IN THE CENTRAL FAMILY COURT Case No: WT15D00448

First Avenue House

42-49 High Holborn | London

WC1V 6NP

Date: 3 September 2021

**Before**:

HER HONOUR JUDGE GIBBONS

- - - - - - - - - - - - - - - - - - - - -

**Between**

**NATAYA UMJUICE**

**Claimant**

**-and-**

**PHOUTHONE SIHARATH**

**Defendant**

- - - - - - - - - - - - - - - - - - - - -

**Ms Camini Kumar** (instructed by **Streathers Solictors**) for the **Applicant**

**The Respondent** did not attend and was not represented at this hearing

Hearing date: 3 September 2021

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Approved Judgment

1. This the final hearing of Nataya Umjuice’s application dated 8 June 2021 to commit Phoutone Simarath (also known as Simarath Phoutone) for contempt of court. Although the parties have been divorced since July 2020, for convenience I shall refer to them as the Wife (W) and the Husband (H). I intend no discourtesy by use of this shorthand.
2. The application is brought on the grounds of H’s alleged breach of various provisions within the final financial remedy order made by District Judge Hudd on 25 June 2020.
3. W attends today represented by Ms Kumar of counsel and Streathers Solicitors. H has not attended. This hearing has started at 11 am and therefore one hour after the advertised time. My clerk has also made the relevant checks to see whether H has communicated with the court in respect of this hearing. He has not.
4. I am sitting in open court in Court 19 at the Central Family Court. Counsel and I are robed.
5. As a preliminary matter, earlier this morning, Ms Kumar, to who I am grateful, very helpfully drew my attention to the fact that this hearing had been incorrectly advertised on the public cause list, and to the authority of *Hashimi v Hashimi* [2016] EWHC 3112, in which Holman J addressed the same defect by causing the door lists to be amended and inviting his clerk to notify the Press Association. I have today taken the same steps.
6. Mr Farmer of the Press Association has kindly acknowledged receipt of the correspondence. No journalists have attended.
7. I have been invited to proceed with the committal application in H’s absence as FPR r18.12 permits. Having heard Ms Kumar’s submissions, I indicated that the hearing should proceed and that I would give my reasons within the judgment to avoid repetition.
8. Ms Kumar draws my attention to *Sanchez v Oboz & Anor* [2015] EWHC 235 (Fam), 6 February 2015 (as recently applied in *Frejek v Frejek* [2020] EWHC 1181 (Ch), 7 May 2020) in which Cobb J re-iterated that it will be an unusual but by no means exceptional course to determine a committal application in the absence of a respondent. The reasons for this are set out at para. 4 of the judgment.

i) Committal proceedings are essentially criminal in nature, even if not classified in our national law as such (see *Benham v United Kingdom* [(1996) 22 EHRR 293](https://www.bailii.org/cgi-bin/redirect.cgi?path=/eu/cases/ECHR/1996/22.html) at [56], *Ravnsborg v. Sweden* (1994), Series A no. 283-B); in a criminal context, proceeding with a trial in the absence of the accused is a course which will be followed only with great caution, and with close regard to the fairness of the proceedings (see *R v Jones (Anthony)* [[2003] 1 AC 1](https://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/2002/5.html), approving the checklist provided in *R v Jones; R v Purvis* [[2001] QB 862](https://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Crim/2001/168.html));

ii) Findings of fact are required before any penalty can be considered in committal proceedings; the presumption of innocence applies (*Article 6(2) ECHR*). The tribunal of fact is generally likely to be at a disadvantage in determining the relevant facts in the absence of a party;

iii) The penalty of imprisonment for a proven breach of an order is one of the most significant powers of a judge exercising the civil/family jurisdiction; the respondent faces the real prospect of a deprivation of liberty;

iv) By virtue of the quasi-criminal nature of committal process, *Article 6(1)* and *Article 6(3)* *ECHR* are actively engaged (see *Re K (Contact: Committal Order)* [2002] EWCA Civ 1559, [2003] 1 FLR 277 and *Begum v Anam* [[2004] EWCA Civ 578](https://www.bailii.org/ew/cases/EWCA/Civ/2004/578.html)); *Article 6(1)* entitles the respondent to a "*a fair and public hearing*"; that hearing is to be "*within a reasonable time*";

v) *Article 6(3)* specifically provides for someone in the position of an alleged contemnor "*to defend himself in person or through legal assistance of his own choosing*", though this is not an absolute right in the sense of "*entitling someone necessarily to indefinite offers of legal assistance if they behave so unreasonably as to make it impossible for the funders to continue sensibly to provide legal assistance*" (per Mance LJ (as he then was) in *Re K (Contact: Committal Order)* (reference above)). The respondent is also entitled to "*have adequate time and the facilities for the preparation of his defence*" (*Article 6(3)(b)*).

1. At para. 5 of his judgment, Cobb J identifies the key considerations which will inform the court’s decision as to whether to proceed in a respondent’s absence:

i) Whether the respondents have been served with the relevant documents, including the notice of this hearing;

ii) Whether the respondents have had sufficient notice to enable them to prepare for the hearing;

iii) Whether any reason has been advanced for their non-appearance;

iv) Whether by reference to the nature and circumstances of the respondents' behaviour, they have waived their right to be present (i.e. is it reasonable to conclude that the respondents knew of, or were indifferent to, the consequences of the case proceeding in their absence);

v) Whether an adjournment would be likely to secure the attendance of the respondents, or at least facilitate their representation;

vi) The extent of the disadvantage to the respondents in not being able to present their account of events;

vii) Whether undue prejudice would be caused to the applicant by any delay;

viii) Whether undue prejudice would be caused to the forensic process if the application was to proceed in the absence of the respondents;

ix) The terms of the '*overriding objective*' (*rule 1.1 FPR 2010*), including the obligation on the court to deal with the case 'justly', including doing so "*expeditiously and fairly*" (*r.1.1(2)*), and taking "*any … step or make any… order for the purposes of … furthering the overriding objective*" (*r.4.1(3)(o)*).

1. In order to consider Ms Kumar’s application to proceed in the absence of the respondent, it is first necessary to set the context in which the application is made.
2. Again, I am indebted to Ms Kumar for her comprehensive and helpful Skeleton Argument. The parties married in 1996 and separated in 2015. Decree Nisi was made absolute on 27 July 2020. W is aged 60, of Thai origin and British nationality. She works as a cleaner. H is aged 52, of Laotian origin and Belgian nationality. It is not known whether he is working.
3. There are 2 children of the family, A (a girl) aged 21 and presently studying at university and B (a boy) aged 17 and still at school.
4. The financial remedy proceedings, which began in February 2018, concluded with the final order of District Judge Hudd dated 25 June 2020 which is the subject of this committal application.
5. H did not engage within the substantive proceedings, he failed to comply with any directions of the court for disclosure and did not attend any hearings, of which there were four, including the final hearing which proceeded in his absence. H had been personally served with notice of the hearing. He proffered no explanation for his failure to attend. He also failed to attend two return date hearings relating to Family Law Act proceedings brought by W in 2018.
6. On 28 June 2017, H disposed of a jointly owned property in Felsham Road, Putney without W’s knowledge or consent.
7. On 18 June 2020, the day after the final hearing and shortly before judgment was handed down on 25 June 2020, H wrote to W’s then solicitors as follows:



**The final order**

1. The relevant provisions of the final order are as follows:
2. H was ordered to vacate the former family home at 60 Arnal Crescent, Wandsworth by 25 August 2020 (para.17)
3. An order for sale was made in respect of a further property jointly held by the parties at 8, Messenger Court, Putney, with W to have sole conduct of sale. The net proceeds of sale were to be applied to redeem the mortgage secured on the family home with any balance of the net proceeds of sale to be paid to H (para.20).
4. To enable W to sell 8 Messenger court with vacant possession, H was ordered within 7 days to disclose to W a copy of the tenancy agreement for 8 Messenger Court and to serve a section 21 Notice on the existing tenants as soon as was practicable and in any event by no later than 28 days after service of the order (para. 22).
5. H was ordered to transfer his legal and beneficial interest in the former family home to W upon redemption of the mortgage (from the net proceeds of 8 Messenger Court), with W to execute a charge of 20% of the net proceeds of sale in favour of H, not be exercisable until the soonest of the youngest child attaining the age of 18 or ceasing full time education, the death of the youngest surviving child, the death of W, voluntary sale or W voluntarily vacating the property for a period in excess of 6 months (para. 23).
6. H was ordered to pay W’s costs assessed at £7,070
7. The final order, which contained the usual warning notice as to the consequences of failure to comply with its terms, was personally served on H on 14 August 2020.
8. It is alleged that H is in breach of paragraphs 17 and 22 of the order and that, as a consequence of his default:
9. W and the parties’ children are unable to move back into the family home as District Judge Hudd intended by her order;
10. W is unable to obtain vacant possession of 8 Messenger Court and is therefore unable to sell it and redeem the mortgage on the family home.
11. The transfer of the family home and the execution of the charge cannot take place until the mortgage has been redeemed.
12. The costs order has been enforced by separate D50K application and is (together with interest and the costs of the D50K) to be enforced, by order of District Judge Jenkins dated 13 August 2021, first against any sum receivable by H on the sale of 8 Messenger Court and then against H’s interest in the former family home essentially by way of offset against the charge. I pause to note that H did not attend the enforcement hearing before District Judge Jenkins on 13 August 2021.
13. W limits her committal application to H’s failure to vacate the former family home by 25 August 2020 and his failure to provide a copy of the tenancy agreement within 7 days of service of the order. She accepts that at present she is unable to prove to the requisite standard that H has failed to serve a Section 21 Notice on the tenants.
14. In terms of the *Sanchez* checklist:
15. *Whether the respondents have been served with the relevant documents, including the notice of this hearing;*

I have read the Statements of Mr Rozario dated 9 September 2020 and of Mr Lane, dated 6 July and 20 August 2021 and am satisfied that:

1. On 14 August 2020, H was personally served with the final order of District Judge Hudd;
2. On 1 July 2021, H was personally served with the sealed committal application; the notice of hearing for 13 July 2021 and the CVP notice giving instructions as to remote attendance, W’s first affidavit and a draft order for committal;
3. On 7 August 2021, H was personally served with the sealed order of 13 July 2021, the Notice of this hearing and W’s amended affidavit in support of the application.

On both latter occasions H was also served with a covering letter from W’s solicitors strongly urging him to seek independent legal advice.

1. *Whether the respondents have had sufficient notice to enable them to prepare for the hearing;*

H has been aware of the terms of the final order since 14 August 2020. He has been aware of the committal application and the grounds relied upon since 1 July 2021. Having been served with notice of this hearing on 7 August 2021, H has had almost one month to prepare for this hearing. That is ample time. The issues are very straightforward and the terms of District Judge Hudd’s order crystal clear. H has made no application for an adjournment for the purposes of instructing a solicitor or obtaining legal aid or for any other reason.

1. *Whether any reason has been advanced for their non-appearance;*

H has not communicated with the court and has provided no explanation for his non-appearance.

1. *Whether by reference to the nature and circumstances of the respondents' behaviour, they have waived their right to be present (i.e. is it reasonable to conclude that the respondents knew of, or were indifferent to, the consequences of the case proceeding in their absence);*

I am satisfied that H is aware of the likelihood and consequences of the case proceeding in his absence. H failed to attend the hearing on 13 July 2021, having been given proper notice by personal service. The order of that date contains the usual warnings and information, including:

1. A warning notice as to the risks of going to prison for up to two years or being ordered to pay a fine for as much as the court thinks appropriate;
2. H’s right to be legally represented and to legal aid, with information as to how to obtain legal aid;
3. That H might be entitled to the services of an interpreter;
4. H’s right to have reasonable time to prepare for the hearing;
5. His right to remain silent;
6. His right to give oral and/or written evidence if so advised;
7. The date time and place of the hearing was included in the order. H was ordered to attend the hearing (he is in breach of that order), and it was recorded, at paragraph 5, that the court would proceed in his absence if he failed to attend, provided that personal service had been effected, which it has.
8. H has had every opportunity but has set his face against the court. He has engaged in a clear course of conduct both within the substantive proceedings and both sets of enforcement applications.
9. The email which he sent to W’s then solicitor on 18 June 2020 and the document which he served on W’s present solicitors on 30 July 2021 (not made under compulsion) make clear his approach to the proceedings and the position he has chosen to adopt as to the authority of the court. For a flavour of H’s position, the index to the 60-page document entitled Living Man document should be read into and is appended to this judgment. H has demonstrated that he has no intention of complying with the final order.
10. *Whether an adjournment for would be likely to secure the attendance of the respondents, or at least facilitate their representation*;

I can see no circumstances in which H would voluntarily comply with a further order to attend a hearing. I have considered the issue of a Bench Warrant to secure his attendance but this would likely lead to delay which would not be justified where H has already had every opportunity to attend and to seek representation and in the circumstances to which I refer below.

1. *The extent of the disadvantage to the respondents in not being able to present their account of events*;

It is difficult to see what disadvantage there could be to the respondent. The terms of District Judge Hudd’s order are clear. It is a simple question of fact as to whether H has vacated the property and has served a copy of the tenancy agreement on W. He did not apply to set aside or appeal the order of District Judge Hudd and has not sought any extension of time to vacate the property.

1. *Whether undue prejudice would be caused to the applicant by any delay;*

I am satisfied that it would cause undue prejudice and further hardship to W if this hearing were to be adjourned. She was entitled to vacant possession of the former family home as long ago as August 2020. She and the parties’ 17-year old son are effectively homeless. They have been sharing a bedroom at the home of friends for over a year and are reliant upon their generosity. If W proves that H has not moved out of the former family home, she and the parties’ son cannot move back in as District Judge Hudd intended. The parties’ daughter is unable to stay with her mother and brother during university vacation because of a lack of space. W and the children are being deprived of their home and H is prioritising his own perceived needs above theirs. Moreover, there are pending charges on the family home to secure a fine and a judgment against H. It is believed that the mortgages have fallen into arrears and that there are likely to be further creditors competing to secure their interests. Time is plainly pressing if the intention behind District Judge Hudd’s order is not to be defeated. The distress W is experiencing because of H’s actions was palpable and unsurprisingly so during her oral evidence.

1. *Whether undue prejudice would be caused to the forensic process if the application was to proceed in the absence of the respondents;*

There is none.

1. *The terms of the 'overriding objective' (rule 1.1 FPR 2010), including the obligation on the court to deal with the case 'justly', including doing so "expeditiously and fairly" (r.1.1(2)), and taking "any … step or make any… order for the purposes of … furthering the overriding objective" (r.4.1(3)(o)).*

The balance of fairness plainly lies in favour of this application proceeding today. H has had every opportunity to he heard.

1. In all the circumstances I am satisfied that this hearing should proceed in H’s absence.
2. As to the committal application, I have read the bundle of relevant material and the Skeleton Argument of Ms Kumar. An oral application for the admission of further evidence was advertised but not pursued. For the avoidance of doubt, I have refused to admit further evidence given the quasi-criminal nature of these proceedings and the lateness of the evidence.
3. I have heard brief sworn evidence from W which I accept.
4. W informed me that neither she nor her solicitors have received a copy of the tenancy agreement from H despite requests made by her. She has been able to take a photograph of a 2019 tenancy agreement shown to her by the existing tenant but that does not enable her to know whether it is the relevant tenancy agreement, nor whether the various other requirements of a valid s21 notice can be satisfied to enable her to serve such a notice. She told me that she is aware from neighbours that H is still in occupation of the property.
5. I take notice of the fact that on 14 August 2020, 1 July 2021 and 7 August 2021, H was in the former family home when personal service was effected. On 7 August 2021, H spoke to the process server from an upstairs room in the property. Ms Kumar draws my attention to a copy of an envelope exhibited to H’s Living Man document on which H had affixed a sticker which demonstrates that as at 3 June 2021 H was giving the address of the former family home as his address. Moreover, W has demonstrated a strong prima facie case as to H’s continued occupation of the former family home and I am entitled to draw inferences from his silence.
6. W must prove the breaches she alleges to the criminal standard of proof. I am satisfied beyond reasonable doubt, i.e so that I feel sure, that:
7. H failed to vacate the former family home by 25 August 2020 and he is therefore in breach of para. 17 of the order of 25 June 2020. This breach continues.
8. H failed to serve W with a copy of the tenancy agreement within 7 days of service of the order. He is therefore in breach of para. 22 of the order of 25 June 2020. This breach also continues.
9. I am also satisfied that the procedural requirements of FPR 2010 r37.4, 37.5 and 37.8(7), as set out in detail at paragraphs 31- 33 of Ms Kumar’s Skeleton Argument, are met.
10. Accordingly, I am satisfied that H is in contempt of court and the question of sanction arises. I propose now to adjourn the committal application to a later date to enable H to consider this judgment, to address the court by way of mitigation or to purge his contempt by fully complying, albeit belatedly, with the final order. H must understand that pursuant to FPR r37.9(1) the penalties which the court may impose includes a period of immediate imprisonment. He is reminded again of the right to legal aid and legal representation for the purposes of the next hearing.
11. Finally, pursuant to FPR r 37.8(13), I must inform the defendant of his right to appeal without permission, any such appeal must be brought within 21 days and brought in the High Court.

Her Honour Judge Gibbons 3 September 2021

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