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JUDGMENT SUMMONS: AN INADEQUATE REMEDY – A DEFAULTER'S CHARTER: *PREST V PREST*

Ashley Murray Chambers, Liverpool

Since the decision in *Mubarak v Mubarak* [2001] 1 FLR 698, the inadequacies of the judgment summons route to enforcement of a 'money' order have been well-known to the Profession. The Judgment Summons process at that time made no reference to the criminal standard of proof, required individuals to incriminate themselves, placed the burden of proof on the person facing committal and confused the separate approaches required when undertaking a means enquiry and committal proceedings. The procedure was therefore non ECHR compatible and the outcome of the *Mubarak* decision was thus to render for most practical purposes the Debtors Act 1869 largely obsolete as a means of enforcement in matrimonial proceedings.

In the light of these problems, the Rules Committee amended the court rules in what is now FPR 2010, r 33.14. In three subsequent cases of *Zuk v Zuk* [2012] EWCA Civ 1871, [2013] 2 FLR 1466, *Bhura v Bhura* [2012] EWHC 3633 (Fam), [2013] 2 FLR 44, and *Mohan v Mohan* [2013] EWCA Civ 586, [2014] 1 FLR 717, it was suggested by both the Court of Appeal and, of course, Mostyn J that this process, whilst limited in terms of sanction to (a wholly inadequate) 6 weeks maximum, nevertheless was likely to be approached with some robustness by the courts in favour of the often embattled applicant faced with repeated failures of a respondent's non-payment of a court money order. Such an interpretation, however, has been shown to be short lived by a now differently constituted Court of Appeal of McFarlane, Gloster LJJ and Blake J in *Prest v Prest (Judgment Summons: Appeal)* [2015] EWCA Civ 714, [2015] 2 FLR (forthcoming and reported at [2015] Fam Law 1047).

The facts

The names of the parties will immediately summon up a broad knowledge of the factual background in view of the more rehearsed areas of the corporate veil law engaged within the substantive hearing and the following appeals of the parties' financial claims.

H and W had separated in 2008 following a marriage of 15 years. They had four teenage children. In the financial remedy proceedings, Moylan J determined that H held a wealth of c £37.5m. In his order, His Lordship awarded W a £17.5m lump sum (via a property transfer) and pending that payment a periodical payments order equivalent to 2% on the lump sum owing.

In 2014, the same judge granted a judgment summons applied for by W under s 5 of the Debtors Act 1869, alleging non-payment of arrears. The penalty for the default was a committal to 4 weeks imprisonment, which was suspended on condition that the arrears were paid within 3 months. The Court of Appeal had before them H's appeal against that order.

The appeal

H sought to undermine the judgment summons committal on a number of bases. He claimed:

(1)Moylan J's refusal of his application to adjourn and decision to pursue the hearing in his absence without further investigation of his claimed medical position as to his competence and fitness to participate meant there had not been a fair trial process;
(2)there had been a real risk or a legitimate perception of risk that as the same judge had previously conducted a fact finding process as to the H's finances based upon the civil standard of proof that the judge would take improper account of those lesser standard findings when now deciding the basis of the judgment summons under the criminal standard of proof;
(3)Moylan J had by such a route taken account of material that was inadmissible before him on the judgment summons and thereby applied an incorrect burden and/or standard of proof;
(4)such evidence which was admissible on the judgment summons did not justify the findings/orders made and Moylan J had failed to properly account for the value of the payments H claimed he had actually made or which W had received in the property transferred to her;

(5)because H had made a counter application for variation of the ppo which Moylan J had stayed until the lump sum had been paid in full, it was inappropriate to proceed with the committal proceedings;
(6)in any event, the imprisonment imposed was too long and the terms of the order suspension inappropriate as they were incapable of fulfilment in the period designated.

The decision

In the circumstances as presented before the Court of Appeal, H's appeal on each of the points raised was rejected. However, in reaching this conclusion, the Court of Appeal cast doubt on the previous encouragement to a more robust approach to the judgment summons process espoused in the trilogy of decisions referred to above. In particular, it had been suggested by Thorpe LJ in the *Zuk* case that:

> '… the judgment creditor starts from the strong position that the order itself establishes, either expressly or implicitly, that the payer had the means to pay at the date the order was made . . . at that stage the evidential burden passes to the debtor, whilst not of course undermining the obligation on the creditor to discharge the burden of proof . . . So although of course the rule is and must remain that the burden of proof rests on the applicant, I think in a case such as this that burden is lightly discharged and an evidential burden may switch to the debtor.' (para [19])

Further, in the *Bhura* case, Mostyn J had stated (at para [13]):

'(iv)It is essential that the applicant adduces sufficient evidence to establish at least a case to answer. Generally speaking, this need not be an elaborate exercise. Proof of the order and of non-payment will likely give rise to an inference which establishes the case to answer …
(vi)If the applicant establishes a case to answer, an evidential burden shifts to the respondent to answer it. If he fails to discharge that evidential burden then the terms of s 5 will be found proved against him or her to the requisite standard.'

Again in *Mohan*, Thorpe LJ had stated (at para [45]):

> '… (with) a summons under the Debtors Act. Very little evidence would have been necessary from the wife in support . . . The reality is that if (the husband) attended (the summons hearing), although not compellable, he would have been obliged to proffer explanation and excuse.'

McFarlane LJ, with whom the other two members of the Court fully agreed, found himself unable to endorse these views as a correct statement of the relevant law. He stated in particular (at para [55]):

> 'The collective professional experience of Thorpe LJ and Mostyn J in these matters makes me most hesitant to express a contrary view, but my reason for advising caution concerning this set of observations is that they each suggest that, in the course of the criminal process that is the hearing of a judgment summons, it is simply sufficient to rely upon findings as to wealth made on the civil standard of proof in the original proceedings and that those findings, coupled with proof of non-payment, is sufficient to establish a "burden" on the respondent which can only be discharged if he or she enters the witness box and proffers a credible explanation. The facts of each case will differ, and the aim of Thorpe LJ and Mostyn J in envisaging a process which is straightforward and not onerous to the applicant is laudable, but at the end of the day this is a process which may result in the respondent serving a term of imprisonment and the court must be clear as to the following requirements, namely that:

a)The fact that the respondent has or has had, since the date of the order or judgment, the means to pay the sum due must be proved to the criminal standard of proof;
b)The fact that the respondent has refused or neglected, or refuses or neglects, to pay the sum due must also be proved to the criminal standard;
c)The burden of proof is at all times on the applicant; and
d)The respondent cannot be compelled to give evidence.'

The Court of Appeal considered that:

•the decision as to whether there should have been an adjournment was well within the judge's case management powers and there was nothing exceptional in the process he undertook to determine this aspect;
•the fact that the same judge undertook both hearings where a different standard of proof existed was unremarkable and it was clear from the judgment that this distinction had been maintained at all times;
•whilst H had made a number of other substantial payments to W whilst failing to pay under the terms of the order, this was not something the court would account to him lest it may be thought a defaulting spouse could chose as and when he could make payments due under a court order;
•the fact of H's outstanding variation application did not impede the judge from proceeding first with the judgment summons and the imposition of 4 weeks imprisonment was not excessive in view of the £320,000 default under consideration.

Commentary

The husband's credibility had already been undermined during the exposure of the several previous hearings, not least before Moylan J. It was thus highly unlikely the husband was to find any ally in the appeal hearing in question and the Court of Appeal duly dispatched his points of appeal with some alacrity.

However, the route adopted in doing so, engaged a rejection of the earlier view that an applicant could simply rely on the fact of the original order as being prima facie evidence that the non-payer had had the means to pay and that without more the same could require a respondent to a judgment summons to positively answer the allegation. On the contrary, the basis of the original order having been on the civil standard of proof, the judgment summons process has at all times to be measured anew by the criminal standard of proof which remains throughout upon the applicant and the respondent remains non compellable.

The principled logic adopted by this current Court of Appeal decision in contrast with the reasoning of the same Court differently constituted in earlier cases is now clearly difficult to resist. Previously, Mostyn J in the *Bhura* case had set out what he discerned to be the applicable principles of the judgment summons process. In relation to the wording of s 5(2) of the Debtors Act 1869 in which it is set out that:

> '(2) . . . such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.'

Mostyn J gave the following guidance (at para [13]):

> 'Stated shortly it seems to me that the applicable principles are these:

(i)Section 5 requires the court to be satisfied to the criminal standard that:
(a)the respondent has had at any point since the date of the order the means to pay the sums due under the order; and
(b)has refused or neglected to pay them.
(ii)The use of the present and past tenses in the phrases "either has or has had" and "and has refused or neglected, or refuses or neglects" means that the section will be satisfied if proof of both ability to pay and refusal or neglect to pay is made at any single point from the date of the order right up to the date of the hearing.
(iii)The use of the alternative verbs 'refuse' and 'neglect' means that the court is not confined to proof of a positive wilful refusal to pay; the section will be equally satisfied if proof is made of a culpable indifference to the obligation to pay.
(iv)It is essential that the applicant adduces sufficient evidence to establish at least a case to answer. Generally speaking, this need not be an elaborate exercise. Proof of the order and of non-payment will likely give rise to an inference which establishes the case to answer.
(v)The respondent is not required to give evidence or to incriminate himself. In the absence of a case to answer being demonstrated the respondent is entitled to have the application dismissed without more.
(vi)If the applicant establishes a case to answer an evidential burden shifts to the respondent to answer it. If he fails to discharge that evidential burden then the terms of s 5 will be found proved against him or her to the requisite standard.
(vii)The applicant does not have to serve evidence prior to the hearing but if he or she fails to do so the court will be astute to ensure that the respondent is not taken by surprise and that the hearing can proceed without unfairness to him or her.
(viii)It is perfectly permissible for both the enquiry into the respondent's means at all points since the making of the order and the enquiry into whether he or she has been guilty of a refusal or neglect to pay to take place in one conflated hearing.
(ix)Provided that principles (i)–(viii) are carefully observed then the procedure will be Convention compliant.'

It is submitted that His Lordship's guidance remains relevant following this latest decision of the Court of Appeal save in respect of points (iv) and (vi) above.

As to point (iv) it is now clear that reliance upon the making of the original order of payment based as it was upon the civil standard of proof coupled with the fact of the non-payment will not by itself be sufficient to discharge the criminal standard of proof that the respondent has had the means to pay and has failed or neglected to make payment under s 5.

As to point (vi) it is also clear that it is unhelpful in this context to refer to the shifting of any evidential burden from the applicant to the respondent so as to suggest there is any obligation upon the respondent to positively answer the allegation, when at all times the burden of proof to establish beyond a reasonable doubt the respondent's means of payment and the refusal or neglect to pay remains upon the applicant.

In *Bhura*, Mostyn J expressed the view that the judgment summons process remained a useful tool of enforcement of last resort. There are many practitioners, who both then and now would not share this view. The latest review by the Court of Appeal in the *Prest* case confirming the high standard of proof required would suggest that save in the most obvious of cases of outright non-compliance following the making of a money order, a judgment summons application will, especially where there has been some partial compliance, continue to present evidential difficulties for an applicant

already pressurised by the financial stringencies of the original default in compliance of the other party and the risk of incurring even more unrecoverable litigation costs.

There is also a sense that even where an applicant should succeed in establishing the respondent's default to justify committal, the sanction of a maximum of 6 weeks, which in most cases will need to be discounted to meet such mitigation as exists, is just too little too late.

It has been said that the primary purpose of s 5 of the Debtor's Act 1869 is for enforcement as opposed to punishment. It is submitted that any reading of the early case law following the passage of this legislation would question the correctness of that stance.

In any event it remains ironic that the contempt of a party in disobeying an injunctive order made or undertaking given prior to a court's final disposal of the claims to financial provision on a divorce attract, at a maximum of 2 years, a far greater penal sanction than the flouting of the terms of a final order once made. This is a bizarre situation and does little to discourage those litigants who are willing to weigh the risks and benefits of disobedience, especially when the short imprisonment served prevents further committal for the same debt, which may be very considerable.

There is presently much Government discussion upon the digital integration of the court system to meet the demands of a modern twenty-first century legal service. However, such technology is of little service to the court user, if having gained his or her court order, the methods of enforcement available remain rooted, as with the judgment summons procedure, in the provisions of a statute enacted when Gladstone was prime minister and Edison's electric light bulb had not even been invented.