

IN THE FAMILY DIVISION OF THE ROYAL COURTS OF JUSTICE

The Royal Courts of Justice
Strand
London
WC2A 2LL

BEFORE:

THE HONOURABLE MR JUSTICE COHEN

BETWEEN:

DS **APPLICANT**

- and -

HR **RESPONDENT**

Legal Representation

Mr Nigel Dyer QC (instructed by Kay Georgiou Solicitors) on behalf of the Applicant
Ms Deborah Bangay QC (instructed by Adler Family Law) on behalf of the Respondent

Judgment

Judgment date: 1 August 2019

Reporting Restrictions Applied: No

“This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.”

“This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.”

Number of folios in transcript 35
Number of words in transcript 2,469

The Honourable Mr Justice Cohen:

1. I have before me an application taken out by Ms S, the wife, in proceedings between her and her former husband, Mr R in which she seeks what is conventionally known as a Hadkinson order barring the husband from proceeding with an appeal in Family Law Act proceedings unless he makes good the admitted default in his payments of child maintenance. The application is made in the context of some of the least attractive and commercially suicidal litigation that I have seen for a long while.
2. The law in relation to Hadkinson applications is very well set out in both of the position statements filed on behalf of the parties. They have had the advantage of being represented by counsel of the highest quality assisted by solicitors who have worked assiduously on behalf of their clients. It is a sad reflection of this litigation that the amount of the brief fees alone of counsel exceed the sum that is in issue in this application.
3. The Hadkinson doctrine dates back to the case of that name reported at [1952] P 285. Romer LJ said this:

“It was the plain and unqualified obligation of every person against or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.

4. And says Mr Dyer QC, on behalf of the wife, this is a case where the husband is a solicitor who consented to an order for child maintenance in the sum for the two children of £5,000 per month indexed linked, and that is the order which he is alleged and, indeed, admits to have breached.
5. Denning LJ, as he then was, in his judgment said this:

“It is a strong thing for a court to refuse to hear a party to a cause, and it is only to be justified by great considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance”.

6. And then quoting from Sir George Jessel M.R. in *Re Clements* (46 L.J. Ch. 383) Denning LJ went on as follows:

“I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men’s right, that is, if no other pertinent remedy can be found”.

7. And then dropping a couple of lines Denning LJ said:
“Applying this principle I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues,

it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed”.

8. Ryder LJ in *Mubarak* [2004] 2 FLR 932 set out the following questions which he said should be answered:
 - “a) is the husband in contempt?**
 - b) is there an impediment to the course of justice?**
 - c) is there any other effective means of securing compliance for the Court’s orders?**
 - d) should the Court exercise its discretion to impose conditions having regard to the question: is the contempt wilful, i.e., is it contumacious and continuing?**
 - e) if so, what conditions would be proportionate?”**
9. In *M v M* [2009] 1 FLR 790 Bodey J and in *C v C* [2011] 1 FLR 434 King LJ have pointed out that these are orders which curtail the ability to litigate and the power must be exercised judicially, sparingly and proportionately.
10. It is an important starting point to look at the history of this matter. In March 2019 Family Law Act proceedings took place in the Central Family Court. They came before Her Honour Judge Brasse.
11. The application before the Court was one in which the applicant was one of the children of the family. She sought an order excluding her mother’s new husband from the matrimonial home. She was supported in that application by her father. The application was opposed by the mother (the applicant before me) and her husband.
12. All four parties were represented, three of them by leading counsel. Her Honour Judge Brasse determined that the child’s application was without jurisdiction and she dismissed it. She made an order that the father, the respondent before me today, pay to the wife’s husband costs in the sum of £37,000, the judge seeing, in effect, his hand behind the litigation.
13. The child sought permission to appeal the dismissal of the application; no other party sought permission, and I dismissed the application on paper. There was no request for an oral hearing.
14. The father sought to appeal the order for costs. I have dismissed that application on paper, but it has been renewed and an oral hearing is due to take place on 6 November.
15. The direct result of the costs order was to cause the father to cease paying child maintenance. That this is the case can be seen not only by the fact that chronologically he ceased to pay the maintenance as soon as the costs order was made, but also by what he has written, and I quote from at B65 to B67 of the bundle.
16. The father said this:

- “a) I can decide not to pay anything in terms of the property, the consent order (that is referring to child maintenance), or the costs order, causing the commencement of enforcement and forfeiture proceedings in relation to the family home. I have no other assets in the UK. The mortgaging bank will then step in and sell the property and take their £1.5 million. The balance under the consent order can only go into trust for the children and cannot be touched by you. Everyone will need to vacate the property.**
- b) bringing the matter into the public arena”** and he then sets out various entities with which the wife’s husband is said to be connected and which he suggests he will publicise, presumably to cause embarrassment.

17. On 13 June this year he wrote in similar vein saying this:

“As your husband is seeking to recover his legal costs and threatening insolvency proceeding against me, I shall draw to your attention that I am a trustee of the property and was acting as trustee in the proceedings. My only asset in the UK and the trust property is the family home, and so this is the only asset that any demand can be enforced again.

I hereby give you notice of my intention to sell the family home. I will be contacting estate agents to arrange this. You will be expected to provide them with access to the flat”

18. And then later:

“I will be doing the above unless I get a written acknowledgement from [the husband] that he withdraw his demands within the next 24 hours”.

19. These are astonishing communications from the father of children saying that he will make them homeless unless the wife’s husband foregoes the order for costs made in his favour.
20. I ask myself the questions raised by Ryder LJ, quoted above, before coming to what is the nub of this appeal. Is the husband, the father, in contempt? Well, that is admitted, as it has to be. He is a rich man. He has chosen not to pay the maintenance that was due on 1 June or 1 July. There is another payment that was due today, which it is assumed has also not been paid. He can pay easily. The sum due under the order is currently £5,546 per month as a result of index linking, and he is either two or three months now in arrears.
21. Two, is it an impediment to justice? In my judgment it is an impediment to justice if a father simply chooses to pay nothing whatsoever towards the support of his children, particularly when the payment is the subject of a consent order. This is all the more so when at the same time, he comes to court to say that he should not pay anything towards the cost of the failed litigation which he supported in relation to the very same child, or children.

22. Three, is there an effective alternative means to enforcement? The answer is plainly not. He says as much in the passages which I have read. The fact that the wife has taken out proceedings for enforcement which so far have simply lead to an order that he file a statement of means and appear at court, seems to me fairly unlikely to produce anything at all, if, as the husband says, he has nothing whatsoever in this jurisdiction apart from the home in which the children live and when he lives in the UAE. That property, pursuant to the consent order which the parties entered into, goes to the children when they reach the age of majority. So, all the wife can seek to do is to deprive the children of their asset in order to meet the husband's default. That does not seem to me to be an effective means of enforcement.
23. The most substantial point that the husband raises is that these proceedings are not the same. The Hadkinson order is sought in Family Law Act proceedings and the maintenance order was made in Financial Remedy proceedings. Related they may be, but not the same, And, says, Miss Bangay QC, the Family Law Act proceedings were a case of daughter against stepfather; The proceedings which the mother is seeking to stop are those which arise out of an order made against the father in favour of the new husband.
24. Well, that is all right as far as it goes, but it does not go very far, in my view, when it is quite clear in the father's mind that these two sets of proceedings are intrinsically linked, and it is directly as a result of the outcome in one hearing that he has chosen not to pay the money that is due pursuant to an order in other proceedings. In his mind there is a very clear link between the two sets of proceedings.
25. I accept that this may be the first time in which the Hadkinson principle has been extended to cover proceedings which are not identical, albeit related. But it seems to me that this is a remedy which is not so closely confined that it cannot be extended to this situation. To use the words of Peter Jackson LJ in *De Gafforj* (2018) EWCA Civ 2070:
- “It does not seem to me that the Hadkinson doctrine is so inflexible that it cannot be applied to this situation”.**
26. Miss Bangay says to me that this is a very draconian remedy. In one way it is, in the sense that the father will not be allowed to prosecute his appeal if he does not pay the existing arrears. But in another way it is not. It is a very small sum of money to him, but it is a sum of money which he has been ordered to pay, and which he agreed to pay to his children.
27. I accept that the breach needs to be a very clear breach. I am not persuaded that the breach can be clearly shown to be anything beyond the failure to pay the child maintenance that is due under the order. There are arguments about other sums of money which it is said are owing but it seems to me proper that the appeal process should be allowed to take its course without the father's ability to conduct it being hampered by disputes about money matters in respect of which he may have a valid defence. But he has no defence whatsoever to the payment of maintenance.
28. Miss Bangay says this remedy is a sledgehammer to crack a nut. It may be that that is the case. She points out how much the parties, in particular in this case the wife, have spent on this litigation. The answer to that is to make the costs order proportionate to the sums that are involved in this litigation. It is not a reason for me not making the

order. I shall order that unless he pays the maintenance due on 1 June, 1 July and 1 August, and those sums that will become due on 1 September and 1 October as they fall due, the appeal will be struck out.

29. Insofar as the charging order application is concerned, I simply adjourn that generally with liberty to restore if thought appropriate.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

The Transcription Agency, 24-28 High Street, Hythe, Kent, CT21 5AT

Tel: 01303 230038

Email: court@thetranscriptionagency.com
