



Neutral Citation Number: [2020] EWCA Civ 1216

Case No: B2/2020/1231

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON**  
**His Honour Judge Lethem**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18 September 2020

**Before :**

**LORD JUSTICE BAKER**  
and  
**LORD JUSTICE ARNOLD**

-----  
**Between :**

**RIZWAN HUSSAIN**  
- and -  
**(1) GULRAJ VASWANI**  
**(2) SAROJ VASWANI**  
**(3) KRITI VASWANI**

**Appellant**

**Respondent**

-----  
**Adam Tear of Scott-Moncrieff & Associates Ltd for the Appellant**  
**Ian Rees Phillips (instructed by YVA Solicitors LLP) for the Respondents**

Hearing date : 10 September 2020  
-----

**Approved Judgment**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 18 September 2020

## **Lord Justice Arnold:**

### Introduction

1. This is an appeal by Rizwan Hussain against an order of His Honour Judge Lethem sitting in the County Court at Central London dated 30 July 2020 committing Mr Hussain to prison for a term of 12 months on each of two counts of contempt of court, to be served concurrently, consisting of breaches of undertakings given by Mr Hussain to pay sums of money. There is no appeal against the findings of contempt. Mr Hussain contends that the judge had no power to impose a sanction of imprisonment for those contempts by virtue of section 4 of the Debtors Act 1869. In the alternative Mr Hussain contends that the judge had no power to impose the coercive part of the term (four months) as distinct from the punitive part (eight months). In the further alternative Mr Hussain contends that the sentence is manifestly excessive. At the time of the hearing before this Court Mr Hussain had only just started serving his sentence, having been arrested the night before.

### Factual background

2. Mr Hussain is a banker and investment manager. He was the tenant of an apartment owned by the Respondents (“the Vaswanis”) at 3 Riverlight Quay, London SW8 5BF (“the Apartment”). The rent reserved by the tenancy agreement was £1,950 per week. Mr Hussain ceased paying rent in January 2019. On 14 March 2019 the Vaswanis served notice to quit, but Mr Hussain failed to do so. On 1 May 2019 the Vaswanis brought possession proceedings. On 2 October 2019 District Judge Parker sitting in the County Court at Wandsworth made an order requiring Mr Hussain to give the Vaswanis possession of the Apartment on or before 16 October 2019 and to pay the Vaswanis £61,150 for rent arrears and occupation rent of £277.80 per day from 23 September 2019 until he gave possession of the Apartment to the Vaswanis. DJ Parker refused permission to appeal.
3. On 14 October 2019 Mr Hussain filed an appellant’s notice seeking permission to appeal and a stay of execution. On 28 October 2019 Judge Lethem refused permission to appeal the money judgment, but listed the application for a stay of the possession order for a hearing which was subsequently fixed for 11 December 2019 and the application for permission to appeal that order for a hearing which was fixed for a date in February 2020. On 7 November 2019 the Vaswanis obtained a warrant of possession which was to be executed on 7 January 2020. Mr Hussain did not attend the hearing on 11 December 2019, having unsuccessfully sought an adjournment beforehand. In his absence Judge Lethem dismissed the application for a stay.
4. On 19 December 2019 Mr Hussain applied to set aside the order made on 11 December 2019 pursuant to CPR rule 39.3 and for a stay of execution, but failed to give notice of the application to the Vaswanis. The application came before Judge Lethem on 2 January 2020. Mr Hussain gave different reasons for his non-attendance on 11 December 2019 to those he had previously given when seeking an adjournment. Judge Lethem did not find his reasons credible and dismissed the application to set aside the order of 11 December 2019. Mr Hussain told Judge Lethem, however, that he was able and willing to pay the rent arrears, which the judge calculated to be not less than £92,500, in full three working days after being given details of the account to which payment should be made. Not only did Mr Hussain state this in a witness statement, but

also he confirmed it orally on affirmation before the judge. Moreover, he told the judge that he had access to £92,500 worth of funds which were being held in an account in the Isle of Man. The judge gave Mr Hussain a warning as to the potential consequences of perjury before Mr Hussain gave this evidence. On Mr Hussain giving an undertaking “to pay to an account nominated by [the Vaswanis] the sum of £92,500 within 4 working days of notification” irrespective of the outcome of his application or the appeal, Judge Lethem adjourned the application for a stay to be heard on short notice to the Vaswanis on 6 January 2020. Again, the judge gave him a warning as to the potential consequences of breaching that undertaking.

5. On 3 January 2020 the Vaswanis’ solicitors sent Mr Hussain details of the bank account to which the money was to be paid. On 6 January 2020 Mr Hussain attended court and informed Judge Lethem that the money had been paid. In support of this he produced a letter from Kilimanjaro Capital Management Ltd (“Kilimanjaro”) to himself dated 6 January 2020 stating that Kilimanjaro had historically been liable for payment of the rent on the Apartment, that it agreed to pay the sum of £92,500 and it expected the funds to reach the nominated account in short order and in any event within four working days.
6. On that basis, Judge Lethem held that, contrary to the submission of counsel for the Vaswanis, there had been a change of circumstances since 11 December 2019 which enabled him to revisit the order made on that occasion pursuant to CPR rule 3.1(7) and to grant Mr Hussain a stay of execution and suspend the warrant. As a condition of doing so, however, Judge Lethem required and accepted a further undertaking from Mr Hussain, namely to “pay monies to [the Vaswanis] for use and occupation at the rate of £1,950 per week until the disposal of the appeal” without prejudice to any claim Mr Hussain had arising out of disrepair of the property.
7. At some point between 7 and 10 January 2020 Mr Hussain issued a claim against the Vaswanis in the High Court for the sum of £264,904. In addition, on 9 January 2020 he applied to the High Court for permission to appeal against Judge Lethem’s order dated 2 January 2020 seeking to be released from his undertaking and for that to be replaced by an undertaking to use his best endeavours to procure that Kilimanjaro made the payment. On 23 January 2020 Zacaroli J refused permission to appeal.
8. The sum of £92,500 was not paid by or on behalf of Mr Hussain by 9 January 2020 in accordance with his undertaking on 2 January 2020, and remains unpaid to this day. Nor was the weekly sum of £1,950 ever paid by or behalf of Mr Hussain in accordance with his undertaking on 6 January 2020, and all such sums remain unpaid.
9. On 21 January 2020 the Vaswanis applied for Mr Hussain to be committed to prison for contempt of court on four grounds, two of which were that that Mr Hussain had failed to comply with the undertakings given to the court on 2 and 6 January 2020. The third ground was that Mr Hussain had failed to comply with another undertaking allegedly given on 6 January 2010. The fourth ground was that Mr Hussain gave the undertakings on 2 and 6 January 2020 dishonestly in that he did not intend to comply with those undertakings.
10. In evidence served in answer to the committal application Mr Hussain contended in summary that he had never had the money to pay the sums in question, that he was the beneficiary of a discretionary trust of which Kilimanjaro was the trustee and that,

despite what it had said in the letter dated 6 January 2020, Kilimanjaro had declined to pay the money allegedly for reasons connected with the tax status of the account which had been nominated. That was a personal account of the Vaswanis rather than the account of the Vaswanis' agents, Savilles, to which rental payments had previously been paid. No offer or attempt to pay the money into the Savilles account, or to pay it into the personal account net of tax at the basic rate, was made, however.

11. It also emerged that, at the time, Mr Hussain was a bankrupt whose discharge from bankruptcy had been suspended, a fact which he had not revealed to Judge Lethem on either 2 or 6 January 2020.
12. On 20 February 2020 Judge Lethem lifted the stay of execution due to Mr Hussain's non-compliance with his undertakings. On 6 April 2020 Judge Lethem refused Mr Hussain permission to appeal against the order of DJ Parker.
13. At hearings on 6 and 7 April 2020 Mr Hussain indicated that he intended to apply to strike out the committal application, and he did so on the first day of the hearing of the substantive application before Judge Lethem on 15 June 2020. Mr Hussain contended that the County Court did not have jurisdiction to deal with the fourth ground, and only the High Court did. Judge Lethem accepted this and struck out the application so far as it concerned the fourth ground. Mr Hussain also contended that the first three grounds were precluded by section 4 of the Debtors Act 1869. Judge Lethem rejected this contention. Mr Hussain did not appeal against Judge Lethem's refusal to strike out the first three grounds. Mr Hussain's advocate explained to this Court that Mr Hussain now accepts that the Debtors Act did not preclude the court from finding that he was in contempt of court, although he maintains that it does prevent the court from imposing a sanction of imprisonment.
14. Later on 15 June 2020 Judge Lethem dismissed the third ground (as I have numbered it) of the application. On 16 June 2020 Judge Lethem adjourned the committal application to 24 June 2020 because of Mr Hussain's non-attendance (due, according to Mr Hussain, to his ill-health). On 24 June 2020 the application proceeded, although again Mr Hussain did not attend (for the same reason).
15. On 1 July 2020 Judge Lethem delivered judgment finding both remaining counts of contempt proved, namely that Mr Hussain had breached the undertakings he gave on 2 and 6 January 2020. He also found (as matters relevant to sanction) that Mr Hussain had had no intention of honouring his commitments on either 2 or 6 January 2020 and that, together with Kilimanjaro, he had engineered the situation so as to achieve the end he wanted, namely the suspension of the warrant without the payment of any sums to the Vaswanis. The judge adjourned sentencing until 30 July 2020. On that occasion Mr Hussain again failed to attend (for the same reason), although he did serve a witness statement setting out his mitigation.
16. On 30 July 2020 Judge Lethem sentenced Mr Hussain to be imprisoned for a term of 12 months, of which eight months were punitive and four months were coercive (meaning that Mr Hussain could be released before service of the latter part of the sentence if he purged his contempt). I must consider the judge's reasoning in more detail below, but in brief summary he concluded that the appropriate starting point was a sentence of 18 months, but that the sentence should be reduced to 12 months having regard to mitigating factors relied upon by Mr Hussain and the impact of Covid-19.

17. It is clear from Judge Lethem’s judgment on the strike out application that he did not accept that section 4 of the Debtors Act 1869 prevented him from imposing a sanction of imprisonment, which is no doubt why the submission was not renewed by Mr Hussain’s advocate on 30 July 2020. It is not in dispute that it is open to Mr Hussain to appeal against the order of 30 July 2020 notwithstanding his failure to appeal against the dismissal of the strike out application.

Grounds of appeal

18. Mr Hussain’s first ground of appeal is that the court has no power to impose a sanction of imprisonment for a contempt of court consisting of a breach of an undertaking to pay a sum of money by virtue of section 4 of the 1869 Act unless one of the exceptions applies and none does in this case. Mr Hussain’s second ground is that, even if a punitive term of imprisonment can be imposed, a coercive term cannot. Mr Hussain’s third ground is that a term of 12 months is manifestly excessive.

First and second grounds: is imprisonment precluded by section 4 of the Debtors’ Act 1869?

19. CPR rule 81.4 provides, so far as relevant, as follows:

“(1) If a person –

(a) required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or

(b) disobeys a judgment or order not to do an act,

then, subject to the Debtors Acts 1869 and 1878 and to the provisions of these Rules, the judgment or order may be enforced by an order for committal.

...

(4) So far as applicable, and with the necessary modifications, this Section applies to undertakings given by a party as it applies to judgments or orders.

...”

20. It is clear from this that an undertaking by a party to do or not to do an act may be enforced by an order for committal just as much as an order to do or not to do an act, but subject in both cases to the Debtors Acts.

21. Section 4 of the Debtors Act 1869 (as amended) provides, so far as relevant, as follows:

“With the exceptions herein-after mentioned, no person shall be arrested or imprisoned for making default in payment of a sum of money.

There shall be excepted from the operation of the above enactment:

...

- (3) Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control:

...

Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any court for payment of money except as regards the arrest and imprisonment making default in paying such money.”

22. The Debtors Act 1869 was an important reforming piece of legislation. It largely abolished the practice of imprisoning people for non-payment of debts in prisons like the Marshalsea, so vividly described by Charles Dickens in *Little Dorrit* based on his experience of his father’s imprisonment there. It should be noted, however, that, even now, there are circumstances in which non-payment of debt can lead to imprisonment. In addition to the six exceptions listed in section 4, section 5 of the Act empowers courts in certain types of cases to commit to prison for a term not exceeding six weeks any person who defaults on the payment of a debt due pursuant to a court order where it is proved that the person in question has or has had the means to pay the debt.
23. There is a body of case law on the interpretation and application of section 4 of the Act. It was common ground between the advocates, however, that, somewhat surprisingly, there is no authority which is decisive of the issue which arises in this case. The most relevant authorities, which I will consider in chronological order, appear to be the following.
24. In *Bates v Bates* (1888) 14 PD 17 a wife petitioned for judicial separation from her husband on the ground of cruelty. An order was made that the respondent should pay the petitioner’s solicitor £41 odd to cover costs already incurred and should pay into court £40 as security for future costs alternatively give a bond. The respondent did none of these things and the petitioner applied for leave to issue a writ of attachment. Leave was granted by Butt J. The respondent appealed, relying upon section 4 of the Debtors Act 1869. Counsel for the petitioner conceded that the order could not be supported so far as it related to the order for payment of £41 odd. Subject to that, the Court of Appeal dismissed the appeal.
25. Cotton LJ said at 19:

“In my opinion the order for attachment was not in violation of the Debtors Act, because it was not for default in payment of a sum of money within the meaning of that section. The object of the Act was to prevent the imprisonment of persons for nonpayment of ordinary debts. No doubt the words used in the Act are very wide; but we must consider what was really meant by the payment of a sum of money. This order was not for the payment of a sum of money to the respondent; nor was it simply

an order for the appellant to pay a sum of money into court; but there was an alternative, he was either to pay the money or to give a bond. It was argued that the mention of the bond was only subsidiary to the order for payment of the money, that the order was in effect simply an order to pay the money. I do not take that view. If the appellant had given the bond, he would have complied with the order. ... The order was an order to give security, and as such was not within the 4th section of the Debtors Act ...”

26. Lindley LJ said at 20:

“The question turns upon the words of the 4th section of the Debtors Act. It is said that the appellant is within the protection of the Act, because he has made default in payment of a sum of money. But what do the words ‘payment of money’ in this section mean? In my opinion, they do not mean depositing a sum of money in court, to abide an order to be subsequently made. If the appellant had been ordered to pay the money to the receiver of the Court in discharge of an obligation to which he had been declared liable, that might be different. But that is not so here; he is to deposit the money in court, or to give security for it. That is not within the meaning of the words of the Act.”

27. Bowen LJ said he was “of the same opinion”, thereby apparently agreeing with both judgments.

28. In my judgment the reasons given by Cotton LJ and Lindley LJ are different, but not inconsistent. Cotton LJ focussed on the fact that the respondent could have complied with the order by providing a bond, but had not done so. Nevertheless, he said that the object of the Act was to prevent imprisonment for non-payment of “ordinary debts” and section 4 had to be construed in that light. Moreover, he went on to say that an order to give security was not within section 4. Lindley LJ held that depositing money into court by way of security was not a payment of money within section 4. What is common to both judgments, and relevant for present purposes, is that the apparently wide words of section 4 must be purposively interpreted.

29. Mr Hussain’s advocate particularly relied upon *Buckley v Crawford* [1893] 1 QB 105, a case which was not cited to Judge Lethem on the strike out application. In that case Mr Buckley had obtained judgment against Mr Crawford. He attempted to execute the judgment against some goods, but the goods which had been seized were claimed by Mr Townend and the sheriff interpleaded. In the interpleader proceedings the master made an order directing the sheriff to sell the goods and pay Mr Townend. The order concluded with the words “[Mr Buckley] undertaking to make good any deficiency on sale”. The goods were sold and there was a deficiency of £139 odd. The master then ordered Mr Buckley to pay that sum to Mr Townend within four days. When Mr Buckley did not do so, Mr Townend applied for an order for committal. Bruce J made the order. The Court of Appeal allowed Mr Buckley’s appeal and set aside the order.

30. The judgment of the Court was given by Wills J, who said at 107:

“This was a simple order to pay money, but it is sought to treat the default in obeying the order as a contempt of court, on the ground that the order for payment was made in pursuance of an undertaking which had been given by the plaintiff. There is however no difference between an order to pay money made in pursuance of an undertaking and any other order to pay a sum of money. It is true that the undertaking is the original ground of the liability, but attachment is never granted except for disobedience of an order to do or abstain from doing some specific thing. Here the only order that could be made in pursuance of the undertaking is to pay the money. The words of the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4, shew that under such circumstances, if the case does not come within any of the exceptions mentioned, there can be no imprisonment for default in payment, for the money is due as a debt.”

31. As can be seen from CPR rule 81.4, it is no longer correct to say that an order for committal will only be made for breach of an order as opposed to an undertaking. Be that as it may, in that case the application before the court was not to commit Mr Buckley for breach of his undertaking, but to commit him for breach of the subsequent order to pay money to Mr Townend i.e. a judgment debt. It is therefore not surprising that the Court concluded that that was precluded by section 4 of the Act.
32. Counsel for the Vaswanis cited *Cotton v Heyl* [1930] 1 Ch 510 in his skeleton argument in support of a submission that, even if the undertakings were within section 4 of the Act, the exception contained in subsection (3) applied. Although this authority was not the subject of oral submissions from either advocate, it is perhaps the closest to the present case. Mr Cotton brought proceedings against Mr Heyl and a company which were compromised on the terms of a Tomlin order which contained an undertaking by Mr Heyl to pay Mr Cotton £1,000 forthwith and £4,000 out of the first monies received by or on behalf of Mr Heyl from the sale or licensing of certain patents. At that time, Mr Cotton was aware that Mr Heyl had already disposed of half of his interest in the patents. The £1,000 was duly paid. Subsequently Mr Heyl sold the remaining half of his interest for £10,000 payable in stages, but failed to pay Mr Cotton the sum of £4,000. Mr Cotton applied for an order for committal alternatively leave to issue a writ of attachment against Mr Heyl. Luxmoore J held that the undertaking was caught by section 4, but that the exception contained in subsection (3) applied, although he refused the order sought on a different ground (namely that no time for payment had been specified).
33. Although Luxmoore J said at 520 that he agreed that an undertaking to money could not be enforced by committal or attachment unless one of the exceptions applied, he did not give any reasons for that view. Having set out his reasons for concluding that subsection (3) applied, he said at 521-522:

“My attention has been called to a decision of Byrne J. in *Carter v. Roberts* [1903] 2 Ch 312. In that case the defendant gave an undertaking as also did the plaintiff ‘to pay all sums of money which shall be received by them in respect of the matters in dispute in this action to the credit of the partnership account of the plaintiff and defendant with [certain banks].’ ... The learned



judge decided that that case was not within any exception to the Debtors Act, 1869. The undertaking in fact was merely to pay into a joint account to await the decision of the court, and with all possible respect to the learned judge it is a little difficult to see how this was an order for payment of money covered by the Debtors Act at all. Indeed the decision hardly seems to be in accord with what was said by the Court of Appeal in the case of *Bates v. Bates*. [He proceeded to quote from the judgment of Lindley LJ.] I am satisfied in the present case that there has been a breach of an undertaking which is within the Debtors Act, 1869, s. 4.”

34. It appears from this that Luxmoore J considered that an undertaking to pay money to a party was to be distinguished from an undertaking to pay money into court or into a joint account by way of security. Thus far his reasoning is clear and persuasive. It remains the case, however, that he did not give any positive reasons for concluding that an undertaking to pay money to a party was caught by section 4 unless one of the exceptions applied. In my view the most likely explanation is that, on the facts of the case, the undertaking appears to have been precisely equivalent to an order to pay the sums in question.
35. *In re Hudson* [1966] 2 Ch 209 is not an authority on section 4 of the Debtors Act 1869, but it is nevertheless relevant because it explains the distinction between an order to pay money and an undertaking to pay money. The plaintiff's marriage had been dissolved and her former husband was ordered to pay her maintenance at a specified rate. The husband subsequently filed evidence that he was unable to comply with that order but offered to undertake to pay one-third of his income to the plaintiff. An order was made in 1939 in those terms, but there was no recital of consent by the plaintiff or other indication that the undertaking was part of a contractual bargain between the parties. The husband remarried and later died. The plaintiff claimed against the husband's executrix, his second wife, an account in respect of arrears of maintenance payable under the 1939 order. Buckley J dismissed the claim on the ground that an undertaking to the court did not confer any personal right or remedy on any other party and that, since there was no evidence of any collateral contract between the parties which might have given rise to a debt recoverable at law, the plaintiff had no cause of action against the husband or his estate for any arrears.
36. In his judgment Buckley J analysed the differences between an order to pay money and an undertaking in a passage at 213-214 which merits quotation at some length:

“[The 1939 order] contained an undertaking given by the deceased to the court to pay one-third of his income to the plaintiff, but such an undertaking has not, in my judgment, the same effect as an order to pay. An order to pay may be enforced in the same manner as a judgment; R.S.C., Ord. 42, r. 24 ... An undertaking, however, is not an order. It is true that an undertaking to do or abstain from doing something other than payment of money may have the same effect as a mandatory or a restrictive injunction; for a breach of such an undertaking, like a breach of an injunction, exposes the culprit to the risk of imprisonment or possibly of sequestration or a fine. These are

penal sanctions aimed at enforcing compliance with either a promise made to the court or an order of the court, as the case may be. They are not remedies the purpose of which is to compensate some other party for damage he has suffered as the result of the breach or for recovering any property or enforcing any right of his. In most cases, at any rate, an order to pay money is of a wholly different character and produces quite different results from an undertaking given to the court to pay something. In the first place an order to pay money is most usually, though not always, a consequence of the person to be paid having established a right to payment of the sum in question. The order having once been made, the court would not revoke or vary it. Where, on the other hand, no order for payment has been made but an undertaking has been given to the court to make a payment, the court could at any time upon good cause being shown release or modify the obligation under the undertaking. Secondly, any order for payment to which R.S.C., Ord. 42, r. 24, applies may be enforced by the party who has obtained it in the same manner as a judgment to the like effect. He could, for instance, recover the sum by means of levying an execution or attaching a debt. But an undertaking could not be enforced by such means. The only sanction for breach of an undertaking would be the imprisonment of the culprit or sequestration of his assets or a fine on the ground of his contempt of court. An undertaking given to the court, unless the circumstances are such that it has some collateral contractual operation between the parties concerned, confers no personal right or remedy upon any other party. The giver of the undertaking assumes thereby an obligation to the court but to nobody else.”

37. It should be appreciated that, in saying what he did about the enforcement of undertakings, Buckley J was not addressing the effect of section 4 of the Debtors Act 1869, which is not mentioned in his judgment and no doubt was not cited.
38. In *Prosser v Prosser* [2011] EWHC 2172 (Ch) a consent order was made in proceedings between two brothers which provided that the respondent should instruct the solicitors acting for him on the sale of his property that the proceeds of sale were to be remitted to a nominated bank account. The respondent did not comply with the order and the applicant applied for him to be committed to prison. One of the issues which Vos J had to consider was whether section 4 of Debtors Act 1869 prevented the order being enforced by committal, it being common ground that none of the exceptions applied.
39. Having considered *Bates v Bates* and an obiter passage from the judgment of Purchas LJ in *Graham v Graham* [1992] 2 FLR 406 at 414-415 commenting on *Bates v Bates*, Vos J said at [102]:

“It seems to me that in reality, as I have said, there was probably very little between the two Lords Justices in *Bates v. Bates*. Both of them were saying in effect that where there is an order for the payment of money or the giving of security, but not the payment of an ordinary debt and not the payment of money directly to the

claimant, then section 4 of the Debtors Act is not engaged. As it seems to me, that is the ratio of *Bates v. Bates* which I must follow and nothing that Purchas LJ says in *Graham v. Graham* casts any doubt whatever upon it.”

40. Vos J’s phraseology (in a judgment that was only reserved overnight and delivered orally) leaves open the position where there is an order for the payment of money to the claimant, but not of an ordinary debt.
41. Vos J went on to hold that section 4 did not apply because the order was one to give instructions to place monies in a deposit account when they arose by way of proceeds of sale of the property, and thus the case was analogous to *Bates v Bates*.
42. In *Discovery Land Co LLC v Jirehouse* [2019] EWHC 224 (Ch), [2020] PNLR 1 the claimant applied to commit a solicitor, Mr Jones, to prison *inter alia* for breaches of undertakings given personally by Mr Jones (as well as by his firm) to pay surplus funds from a transaction amounting to \$9.3 million or the sterling equivalent into court and to procure repayment of a loan of £4.9 million to a lender called Dragonfly. Mr Jones failed to do so. One of the issues which Zacaroli J had to consider was whether section 4 of Debtors Act 1869 prevented the undertakings being enforced by committal. It was common ground that, in the light of *Prosser v Prosser*, section 4 did not apply to the undertaking in relation to the surplus funds, but it was argued that it did apply to the undertaking in relation to the repayment to Dragonfly.
43. Zacaroli J held section 4 did not apply for reasons he expressed at [111] as follows:

“Mr Halpern maintains that the Debtors Act applies to the undertaking in respect of the monies drawn down under the Dragonfly Facility, because that was an undertaking to repay money to Dragonfly. I disagree. The first task is to construe the undertaking. As I have pointed out, it was given in circumstances where Mr Jones had assured the court that the funds drawn down under the facility were sitting in a separate account with Hambros and that those funds were available to be transferred to Dragonfly (subject only to there being any problem arising from the terms of the facility itself). In my judgment, the undertaking to ‘procure’ that the facility was discharged is to be understood as an undertaking to procure that the funds so described would be transferred to Dragonfly. There is no question, therefore, of Mr Jones being required to “pay” a debt which he owed, nor of paying anything from his own funds. Ms Felix made much of the point that the claimant would no doubt have been content if *any* money had been procured by Mr Jones, including from his own funds. I suspect that is correct, but there is an important difference between what the claimant would have been content with and what the undertaking, properly construed, required. The purpose of the Debtors Act is clearly not engaged in these circumstances.”
44. Turning to the present case, the undertakings in question were undertakings by Mr Hussain to pay sums of money to the Vaswanis. Mr Hussain was found in contempt for

failure to comply with his undertakings in that he did not pay the sums in question (nor were they were paid on his behalf). Mr Hussain's advocate submitted that it followed that committal of Mr Hussain to prison was prevented by section 4.

45. Counsel for the Vaswanis accepted that section 4 would have prevented the Vaswanis from enforcing either the contractual debt owed by Mr Hussain under the tenancy agreement or the money judgment granted by DJ Parker by committal of Mr Hussain to prison; but he pointed out that the money judgment could be enforced by the processes available for that purpose such as a writ of control, a third party debt order or a bankruptcy petition. By contrast, as Buckley J explained in *Re Hudson*, the undertakings could not be enforced by those processes, but could be enforced by an application for Mr Hussain to be found in contempt of court and sanctioned accordingly. Counsel for the Vaswanis submitted that section 4 did not prevent Mr Hussain from being imprisoned for his contempts because the contempts did not consist of "making default in payment of a sum of money" within the meaning of section 4.
46. I accept this submission. As *Bates v Bates* makes clear, section 4 must be purposively construed. As Cotton LJ stated, its purpose is to prevent imprisonment for non-payment of ordinary debts. Thus, as the authorities make clear, it does not apply to orders or undertakings requiring the provision of security, whether way of payment into court or an appropriate bank account. I shall assume for present purposes that Luxmoore J was correct to decide in *Cotton v Heyl* that section 4 applies to an undertaking to pay money to a party which is otherwise precisely equivalent to an order to pay money to that party. I agree with Zacaroli J in *Discovery v Jirehouse*, however, that it is necessary not only to construe the undertaking, but also to take into account the context in which, and the purpose for which, it was given. In the present case, as counsel for the Vaswanis pointed out, Mr Hussain gave the undertakings in order first to establish a change of circumstances which would open the door to a reconsideration of the refusal of a stay and secondly to persuade the court to exercise its discretion in his favour by granting a stay. Thus the undertakings were the price Mr Hussain paid in order to obtain court orders in his favour and adverse to the Vaswanis. In such circumstances it is vital that the court should be able properly to enforce undertakings given to it. Mr Hussain did not comply with his undertakings. True it is that the non-compliance manifested itself in a failure to pay money to the Vaswanis, but in the circumstances that was not a failure to pay an ordinary debt. On the contrary, it was a failure to honour extra obligations to the court which Mr Hussain assumed, over and above the ordinary debts he owed, for the purposes of obtaining advantages in the proceedings.
47. Finally, I should address two remaining points. First, if (contrary to my conclusion) section 4 applies, I do not accept counsel for the Vaswanis' alternative argument that the exception in subsection (3) applies. Mr Hussain's evidence is that he was a beneficiary of the discretionary trust. There is no evidence that he was a fiduciary in respect of the monies in question. Counsel's attempt to argue that he must have become a fiduciary because he was an undischarged bankrupt was imaginative but not persuasive. There was nothing to stop Kilimanjaro paying the Vaswanis on behalf of Mr Hussain, and as counsel for the Vaswanis himself submitted that would have amounted to compliance with the undertakings.
48. Secondly, if I am right that section 4 does not prevent Mr Hussain being imprisoned for breach of his undertakings, it makes no difference that part of the term was imposed for coercive rather than punitive purposes.

Third ground of appeal: is 12 months manifestly excessive?

49. In *Financial Conduct Authority v McKendrick* [2019] EWCA Civ 524, [2019] 4 WLR 65 Hamblen and Holroyde LJ stated:

“37. In deciding what sentence to impose for a contempt of court, the judge has to weigh and assess a number of factors. This court is reluctant to interfere with decisions of that nature, and will generally only do so if the judge: (i) Made an error of principle; (ii) Took into account immaterial factors or failed to take into account material factors; or (iii) Reached a decision which was plainly wrong in that it was outside the range of decisions reasonably open to the judge. See *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101, at paras 35–36, *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260; [2008] 1 WLR 748, at para 16, *Stuart v Goldberg Linde* [2008] EWCA Civ 2; [2008] 1 WLR 823, at paras 76 and 81 and the very recent decision of this court in *Liverpool Victoria Insurance Co Ltd v Zafar* [2019] EWCA 392 (Civ), at para 44.

38. It follows from that approach that there will be few cases in which a contemnor will be able successfully to challenge a sentence as being excessive. If however this court is satisfied that the sentence was “wrong” on one of the above grounds, it will reverse the decision below and either remit the case to the judge for further consideration of sanction or substitute its own decision.

39. In *Liverpool Victoria Insurance Co Ltd v Zafar*, at para 58 this court considered the correct approach to sentencing for a contempt of court involving a false statement verified by a statement of truth. We consider that a similar approach should be adopted when—as in this case—a court is sentencing for contempt of court of the kind which involves one or more breaches of an order of the court. The court should first consider (as a criminal court would do) the culpability of the contemnor and the harm caused, intended or likely to be caused by the breach of the order. In this regard, aggravating or mitigating factors which are likely to arise for consideration will often include some of those identified by Popplewell J in the *Asia Islamic Trade Finance Fund* case (see para 32 above). Having determined the seriousness of the case, the court must consider whether a fine would be a sufficient penalty. If it would, committal to prison cannot be justified, even if the contemnor's means are so limited that the amount of the fine must be modest.

40. Breach of a court order is always serious, because it undermines the administration of justice. We therefore agree with the observations of Jackson LJ in the *Solodchenko* case (see para 31 above) as to the inherent seriousness of a breach of a court order, and as to the likelihood that nothing other than a prison sentence

will suffice to punish such a serious contempt of court. The length of that sentence will, of course, depend on all the circumstances of the case, but again we agree with the observations of Jackson LJ as to the length of sentence which may often be appropriate. Mr Underwood was correct to submit that the decision as to the length of sentence appropriate in a particular case must take into account that the maximum sentence is committal to prison for two years. However, because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum.”

50. Mr Hussain’s advocate did not submit that Judge Lethem had made an error of principle or taken into account immaterial factors or failed to take into account material ones. He submitted that the sentence was outside the range of decisions reasonably open to the judge, and accepted that this test was essentially the same test as the “manifestly excessive” test applied by the Court of Appeal Criminal Division to criminal sentences. As the Court noted in *FCA v McKendrick* at [47], “it is the sentence actually imposed which must be outside the range reasonably open to the judge if an appeal is to succeed”. Thus the question is whether a sentence of 12 months was manifestly excessive for the contempts found proved.
51. Nevertheless, it is pertinent to consider how the judge arrived at the figure of 12 months. As noted above, he took as his starting point a sentence of 18 months. In arriving at this starting point, he took into account the following factors: (i) Mr Hussain had had no intention of honouring the undertakings when he gave them; (ii) Mr Hussain had failed to reveal crucial information concerning the source of the funds and his status as an undischarged bankrupt at the hearings on 2 and 6 January 2020; (iii) Mr Hussain had engineered the situation to achieve the end he wanted; (iv) there was an element of premeditation in Mr Hussain’s approach to the court; (v) Mr Hussain had given false evidence and thus had set out to deceive the court; (vi) Mr Hussain had been warned by the judge before giving oral evidence and before giving the first undertaking and thus could have been in no doubt as to the seriousness of the situation and the potential consequences; (vii) as a result the Vaswanis were considerably out of pocket (although the judge rightly excluded from consideration the consequences which arose after 20 February 2020 due to the stay on enforcement of the possession order which was imposed due to the Covid-19 pandemic); (viii) the sums in question remained unpaid without justification and thus the breaches remained unremedied; and (ix) Mr Hussain had not pleaded guilty to the charges, nor had he demonstrated any contrition or remorse. Overall, the judge’s assessment was that this was “a particularly egregious breach of undertakings, particularly bearing in mind the circumstances in which the undertakings were given”.
52. Mr Hussain’s advocate submitted that a starting point of 18 months was plainly excessive given that only two counts of contempt were proved, the contempts simply consisted of a failure to pay money and that 18 months was close to the maximum of 24 months permitted.

53. There is nothing in the point about the number of counts. The judge correctly considered each count separately and imposed the same sentence for each, to run concurrently. What matters is not the number of counts, but their gravity. It is true that the breaches comprised a failure to pay money, but as the judge explained there were considerable aggravating circumstances. As for 18 months being close to the maximum, the judge expressly acknowledged this. I agree that it is on the high side, but given all the circumstances identified by the judge I am not persuaded that it was outside the reasonable range of starting points. In any event, as I have already pointed out, it is the final sentence that matters.
54. As stated above, Judge Lethem discounted the sentence to 12 months. This was partly to reflect Mr Hussain's mitigation that he was previously of good character, the effect of incarceration upon someone in his position, the effect on his future earning ability and, in particular, the fact that Mr Hussain suffers from diabetes and high blood pressure. In addition, the judge took into account the guidance given by the Sentencing Counsel on 23 June 2020 and in *R v Manning* [2020] 4 WLR 777 on sentencing during the Covid-19 pandemic to the effect that the impact of a custodial sentence is likely to be heavier at present than it would otherwise be.
55. Mr Hussain's advocate submitted that a greater discount was required, given in particular that Mr Hussain was vulnerable to Covid-19. The judge took that fully into account, however, and applied a substantial discount of six months, one-third of his starting point.
56. It is also relevant to take into account the fact that, as I have already mentioned more than once, Judge Lethem apportioned the 12 months sentence into a punitive element of eight months and a coercive element of four months, thus enabling Mr Hussain to seek remission of the latter part if he purges his contempt.
57. In all the circumstances I am not persuaded that a sentence of 12 months divided in that way is outside the range of sentences reasonably open to the judge.

### Conclusion

58. For the reasons given above, I would dismiss this appeal.

### **Lord Justice Baker:**

59. I agree.