The evidential burden in judgment summons hearings: *Migliaccio*

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ABOUT THE AUTHOR

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Ashley Murray is one of the few senior Circuit specialists outside London with a recognised big money ancillary relief practice. He is known for his knowledge and ability in this area of the law and his detailed preparation and attention to his brief.

In my article published in November [2015] Fam Law 1365, 'Judgment summons: an inadequate remedy – a defaulter's charter: *Prest v Prest*', I set out an analysis of the Court of Appeal's decision (McFarlane LJ) in that case (reported at [2016] 1 FLR 773) dealing with, in particular, the required procedure to be followed upon a judgment summons committal hearing.

In *Prest*, a number of previous authorities were considered, including *Bhura v Bhura* [2012] EWHC 3633 (Fam), [2013] 2 FLR 44 (per Mostyn J) and *Mohan v Mohan* [2014] 1 FLR 717 (per Thorpe LJ). In *Bhura* (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 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 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.'

A DIFFERENT OPINION

In the view of McFarlane LJ, as outlined in *Prest*, these propositions – as subsequently approved of by Thorpe LJ in *Mohan* – suggested an invalid procedural approach. McFarlane LJ maintained it was wrong to suggest that in determining a judgment summons application, which itself engaged a criminal process , it was simply sufficient to couple the findings as to the respondent's wealth made on the civil standard of proof in the original proceedings with proof of non-payment, in order to establish the case to answer against the non-payer respondent, which could only be discharged if he or she then entered the witness box and put forward a credible explanation.

According to McFarlane LJ, while declaring himself reluctant to express a contrary view to such a body of judicial opinion and acknowledging that the facts of each case would differ and that the aim of both Thorpe LJ and Mostyn J in attempting to make the process more straightforward had been laudable, it was right that he should caution 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

In response, in *Migliaccio v Migliaccio* [2016] EWHC 1055 (Fam), Mostyn J, when determining a wife's application upon a judgment summons in respect of child maintenance arrears and an unpaid costs order, challenged McFarlane LJ's view, maintaining that the same was in conflict with an earlier and, according to Mostyn J, binding Court of Appeal authority in the conjoined appeals of *Karoonian v CMEC; Gibbons v CMEC* [2012] EWCA Civ 1379. In particular, His Lordship stated:

'26. Intelligence has reached me that these remarks – which, as I say, are obiter dicta because in that case the appeal against the order of Moylan J awarding a suspended prison sentence against the husband was dismissed – have caused considerable difficulty in routine enforcement proceedings, particularly under the Child Support Act, inasmuch as they suggest that everything must be proved de novo.

27. With all due respect to McFarlane LJ, I have to express my disagreement with his observations. The fourth and sixth principles that I set out in *Bhura v Bhura* were not inventions by me, but were a summary of the judgment of Richards LJ in *Karoonian v CMEC*.'

Having then cited para [57] (see below) of Richards LJ judgment, Mostyn J continued:

'29. In my judgment that is the principle and those are the standards that should be applied on a judgment summons. I have no hesitation in preferring that formulation to the far more restrictive approach suggested by McFarlane LJ. I would also suggest that in any future case, whether under the Debtors Act or under the Child Support Act, the judgment of Richards LJ should be regarded as definitive and must be followed.'

KAROONIAN AND GIBBONS

However, in *Karoonian and Gibbons*, 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. Such a procedure 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.

Ward LJ was in no doubt that this procedure, if being generally adopted, was non-compliant with Art 6 and did not constitute a fair hearing upon such an application. In Ward LJ's view, while 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* 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.

The two other members of the Court of Appeal sitting with Ward LJ in *Karoonian and Gibbons* namely Richards and Patten LJJ had, in regard to the view expressed by Ward LJ in regard to the 'muddled' judgment 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 Art 6 terms. I would add that there is no requirement under Art 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) [of the 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 Art 6.
59. For like reasons, I see nothing inherently wrong with the fact that the regulations cited at para 34 of Ward LJ's judgment contemplate that issues of means and conduct will be considered at the same "inquiry". I do not accept that the regulations need to "distinguish between a means enquiry and the committal proceedings" (para 49), if by that it is meant that the regulations must provide for them to be the subject of distinct processes.

60. On the other hand, I agree with Ward LJ's criticism of the language of the summons used in these cases. In stating that "you are required to show cause why such a Warrant or Order should not be made", the summons fails to respect the burden of proof and sends out a seriously erroneous signal both to the defendant and to the court.

61. More generally, I am concerned that the Commission has not been giving sufficient thought in practice to the implications of the burden of proof upon it, and I share Ward J's view that the practice and procedure in this area need to be improved as a matter of urgency. For the reasons outlined above, however, I take the view that the changes required in order to bring the practice and procedure into line with article 6 are relatively limited.

62. None of this affects the outcome of the appeals, which fall to be allowed in any event for the reasons given by Ward U at para 20 (*Gibbons*) and para 31 (*Karoonian*).'

It is this limited departure by Richards and Patten LJJ with the view expressed by Ward LJ that there needed to be a distinction 'between a means enquiry and the committal proceedings', in an otherwise unanimous decision of the Court of Appeal in *Karoonian and Gibbons*, which Mostyn J now suggests provides binding authority for his propositions 4 and 6 (above) and undermines the stricter view of the required evidence to establish a case to answer upon a judgment summons suggested recently by McFarlane LJ in *Prest*.

COMMENTARY

This call to put aside the guidance of McFarlane LJ, without more, concerning an important area of judgment summons procedure is, with respect, unhelpful and confusing in practice.

On closer analysis of the judgments concerned in both *Karoonian and Gibbons* and *Prest*, it is submitted that none of the observations upon the appropriate judgment summons procedure to be adopted, as now highlighted, were essential for the decisions made. It is, therefore, suggested that, even pursuing Mostyn J's line of reasoning, the most that can be said is 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.

However, in reality and contrary to Mostyn J's contention, it would appear that none of the Court of Appeal 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. The one area of division 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.'

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. McFarlane LJ's remarks in *Prest* 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 in *Karoonian and Gibbons*, it is doubtful that Richards LJ intended his words to be construed in such a way as to suggest anything different.

I have in previous articles commented about the continued failings of the judgment summons procedure in practice and the need for a more straightforward process and a more significant penalty. This would ultimately, of course, require legislative change. Until the current judicial approach to the existing procedure 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* by McFarlane LJ.