Neutral Citation Number: **[2024] EWHC 2521 (Fam)**

Case No: FD24P00451 and NR23P50573

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 October 2024

Before:

MR DAVID LOCK KC
SITTING AS A DEPUTY HIGH COURT JUDGE

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Between:

AB **Applicant**

- and –

CD **Respondent**

- -
- -

Brian Jubb (instructed by Anthony Louca Solicitors Limited) for the **Applicant**

Hearing date: 2 October 2024
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Approved Judgment

1. In this case the applicant mother, AB, ("**the Mother**") applies pursuant to an application made under Part 18 FPR on a without notice basis for an order that a property belonging to her ex-husband and father of her daughter, CD, ("**the Father**") be sold and that she be permitted to use any funds so generated to meet the costs of litigating in Dubai in order to seek an order from the Dubai Court to require the Father to hand over their daughter, EF to her custody and to allow her to bring EF back to live with the Mother in the United Kingdom.

2. In order set this application in context, it is necessary to say a little about the litigation between the parties and the sequence of events that has brought the Mother to making this application. EF was born in 2018 and is now aged 6. On 21 April 2023, His Honour Judge North sitting in the Family Court made a final child arrangements order whereby, amongst other orders, EF was to live with the Mother. Provision was made within that order for EF to spend time with the Father and in July 2023 the Father took EF abroad to Florida for an agreed holiday. The Father provided details of the hotel where they would be staying and it was agreed that he should return to England with EF on a date in August 2023. The Father did not return to the UK with EF at the end of this holiday. Instead, he abducted her to live with him abroad in breach of the terms of the order of His Honour Judge North.

3. The Mother then issued these proceedings seeking a Return Order. A Return Order was made by Mrs Justice Arbuthnot on 1 September 2023 which required the Father to return EF to the UK by 8 September 2023. The Father failed to comply

with that order. A further hearing was held on 15 September 2023 where the recitals recorded as follows, and where "He" refers to the Father:

a. He had not booked return flights to the United Kingdom;
b. He was not prepared to confirm that he would return to the United Kingdom;
c. He refused to disclose his current address or the country that he was in;
d. He confirmed that EF was with him;
e. He confirmed that he was aware that the purpose of his trip to the United States in July 2023 was for a two week holiday and that he did not have the applicant's consent to stay beyond the two week holiday;
f. He confirmed that he had received by email the return order made by Mrs Justice Arbuthnot dated 1 September 2023 and that he was aware that he was in breach of that order as he had not returned EF to the United Kingdom by 8 September 2023.

4. The Mother issued contempt proceedings which came before the Court on 8 February 2024. The Father attended remotely from an undisclosed location and was represented by counsel. He elected not to give evidence. The Judge, Mr Justice Cusworth, found that the Mother had proved that the Father was in contempt of court and sentenced the Father to a period of imprisonment of 12 months. That sentence was suspended for a period of 28 days to allow the Father an opportunity to return EF and apply to purge his contempt. The Father did not take advantage of that opportunity and so, if the Father were to return to the UK, he would be arrested and, subject to any application to purge his contempt, would be required to serve that sentence of imprisonment.

5. In May 2024 the Mother managed to find out that the Father was living with EF in the United Arab Emirates ("**the UAE**"). She then travelled to the UAE to seek to resolve matters. What happened next is explained in a witness statement of the Mother's solicitor which explains:

"Having located the respondent father's exact location she attempted to confront the respondent and have contact with EF. The authorities there were extremely cautious leading to very little progress. In June 24 the applicant mother issued proceedings in the civil court in Dubai. On 25 June 2024 the Court in Dubai issued a decision as follows; "It will be postponed until a certificate is submitted from the competent British Court stating that the attached ruling has become final and cannot be appealed". These Orders were made on 4 July 2024 by this Court and have been Apostilled. The orders also need to be Attested by the UAE Embassy in London to have legal weight and recognition in Dubai. This should be done with a week"

6. The Mother's solicitor explains the background to the present application as follows:

"11. The respondent father is the sole freehold owner of property … ("the property"). The property has a first charge registered against it dated 1 October 2021 in favour of Barclays Bank Plc ("Barclays"). The property was used by the respondent father as an AirBNB income producer and the property was managed on his behalf by Ms [GH] until recently. The property is thought to have been abandoned by the respondent father and lies empty. Pursuant to an order made by this Court on 4 October 2023 a Restriction has been entered against the title to the property which was registered on 9 October 2023. The current amount due to Barclays to redeem their charge and including arrears is in the region of £465,000. According to internet based research the property should be worth on the open market approximately £550,000 to £600,000.

12. The applicant mother has worked tirelessly to secure counsel in Dubai to assist her to rescue EF however the cost of this is prohibitive for her as she is of modest means. In or about June 2024 the applicant mother issued proceedings in the Civil Court in Dubai, for the enforcement and / or recognition of the English proceedings…

13. It is in my view imperative that the applicant mother be afforded a means to pursue the recovery of EF by instructing competent legal counsel in Dubai. On enquiry the cost of this would run into tens of thousands of pounds which the applicant mother simply does not have. The Legal Aid Agency will not fund the matter abroad. Bearing in mind that [EF] has been unlawfully kept away from her country of habitual residence since August 2023, has not had video contact with the applicant mother since 23 May 2024, has not attended school in England with her contemporaries and friends (as is her right as a natural person), and may be spending much of her time in a small hotel room in Dubai, it is respectfully submitted leave to issue a Writ of Sequestration ought to be made today. The applicant mother's case for the provision of tools to see about the return of EF is entirely at the mercy of this Honourable Court"

7. Mr Jubb, who appears for the Mother, was unable to explain the basis upon which the restriction was entered because, at this stage, the Mother has not applied to enforce any financial claim she has against the Father. Nonetheless, it seems to me that this is a potentially meritorious application because the Mother is only having to incur the expenses of litigating in the UAE because of the Father's failure to comply with orders made by this court. However, even though I am sympathetic to the Mother's position, there are a series of reasons why, at this point, it does not appear to me that I have power to make the order that the Mother seeks.

The law

8. The law relating to the use of sequestration orders to assist parties give effect to a High Court order where a child is abducted abroad has some history. Sequestration has long been used as a method of enforcing monies which ought to have been paid as part of family orders: see Part 33 of the Family Procedure Rules 2010 ("**FPR**"). FPR 33.1 provides that Parts 50, 83 and 84 of the Civil Procedure Rules apply to enforcement and a sequestration order can be applied for under CPR 83.14A. The underlying basis a sequestration order in family

proceedings was explained by Scarman J (as he then was) in *Romilly v Romilly* [1964] P 22 who said at p24 "*Sequestration is, however, a process of contempt*". However, in this case the Mother is not seeking to sequest the Father's property in order to pay monies that are owed to her but for an entirely different purpose, namely to fund the costs of her litigating in the UAE where the need to do so has only arisen as a result of the failure by the Father to comply with return orders. Any such application, as Mr Jubb rightly recognised, now needs to be made under Part 37 FPR and not under Part 33.

9. In *Richardson v Richardson* [1989] Fam 95 Scott Baker J tried a case that involved a mother who had taken her children to Ireland to live in breach of the terms of orders made in the High Court. The Judge said:

> *"In order to retrieve the children it is necessary for the father to take proceedings in the Irish courts. Legal aid is not available for that purpose. The father has no funds. There is evidence from Irish solicitors, Messrs. Matheson Ormsby & Prentice of Dublin, that in the ordinary way the Irish court will not look behind the United Kingdom order, and that an application would have a reasonable chance of success. They estimate that a one-day hearing would cost in the region of 5,000 Irish punts. At an exchange rate of 1.18 punts to the pound, this would be £4,237.28 sterling.*
>
> *The question is whether money can be realised by the sequestrators from the house in York for this purpose. The evidence is that the house was bought in the mother's sole name on 17 June 1988 for £35,750, with a mortgage from the Woolwich Building Society of £31,000. On 14 March 1989 the sum necessary to redeem the mortgage was £31,111.68. That is the latest figure available. It is said that the property would fetch £60,000 to £62,000, thus leaving an equity after deducting the costs of sale of something approaching £30,000. There is also evidence that the mother has taken steps towards trying to sell the premises"*

10. The Judged explained that the question was the extent of the court's jurisdiction. He said:

> "*Sequestration is an ancient and drastic remedy that the court is prepared to use to secure enforcement of its orders in serious and clear cases. The writ of sequestration binds real and personal property from the date of issue: see Halsbury's Laws of England, 4th ed., vol. 9 (1974), p. 62, para. 102*".
>
> ....
>
> *The writ of sequestration directs and authorises the sequestrators to enter on the contemnor's property and to take possession of all property liable to sequestration. The sequestrators, having taken possession of the property, are required to detain and hold it until the contempt is cleared. The property sequestered may be applied to meet the demand of the party prosecuting the writ but an application to the court for sale is necessary"*

11. The Judge decided that there was power for the court to enable the sequestrators to raise money against the security of the property to but in order to fund proceedings in Ireland to give practical effect to the order of the English High Court in Ireland. He said:

> *"In my judgment, the costs of the Irish proceedings are no different in principle from any other costs incurred in enforcing or endeavouring to enforce a court order. It is not only reasonable to incur those costs, it is the only remaining means (I find) of securing compliance with the court's order. It is clear from the cases that the parties seeking to secure compliance with an order can recover the costs of doing so"*

However, the Judge specifically left open at that stage the question as to whether the court had the power to order the sale of the property for that purpose.

12. The question as to whether the powers of the court extended to the sale of a sequestered property was considered by the same judge in *Mir v Mir [*1992] Fam 79. In that case the mother of a ward, who had been removed from the jurisdiction by his father without leave of the court in contravention of an order made in wardship proceedings, applied for the father to be committed to prison for contempt of court and for a writ of sequestration in respect of his property. On 13 June 1991 Sir Stephen Brown P. committed the father to prison for six months, suspended on his compliance with the court's order within one month, and granted the writ of sequestration so that sequestrators, acting on the court's instructions, might take possession of the former matrimonial home and let it or use it as security for a loan in order that the mother might finance litigation in Pakistan directed to seeking the return of the ward to the jurisdiction. The father having failed to return the ward to the jurisdiction, the mother applied for the sequestrators to be granted leave to sell the property. Thus, in that case, the application to sell the property arose after a sequestration order had been made.

13. The Judge explained that the underlying reason why the courts in earlier times would not make an order for sale of freehold property was the absence of any procedure whereby good title could be given to the purchaser. He observed that "*That difficulty no longer exists today*" because of the powers in s39 of the Supreme Court Act 1981. Given that power exists, the Judge said:

> *"I have come to the conclusion that the court does everything that it can to secure compliance with its orders, particularly in the case of wards of court, where they are wrongly being detained out of the jurisdiction. It seems to me that the order that is sought in this case is an appropriate one, and is one that I can properly make in law. I therefore grant the relief that is sought"*

14. It is also clear from *re HM (Vulnerable Adult: Abduction)* [2010] EWHC 870 (Fam) that the powers of the court to sequestrate assets arises as part of the common law powers of the High Court and not as part of any statutory framework. See also the helpful commentary in Arlidge, Eady and Smith on Contempt at para 14-149.

15. When opening this case, Mr Jubb referred to FPR 37.19 as the source of the powers his clients were relying upon. This rule provided:

> ***"37.19. Writ of sequestration to enforce a judgment, order or undertaking***
> *(1) If—*
> *(a) a person 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) a person disobeys judgment or order not to do an act,*
> *then, subject to the provisions of these Rules and if the court permits, the judgment or order may be enforced by a writ of sequestration against the property of that person.*
> *(2) If the time fixed by the judgment or order for doing an act has been varied by a subsequent order, references in paragraph (1)(a) to the time fixed are references to the time fixed by that subsequent order.*
> *(3) If the person referred to in paragraph (1) is a company or other corporation, the writ of sequestration may in addition be issued against the property of any director or other officer of that company or corporation.*
> *(4) So far as applicable, and with the necessary modifications, the Chapter applies to undertakings given by a party as it applies to judgments or orders"*

16. This rule provided a specific power to allow the Court to issue a writ of sequestration but it was repealed in 2020. As Mr Jubb accepted in helpful written submissions following the hearing, those rules were repealed at the same time as changes were made to CPR 81. The Explanatory Memorandum to the SI changing the rules, the Family Procedure (Amendment No. 2) Rules 2020, explains the reason for the change in the rules as follows:

> *"These Rules codify procedural rules on contempt of court for all types of contempt in family proceedings. The principal issue to which the codification is addressed arose in R v Stephen Yaxley-Lennon (aka Tommy Robinson) [2018] EWCA Crim 1856, following which proposals for recasting the rules*

relating to contempt of court in courts to which the Civil Procedure Rules 1998 (CPR) apply were developed and put out to public consultation by the Civil Procedure Rule Committee (CPRC)"

17. Thus, as this is a codification of the powers of the High Court, it is necessary to look for the power to make the order the Mother seeks within the new form of Part 37. FPR 37.9 provides:

> *"(1) If the court finds the defendant in contempt of court, the court may impose a period of imprisonment (an order of committal), a fine, confiscation of assets or other punishment permitted under the law.*
> *(2) Execution of an order of committal requires issue of a warrant of committal. An order of committal and a warrant of committal have immediate effect unless and to the extent that the court decides to suspend execution of the order or warrant.*
> *(3) An order or warrant of committal must be personally served on the defendant unless the court directs otherwise.*
> *(4) To the extent that the substantive law permits, a court may attach a power of arrest to a committal order.*
> *(5) An order or warrant of committal may not be enforced more than two years after the date it was made unless the court directs otherwise*

18. Thus, as it seems to me, the word "sequestration" of assets in the context of contempt proceedings under FPR Part 37 should be confined to history and the new term to be used is "*confiscation of assets"*. As mentioned above, in the CPR, a rule change which took effect in 2023 provides that sequestration can be used as a method of enforcement of money orders, as distinct from sequestration as sanction for contempt: see CPR 83.14A. But, as I have explained, this property is not being sought to be sequestered to meet a debt owed by the Father to the Mother but to fund litigation in the UAE which the Mother has to undertake as a result of the failure of the Father to comply with orders made by this court.

19. There are two points which arise relating to the new power of "confiscation". Firstly, there does not appear to be any limitation on the type of property of a person in contempt that can be considered for potential confiscation. I thus consider that this real property could be subject to a confiscation application, as could any bank account standing to the credit of the contemnor or, for example, the contemnor's beneficial interest in any pension fund. Secondly, it seems to me that the change in the rules has probably not affected the range of powers open to the Court once an asset has been confiscated. Thus, whilst damages are not available as a remedy for contempt (see Arlidge, Eady and Smith on Contempt and *JSC BTA Bank v Ablyazov & Anor* [2016] EWHC 230 (Comm)). Nonetheless, on an application for contempt in the Family Division, it appears to me that it is open to the court to confiscate the assets of a person who is held in contempt and then to direct that those confiscated assets should be made available to another party as a means of putting right the wrong which led to the contempt finding. That appears to be the effect of CPR 37.1(2) which provides "*This Part does not alter the scope and extent of the jurisdiction of courts determining contempt proceedings, whether inherent, statutory or at common law*".

20. There are procedural consequences arising from the fact that the power to make a confiscation order in respect of the property of the Father arises under FPR 37.9, namely that the power to make a confiscation order of property belonging to a party in contempt and the power to make directions as to what should happen to that property can only be exercised as part of the exercise of deciding the appropriate order to make following a finding that a party has acted in contempt of court.

21. The Mother relies, of course, on the fact that Mr Justice Cusworth made a finding that the Father was in contempt of court in February 2024. However, the Judge made decisions at that hearing about which orders to make consequent upon that finding of contempt. No application was made by the Judge at that hearing that an order should be made that the Father's property should be confiscated, a direction should be made for the property to be sold and that the proceeds of the

sale of the property should be used to fund the legal costs of the Mother in litigating in UAE. The Mother could have sought a confiscation order at that stage in relation to the property, but I accept, of course, that the Mother could not have made an application to use the proceeds to fund the costs of litigation in the UAE because, at that point, she did not know where the Father was living.

22. Any judge undertaking a sentencing exercise following a finding that a party is in contempt needs to look carefully at the balance of measures that the judge seeks to impose and to decide whether the totality of measures appropriately meets the gravity of the contempt. The sentencing exercise undertaken by Mr Justice Cusworth in February 2024 followed his finding that the Father was in contempt in February 2024 and sought to impose suitable sanctions. That exercise has now been completed and I do not consider it is appropriate for me to seek to re-open the exercise by, in effect, adding a further term to the order made by Mr Justice Cusworth, particularly on an application that is without notice to the Father.

23. Further, in my judgment, the court has no power to make an order under FPR 37.9 pursuant to an application under Part 18 FPR. There are specific procedural rules that have to be followed in the making of a contempt application: see FPR 37.4. It follows that a Part 18 application cannot be used to make such an application: see FPR 18.1(2)(b). In particular, a contempt application can only be made on notice to the proposed contemnor and not on an *ex parte* basis.

24. I do not consider that this will necessarily become a particular difficulty for the Mother in this case because the Father remains in breach of the terms of existing mandatory orders. It does not seem to me necessary to make a new return order because the general effect of a mandatory order made by the High Court was explained by Chamberlain J in *Mohammad v Secretary of State for the Home Department* [2021] EWHC 240 (Admin) who said at para 24:

> *"...when the court grants a mandatory injunction, it must be complied with by the time stipulated unless it is set aside before that time. If it is not complied*

with by the stipulated time, the obligation to comply remains. A pending application to discharge or vary it does not excuse a failure to comply. The obligation to comply remains unless and until the order is set aside by a judge: see South Cambridgeshire District Council v Gammell [2006] 1 WLR 658, [29] -[33]." [*emphasis added*]

25. Whilst those observations were made in a wholly different context, it seems to me that mandatory orders made in the Family Division of the High Court must have the same effect as orders made in the Kings Bench Division. Chamberlain J must be right in saying that a person who fails to comply with a mandatory order by the stipulated date remains under a legal obligation to comply with the terms of the order, albeit he will perform the obligation at a later date than specified in the order. If the court makes a mandatory order to require a party to take a defined step, such as to cease to live in a dwelling house by a defined date and the person fails to vacate the property by that date, the person cannot thereafter say that they are free from the obligation to leave the property. It would be nonsensical to suggest that such a person is no longer under any duty to comply with the eviction order because they have failed to leave the property by the defined date. It thus seems to me that the statement made by Chamberlain J that a failure to comply with a mandatory order by the defined date does not relieve the order of legal effect must be right and that "*the obligation to comply remains"*.

26. Thus, in my judgment, the effect of the orders made by Mrs Justice Arbuthnot in this case is that the Father continues to be under a legal obligation to return EF to the UK notwithstanding the date set out in the order has passed. Thus, it seems to me that, unless the Father seeks to purge his contempt, it is open to the Mother to bring fresh contempt proceedings against the Father arising out of his continuing failure to comply with the orders to bring EF back to the UK. If such an application were to be made and the contempt was proven, it would then be open to a judge to make a confiscation order in respect of the property under FPR 37.9 and then direct the sale of the property and make order to provide that part or all of the proceeds of sale can be used to fund the Mother's litigation costs in the UAE.

However, there is no contempt application before the court at the moment and thus I am not in a position to be able to make a confiscation order.

27. Nonetheless, I can see considerable merit in the concern that, if the Father is put on notice of this application, he may seek to charge or otherwise dispose of the property before such an application could be brought before the Court. Accordingly, if the Mother's solicitors provide an undertaking that they will issue and serve a fresh set of contempt proceedings, I am thus prepared to make orders:

    a. Dispensing with the need for personal service of the application on the Father and giving permission for contempt proceedings to be served by email; and
    b. To make an injunction order to restrain the Father selling, charging or otherwise dealing with the property pending the hearing of the contempt application, thus providing a proper jurisdictional basis for the present Restriction which has been registered against the property.