Neutral Citation No
IN THE CENTRAL FAMILY COURT No. BV17D13327
First Avenue House
42-49 High Holborn
London, WC1V 6NP

Friday, 4 December 2020

Before:

HER HONOUR JUDGE GIBBONS

In Open Court

B E T W E E N:

EKANJALI KAUR DHILLON

Applicant

- and -

KAVANDEEP SINGH SAMPURAN

Respondent

MR P. PERRINS (instructed by Waterfords Solicitors) appeared on behalf of the Applicant.

MR M. SIRIKANDA (instructed by Hughes Fowler Carruthers) appeared on behalf of the Respondent.

J U D G M E N T

(via Cloud Video Platform (CVP) Hearing)

Her Honour Judge Gibbons:

1. This is an extempore judgment in respect of a judgment summons issued on 26 October 2020. The creditor is Dr Ekanjali Dhillon represented by Mr Perrins of counsel; the debtor is her former husband, Mr Kavandeep Sampuran represented by Mr Sirikanda of counsel.

2. This judgment summons is the method of enforcement chosen by the creditor to enforce a

final financial consent order approved and made by District Judge Duddridge in this court on 7 June 2019.

3. I have read the bundle of relevant documents including witness statements filed by the wife. The husband has elected, as he is perfectly entitled to do, not to file any evidence or submit any documentation. I have read and heard submissions from counsel.

4. The relevant order provided for the payment by the debtor of a lump sum of £230,500 in two instalments: £15,500 by 20 April 2019 and £215,000 by 1 August 2019. The first instalment was paid.

5. The purpose of the second instalment was for the wife to use as a deposit to purchase a property following the breakdown of the marriage. That second instalment has not been paid and, therefore, remains outstanding some sixteen months after it was due. Two orders have since been made extending time for payment, but it remains unpaid notwithstanding these enforcement proceedings.

6. As to the law, s.5 of the Debtors Act 1869 provides as follows:

> "Subject to the provisions hereinafter mentioned, and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court.
>
> Provided -
>
> > (2) That 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."

7. Thus, I must be satisfied beyond reasonable doubt, i.e. so that I feel sure (a) that the husband (the debtor) had on 1 August 2019 or has had since that time the means to pay the sum due; and (b) that he has refused to pay or has wilfully neglected to pay the same sum. The burden of proof lies on the creditor.

8. There is some tension in the reported authorities, notably between the line of authorities starting from *Rundell* [2005] through the *CMEC v. Gibbons* [2011] (both Court of Appeal authorities); *Bhura* [2013]; *Zuk* [2013]; and *Migliaccio* [2016] on the one hand and *Prest*, a Court of Appeal decision in 2016 on the other, specifically the observations of McFarlane LJ before he became President.

9. Essentially the issue is whether, on a judgment summons, the evidential burden of proof shifts to the debtor after the creditor has made out an arguable case.

10. Given this disagreement and exercising caution, I propose to adopt the approach that is set out in *Prest* referred to by Mr Sirikanda in his position statement.

11 At para.55, Lord Justice McFarlane with whom Lord Justice Gloster and Mr Justice Blake agreed said this:

> "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.

12. To a degree, it seems to me that this divergence of views might be said to be academic since the law on adverse inferences is very relevant on the facts of this case. The husband debtor, has, as I have indicated, chosen not to file evidence. Mr Sirikanda points to the fact that the creditor could have chosen the route of a D50K to obtain answers to her various questions and the necessary documentation.

13. I expect, although I do not know nor do I need to know, that the judgment summons was the chosen method because the evidence filed within the substantive proceedings might tend to suggest that the husband's assets, beyond those disclosed in the D81, lay outside the jurisdiction and enforcement might, therefore, have been a difficult route.

14. Mr Sirikanda has helpfully taken me to the case of the *R v. Chohan* [2005], a Court of Appeal decision in the Criminal Appeals Division. It relates to the guidance to a jury with respect to adverse inferences in the context of the right to silence within criminal proceedings - of course, these are quasi-criminal proceedings. At p.381 of the report, the Court of Appeal said this:

> "We consider that the specimen direction is in general terms a sound guide. It may be necessary to adapt or add to it in the particular circumstances of an individual

> case. But there are certain essentials which we would highlight. (1) The judge will have told the jury that the burden of proof remains upon the prosecution throughout and what the required standard is. (2) It is necessary for the judge to make clear to the jury that the defendant is entitled to remain silent. That is his right and his choice. The right of silence remains. (3) An inference from failure to give evidence cannot on its own prove guilt. That is expressly stated in s.38(3) of the Act. (4) Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Of course, the judge must have thought so or the question whether the defendant was to give evidence would not have arisen. But the jury may not believe the witnesses whose evidence the judge considered sufficient to raise a prima facie case. It must therefore be made clear to them that they must find there to be a case to answer on the prosecution evidence before drawing an adverse inference from the defendant's silence. (5) If, despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference."

15. How then do I apply the law relating to the drawing of adverse inferences to the facts of this case? I recognise the seriousness of a judgment summons, but it seems to me that I can nonetheless take this relatively shortly.

16. A final consent order was lodged on 11 April 2019. It was supported in the usual way by a D81, the statement of information, providing the information necessary for the court to discharge its duty to scrutinise the terms of the order. The D81, supported by the debtor's statement of truth, revealed that he had net assets excluding pension at the relevant time of £284,000 or thereabouts. The order was stopped by the District Judge who raised a query as to why the wife was ostensibly receiving the lion's share of the capital. On 22 May 2019, the parties wrote jointly to the court in the following terms:

> "We understand the District Judge's concern to be that the wife receives the vast bulk of the available capital. This is, in part, because of the support which the husband has had from his family in the past and he works for one of the family's businesses. Most of the husband's family businesses are held through a Guernsey trust referred to at Box 9. Additionally, the husband received and spent the net proceeds of sale of the former family home. The lump sum payments to the wife reflect this."

17. I pause briefly to observe that the wife's evidence is that the husband told her during the marriage that the sale of a family business had resulted in £30million being held in a trust, I think in Guernsey, for the family and also that it was submitted in the husband's Form E that historically he had the wherewithal to lend and/or invest significant funds of £1.6 million to an individual who, he said, had 'scammed' him. I do not consider that I need to go further than the D81 which discloses net capital available to the husband in the sum of £284,369.

18. The only logical conclusion I can draw is that, as at 22 May 2019, the debtor must have been satisfied that he had the means to pay both instalments, including the second instalment

falling due on 1 August 2019. Moreover, the order provided for the husband's release from an earlier undertaking not to dispose of or deal in any way with an ISA valued at approximately £195,000. Again, the only logical conclusion I can draw as to the purpose of that recital, given that the debtor had disclosed available capital of £284,000 and had agreed to a lump sum order of £230,500, is that the proceeds of the ISA were to be applied in part payment of the lump sum.

19. I have no hesitation in finding in this case that the creditor has made out, for the reasons I have just explained, an arguable case; even a formidable one, as Mr Perrins submits, in line with the authority of *Rundell*, given that this was a consent order. It is in that context that I must consider the debtor's election not to file any evidence in the context of the law relating to adverse inferences.

20. The questions that he might have answered, and indeed for which answers were called, are: First, what happened to the £284,000 that was available on 22 May 2019, because no amendment was made to the statement of information when the response was sent to the District Judge? What had changed after the end of May that meant he was unable to pay £215,000 in addition to what he had already paid, only twelve weeks later on 1 August 2019?

21. Secondly, and more significantly, what became of the ISA that was to be surrendered in order to meet a substantial part of the sum due?

22. Mr Sirikanda quite properly submits that I must be satisfied so that I feel sure that the husband still had the funds to pay as at 1 August 2019. But in the light of the husband's silence, I am satisfied that I am entitled to draw adverse inferences in accordance with *R v. Chohan* specifically paragraph 5 to which I referred a moment ago, namely:

> "If, despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference."

That, I consider, is the position here. I consider that I am entitled to and I do draw an adverse inference.

23. The first limb of s.5 is thus made out to the requisite standard. As at 1 August 2019, drawing inferences and in the context of all of the other available evidence, I am satisfied, so that I feel sure, that the husband had the means to pay.

24. For the same reasons, I draw an adverse inference in respect of the second limb of s.5. I am also satisfied, so that I feel sure, that the husband has refused and/or neglected to pay the sum when he had the means to do so. The fact of his non-payment alone and his silence as to the reasons is sufficient. In addition, however, I note that at no point throughout the whole of these proceedings has the husband issued any application to vary the lump sum order and, of course, given that this was a lump sum payable by instalments, he would have had the ability to do so.

25. Further support for the position I have adopted is gleaned, I consider, from the husband's wilful neglect over the past two years or so of the order that he hand over jewellery to the wife. He was ordered to do so by no later than 21 June 2019. For no apparent reason he chose not to do so for a whole year, eventually providing some but not all of the jewellery on 19 June 2020 (so just two days shy of a full year) and even then only in the face of separate committal proceedings brought by the creditor.

26. Moreover, in the period between August 2019 and as recently as 2 October 2020, the husband has instructed solicitors to write numerous letters on his behalf, none expressing an inability to pay but indeed promising payment and, on some occasions, certainly on one occasion, even suggesting that the money was physically on its way to the wife.

27. I make it clear, for the avoidance of doubt, that I have not relied on this correspondence between 2019 and October 2020 as evidence of itself that the husband had the means to pay when those letters were written, because it could just have been filibustering and playing for time on his part. What it does do, however, is to give an insight into the husband's overall cavalier approach to his obligations under the terms of the consent order.

28. Finally, I would simply add this that the fact that the wife at times agreed to an extension of time in compromising potential enforcement proceedings and thereby saving costs does not of itself, in my judgment, signal tacit acceptance by the wife that the husband did not have the wherewithal to pay or indeed undermine the findings I have made in the context of all of the evidence adduced by the wife and in the context of the adverse inferences that I draw in respect of the husband's silence and his failure to answer questions which had to be answered.

29. It follows that I am satisfied as to both limbs of s.5.

30. I consider that the appropriate orders in this case in relation to the judgment summons that was heard on 23 October 2020 is no order as to costs. I appreciate that a few moments ago I was discussing the fact that I could have rectified or permitted amendment of that judgment summons and that the only reason I adjourned the case was to enable the husband to take further legal advice as to the stance he wished to take in relation to these proceedings and notably whether he wished to file evidence or not. However, some two months or so has now passed and nothing has changed because the husband still has not filed any evidence.

31. Nonetheless, it is a fact that the hearing on 23 October 2020 could not proceed on that date. There was also a committal application listed before the court on that date which was dismissed by consent; indeed, I recall having a dialogue with counsel in which I was trying to understand the position in relation to the jewellery. Notwithstanding that Mr Sirikanda actually had addressed the committal in his Note, counsel for Dr Dhillon indicated that he was not pursuing it.

32. It seems to me, despite the potential to waive a procedural defect on the last occasion, this was fundamentally a different judgment summons and I should err on the side of caution. I most certainly would not entertain an application for costs on behalf of the husband which I would consider to be wholly unmeritorious in circumstances where he has again chosen not

to file any evidence and where, as Mr Perrins says, the only reason we are here is that he has not complied with an order that was made some sixteen months ago.

33. It will be a matter as between Dr Dhillon and her legal advisors as to what happens about the costs of and incidental to that hearing of 23 October, but it is rather difficult to ignore the fact that there have already been defective applications for committal issued, notwithstanding the warnings of District Judge Jenkins earlier in the year; all of this, of course, pre-dates Mr Perrins' involvement. It is difficult to see that another mistake should have been made in the Judgment Summons that was lodged and heard on 23 October. So, I make no order for costs in relation to that.

34. I have no hesitation in ordering the husband to pay the costs of this judgment summons, which has now been properly issued. Given the circumstances of the case, I do consider that indemnity costs are appropriate. Where there is any issue as to the assessment I should err on the side of the receiving party and look at what I consider to be proportionate to the issues and reasonable in all the circumstances. I am not going to assess the costs bill down at all. The amount of £13,615 inclusive of VAT which includes the attendance of counsel, court costs and the work that was necessary is, to my mind, is a reasonable sum.

35. Having heard further from Mr Sirikanda, I still propose to assess the costs in the sum of £13,615 and that is the costs order I make. The rules provide that a judgment summons should be supported by a witness statement and if there was an issue as to the need for a further witness statement or whether I should have made the alternative direction that the evidence already within the proceedings should stand on the basis that the husband would not take a technical point, that could and should have been raised and I would have ruled on the point.

36. Given the history of this case and the difficulties there have been in the summons being put into a proper form and given the perfectly proper technical points that have been raised in the past, it seems to me it was particularly incumbent on the wife's solicitors to make sure that they had everything in order. But I do repeat what I said earlier about whether the wife should be expected to meet her costs of the last occasion. As I have said, that will be a matter between them.