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**Family Finance Flyer No 59**

# Round 2 – The Debate on Evidential Burden in Judgment Summons Hearings

## Analysis of Migliaccio v Migliaccio [2016] EWHC 1055 (Fam) – Mostyn J

### Introduction:

**1.** In Flyer 55 **JUDGMENT SUMMONS – AN INADEQUATE REMEDY AND A DEFAULTER'S CHARTER – analysis of Prest v Prest [2015] EWCA 714.** I set out the analysis of the Court of Appeal's decision (McFarlane LJ) in the case of ***Prest v Prest*** [2016] 1 FLR 773 dealing with, in particular, the required procedure to be followed upon a judgment summons committal hearing.

**2.** In that decision, a number of previous authorities were considered, including ***Bhura v Bhura*** [2013] 2 FLR 44 (per Mostyn J) and ***Mohan v Mohan*** [2014] 1 FLR 717 (per Thorpe LJ).

**3.** In the ***Bhura*** case (at para 13 of the judgment), Mostyn J had within 13 propositions summarised the legal principles applicable to a hearing for a judgment summons. In the fourth proposition His Lordship had stated:

> "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."

Then, in the sixth proposition, His Lordship had stated:

> "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** (of the **Debtors Act 1869**) will be found proved against him or her to the requisite standard."

## The View of McFarlane LJ:

**4.** In the view of McFarlane LJ, as outlined in the ***Prest*** case, these propositions and subsequent remarks of approval by Thorpe LJ to such a procedural approach in the ***Mohan*** *case*, wrongly suggested that in determining a judgment summons application it was, in the course of that criminal process engaged, simply sufficient to rely upon findings as to the respondent's wealth made on the civil standard of proof in the original proceedings and that those findings, when coupled with proof of non-payment, would by themselves be sufficient to establish an evidential burden on the non-payer respondent which could only be discharged if he or she then entered the witness box and put forward a credible explanation.

**5.** According to McFarlane LJ, whilst declaring himself as reluctant to express a contrary view to such a body of judicial opinion and acknowledging both that the facts of each case would differ and the aim of both Thorpe LJ and Mostyn J in attempting to make the process more straightforward had been laudable, he cautioned that:-

> **"**(55)."… 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 view of Mostyn J:

**6**. In response, in the case of ***Migliaccio v Migliaccio*** [2016] EWHC 1055 (Fam) – Mostyn J has now challenged McFarlane LJ's view maintaining the same is in conflict with an earlier and, according to His Lordship, binding Court of Appeal authority in the conjoined appeals of ***Karoonian v CMEC; Gibbons v CMEC*** [2012] EWCA Civ 1379.

## The Karoonian and Gibbons Decisions:

**7.** In the **Karoonian** and **Gibbons** cases, Ward LJ had, in giving the leading judgment and upholding both appeals against orders of commitment for non payment of child support arrears on other grounds, gone on to express concern at the adoption within the general judgment summons process of a procedure which entailed the Court in investigating within the same hearing both a respondent's means to pay and whether there had been a wilful refusal or culpable neglect to pay – a procedure which, in the view of Ward LJ, would result often in a 'muddle' of the former task in which the alleged non-payer respondent was a compellable witness with the latter task, which, because of the criminal level of proof required, meant the respondent was certainly not a compellable witness –the effect of which would be that the respondent would be required to provide evidence (ie concerning his or her means) in support of his or her own committal.

**8.** Ward LJ was in no doubt that this procedure, if being generally adopted, was non compliant with Article 6 and did not constitute a fair hearing upon such an application.

**9.** In His Lordship's view, whilst the applicant to a judgment summons was entitled to rely upon an order made for payment of the debt in question to establish the fact of the debt owed by the respondent, it was nevertheless always the burden of the applicant to establish some evidence that the respondent had since the order was made had the means with which to meet the debt and had wilfully failed to do so. Ward LJ considered also that regulation change was required to ensure a distinction was maintained between the means enquiry of the respondent and the merits of his or her committal. McFarlane LJ in ***Prest's*** case appears, like Ward LJ before him, to have sought to re-emphasise the danger of any attempt to lessen the applicant's burden of proof in such applications.

**10.** However, the two other members of the Court of Appeal sitting with Ward LJ, namely, Richards and Patten LJJ in the **Karoonian** and **Gibbons** cases had, in regard to the view expressed by Ward LJ in regard to the judgement summons procedure, disagreed to a limited extent with Ward LJ in their otherwise concurring judgments. In particular, Richards LJ with whom Patten LJ agreed, whilst in no doubt, like Ward LJ, that the applicant in a judgment summons was required to prove the non-payer respondent had both the means to pay and had been guilty by non payment of a wilful failure or culpable neglect, further stated that:-

> "57. It follows that in practice the [applicant] must adduce sufficient evidence to establish at least a case to answer. In the generality of cases, the exercise may not need to be a particularly elaborate one, since there will be a history of default from which inferences can properly be drawn. But the exercise is an essential one: the defendant is not required to give evidence or to incriminate himself, and in the

> absence of a case to answer he is entitled to have the application against him dismissed without more. If the [applicant] establishes a case to answer, there will be an *evidential* burden on the defendant to answer it, but that is unobjectionable in article 6 terms. I would add that there is no requirement under article 6 for the [applicant] to serve evidence in advance of the hearing, but if it chooses to wait for evidence to be given by the presenting officer at the hearing, the court must be astute to ensure that the defendant is not taken by surprise and that the matter can proceed at that hearing without unfairness to him.
>
> 58. Provided that the burden and standard of proof and the need for procedural fairness are borne clearly in mind, there is in my view no inherent objection to considering the defendant's means and the issue of wilful default or culpable neglect in a single hearing. They are closely related matters, and it seems to me that the statute contemplates that they will be inquired into at one and the same time: s.39A(3) (Child Support Act 1991 - Commitment to prison and disqualification from driving.) provides in terms that on an application under subs.(1) "the court shall (in the presence of the liable person) inquire as to (a) whether he needs a driving licence to earn his living, (b) his means, and (c) whether there has been wilful refusal or culpable neglect on his part". In so far as Ward LJ considers that this involves an impermissible muddling up of two distinct processes, I respectfully disagree. ***Mubarak v Mubarak*** was concerned with a specific regime and I do not read it as laying down any general rule that issues of means and wilful refusal or culpable neglect cannot be considered together. We were not taken to any Strasbourg case-law laying down such a rule. In ***Benham v United Kingdom*** (1996) 22 EHRR 293, which involved a very similar procedure (see para 19 of the judgment), there was no suggestion that in this respect it offended article 6."

**11.** It is this limited departure by Richards and Patten LJJ in an otherwise unanimous decision of the Court of Appeal in the **Karoonian** and **Gibbons** cases, which Mostyn J now suggests provides binding authority for his propositions 4 and 6 (above) and undermines the stricter view of the required evidence upon a judgment summons suggested recently by McFarlane LJ in ***Prest's*** case.

# Commentary:

**12.** This call to put aside the guidance of McFarlane LJ, without more, concerning an important area of judgment summons procedure is, it is submitted, unfortunate and unhelpful in practice. On closer analysis of the judgments concerned in both the **Karoonian** and **Gibbons** cases and ***Prest's*** case, it is also submitted that none of the observations upon the appropriate judgment summons procedure to be adopted were essential for either of the case decisions made. It is, therefore, suggested that there exists powerful non-binding judicial opinion on both sides of the divide as to the degree of evidence required to provide at least a case to answer for committal upon a judgment summons against an alleged non paying party. Indeed, viewed broadly, it would appear that none of the judges in question actually suggest other than that a case to answer has to be established by the applicant before the evidential burden shifts to the respondent.

**13.** The one area where opinion divides would appear to be in regard to Mostyn J's fourth proposition (as above) where His Lordship contends that in relation to the need to establish a case to answer that:-

> "…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."

**14.** It is suggested that, whilst the circumstances of a given case may enable a Court upon a judgment summons to make such an inference, this is by no means 'likely' to be the case – since there may well be any number of reasons why the non-payer, subsequent to the initial order for payment made, has become unable to discharge the obligation -whatever the previous history of court order compliance may have been.

**15.** McFarlane LJ's remarks are no more than a sensible reminder that in a judgment summons application, however frustrating the requirement for sufficient evidence to establish a case to answer and however flagrant the actual default has been in fact – it is essential, where the liberty of the subject is involved, that the requirement of establishing beyond reasonable doubt, at least, a case to answer of the means to pay and a wilful payment failure or culpable neglect to pay is not undermined for the sake of convenience. Indeed, it is suggested that on a fuller reading of the relevant part of the judgment of Richards LJ (as above) in the **Karoonian** and **Gibbons** cases, it is doubtful that His Lordship intended his words to be construed in such a way as to suggest anything different.

**16.** Until the matter is resolved further, it is likely, despite the comments of Mostyn J to the contrary, to be best practice to advise any potential applicant to seek to establish a case to answer upon a judgment summons in accordance with the guidance recently set out in ***Prest's*** case by McFarlane LJ.

**Ashley Murray**

**22.05.16.**