IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

[2015] EWHC 3229 (Fam)

No. ZC15D00024

Royal Courts of Justice

Tuesday, 27th October 2015

Before:

MR. JUSTICE MOSTYN

(**In Public**)

B E T W E E N :

SARAH KIMURA AL-BAKER

Applicant

- and -

ABDUL AMIR AL-BAKER

Respondent

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MR. S. CALHAEM (instructed by Vardags) appeared on behalf of the Applicant.

THE RESPONDENT did not attend and was not represented.

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE MOSTYN:

1 This is an application by Sarah Kimura Al-Baker for the committal to prison of her husband, Abdul Amir Al-Baker, for breach of two disclosure orders made respectively by Mrs. Justice Roberts on 19th August 2015 and, in identical terms, by District Judge Aitken on 2nd September 2015.

2 I shall on occasion refer in this judgment to the parties as "husband" and "wife", although it is not entirely certain for reasons which I will explain whether they are in fact married at the moment.

3 The husband and wife were married forty-five years ago. On 6th January 2015 the wife issued divorce proceedings in this country pleading habitual residence here and, on the same date, initiated ancillary relief proceedings. Subsequently, the husband produced a Talaq divorce said to have been pronounced and effected in the UAE. In those circumstances, on 31st July 2015, I gave the wife permission for her financial claims to proceed under Part 3 of the Matrimonial and Family Proceedings Act 1984. In giving leave I did no more than to decide that there was a substantial ground for concluding that the wife had tenable claims under the 1984 Act. I was not deciding whether the UAE Talaq did in fact validly dissolve the marriage. That may yet have to be determined but one thing is certain and that is, whether it is in English divorce proceedings, or whether it is in English Part 3 proceedings, the claim by the wife for ancillary relief will proceed here. It is in the context of that financial claim that the disclosure orders were made. The disclosure orders were part and parcel of freezing orders and they were the usual form of disclosure order that is attached to a freezing order. The ancillary relief claim is made in the context of immense wealth and an exceptionally high standard of living. The disclosures hitherto made by the respondent have been partial, and have been demonstrated by the wife to be in all likelihood dishonest. Notwithstanding the evidence of enormous wealth, he has disclosed virtually nothing and the wife has been able to demonstrate that his assertion in relation to the non-ownership of property in Dubai was demonstrably untrue. But all this is no more than background.

4 The key facts are that, on 19th August, and then identically on 2nd September, Mrs. Justice Roberts and then District Judge Aitken ordered the respondent to give specific disclosure. The terms of each order were as follows:

> "The respondent shall, within 7 days of service of the order and to the best of his ability, inform the applicant's solicitors of all his assets worldwide exceeding £15,000 in value, whether in his name or not and whether solely or jointly owned, giving value, location and details of all such assets.

> If the provision of any of this information is likely to incriminate the respondent he may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render the respondent liable to be imprisoned, fined or have his assets seized.
>
> Within 7 working days after being served with this order, the respondent must swear and serve on the applicant's solicitors an affidavit setting out the above information."

Each order contained a provision permitting it to be served out of the jurisdiction by email. The relevant provision in each order provided:

> "Service of this order shall be effected by email and first class post to the respondent"

and included his email address and an address in some apartments in Dubai and of the property in Portugal.

So it was provided that service should be by email and by post to the named addresses in each order.

5 I am aware of another case which is pending before me where the issue that will have to be decided is whether there is power to authorise service out of the jurisdiction pursuant to Chapter 4 of Part 6 of the Family Procedure Rules otherwise than in accordance with the terms of that Chapter. The Chapter provides for service out of the jurisdiction in various ways depending on whether the person to be served is in an EU country, or in a Commonwealth country, or in a British dependent territory, or is elsewhere in the world; but Chapter 4 does not provide for an equivalent to Rule 6.23(d) which permits service by fax or other means of electronic communication in accordance with Practice Direction 6A. Now it would be very strange if Chapter 4, which permits service out of the jurisdiction without leave, did not allow an alternative method of service when the primary methods of service were shown to be impracticable. It is my opinion, although I may have to decide it conclusively in the other case which I have mentioned with the benefit of full adversarial argument, that there is certainly to be read into Chapter 4 power to permit service out of the jurisdiction, for example, by email. The reason I reach this conclusion (recognising that I have heard only one side of the argument) is by virtue of the terms of Rule 6.1 which applies to service generally whether within or outside the jurisdiction. Rule 6.1 states:

> "This part (that includes all the chapters of Part 6) applies to the service of documents except where:

(a) Another part, any other enactment or a Practice Direction makes a different provision; or
(b) The court directs otherwise."

In those circumstances, where the court has directed that service may be done by email, to my mind, rule 6.1(b) effects valid service even where the person being served is out of the jurisdiction. So I am satisfied in such circumstances, having seen the affidavit of the wife's solicitor in support of the application to commit, that the orders have been validly served in accordance with their terms.

6 The next two questions concern the application notice to commit. Has that been validly served and have all the rules been complied with? The application to commit is to be found in the bundle at B42. This asks, first, to dispense with the requirement under Family Procedure Rule 37.10(4) personally to serve it on the respondent and, secondly, that he should be committed to prison for breach of the orders which I have mentioned. It is certainly true that Rule 37.10(4) provides that: "Subject to paragraph 5, the application notice and the evidence in support must be served personally on a respondent", but paragraph 5 provides that:

"The court may:
(a) Dispense with service under paragraph 4 if it considers it just to do so; or
(b) Make an order in respect of service by an alternative method or at an alternative place."

Subparagraph (b) presupposes that an order will be made before an alternative method of service is effected. Subparagraph (a) presupposes that dispensation with service will take place when the court was satisfied that service has, in effect, been achieved. So that is the first issue: Should the court dispense with service in circumstances where, as I will explain, it is clear that the respondent has been in reality served with this application? The second matter relates to Practice Direction 37A, para.12.2. This provides that:

"The hearing date of a committal application must not be less than fourteen days after service of the application notice on the respondent."

However, that is again subject to the court being able to direct otherwise.

7 In this case the application notice has not been personally served, but it has been sent by email to the respondent's Gmail address - the same Gmail address for which the orders themselves provide for service - and it has also been sent by email to his lawyers in Lisbon who have been communicating with the court in relation to the freezing orders and who have been corresponding with

the wife's solicitors. In those circumstances it is plain beyond any doubt that the respondent is fully aware of the application. If the court felt it appropriate to provide for email service on him of the original orders then, to my mind, it would be unreal if the court was not to reach the conclusion that email service of the application to commit was just as effective. At the end of the day the point of the service rules are to ensure that the respondent to any application knows what is happening and has a reasonable opportunity to present his case: see *Abela & Ors v. Baadarani* [2013] UKSC 44 at para 37 per Lord Clarke. I am satisfied in this case that the respondent has had such a reasonable opportunity notwithstanding that he has had only thirteen days rather than the fourteen days mentioned in para.12.2 of Practice Direction 37A. So I therefore dispense with the need for personal service of the committal application, pursuant to Rule 37.10(5)(a) and I abridge the period in Practice Direction 37A, para.12.2 by one day to 13 days.

8 Having dealt with all these preliminary technical aspects, I now turn to address the substance of the application. I am satisfied beyond any reasonable doubt that the respondent has failed to comply with the disclosure orders that have been made. He has not only refused to comply, but he has been defiant in his refusal to do so and I regard this as an exceptionally serious case of refusal to comply with the court's lawful directions. I regard this as a worse case in terms of the obloquy of the respondent than the case of *Young v. Young* [2013] EWHC 34 (Fam) where the sentence for non-disclosure that was awarded by the court was six months imprisonment. Mr. Calhaem rightly points to aggravating factors namely that the disclosure that the respondent has given hitherto has been shown (at least prima facie) to be untrue. But that really should not, to my mind, influence the simple conclusion that I have reached, which is that the rule of law depends on compliance with court orders and where court orders are not complied with then the court should take an adamantine approach unless there is good excuse. And no good excuse has been advanced here.

9 In the circumstances I am satisfied that it is a case where the respondent should be imprisoned forthwith for his default and the length of the sentence that I award is nine months' imprisonment. The order will provide in the normal way that the respondent has the right to apply to me to purge his contempt. It has often been observed that a committal sentence has a dual function. It is not only punitive, but coercive as well and the facility to apply to purge contempt is there to give effect to the coercive element of the sentence.

10 The wife is proceeding on advice that this is a sensible way of advancing her claim and it is not for me to question that. It has been asserted that this being a sentence of nine months it would be open for this court to request that a European arrest warrant be issued. That would have the effect of detaining the respondent anywhere within the European Union and having him brought to this court if the European arrest warrant procedure is available. I confess that

when I first read this I was surprised that it was being asserted that the arrest warrant procedure was available as it was my belief (it is fair to say not based on much education) that the European arrest warrant was confined only to what can strictly be described as criminal offences and a civil contempt was not in that category. However, Mr. Calhaem has placed before me the Council Framework Decision of 13th June 2002 on the European arrest warrant and Surrender Procedures between Member States of which Article 2.1 states:

> "A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months."

The use of language for "acts punishable by law" would certainly embrace a custodial penalty imposed for contempt of court and, recognising I have only heard only one side, I am satisfied in these circumstances that the sentence I have awarded is properly to be backed by a request for a European arrest warrant and I will complete the necessary annex form when the order is made.
