Neutral citation: [2024] EWFC 116 (B)
Case No: BE14D00257

IN THE CENTRAL FAMILY COURT

First Avenue House
42-49 High Holborn
London
WC1V 6NP

Thursday, 15 February 2024

BEFORE:

DISTRICT JUDGE ASHWORTH

BETWEEN:

WJB

Applicant

and

HJM

Respondent

MS F DE NAVARRO appeared on behalf of the Applicant instructed by Slater Heelis Solicitors

The Respondent did not attend and was not represented

JUDGMENT

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(Official Shorthand Writers to the Court)

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1. THE DISTRICT JUDGE: This is an application by the applicant ex-wife (whom, for ease of reference I shall refer to as "W") made within proceedings for an order for enforcement of a court order by such means as the court considers appropriate for what is known as a *Hadkinson* order, namely an order that prevents the respondent, her former husband ("H") from making or taking further steps in a case pending compliance with a court order.

2. In dealing with the matter, I had access to a court bundle. I received a position statement from Ms de Navarro, who represents the applicant, and she also referred me to two cases, the *de Gafforj* [2018] EWCA Civ 2070 decision of Jackson LJ and the case of *Tattersall v Tattersall* [2018] EWCA Civ 1978, which is a decision of Moylan LJ.

3. H has not attended this hearing. He has a history of non-attendance and indeed non-compliance with orders, which is what has led to the making of this application.

4. When the matter was before DJ Mulkis on 13 September, he made a specific direction that H must attend the next hearing in person, because this is substantively a D50K application relating to enforcement and the court required him to attend to enable him to be orally examined as to his means. The further hearing was listed before me on 13 October and H failed to attend that hearing. He did send an email to the court the day before saying that he lives in the USA and as such the notice he had been given to attend in person along with the cost of a short notice flight, makes it physically not possible at this time, but he did plan to attend the UK towards the end of the year although nothing had been booked and he would be happy to join the hearing remotely.

5. We did in fact send him an invitation to join the link to enable him to attend the hearing remotely but he did not accept it, although he did make reference to the fact that the hearing being at 10 am meant that it was 3 am in his time.

6. I made directions leading to the hearing today and I specifically made a direction that if he wanted this hearing to be remote, he must make an application and statement in

support at least 14 days prior to this hearing so, by 1 February. I directed that this hearing was to be an in person hearing and he was to attend.

7. I am satisfied that H was served with that order on 31 October 2023 in accordance with the directions I had given in relation to service, namely by email and no such application has been made, my clerk having checked the emails that we have received and apparently none having been received from H after 12 October.

8. An email from the solicitors acting for the applicant, which was sent with the bundle and position statements confirmed that they had spoken to him and he had confirmed that he would not be attending today and that has been reaffirmed by Ms de Navarro this morning. She tells me that there has been contact and I am told there are some without prejudice discussions ongoing, but nevertheless, he has chosen not to attend this hearing today.

9. The history of the matter is that on 29 November 2017 HHJ O'Dwyer made a final financial remedies order in proceedings between the parties. In his decision and the order he recorded that his findings were that there were insufficient funds to make provision to meet the applicant's needs which he put at £6,000 per month. He made an order of periodical payments for £3,500 per month and it is a joint lives order or until H's retirement at aged 67, together with CPI adjustment payments to be made on the 28th day of the month.

10. On 5 April 2023, W issued a D50K seeking enforcement by such means as the court considered appropriate and in particular a third party debt order against a company bank account with NatWest. At that time the arrears were £35,282.64 and the payment, taking into account the CPI adjustment, had increased to £3,851.93 from 28 April 2022. At that time H had paid £3,670 in April 2022 and then made no payments thereafter.

11. On 2 May 2023 the court issued the standard order when receiving applications and listing them for hearing, that he should complete his ES1 and attend a hearing on

19 June 2023. That hearing took place before HHJ Evans-Gordon and he attended remotely. Her order reflects that he agreed to reinstate maintenance from 28 June 2023 until the conclusion of the proceedings. I understand that he informed the court that the reasons why payments had not been made was because of a judgment debt, but that that had now been resolved and he was able to make payments going forward. He also gave an assurance that £43,000 remained in the NatWest account for the company and that that money would not be utilised pending further hearing.

12. The court adjourned the application to enforce on that basis, made a direction that he was to serve his Form E1 by 17 July 2023 and listed the matter for further hearing, including reserving costs.

13. On 17 July 2023, H made an application to vary paragraph 21 of the original order of 29 November 2017. That document is quite interesting. It is not in a Form A. He made it on a D11 and he set out the reasons why he was applying for the variation and there were two reasons given. Firstly was that the order had been made on the basis that W would be earning £20,000 per annum and he thought that by now she ought to have been doing that, and secondly, that she is cohabiting. There is no reference in that D11 to the application being made because he cannot afford it.

14. On 6 September, W made her application for a *Hadkinson* order preventing him from proceeding with his application to vary unless he cleared the arrears, and for a penal notice to be endorsed on the directions to file an E1.

15. On 13 September 2023 DJ Mulkis heard this matter. He again reinforced the direction that H was to file an E1 as he had not done so, and that was to be done by 28 September 2023. He relisted the hearing before me on 13 October, again made a costs order in relation to the hearing in June and that hearing totalling £13,687.20 and, as I have already said, directed that the next hearing was to attend in person. He also made a final third party debt order against the company bank account with NatWest plc for £53,175.80.

16. As I have said, at the hearing on 13 October H did not attend. He had filed by then an E1 in compliance with the order of DJ Mulkis, but it was deficient and I made a further order that he was to file a fully completed E1 with all attendant documents by 27 October 2023. That order had a penal notice attached to it and, as far as I am aware, it has not been complied with. As I said, I am satisfied that that order was served on 31 October 2023.

17. He has apparently paid £4,000 in November and December 2023 but he is substantially in breach and the arrears as of today's date, I understand, stand at £61,901.62.

18. There is no doubt that the order that the court is being asked to make is a draconian one and this was enforced by Peter Jackson LJ who confirmed in *de Gafforj v de Gafforj* the description of such an order made by Sir Ernest Ryder in the case of *Assoun v Assoun* [2017] EWCA Civ 21, namely:

> "Such an order is draconian in its effect because it goes directly to a litigant's right of access to a court. It is not and should not be a commonplace. As developed in case law, it is a case management order of last resort in substantive proceedings (for example for a financial remedy order) where a litigant is in wilful contempt rather than a species of penalty or remedy in committal proceedings for contempt."

19. He also made clear that such an order is also not a species of what has been described as "enforcement by the back door".

20. In his judgment Jackson LJ set out the conditions that would be necessary before such an order could be made, namely that the respondent is in contempt; that the contempt is deliberate and continuing; as a result, there is an impediment to the court of justice; and there is no other realistic and effective remedy. The order has to be proportionate to the problem and go no further than necessary to remedy it. His decision also refers to the decision of Bodie J in *Mubarak v Mubarik* [2006] EWHC 1260 (Fam) in which he

said that non-payment in breach of a maintenance order is in itself a contempt of court regardless of ability to pay and that questions of ability to pay come into play when the court decides whether and how to act on the contempt. Also, as to the third condition, namely whether there is an impediment to the course of justice, this is likely to include what was described by Sir Mark Potter in *Laing v Laing* [2005] EWHC (Fam) that it was "making it more difficult for the court to ascertain the truth or to enforce the orders that it makes."

21. There can be no doubt that H is in contempt of court. There are numerous examples in the history of these proceedings where he has failed to comply with court orders, not only the original ones, the payment of maintenance, but also the orders within these proceedings for disclosure and to attend for questioning. These failures to comply have put the applicant at significant cost because there have had to be more hearings than would otherwise have been necessary. This is the fourth hearing and the matter will not conclude today.

22. There can equally be no doubt that the contempt is deliberate and continuing and that is exampled by H's failure to attend today. He was given clear notice that he was required to attend in person. He was given sufficient time to make the necessary arrangements. He was served with the order giving the notice of hearing on 31 October. He was also given a means by which to apply to vary that direction if he wished to do so, but he failed to avail himself of that. That is in addition to his ongoing contempt in relation to failing to comply with the original order as to maintenance, despite having made sporadic payments.

23. Is there then an impediment to the course of justice? Ms de Navarro says that there is. She refers me to the applicant's statement in support of this application, which is in fact attached to the application itself. She has exhausted her savings, not only paying for her income needs but also paying for legal costs and she is now having to rely on credit cards and borrowing. I am told that she is, and I can understand why, extremely stressed by these proceedings. Clearly there will be an impediment to justice in the event that she is unable to pursue matters with the assistance of legal representation,

given the fact that the respondent, H, is in the United States of America, and his failure to comply with orders to date.

24. The decision in *de Gafforj v de Gafforj* related to two breaches. One was in relation to a legal services payments order, and one was in relation to non-payment of maintenance. Jackson LJ slightly differentiates between the two at paragraph 17 of his judgment when he says:

> "Does the order sought by the wife go further than necessary? Yes, but only to a marginal extent. I would differentiate between the unpaid costs and maintenance on the one hand and the unpaid legal services payments on the other. The latter impacts in the most direct way possible upon the course of justice; the position of the former is less clear. I am far from dismissing the wife's concerns about the effect upon her everyday life of the abrupt and arbitrary removal of her income stream, and the knock-on effect on her ability to participate in the proceedings, and I would not want to be understood as saying that there are no circumstances in which such a contempt could found an order of this kind; but in this case it does not compare to the strikingly direct impediment to the course of justice represented by the contempt in relation to the litigation services payment order …"

25. Ms de Navarro says that this case is differentiated from *de Gafforj* because in this case there is no legal services payments order. A pragmatic decision was taken not to pursue such an application because of the history and the costs and so, in effect, the maintenance is being used to fund the cost of legal proceedings which otherwise might have been the subject of a LSPO order, namely there is one pot of money and this wife is having to use it to fund living expenses and legal costs and therefore there clearly is an impediment to justice by H's failure to make the payments. I accept and I agree with her argument in that respect and I am satisfied that breach of this order, coupled

with breaches of all the other directions orders that have been made, are such that there will be an impediment to justice if the order is not enforced and the order that is being sought made.

26. But I must also consider the effect of the impediment to justice on H if he is unable to gain access to the court in circumstances where he is applying to vary the order that is being sought to be enforced. In circumstances where somebody is told that they cannot pursue an application to vary because they cannot afford to pay the order unless they pay the arrears under the order, then it puts them in a difficult position. However, I am satisfied that is not the case here and I make specific reference to the D11 on which H has made his application to vary. He has not made this application on the basis that he says he cannot afford to pay it. He made the application on the basis that W would have £20,000 per annum which should be offset against maintenance and also that she is cohabiting.

27. So far as the former is concerned, he is correct in his broad analysis, but on looking at the judgment of HHJ O'Dwyer, that is not what was said. In the judgment HHJ O'Dwyer made a finding that W's needs were £6,000 per month and that they could not be met by H in full as there were insufficient funds at that time to meet such an order. He made the order he did knowing that there would be a shortfall. He then went on to say at paragraph 83 of his judgment that he was satisfied that within the next 12 months H would have an income of £100,000 per annum and that W would have an income of around £20,000 per annum and so what he said was that there was no reduction in his order in 2018 when he considered that W could be in work because by that time he considered that H would have increased his income and that they each cancelled each other out. The income that W was going to receive filled the shortfall in what he assessed was the difference between her reasonable needs and what H could afford to pay. H's argument in that respect is wrong.

28. The court does not know about the position in relation to the allegation of cohabitation, but the application is not based on inability to pay and it is not for a party to take it upon himself to stop making payments of an order pending a determination by the

court as to whether or not they should do so and whether the order should be suspended pending the application to vary. In this respect I am aware of the decision in *Tattersall v Tattersall* which makes it clear that applications to vary do not prevent enforcement but in any event H has not attended this hearing or put forward any argument that enforcement should be postponed pending the outcome of his application for variation. I am satisfied that this is not a case where there should be a stay pending enforcement, because of the reasons given as to why the application is made.

29. Although H says that a bankruptcy petition has been issued, Ms de Navarro tells me that a search of the register has not disclosed one and he has provided no further information or detail.

30. So in conclusion whilst I accept that this is a draconian step to take and that there will be many cases where a court would not make the order that is being sought today in circumstances where there is an application to vary because of the risk of putting a respondent in an impossible position, in circumstances where the application to vary is not made on the basis of ability to pay and bearing in mind in mind the history of non-compliance with this matter, I am quite satisfied that there is an impediment to the course of justice to W if the court does not make the order sought.

31. Finally then is there any other realistic and effective remedy? The answer to that appears to be no. H is residing in the United States of America. He has very few, if any, assets here. I am satisfied that he deliberately misled the court as to the position in relation to the £43,000 which he gave assurances in June 2023 was in the company's NatWest account as the bank accounts and statements for that account disclosed with his E1 clearly show that on the date in question he had approximately £5,000 in the account. So, I am satisfied that there is no other realistic and effective remedy, that the order is proportionate to the problem and goes no further than necessary to remedy it. I make a *Hadkinson* order preventing H from pursuing his application to vary unless and until he makes a payment to W of £61,901.62 in relation to the arrears and the sum of £13,687.20 in relation to the costs that are outstanding as at today's date. I include the costs of £7,252.80 as well.

(**After further submissions**)

JUDGMENT ON COSTS

32. I am now asked to make an order of the costs in relation to this hearing. An N260 has been served on 12 February and is also included in the bundle that was served on 13 February, so I am satisfied that H has notice of the costs that are being claimed.

33. Ordinarily, claims for costs are dealt with under the provisions of FPR 28 and that of course provides for the starting point to be no order for costs but for the court to be able to make a different order in the event that there has been, in effect, litigation conduct. That provision refers to and relates to financial remedies applications. A D50K is not included within the definition of the financial remedy applications and so the no order as to costs starting point does not apply. The rules to be applied are the Civil Procedure Rules, and in particular CPR 44.2 with the exception of 44.2(2), which is the rule that, if a court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order. That presumption does not apply, but nevertheless the courts have made it clear in decisions, including that of Butler-Sloss LJ in *Gojkovic v Gojkovic (No.2)[1991]2 FLR* that you have to start somewhere and in her view this remained the correct starting point although it may be displaced more easily in family law cases. Obviously when applying what is known as the clean sheet, the court has to look at all the circumstances of the case.

34. CPR 44.2 (4) makes it clear that in deciding what order, if any, to make about costs, the court has to have regard to the conduct of the parties and whether a party has succeeded on part of its case, even if they have not been successful on the whole, and that conduct includes conduct before and during the proceedings. Also whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue and the manner in which they have done so.

35. There can be no doubt that H's conduct is such that he should be responsible for W's costs of this hearing today for the reasons that I have already set out in my judgment, namely the ongoing breaches of the order and his failure to engage in the court process or to attend today, so I am satisfied that it is appropriate to make an order as to costs.

36. The N260 is for £15,374. That was based on solicitor attending with counsel. Solicitors took the very sensible approach that, once they knew that H was not going to be attending, that they would not attend and so Ms de Navarro has kindly recalculated the schedule to exclude their attendance costs and disbursements and the figure I am told is £10,932.60.

37. I am satisfied that in view of the amount of work needed to be done, the importance of this decision and the fact that this was originally listed for three hours, that those costs are reasonable and proportionate, and so I make a summary assessment of costs of £10,932.60 to be paid in 14 days and I add those to the sum that is due to be paid under the *Hadkinson* order.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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