. Warshaw has been paid off since February and he initially told me £100,000, but I pinned him down and in fact it seems that the correct figure is around £33,000. This is by taking the aggregate of the payments at p.275H, which deals with the payments since 1st April, and adding on a further £8,000 or two months' worth for the months of February and March. Therefore Mr. Warshaw has conceded that of the principal at least £600,000 is outstanding, although he sought to back-track from that concession saying that that was not an unqualified concession. It was a concession made for the purpose of the general enforcement proceedings but in any lump sum proceedings, consistently with his client's instructions, he will take every technical point he

could think of (and he has not actually told me if he has thought of any) to challenge the figure that derives from his own document, that at least £600,000 of principal is outstanding today.

36 If £600,000 of principal is outstanding today that is payable today. So in a sense my endeavours to get Mr. Mann to focus on the amount that needed to be paid to save Mrs. Mann from eviction and bankruptcy can be seen to have been, to an extent, an exercise in beating the air, because not only were they in a sense completely *otiose* - because if he owes £600,000 then *ex hypothesi* he owes £100,000 - but the consequences of my endeavours to focus Mr. Mann's mind on almost a moral obligation to prevent his ex-wife being rendered homeless has simply led to an explosion of appellate litigation, all of which I consider to be quite spurious.

37 So I shall leave the appellate proceedings to run their course, but would simply in this judgment make it abundantly clear that, irrespective of the question of interest (as to which Mr. Warshaw seeks to take points under s.24(2) of the Limitation Act 1980); irrespective of the question of whether the asserted compliance by Mr. Mann with the compromise that was thrashed out in mediation with His Honour Clive Callman, should or should not lead to remission of all or part of the interest, there can be no doubt that as at today the husband owes around £600,000, probably £650,000 (being Mr. Warshaw's £681,679 less the £33,000-odd that has been paid since February) in principal to Mrs. Mann. That sum is payable today and I see no reason at all why at the next hearing Mr. Mann should not show cause why he should not be imprisoned for failing to pay that sum of principal or part of it.

38 If he has paid part of it by the time of the next hearing then that will no doubt provide strong mitigation. Of course, in any enquiry under the Debtors Act, the court has to be satisfied that Mr. Mann is in wilful default and there will have to be a close enquiry as to whether his circumstances are as desperate as he says in the affidavit which he made on 21st July pursuant to my previous order.

39 I have to say this, that although the definitive enquiry into the state of Mr. Mann's means is awaited, I have to say that having read the affidavit made in response to my previous order, I believe it is certainly possible - and Mrs. Mann will have to reflect on this - that she is clutching at straws in believing that there is hidden wealth in the property, Flat 3 47 Eaton Place, or within the loan facility with United Capital or in secret bank accounts.

40 In relation to Eaton Place, Mr. Mann has given what seems to me a plausible explanation as to how he was effectively foreclosed in relation to his interest in

that property. He has given what seems to me to be a reasonable explanation in relation to his loan account with United Capital and how that has now run into a cul-de-sac. In relation to the allegation that he has a secret bank account from which he is paying rent, he has, to my mind, quite persuasively explained how that suspicion is unfounded. The rent was not in fact paid in full but the deposit was appropriated, leaving arrears in respect of which his girlfriend was either bankrupted or made herself bankrupt.

41 He has also in his affidavit explained his dire medical condition, which is supported by the letter from his doctor, and it does seem to me that it would be an extreme example of cutting off his nose to spite his face if he were not to reveal secret funds, as part of his feud with Mrs. Mann, at a time where he is facing such acute medical problems.

42 Those are only impressions of mine at the moment and, as I say, in circumstances where it is indisputable, on the basis of the concessions made by Mr. Warshaw, that around £650,000 in principal is outstanding, there will have to be an enquiry at the next hearing where Mrs. Mann can cross-examine Mr. Mann as to whether he has been in wilful default in paying off that sum of principal or any reasonable part of it by the time of that hearing.

43 That will be the first function of the next hearing, which is going to be listed for two days on dates to be obtained from the Clerk of the Rules, to be heard this term on dates which are convenient to counsel, provided that it is this term. Put another way, I am not prepared to allow the convenience of counsel to take the next hearing beyond this term, and when I say "this term" I mean the term that begins on 1st October.

44 The other purpose of that hearing is to establish the exact amount of principal and interest that Mr. Mann owes Mrs. Mann. For this purpose there needs to be a determination by the court of the precise amount of the principal, in circumstances where, as I have said repeatedly, Mr. Mann accepts that he owes around £650,000 but Mrs. Mann says it is rather more. There needs to be a determination of what the actual interest at judgment debt rate has accrued since then. There needs to be a determination of whether any part of that interest is unenforceable by virtue of s.24(2) of the Limitation Act 1980. Then there needs to be a determination of whether any part of the interest, or principal for that matter, should be remitted in the exercise of the court's discretion.

45 In that regard, Mr. Mann places considerable emphasis now on the fact that he did in numeric terms pay the compromise that was reached before His Honour Clive Callman. He says numerically he paid it, he just did not pay it on time. To which Mrs. Mann, to my mind, makes a compelling riposte, which is that

had he paid the sums due under the compromise agreement at the due time she would have bought a house. She was not able to buy a house and the payments subsequently made only went to pay rent which is, of course, lost/dead money, the result of which is that, although the monies may have been paid, she has not at the end of it got a house. So it seems to me that the force of Mr. Warshaw's argument is considerably undermined by that good point made by Mrs. Mann.

46 I expect Mrs. Mann and Mr. Warshaw to agree the necessary directions for the determination of the amount that is owed. Mr. Warshaw and I have had a dialogue about that and I approve the scheme that he has put forward. It just needs to have its Is dotted and Ts crossed. If there are any difficulties about that I will rule on them.

47 Those are my rulings.