Neutral Citation Number: [2021] EWCA Civ 1295

Case No: B5/2021/1057

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EAST LONDON FAMILY COURT
(MR JUSTICE MOOR)

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 20 July 2021

Before:

LORD JUSTICE UNDERHILL
and
LORD JUSTICE NUGEE

Between:

ALESIA VLADIMIROVNA HASKELL

Applicant

- and -

PRESTON HAMPTON HASKELL IV

Appellant

Transcript of Epiq Europe Ltd, Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
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MR TEAR (solicitor advocate) appeared on behalf of the **Appellant**

The **Respondent** appeared in person

Judgment

(Approved)

LORD JUSTICE UNDERHILL:

1. This is an appeal against an order of Moor J in the Family Court dated 17 May 2021, committing the appellant to prison for six weeks from 1 June 2021 unless he paid the sum of £50,000 which he had previously been ordered to pay to the respondent, his former wife, by way of maintenance. Decree absolute was pronounced on 19 February 2020. The wife lives in London with two of the three minor children of the marriage. The husband is based abroad. I will refer to the parties as "the husband" and "the wife". The husband is represented before us by Mr Adam Tear, solicitor advocate. The wife was represented until recently, and we have the benefit of a skeleton argument from counsel instructed by her, but she appears today in person. Having heard the submissions of Mr Tear, we have not felt it necessary to call on the wife and propose to dismiss the appeal. My reasons are as follows.

2. Moor J's order was made under section 5 of the Debtors Act 1869 and the judgment summons procedure in order 28 of the County Court Rules 1984, which remain in force. A judgment debtor can only be committed if the creditor proves to the criminal standard that they had at the date of payment specified by the judgment order, or have had since that date, the means to pay the sum in question, but have refused or neglected to pay that sum.

3. The £50,000 which is the basis of the order in the present case was originally ordered to be paid by Mostyn J following a six-day final financial remedies hearing starting on 28 January 2020. Judgement was handed down on 19 February, having been pre-circulated in draft in the usual way. By paragraph 16 the wife was awarded a lump sum payment in the sum of £5,878,732. The £50,000 with which we are concerned is the first instalment of that amount and was ordered to be paid the following day. The balance was to be paid in two tranches, one on 2 March 2020 and the other on 2 March 2022. By paragraph 20 a child periodical payments order was directed in the sum of £20,000 per year for each of the three children, with the first payment due on the day of the order.

4. A judgment summons was issued on 26 February 2020 in respect of the non-payment of the £50,000 and the first instalment of the child periodical payment order. There is some

obscurity about what the amount in question as regards the second element was, but nothing turns on that for present purposes. A second judgment summons was issued on 11 March 2020 in respect of the non-payment of the first substantial tranche of the maintenance order. Both judgment summonses were supported by witness statements from the wife giving evidence that the sums in question had not been paid.

5. Regrettably, neither summons was heard until 17 May this year, principally because of problems caused by, or at least attributed to, the pandemic. The husband was represented by Mr Tear and the wife by Ms Lister of counsel. The husband did not attend the hearing, despite having been ordered to do so, and adduced no evidence. The wife attended and gave oral evidence and was cross-examined by Mr Tear. Moor J made no order on the second judgment summons. On the first he made the order now appealed, which related only to non-payment of the £50,000. The reason why he made no order in relation to the child periodical payments order was that, even if they had not been paid as at 19 February 2020, the wife had accepted in cross-examination that some payments had been made, and he was unable on the evidence to be sure that that was not the case as regards the full amount. However, as he put it at paragraph 20 of his judgment, "I am satisfied that insofar as he [the husband] has paid, it has related not to the lump sum but to the ongoing child periodical payments order".

6. Mostyn J's order for what was in effect an immediate payment of £50,000 in respect of the lump sum due to the wife was based on his finding recorded at paragraph 62 of his judgment that that amount was "held in an account and … intended to cover, inter alia, the wife's rental costs between December and the final hearing". That finding was in turn based on an email dated 31 January 2020 from the husband to the wife's solicitors, produced in the course of the hearing, which stated that there was a sum of £50,411.38 remaining from an amount of £76,300 (the equivalent of US$100,000), which had been made available to the husband from a trust established by his father for the benefit of his grandchildren, who include the two children of this marriage who live with the wife. He also supplied a ledger entry showing how the £26,000 difference between the £76,000 and the £50,000 had arisen.

7. When Mostyn J's judgment was circulated in draft, the husband, who was then unrepresented, wrote to him on 12 February 2020 saying that the sum of £50,000 was not in fact available. Mostyn J did not make any change to his judgment in this respect, and he included in the final order a recital (numbered 11), in the following terms:

> "The respondent informed the court during the hearing that as at 31 January 2020, there was a sum of over £50,000 remaining in an account from funds emanating from the grandchildren's trust."

8. Mostyn J refused the husband permission to appeal to this court, and no application was subsequently pursued.

9. Before Moor J Mr Tear sought to revive the argument that the husband had made in his letter of 12 February 2020 to Mostyn J. At paragraphs 14 to 15 of his judgment, Moor J rejected those arguments. I need not give the details, since those particular issues are not pursued before us. At paragraphs 16 and 17 he said:

> "16. I am, therefore, satisfied beyond reasonable doubt that, on 31 January 2020, Mr Haskell had £50,411 that was available to deal with the orders that were going to be made in this case. I am equally satisfied so that I am sure that this money remained available to him on 20 February 2020 and could have been paid over to satisfy the first instalment of the lump sum.
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> 17. I am, therefore, entirely satisfied that, pursuant to s.5, the respondent had, since the date of the order, namely on 20 February 2020, the means to pay that first instalment due under the order and has refused or neglected to pay it. He simply did not pay ..."

10. The appellant's single ground of appeal is that "the judge on the evidence before him could not have been satisfied beyond all reasonable doubt that Mr Haskell had on 20 February 2020 or since that time the sum of £50,000 in liquidity and/or had not paid the same, such that the court could be satisfied that he was in default by refusal or neglect such as to impose a sentence of six weeks". That ground was elaborated in Mr Tear's skeleton argument under three heads, but, as he acknowledged before us, the first and third heads largely overlap and they are essentially concerned with two questions: first,

whether it was open to the judge on the evidence to conclude that the husband had the £50,000 available on 20 February 2020; and, second, whether it was properly proved that that sum had not been paid since then.

11. As to the former question, Mr Tear does not, as I have said, seek to revive the issues raised by the husband in his letter to the judge, but he raises what on the face of the judgment appears to be a new point, although he tells us that he did in fact make it to the judge, namely that the £50,000 represented, as Mostyn J recited in the order, a payment from the grandchildren's trust and that accordingly it was not available to be paid for the benefit of the wife by way of maintenance. Mr Tear points out that Moor J himself emphasised that these were trust proceeds when rebutting the husband's argument that part of the sum had in fact been spent to discharge his own tax liabilities. These sums, submits Mr Tear, could only be paid for the benefit of the children. However, the short answer to this point seems to me to be that the payment of the £50,000 to the wife would not have been a breach of trust, because the evidence before Mostyn J was that at least that sum was required in order to enable her to pay the rent on the property where she and the two children were living. Securing proper accommodation for the children was clearly in their interests and for their benefit. There would accordingly have been no breach of trust in his paying the sums as required by the order, and they were available to him in the relevant sense.

12. As regards proof of continued non-payment, the wife's witness statement in support of the judgment summons, dated 27 February 2020, stated in terms that the £50,000 had not been paid on the due date or subsequently, and indeed she gave the same evidence in connection with the second judgment summons issued on 11 March. She confirmed the truth of those statements in her evidence-in-chief, but she did not say expressly that no part of the £50,000 had been paid since. Mr Tear submits that that is not a sufficient basis for a finding to the criminal standard that the amount remained outstanding at the date of Moor J's order. His primary position was that it was an absolute requirement that in a case of this kind the judgment creditor must give updating evidence at the committal hearing that there had been no payment in the interval between the issue of the judgment summons and the hearing, however short (although he points out that in this case it was

unusually long), because otherwise the judge could not be sure that there was no sum outstanding.

13. However, although that was Mr Tear's primary submission, he also made a less absolute submission by reference to the circumstances of the present case. He referred to his cross-examination of the wife, in which he put to her that various comparatively small payments had been made since the issue of the summons – these being the ones that were taken into account by the judge, as already mentioned, in the context of the child maintenance aspect of the summons – although he did not put to her that the £50,000 had been paid. After exploring those payments with her, and it becoming clear that she was not in a position to give precise answers about them, he concluded the cross-examination by asking, "Can you tell this court today exactly how much money Mr Haskell has paid you since you issued these judgment summons?" and getting the answer, "I cannot say exactly how much money". He submitted that answer also made it impossible for the judge to be sure that the £50,000 had not been paid in the interval since the issue of the judgement summons. He made a further point to us that since the wife had no other apparent sources of income the question naturally arose of what she could have been living on in the intervening period of more than a year, and how she had been paying her lawyers, if she had not received substantial sums from the husband. In those circumstances too, he submitted, Moor J could not properly have been satisfied so that he was sure that no part of the £50,000 had been paid.

14. I do not accept those submissions. I fully accept that the judge was not entitled to make a committal order unless he was sure that the £50,000 had not been paid, but there is no rule that the only way in which he could be sure of that point was by explicit evidence given at the time of the committal hearing that the position had not changed since the statement in support of the original judgment summons. What is required will depend on all the circumstances of the case, including such inferences as it was proper for the judge to draw from the evidence that he did hear, which might include an inference that unless there were some reason to believe to the contrary the original default was continuing. In the circumstances of the present case as I have outlined them Moor J was in my view fully entitled to conclude to the criminal standard that the £50,000 was indeed still outstanding.

15. For those reasons, I would dismiss this appeal. I should mention the appeal was lodged seven days out of time. In the circumstances, I think the better course is to allow the extension but to dismiss the appeal on the merits.

LORD JUSTICE NUGEE:

16. I agree.

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

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