RS 16 D00223

Victoria Foxwell

V

Nicholas Foxwell

1. At a final hearing on 26.10.18 on Mrs Foxwell's application for financial remedies, District Judge Watson made an order which included provision for periodical payments in her favour for life.
2. Immediately preceding this, Mr Foxwell had been subject to a suspended order for his committal made by Deputy District Judge Gisby on 23.2.18 on Mrs Foxwell's earlier application for a judgment summons in relation to an order for maintenance pending suit.
3. The current application was listed before District Judge Taylor on 22.4.21 but adjourned by him to be heard by District Judge O'Neill on 4.5.21 when the case was already listed before her for variation of the original order because he considered that it was not properly listed, having been set down for hearing by remote video instead of on personal attendance. It could not proceed on 4.5.21 before DJ O'Neill because she had other urgent work and so it was placed in my list on 6.5.21. One reason for listing it in front of DJ O'Neill was that she could then go on and hear the application for variation or remission either immediately following the judgment summons application or on another date.
4. In my view, whilst it is appropriate that the court knows that variation or remission applications have been made and there will be cases in which it is appropriate to hear all of them together, that is not essential and in particular cannot be required by the

court since the respondent to the summons is entitled to have the case against him proved and cannot be compelled to give any evidence and would therefore be disadvantaged if he chose to rely on his right to silence in connection with the judgment summons but the court was also seized of the variation and remission applications for which it would be essential that he provide evidence. The practice of hearing judgment summons and variation applications together has been deprecated in *Inplayer Ltd (formerly Invideous Ltd) v Thorogood [2014] EWCA Civ 1511.* I did not consider that either of the variation or remission applications was before me on 4th May. Directions given by HHJ Wildblood QC provided for the variation and remission application to take place five weeks after the hearing of the judgment summons. Rule 33.13(2) requires personal service of the notice of the adjourned hearing but no point was taken about the notice for this hearing and the court's general powers of management in FPR Part 4 provide for any step to be taken to further the overriding objective to deal with cases justly, which includes dealing expeditiously and fairly, proportionately, economically, and allocating the court's resources appropriately.

5. There was an application at the beginning of the hearing on behalf of Mr Foxwell by his solicitor, Mr Arif, for the case to be adjourned for the convenience of counsel who had acted previously, Miss Kamal, who had professional engagements which prevented her attending this hearing which had been rescheduled at short notice. He did not argue that Mr Foxwell would be disadvantaged in terms of achieving a fair hearing but told me that Mr Foxwell would prefer the case to be adjourned so that he could prepare for the variation and remission hearing. Mr Arif told me that he was stepping in: he did not tell me that his role was limited to applying for the adjournment and he helpfully remained and conducted the case on behalf of Mr Foxwell.

6. Mrs Foxwell's position was that she was anxious for the hearing to proceed: she had travelled from Cornwall for the hearing and she was doubtful that she would receive any support from Mr Foxwell without the court's intervention.
7. I heard the judgment summons and took into account only such parts of the evidence which may have been filed in connection with the other applications as was specifically drawn to my attention by both parties in their oral evidence. At the hearing before District Judge Taylor Mrs Foxwell had been given permission to file additional evidence: on enquiry before me, she explained that she had not done so because the evidence which she had referred to was of Mr Foxwell having disposed of some chattels on eBay and she recognised that it was not going to assist the court on this occasion because he had paid her £1500 on 29.4.21 which would have reflected the sums which could apparently have been raised via eBay.
8. In his directions given on 26 February 2021, HHJ Wildblood QC had given both parties information about the proceedings and in particular had informed Mr Foxwell of his right to legal aid and his right to remain silent.
9. The relevant order is for Mr Foxwell to pay to Mrs Foxwell periodical payments for the benefit of herself and the children of the family at the rate of £24,000 per annum, i.e. £2000 per calendar month (paragraph 25 c of the original order of 26.10.18.) There is no provision in this subparagraph for credit to be given for any payment made by Mr Foxwell to the child maintenance service (CMS) although that is specifically provided for in subparagraph a. There are three relevant dependent children of the family.
10. The judgment summons was issued on 25.11.20 stating that the balance due at that date was £41,603.26. Mrs Foxwell's evidence on her own affirmation was that she had done an accurate calculation at the date that the summons was issued: she explained that Mr Foxwell had never paid the amounts ordered by District Judge Watson but had paid

each month an amount which he calculated, recently of the order of about £400. Mr Foxwell did not challenge Mrs Foxwell's calculation and explained to me that he had used an online calculator to establish what his CMS liability would be. Mrs Foxwell's evidence was that she had received nothing following the issue of the judgment summons application until the single payment of £1500 in April so that the current arrears are at least £50,000.

11. I find beyond reasonable doubt that the amount unpaid is £50,000. It may be more.

12. I find beyond reasonable doubt, on his admission on affirmation, that Mr Foxwell has refused or neglected to pay that sum. He explained that he has paid varying sums depending on his view of his income in each month, using an online calculator which would provide a figure on the basis of information which he provided but which was not disclosed to Mrs Foxwell or the court. He has never paid the full amount ordered by the court and he has chosen to pay different, smaller, amounts each month.

13. Section 32 of the Matrimonial Causes Act 1973 provides that a person may not enforce arrears due more than 12 months before the beginning of proceedings to enforce payment without the leave of the court. HHJ Wildblood deemed Mrs Foxwell to have made such an application but she did not pursue it, perhaps indicating that she recognised that there might be difficulties in enforcing the whole amount at this stage. She had tried to enforce by way of attachment of earnings at an earlier stage but this was blocked by Mr Foxwell becoming self employed. The pro rata amount outstanding in the 12 months before the issue of the application for the judgment summons, given Mr Foxwell's acknowledged practice of paying what he regarded the CMS calculation to be and never having paid the full £2000 PCM, is £20,800. The amount which has accrued since then, due on the 28th of each month from November to April, £2000 minus

£400 x 6, is £9600, but credit must be given for the £1500, so £8100, giving an enforceable figure of £28,900.

14. The outstanding issue was therefore whether Mr Foxwell has, or has had, since the date of the order, the means to pay the sum in respect of which he has made default: Rule 33.14 3)b)(i). The effect of section 32 is to reduce the relevant period to the time after 25 November 2019.

15. Questions were put to Mrs Foxwell about her spending and her resources: those are irrelevant for the purposes of this application.

16. Mr Foxwell liquidated his business, Foxwell Associates Ltd in February 2019 and made himself personally bankrupt in June 2019. Mrs Foxwell's evidence included observations as to chattels he had disposed of or holidays he enjoyed in 2019 and 2018: this part of her evidence did not establish that he had the means to pay her before November 2019. She also provided evidence that his fiancée has a very high income: the relevance of this is that Mr Foxwell has no need to contribute to her support and, before marriage, has no legal or moral obligation to support her. He is effectively a single man.

17. Mr Foxwell would have received £20,000 from the sale of the matrimonial home, during the period of his bankruptcy, and so, as he pointed out to me on the occasion of handing down judgment, immediately absorbed into his estate in the bankruptcy. When the bankruptcy was discharged in July 2020 he should have emerged without debt other than the unpaid periodical payments, which are not provable in bankruptcy. His trustee in bankruptcy should have permitted him to go on paying periodical payments as required by the order of 26.10.18: Mr Foxwell told me that he had insisted to the trustee that he should pay what he called his child support.

18. The information that I have about Mr Foxwell's income in the period following 25.11.19 is derived from his own statement and from Mrs Foxwell's research using the Internet into matters of public record. Mr Foxwell has provided two statements, one dated 26.1.20 and the other provided to me undated but in response to evidence filed by Mrs Foxwell. He had secured work within the NHS as a project manager at the beginning of 2019 on a salary of £44,000 PA. Between September 2019 and February 2020 he was earning £52,306 pa pro rata. He had a series of short-term assignments and in February 2020 was employed by Hays recruitment at £56,000 pa. On resigning from Hays, he took a post with the NHS in Poole at £53,168 pa. These projects were to do with the implementation of the response to the covid crisis. From October 2020 he has done the same work but on a self-employed basis through his own company, Foxwell's Limited. He explained to me that he set that up because he was asked to work as a contractor rather than an employee by the NHS, specifically because he lacked a qualification, but it happens that his change to self-employment coincided with MrsbFoxwell's application for an attachment of earnings order. He is currently working for NHS Kernow but has been working remotely due to the Covid crisis, travelling to Cornwall occasionally as required. He says that he was advised to pay himself £2000 PCM but he preferred to take £3000.
19. The work which Mr Foxwell does is remunerated at a rate equivalent to the NHS salary band 8, and the pay scales searchable via the Internet which we looked at in the hearing give a net monthly pay for band 8A and the first pay point on 8B of £2901 PCM and £2963 PCM (annual £53,168.)
20. Searches also gave figures of £400 per day for short-term contracts: Mr Foxwell told me that he sometimes received £400 a day but sometimes only £200 and sometimes £350.

21. I am satisfied that Mr Foxwell, and the large number of other persons employed as project managers on interim assignments within the NHS, would not work on the self-employed basis for a lower reward than would be available to an employee.
22. Mr Foxwell told me that he had overheads that had to be deducted from his gross fee income, including travel expenses and an office. Fees for self-employed work recognise overheads, which is why on occasion he would be paid £400 or more a day, but I am not satisfied that he needed to pay for an office in Clevedon, which he told me he had taken on because his mental health had suffered working at home in the house he shares with his girlfriend in Portishead. It is clear that he has chosen to incur expenditure which will have the effect of reducing his annual profit.
23. I am satisfied beyond reasonable doubt that throughout the relevant period Mr Foxwell has had an average net monthly income of £3000, which he has drawn, and that funds will have been left in his business account to meet any tax liability.
24. Mr Foxwell asserted that DJ Watson had assessed his income needs: in a written judgment DJ Watson records Mr Foxwell's own assessment of his needs, then identifies that it was aspirational, not actual, and that many figures included in it were not actually being paid, and that there were huge debts which will now have been cleared through the bankruptcy. I have no current evidence about what Mr Foxwell's needs are apart from his assertion that his share of the rent on the property that he shares with his girlfriend is £1000 PCM. That amount would allow him to rent a three bedroomed house in Portishead or Bristol on his own. I note that DJ Watson observed that Mr Foxwell had been uncooperative in the original proceedings and that there were aspects of his evidence which required the judge to scrutinise with considerable care what Mr Foxwell was telling the court. In that judgment District Judge Watson accepted Mr Foxwell's evidence that his girlfriend, Ms Wickenden, paid him £500 on the 11th of

each month in order to equalise the household expenses each pays for. He was then saying that he intended to move to a smaller property and that his half share of the outgoings on his present home was £1450, of which £725 was his half share of the rent. District Judge Watson assessed Mr Foxwell's half share of the expenses of running the house to which they proposed to move at £1250 PCM. District Judge Watson was making his decision on the balance of probabilities: I had no direct evidence as to Mr Foxwell's needs or obligations, but I treat him as a single man with no obligation to support any other person whose debts have been cleared in the bankruptcy and I take into account the information in the public domain about salary levels for professional people. There is no reason why if Mr Foxwell had prioritised his obligation to his former wife and his children he should have needed net disposable income of his own of any more than £1500 pcm: newly qualified teachers and nurses earn in the region of £22,000 to £24,000 per annum gross, £1500 - £1650 pcm.

25. The reported cases are not helpful on the two questions which present themselves next: to what extent does the assessment of Mr Foxwell's means require the court to take into account his own cost of living, and if he has had means but those means have been less than the amounts due and in the absence of a variation application being heard, is the court entitled to make an order based on his default in the lower sum? I have no doubt that for the purposes of this process the court is concerned with Mr Foxwell's actual means rather than his earning capacity, which would be relevant on a variation application, and I have concluded that his actual means must take into account his own costs of living but that his costs of living must be assessed on the basis of what is reasonable given his income and his obligations to his former wife and children. I therefore assess the means that he has had throughout the relevant period as being sufficient to have paid £1500 pcm of the sums due under the order. On the second

question, it could not be right that a judgment debtor with the means to pay a significant proportion of the sums due could be exonerated from making any payment simply because he did not have the means of meeting the full amount, and I am satisfied that the court can make an order based on the failure to pay the lower amount.

26. Mr Foxwell complains that the original order was not affordable: he should have appealed for applied to vary it. He complains that Mrs Foxwell has not been employed since the order was made: the order is a joint lives order and does not indicate any expectation that she would generate sufficient income to manage without it. There is no relevance *to this application* of any sums which she may have received from any other source. Mr Foxwell complains that Mrs Foxwell has not brought the children to the handover point for contact: he appears not to recognise that if she has no money for petrol because he has failed to pay what he owes her she will not be able to transport the children to meet him. At paragraph 153 of his judgment District Judge Watson explained why he made a joint lives maintenance order: the evidence did not give him confidence to hold that Mrs Foxwell could or would be able to adjust without undue hardship to a termination of her maintenance.
27. I find beyond reasonable doubt that since November 2019, the time 12 months before issue of the process of enforcement by judgment summons, Mr Foxwell has had the means to pay £1500 pcm towards the sums due under the order.
28. I find beyond reasonable doubt that Mr Foxwell has been guilty of contempt of court in failing to comply with the order dated 26.10.18 in that he has not paid to the applicant global maintenance for herself and the children in the full sum ordered at any time since 26.10.18 and specifically that he has refused or neglected to pay the sums due under the order.

29. I find beyond reasonable doubt that the amount outstanding under the order of 26.10.18 as at today's date is in excess of £50,000 but that the amount ~~enforceable~~ outstanding on the basis of 12 months preceding the application and the six months which have ensued since then is £28,900. To this must be added the issue fee of £100, making a total of £29,000. Having found that the Respondent had the means to pay £1500 rather than £2000pcm, I have in effect to give him credit for £500 per month for 18 months between and including December 2019 and May 2021 the amount enforceable is reduced by £9,000 to £20,000.

30. The sentence which I impose is committal for a period of 28 days, but that sentence will be suspended for a period of 12 months or until the conclusion of the variation and remission application on condition that the respondent pays to the applicant maintenance at the rate of £1500 pcm on the first day of each month beginning on 1st June 2021 and pays £10,000 towards the enforceable amount of £29,000 on or before 1 July 2021 and the balance of the amount outstanding, £10,000, by 1 November 2021.

After the judgment had been delivered, Mr Arif on behalf of Mr Foxwell made short submissions as to the payment received from the sale of the parties' home and the setting up of the limited company which I have reflected in underlined text above and I recognised that the calculation in paragraph 29 needed correction and amended the text as underlined there and in paragraph 30.

Judgment was handed down between 11.40 am and 12.10 pm on 18th May 2021.