



Neutral Citation Number: [2024] EWHC 290 (KB)

Case No: CA 2022 000966

IN THE HIGH COURT OF JUSTICE
ON APPEAL FROM the County Court sitting at Swansea
His Honour Judge Beard
E36YJ705

Swansea Civil Justice Centre
Caravella House
Quay West, Quay Parade
Swansea SA1 1SP

Date: 14/02/2024

Before :

LORD JUSTICE BIRSS

Between :

Andrew Paul Roberts
- and -
Kathryn Jayne Jones

Appellant

Respondent

Simon Butler and Anirudh Mandagere (instructed by **Advocate**) for the **Appellant**
The Respondent did not appear and was not represented

Hearing date: 12 December 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 14 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Birss:

31. This appeal arises from a hearing in the Court of Appeal in a case in which at a late stage it was appreciated that the route of appeal was to the High Court and not the Court of Appeal and on the application of the approach in *Massie v H and M* [2011] EWCA Civ 115. The full background of this appeal is set out in the judgment of the Court of Appeal (neutral citation [2024] EWCA Civ 118) given at the same date as

this judgment. There is no need to repeat it. This judgment is written to be read following on from that judgment. It picks up the paragraph numbering accordingly.

Ground 1

32. This ground arises because on 5 April 2022 HHJ Beard suggested to Ms Jones that she answer questions by a court officer, which is what she did, whereas the underlying order of 5 May 2021 provided that the judgment debtor was to be questioned before a judge, with the consequence under CPR 71.6(3) that the questions were required to be asked by the judgment creditor or his representative.
33. Mr Roberts also makes two further points about what happened when Mr Jones was questioned by the court officer. The 5 May 2021 order required all documents relevant to her means to be produced but Ms Jones produced no documents at all, as the record of her examination records. Mr Roberts also challenges the accuracy of the answers Ms Jones gave. On this appeal there is no evidence or ground on which the accuracy of the answers could be challenged. However Mr Roberts' point on the absence of documents is an important one.
34. The reasons for inviting Ms Jones to be questioned by a court officer can be seen from the transcript of the hearing. The judge asked Ms Jones what her reasons for not attending on the previous occasion were. She apologised, explaining that she had heard that her ex-partner (Mr Roberts) was attending, and said "it's not a very nice relationship and I don't want to be in the same area as him." Ms Jones also explained that she had had severe depression, sometimes struggled to leave the house unless she was with her mother, and was on medication for that. The judge's questions showed that he thought that the original order was for Ms Jones to attend to answer questions before a proper officer. He also asked why she had not attended to answer questions before a proper officer. At that point, having observed understandably that the matter had gone on for far too long, the judge asked Ms Jones if she would be prepared to answer questions before the proper officer today, she agreed and the matter proceeded that way.
35. The first difficulty is that it was a mistake to have assumed that the relevant order was for Ms Jones to attend and be questioned by a court officer. The original 5 May 2021 order was quite clear that questioning was to be before a judge. So the premise of the approach taken was wrong and in effect what was done amounted to a variation of the original order on no notice to the other party.
36. The second difficulty is the absence of documents. Again the original 5 May 2021 order was quite clear that Ms Jones was to produce relevant documents when she attended for questioning. Ms Jones was not asked by the judge whether she had any of the relevant documents with her to facilitate the process. No doubt she did not have any since she had been brought to court under an arrest warrant.
37. One possible course available on 5 April 2022, given Ms Jones' explanation why she had not attended before, was to consider a way forward by exercising the wide powers available in the case of a vulnerable party under CPR Part 1 PD 1A. The special measures include the use of screens, remote attendance and questioning through an intermediary. No doubt there are many other options but one possibility might have been for a hearing to be arranged whereby Ms Jones – with her documents – attended court in person to be questioned before a judge, but with Mr Roberts attending remotely.

38. If the court thought that the right thing to do was for the judgment debtor to attend before a court officer, directions could have been given for that to take place at a date in the future, with the debtor producing relevant documents, and giving the judgment creditor Mr Roberts notice of that variation of the order (made of the court's own motion and without notice) and an opportunity to apply to set it aside. If he had done so then the court could rule on what the best approach was in the presence of both parties.
39. These possibilities are more involved as a way forward than what in fact happened but they would have avoided the problems inherent in the short cut which was taken on 5 April 2022.
40. A more difficult question is what should be done about this now. I believe the answer is that this court should allow Mr Roberts' appeal from what was in effect a variation of the original 5 May 2021 order which had required Ms Jones to attend before a judge, producing relevant documents. The matter should be remitted to the county court sitting at Swansea for further directions as to how to proceed. The judge giving directions may take the view that for Ms Jones to be required to attend and produce documents may require an order for some appropriate special measures under PD1A.

Ground 2

41. The thrust of ground 2 was that an immediate custodial sentence should have been passed and it was wrong to order a suspended sentence, given there was a previous suspended committal order. The submissions viewed this ground as another way of putting the case that the order was too lenient. On that basis this aspect has fallen away as explained in paragraph 9 of the judgment of the Court of Appeal. However the ground also involves the contention that the court ought to have activated the suspended sentence, and therefore raises the question of what basis there was to impose any sentence at all (although since Ms. Jones did not appear nor appeal, there was no-one before the court to take that point).
42. The matter was approached on the basis that the defendant's admitted failure to attend court on the previous occasion of 11 March 2022 was a contempt. There was also a reference to a suspended committal order as if it had been issued on that occasion whereas as best one can tell the only suspended committal order made before 5 April 2022 was the defective order of 5 November 2021. On the basis that the matter was being approached as a breach of the conditions of suspension of the 5 November 2021 committal order, that raises the question of what options are available to a judge where the debtor does not comply with the conditions on which a properly drafted suspended committal order under Part 71 is made. Rule 71.8(3)(b) indicates that the judge in such a case can consider whether to discharge the order. That necessarily suggests that they are not bound to activate it. I would hold that the court therefore does have a discretion to make other orders, on proper grounds, aside from simply having a binary choice between activating the suspended committal and discharging it altogether, but that is a provisional view having not heard full argument on the point. On that basis, if the order of 5 November 2021 had not been defective, then the judge would have had power to pass a custodial sentence on 5 April 2022. He would also have had the power to suspend that sentence.
43. However, the 5 November 2021 order was defective as a suspended committal order because it did not specify a sentence of imprisonment to be served (see paragraphs 16-18 of the Court of Appeal judgment in this case). The question then is what if any consequences flow from this. Although Ms Jones did not appear, and the order is

spent, I would nevertheless quash the suspended sentence of 14 days imprisonment passed on 5 April 2022. It could only have been made as a consequence of a failure to comply with the conditions of suspension in the 5 November 2021 order, but that order was fundamentally flawed.

Ground 4

44. Ground 4 relates to the amendment to the order of 5 April 2022 made under r40.12. By this amendment a new recital was added to the order, purportedly under the “slip rule” CPR 40.12, which provided:

“AND UPON HHJ Garland-Thomas ordering the contempt issues in Family proceedings, case number SA19P50901, be considered at the hearing of civil case E36YJ705 on 15th October 2021 and that matter having been adjourned and heard 5th April 2022, and all matters in both cases being before the court.”

45. Recall that when the civil case was sent to Swansea there was a direction that it be heard on the same occasion as family proceedings between the same parties. The family proceedings referred to in this recital are those proceedings.
46. There is nothing on the face of the order to explain why this amendment was made but it appears to have taken place as follows. After the 5 April 2022 order was made Mr Roberts queried it with the court. There was a question whether the court on 5 April 2022 had had just the civil matter before it or the family contempt proceedings too. The order was amended by the court apparently so as to indicate that the family contempt proceedings had been before the court on 5 April 2022 and so the order made had taken that into account as well.
47. This amendment ought not to have been made. There is simply no basis in the papers we have seen to support the idea that the family contempt proceedings were before the civil court on 5 April 2022. The existence of the parallel family proceedings was referred to briefly and in passing at the hearing but there is nothing to suggest they played any part in the decision about what order to make. The date when both the civil and the family proceedings were heard together on the same occasion was 13 August 2021 before HHJ Garland-Thomas. On that date the judge made two distinct orders: one in the family proceedings SA19P50901, to issue the committal warrant against Ms Jones; and the other in the civil proceedings, to adjourn the civil proceedings E36YJ705 to a hearing on 15 October 2021. The family order does not mention the hearing of civil case E36YJ705 on 15 October 2021 and makes no direction that contempt issues in relation to the family proceedings be considered at that or any other hearing. The civil order of 13 August 2021 does not do this either and there is nothing in the papers to show that HHJ Garland-Thomas made another order of the kind referred to in the recital. In addition, neither the original form of the order made in the civil proceedings on 15 October 2021 nor the variation of it made on 5 November 2021 say anything about the family contempt proceedings.
48. I would allow the appeal on this ground and direct the amendment to the order of 5 April 2022 purportedly made under CPR 40.12 be struck out. It is, however, not obvious what practical consequence this will have in the civil proceedings.

Conclusion

49. The suspended sentence of imprisonment passed on Ms Jones on 5 April 2022 will be quashed. The amendment to the order of 5 April 2022 will be struck out. The civil proceedings under CPR 71 will be remitted to the County Court sitting in Swansea for further directions.