

Before His Honour Judge Richard Clarke

BETWEEN:

MAJA OLGA BETSY

Applicant

-and-

BRIAN ANTHONY BETSY

Respondent

Note of Judgment of 05 April 2022 at a hearing held in open court

Mr Andreou of Proctor Moore Solicitors appeared on behalf of the applicant
Mr Miller of 14 Gray's Inn Square appeared on behalf of the respondent

1. This is an application for committal for contempt of court, brought under the Debtors Act of 1869 s5, for non-payment of monies due under a consensual Financial Remedy Order made on 6 July 2020. The test is identical under FPR r33.14 and s5 of that Act, namely that the debtor may be committed for making default on payment of debt if the debtor has the means with which to pay the sum in respect of which he has made default and has refused or neglected to pay.
2. The application itself was a fairly wide ranging application which was originally dated 6 December 2021. It raised issues in relation to payments that were due from the respondent pursuant to the Financial Remedy order made on 6th July 2020 relating to
 - a. payments for a vehicle that was repossessed in March 2021,
 - b. a failure to transfer a number plate in the name of the complainant because it was repossessed in February 2021,
 - c. a failure to maintain life and critical illness cover, medical insurance and life insurance pursuant to an undertaking in the order
 - d. payments of £5,000 pcm maintenance, linked to RPI, required from the 1st of each month, and
 - e. payment of nursery fees.
3. This is the second return date hearing. At the first return date hearing the court made the respondent aware that he did not have to file any evidence and was advised of his rights generally. In addition to the application and supporting statement, the court has the benefit of written witness evidence from the respondent in respect of the allegations.
4. The respondent's case is that during a period of September 2020 to December 2020 he was in considerable financial difficulty and by the start of 2021 he was clearly unable to pay.

5. The wife would appear to take a pragmatic approach in relation to the submissions and the following was raised in relation to the financial circumstances of the respondent.
 - a. At the time of the consent order the respondent filed a statement of information saying he had capital of £91,000 that was previously identified in form E and available in a bank account.
 - b. The respondent had outgoings in his Form E of around £22,000 a month. In addition, in general terms, his obligation to the applicant was about £7,000 pcm so therefore £29,000 a month was what he was needing to live on.
 - c. His was a business that did property deals; feast or famine by nature, a lot of money one month and none the next. That business was hit as a result of Covid.
6. As the court has pointed out in discussion with counsel for the applicant, the finances of the company and the individual are not synonymous and it is not assumed that monies held by the company were ones he had access to, but what the court had to be clear on was that he had the ability to pay and chose not to or neglected to pay. The Court has to take into account that monthly outgoing of £29,000 in rough terms.
7. At the time of the consent order, just over £90,000 was in his accounts. On that basis it should last about 3 months, namely July, August and September 2020. He also received drawings of £29,000 over that period, which arguably takes it to October 2020. The Court was also referred to the fact that on 14 September 2020 he received his share of the former matrimonial home in the sum of £49,420.
8. The respondent has identified through this period that he was in financial difficulties and not in a position to pay. It is not a question that he was in a position where he could pay nothing at all, but that he made payments to the obligations, but he did not make full payments. He paid £563 in maintenance in September 2020, along with a cost liability, and £3,262 in October, £3032.88 in November and in December £3,621. By December 2020 the arrears were £9,924.
9. It is clear from looking at the schedule of withdrawals that his income was not consistent and his income was nowhere near meeting what his budgeted sums were. He entered into a period where his vehicles were repossessed and he stopped paying life insurance. He was already in arrears on a mortgage on Lowther drive which he owned with a former partner. There is clear evidence of a spiral down of his finances. The focus has therefore been the period at the end of 2020 and the ability to pay in that regard.
10. In terms of the £91,000 declared capital, there is a suggestion that was not actual money he had at the time of the order. However, the court refers to the fact he signed the statement of means, he signed the Form E and if it was his case it had

gone or dissipated significantly he would have to have explained it at the time. The applicant is entitled to and does rely on that.

11. The Court is also referred to a sum from realisation of capital in Mauritius of £8,000 that does go, to a degree, to the respondent's credit because he made a lump sum payment to the applicant in this sum in February 2022. There was an ongoing obligation of £5,065 pcm. Therefore, while it stands to his credit that he made the payment it should also be noted all payments for maintenance stopped in February 2021.
12. The Court also has to bear in mind that payment was made after the committal application had been served on the respondent. The court has to accept the sale of the Mauritian property might be linked to the timing of that.
13. As at July 2020 we have a situation where the respondent had £91,745 in capital. We bring into that figure the capital in September from the sale of the family home of £49,420, with outgoings of £30,000 a month. By 1st of September 2020 in simple terms there should have been about £30,000 still in the respondent's account, but he did not pay the £5,000 due, he paid £536.63 later that month, He received a payment of £49,420 but we then have his ongoing liabilities for September. By 01 October 2020 he should have had, in rough terms, £49,420.
14. There was a nominal payment in October 2020 of just over £3,000, but on 1st of October 2020 he received a further sum of £10,000. The court also reminds itself that the £29,000 to which it has referred includes £5,000 pcm deducting sums which should have been paid but which were not actually paid.
15. It is the finding of the court that at that stage he was on the verge of not being able to pay. The court reminds itself it is the obligation of the applicant to prove her case and that it is not for the respondent to disprove the case. However, the above information is all proven on the evidence put forward to the court at the time of approval of the order and what should have occurred since then.
16. It appears from the evidence that by the start of November 2020 the respondent's finances had started to unravel. The court considers the evidence in the round and has considered if it matches up with other information.
17. There are two payments which caused the Court particular concern. The first was a payment in September 2020, whilst there were still arrears of maintenance to the applicant, where the respondent spent £1,291 at Richer Sounds; clearly some form of Hi-Fi or other equipment. The second was a further payment in December 2020, which appears to be £1,390 for shoes.
18. The court has been reminded the respondent was entitled to meet his reasonable needs, but both of those payments strike the Court as questionable in circumstances where the respondent was not paying the full amount of money to the applicant and they do not sit well in the Court's mind with the question of the ability to pay.

19. The court reminds itself again that it is for the applicant to prove to the criminal standard that he has not paid the amount that is established and that he has or has had the means to pay. As at 1st September 2020, on the evidence produced before the Court to the criminal standard the respondent had the ability to pay. As at 1st October 2020 on the criminal standard he had the ability to pay. By 01 November 2020 things start to get less clear and the court reminds itself the applicant has to prove the allegation beyond all reasonable doubt. If she does not, then the Court does not make the findings.
20. The court finds that from 01 September to 01 October 2020 the respondent had the ability to pay and chose not to do so. The court takes account of the efforts he did make to pay and the sums paid, but the court does not accept on the face of the evidence that he was unable to pay the remainder. The respondent chose to spend the money elsewhere.
21. In addition, there is an acceptance that he did not transfer the title in the number plate to the applicant. That is an admitted breach. It is argued that it is a minimal breach.
22. In the circumstances and to the extent set out, there is an established breach in the title of number plate and a breach in relation to payments in the sum of £6,173.93. Given the fact the respondent used £8,000 obtained from the Mauritian property to discharge an element of the arrears, to what extent does the applicant say there should be consequences of the breach?
23. [Submissions heard from both counsel]
24. The money paid from the Mauritian property stands to his credit against the breach, if you pay a debt you discharge the first liability in time, not the last. In general, the court accepts he paid the arrears from the sale of the Mauritian property even though not under a strict obligation to do so, and to that extent he has made good that breach.
25. The breaches found were met by the amount paid in February 2022, so it is the decision of the court his breach was purged before sentence.
26. The court is sentencing for the total breaches. If the breaches do not warrant a custodial sentence, then the court cannot impose a suspended sentence as proposed by the applicant. The court is satisfied a conditional discharge is appropriate.
27. [Submissions heard on costs]
28. The Court has to consider who should pay the costs on the application to commit. It is a rare application and at the time the court first saw this application there was

some question in the court's mind as to why the applicant was bringing the application on the basis of committal. To commit implies the ability to pay and normally a precursor to such an application would be an application for an enquiry about means of the debtor so that a decision can be made as to whether there is the ability to pay or not. The application was light on information in that regard. There have also been a number of concerns as to how the case has been pursued. There was no argument that the court was entitled to pierce the corporate veil or have regard to the finances of the business.

29. There is a reason why these applications are rare and it is because there is a risk you will not succeed if you do not have the information to support the application. The applicant was pursuing an argument of breach (if the court looks at maintenance alone) having occurred 20 times by the time of the final hearing with arrears in excess of £70,000 in circumstances where the court only found two breaches in relation to maintenance, breaches amounting to £6,000, and there was an admitted breach in respect of the number plate. Proportionality becomes an issue and the court has to take into account the extent to which each party has succeeded.
30. The costs incurred by the applicant seem to the court to be extremely high, albeit I am not progressing on summary assessment. I have attendance at the hearing 8 hours. The last hearing was a short one. We started just before 10 o'clock and concluded at 10.10 and today was listed for three hours, although it has taken going on for 4 hours. Despite this there is a claim for 14 hours attendance at a hearing in circumstances where the representative attended alone and attends alone today.
31. The court has to draw a broad-brush approach to principles overall and the concerns go to proportionality. If the court accepts the schedule on behalf of the applicant, she spent nearly £19,000 pursuing this application. The court considers the proportionality of this against the cost of an appointment to provide information as to means which would not have come anywhere near that cost.
32. The court also takes into account the other allegations, not just maintenance. The applicant was not able to prove anything else. The court takes into account the payment in February 2022 that was a payment after proceedings were brought and after an element of costs had been incurred. However, it was a risky approach for the applicant to take and one that did not come off. In all the circumstances the appropriate cost order is no order as to costs.