BHURA v BHURA
[2012] EWHC 3633 (Fam)

Family Division

Mostyn J

17 December 2012

Financial remedies – Enforcement – Financial award made in USA registered in England – s 5, Debtors Act 1869 – Whether the husband had the means to pay but failed to do so – Writ ne exeat regno

The husband and wife were married for 21 years and lived in the USA where they ran a jewellery business together. Following an argument the marriage came to an abrupt end and the husband stripped the jewellery shop of all its contents, allegedly selling items to friends and acquaintances at a low rate. The wife estimated the retail value of the jewellery to be approximately $5m. When he was served with divorce proceedings the husband left the USA for the UK and his legal representatives disputed the jurisdiction of the Georgia court. At the hearing, that submission was refused and the wife was awarded a lump sum of $2m and $4,000 per month pending payment. The order was registered in the English High Court pursuant to the Maintenance Orders (Reciprocal Enforcement) Act 1972. The wife thereafter applied for an order that the husband be committed to prison under s 5 of the Debtors Act 1869 due to the fact that he had the means to satisfy the award but had refused or neglected to do so, and a writ of ne exeat regno. The husband claimed to be living on State benefits and that a 75% share of a property he had previously owned in London had been gifted to his parents. He proposed to transfer the remaining balance once he had discharged his legal costs to the wife but had failed to do so.

Held – sentencing the husband to 6 weeks' imprisonment, suspended for 3 months; making a charging order over the husband's interest in the London property; discharging the existing writ; imposing an injunction restraining the husband from leaving the jurisdiction –

(1) The reasoning in *Mubarak v Mubarak* had survived the implementation of the Family Procedure Rules 2010 (FPR) and Part 33, Chapter 2 provided for the issue and hearing of a judgment summons. Form S 62 addressed all the concerns of the Court of Appeal that the old form appeared to reverse the burden of proof. Most importantly, it remained the case that an application under s 5, being quasi-penal in nature, required proof of the constituent elements to the criminal standard, beyond reasonable doubt (see paras [8], [9]).

(2) The locus classicus for commitment applications outlined in *CMEC v Karoonian; CMEC v Gibbons* [2012] EWCA Civ 1379, whether under the Debtors Act 1869 or the Child Support Act 1991, were:

i) Section 5 required the court to be satisfied to the criminal standard that the respondent had at any point since the date of the order the means to pay the sums due under the order; and had refused or neglected to pay them.

ii) The use of the terms 'either has or has had' and 'has refused or neglected, or refuses or neglects' in the section meant that it would be satisfied if proof of both ability to pay and refusal or neglect to pay was made at any single point from the date of the order right up to the date of the hearing.

iii) The use of the alternative verbs 'refuse' and 'neglect' meant that the court was not confined to proof of a positive wilful refusal to pay; the section would be equally satisfied if proof was made of a culpable indifference to the obligation to pay.

iv) It was essential that the applicant adduced sufficient evidence to establish at least a case to answer. Generally speaking, that need not be an elaborate exercise. Proof of the order and of non-payment would likely give rise to an inference which established the case to answer.
v) The respondent was not required to give evidence or to incriminate himself. In the absence of a case to answer being demonstrated the respondent was entitled to have the application dismissed without more.
vi) If applicant case to answer was established, an evidential burden shifted to the respondent to answer it. If he failed to discharge that burden then the terms of s 5 would be found proved against him or her to the requisite standard.
vii) The applicant did not have to serve evidence prior to the hearing but if he or she failed to do so the court would be astute to ensure that the respondent was not taken by surprise and that the hearing could proceed without unfairness to him or her.
viii) It was perfectly permissible for both the enquiry into the respondent's means at all points since the making of the order and the enquiry into whether he or she had been guilty of a refusal or neglect to pay to take place in one conflated hearing.
ix) Provided that the principles above were carefully observed then the procedure would be compliant with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (see para [13]).

(3) The husband's evidence was unpersuasive and it was clear that, following the marriage breakdown, he took steps to appropriate the stock held in the jewellery business, worth approximately $5m. It was not possible to state whether the items had been sold or retained but either the State or the money representing its value was retained by the husband directly or by his family (see paras [48], [49]).

(4) The husband had at all times had the means to pay the award and had refused to do so. This was a case where the scale of the default was extremely high and where the position had been seriously aggravated by the completely false evidence which had been given by the husband (see para [50]).

(5) The power under s 5 was coercive. Almost invariably the first order would be a suspended sentence thereby supplying the necessary coercion. There was no reason why that should not be adopted in this case (see para [50]).

(6) The modern form of order, rather than a writ of ne exeat regno, was an injunction restraining the respondent from leaving the jurisdiction and requiring his passport to be held by the tipstaff or the applicant's solicitors. *B v B (Injunction: Jurisdiction)* [1998] 1 WLR 329 established that after judgment an injunction restraining movement out of the jurisdiction could not be made as a freestanding measure of enforcement. It had to be linked to another measure and must be time-limited (see para [51]).

(7) Since both parties were represented it was appropriate to make a charging order as to the respondent's share in the London property and the requirement for the applicant to file an application for general enforcement under FPR 2010, r 33(2)(b) would be waived.

Statutory provisions considered

Debtors Act 1869, s 5
Administration of Justice Act 1970, s 11, Sch 4
Maintenance Orders (Reciprocal Enforcement) Act 1972
Child Support Act 1991, ss 5, 39A–40B
Civil Evidence Act 1995
Human Rights Act 1998
Criminal Justice Act 2003, ss 114–126
Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007 (SI 2007/2005)
Family Procedure Rules 2010 (SI 2010/2955), rr 23.2–23.5, 33(2)(b), Part 33, Chapter 2

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 6

Cases referred to in judgment

B v B (Injunction: Jurisdiction) [1998] 1 WLR 329, [1997] 2 FLR 148, [1997] 3 All ER 258, FD

CMEC v Karoonian; CMEC v Gibbons [2012] EWCA Civ 1379, [2012] All ER (D) 316 (Oct), CA

Mubarak v Mubarak [2001] 1 FLR 698, CA

Young v Young [2012] EWHC 138 (Fam), [2012] 3 WLR 266, [2012] 2 FLR 470, [2012] All ER (D) 36 (Feb), FD

Sally Harrison QC for the applicant
Jason Green for the respondent

Cur adv vult

MOSTYN J:

[1] On 31 August 2011 Judge Kristina Blum, sitting in the Superior Court of Gwinnett County, Georgia, USA, gave a final judgment in the divorce proceedings between the applicant and the respondent. She decreed a final divorce and further, inter alia, ordered that:

(a) the respondent should pay the applicant lump sum alimony of US $2m within 30 days, with statutory interest; and
(b) pending payment of the lump sum he should pay her the sum of $4,000 per month commencing 1 September 2011, with credit to be given in respect of such payments against the lump sum award.

[2] After a certain amount of bureaucratic confusion that order was registered here pursuant to the Maintenance Orders (Reciprocal Enforcement) Act 1972 as amended; in the case of the USA, by the Reciprocal Enforcement of Maintenance Orders (USA) Order 2007. The order was initially registered in the Westminster Magistrates Court (as the rules require) on 27 February 2012, which court eventually, on 20 November 2012, granted an application for the order to be re-registered in the High Court. On 30 November 2012 Her Majesty's Court and Tribunals Service (HMCTS) confirmed that the order had been registered in the High Court and allocated the number HC/03/2012. The order, therefore, has the status and effect of a High Court order made originally here.

[3] On 23 November 2012 the applicant applied for:

(i) an order that the respondent be committed to prison pursuant to s 5 of the Debtors Act 1869, it being alleged that since the date of the order of 30 August 2011 he has had the means to satisfy the award and refused or neglected to do so; and
(ii) the issue of the writ ne exeat regno against the respondent.

This is my judgment on those applications.

[4] On 27 November 2012 Theis J granted the application for the writ. Implicitly it was to endure until this hearing where its continuance would be considered.

The legal landscape

[5] The Debtors Act 1869 swept away the extensive powers of imprisonment for debt which had existed for centuries prior to then, and which had been acerbically described by Victorian social commentators and novelists. However, by s 5, judgment debts carried the ultimate sanction of imprisonment, for a maximum of 6 weeks. But the class of judgment debts thus enforceable was progressively narrowed so that by the time of the passage of the Administration of Justice Act 1970 (s 11 and Sch 4) the debts were confined to maintenance orders and taxes. In addition there were (and are) further statutory powers to imprison people for non-payment of things like rates and television licence fees. Later, a corresponding power was provided in the Child Support Act 1991, ss 39A and 40.

[6] Section 5 provides:

> '(1)Subject to the provisions herein-after mentioned, and to the prescribed rules, any court may commit to prison for a term not exceeding 6 weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court.
> (2)That such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.'

[7] An application under s 5, known as a judgment summons, has always been a common feature of enforcement proceedings in the divorce courts. However, its regular use encountered an obstacle with the enactment of the Human Rights Act 1998 and the decision of the Court of Appeal in *Mubarak v Mubarak* [2001] 1 FLR 698. In that case the Court of Appeal decided that the then prevailing procedure, and the then prescribed forms, were not compliant with Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention). In para [41] Thorpe LJ stated:

> 'I suspect that the consequence of the re-evaluation of the utility of the Debtors Act 1869 procedure in the light of the advent of the Human Rights Act 1998 will be that it will become a largely obsolete means of enforcement. I doubt whether experienced specialist practitioners will think that it has sufficient value for money to be worth its initiation. Certainly it seems to me that it will be more or less useless in cases involving fraudulent husbands seeking to conceal assets difficult or impossible to identify specifically.'

[8] Despite that doom-laden prediction the judgment summons did not become extinct. Instead the procedure and forms were reformed. In 2010 the procedure was reiterated and validated anew by Parliament with the promulgation of the Family Procedure Rules 2010 (FPR). In Part 33, Chapter 2, extensive provisions concerning the issue and the hearing of a judgment summons were set out. PD 5A prescribes Form D62 for the form in which an application under s 5 is to be made. This form addresses all the concerns of the Court of Appeal which had ruled that the old form by its language appeared to reverse the burden of proof.

[9] The most important part of the ratio of the Court of Appeal is that an application under s 5, being quasi-penal in nature, requires proof of the constituent elements to the criminal standard, namely beyond a reasonable doubt.

[10] Curiously, the reforms to which I have referred were not extended to the procedures and paperwork for applications for commitment to prison under the Child Support Act 1991. Unsurprisingly, therefore, in the relatively recent decision of the Court of Appeal of *CMEC v Karoonian; CMEC v Gibbons* [2012] EWCA Civ 1379, those procedures and paperwork received identical condemnation to those previously meted out in *Mubarak v Mubarak*.

[11] The Court of Appeal, following *Mubarak v Mubarak*, held that the procedures and forms referable to a commitment application under the Child Support Act 1991 needed to be reformed, in order to be European Convention-compliant, in line with the reformed procedure and paperwork found in Part 33, Chapter 2, FPR. There was a slight difference of opinion between Ward LJ and Richards LJ as to how the procedure could be made compliant, and in this aspect Richards LJ was supported by Patten LJ. In his relatively short judgment Richards LJ set out definitively how the application should be formulated and proved. He said:

> '[56] My starting point is that the statutory scheme under ss 39A-40B is capable of being operated in compliance with Art 6. I agree with Ward LJ that, although s 39A(3) provides for the court to "inquire" as to the defendant's means and whether there has been wilful refusal or culpable neglect on his part, and s 40(1) requires the court to be of the "opinion" that there has been wilful refusal or culpable neglect, the burden lies on the Commission to prove to the criminal standard that there has been wilful refusal or culpable neglect on his part (which will necessarily include proving that the defendant has or has had the means to pay the unpaid amount). The District Judge in the case of *Gibbons* was wrong to say:
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> > "The court is required simply to form an opinion as to whether there has been wilful refusal or culpable neglect. There does not seem to be any burden of proof no[r] standard other than that of 'opinion'."
>
> The court must be satisfied to the criminal standard, on the basis of all the evidence before it, that there has been wilful refusal or culpable neglect. So much, indeed, is common ground between the parties.
>
> [57] It follows that in practice the Commission must adduce sufficient evidence to establish at least a case to answer. In the generality of cases the exercise may not need to be a particularly elaborate one, since there

will be a history of default from which inferences can properly be drawn. But the exercise is an essential one: the defendant is not required to give evidence or to incriminate himself, and in the absence of a case to answer he is entitled to have the application against him dismissed without more. If the Commission establishes a case to answer, there will be an evidential burden on the defendant to answer it, but that is unobjectionable in Art 6 terms. I would add that there is no requirement under Art 6 for the Commission to serve evidence in advance of the hearing, but if it chooses to wait for evidence to be given by the presenting officer at the hearing, the court must be astute to ensure that the defendant is not taken by surprise and that the matter can proceed at that hearing without unfairness to him.

[58] Provided that the burden and standard of proof and the need for procedural fairness are borne clearly in mind, there is in my view no inherent objection to considering the defendant's means and the issue of wilful default or culpable neglect in a single hearing. They are closely related matters, and it seems to me that the statute contemplates that they will be inquired into at one and the same time: s 39A(3) provides in terms that on an application under sub-s 1) "the court shall (in the presence of the liable person) inquire as to (a) whether he needs a driving licence to earn his living, (b) his means, and (c) whether there has been wilful refusal or culpable neglect on his part". Insofar as Ward LJ considers that this involves an impermissible muddling up of two distinct processes, I respectfully disagree. *Mubarak v Mubarak* was concerned with a specific regime and I do not read it as laying down any general rule that issues of means and wilful refusal or culpable neglect cannot be considered together. We were not taken to any Strasbourg case-law laying down such a rule. In *Benham v United Kingdom* (1996) 22 EHRR 293, [1996] ECHR 19380/92, which involved a very similar procedure (see para 19 of the judgment), there was no suggestion that in this respect it offended Art 6.'

[12] In my judgment this should be regarded as the locus classicus for commitment applications whether made under the Debtors Act 1869 or the Child Support Act 1991.

[13] Stated shortly it seems to me that the applicable principles are these:

(i) Section 5 requires the court to be satisfied to the criminal standard that:

  (a) the respondent has had at any point since the date of the order the means to pay the sums due under the order; and
  (b) has refused or neglected to pay them.

(ii) The use of the present and past tenses in the phrases 'either has or has had' and 'and has refused or neglected, or refuses or neglects' means that the section will be satisfied if proof of both ability to pay and refusal or neglect to pay is made at any single point from the date of the order right up to the date of the hearing.

(iii) The use of the alternative verbs 'refuse' and 'neglect' means that

the court is not confined to proof of a positive wilful refusal to pay; the section will be equally satisfied if proof is made of a culpable indifference to the obligation to pay.

(iv) It is essential that the applicant adduces sufficient evidence to establish at least a case to answer. Generally speaking, this need not be an elaborate exercise. Proof of the order and of non-payment will likely give rise to an inference which establishes the case to answer.

(v) The respondent is not required to give evidence or to incriminate himself. In the absence of a case to answer being demonstrated the respondent is entitled to have the application dismissed without more.

(vi) If the applicant establishes a case to answer an evidential burden shifts to the respondent to answer it. If he fails to discharge that evidential burden then the terms of s 5 will be found proved against him or her to the requisite standard.

(vii) The applicant does not have to serve evidence prior to the hearing but if he or she fails to do so the court will be astute to ensure that the respondent is not taken by surprise and that the hearing can proceed without unfairness to him or her.

(viii) It is perfectly permissible for *both* the inquiry into the respondent's means at all points since the making of the order *and* the inquiry into whether he or she has been guilty of a refusal or neglect to pay to take place in one conflated hearing.

(ix) Provided that principles (i)–(viii) are carefully observed then the procedure will be European Convention-compliant.

[14] There is only one further point I wish to make. Inevitably a good deal of the evidence is likely to be hearsay. Although the proceedings are quasi-penal they are civil proceedings nonetheless. Therefore it is my opinion that on the hearing of a judgment summons the use of hearsay is governed by the Civil Evidence Act 1995 and of the FPR r 23.2–23.5, rather than by ss 114–126 Criminal Justice Act 2003.

[15] Finally I would respectfully (and with trepidation) disagree with Thorpe LJ's opinion cited above. As the above history demonstrates the procedure has been made wholly European Convention-compliant. In my opinion it remains a useful weapon in the armoury of enforcement, even if it is one that, generally speaking, should only be deployed as a measure of last resort.

This case: *background*

[16] The applicant and respondent were married on 10 October 1989. They are British citizens of Hindu Indian origin. They have two children: a boy now aged 21 and a girl now aged 18. In 1992 the parties opened a jewellery shop here known as Veeraji Jewellers. In September 2000 they moved to Georgia, USA, and opened a jewellery shop under the same name in Decatur. Their final matrimonial home in Duluth, Georgia was purchased in the respondent's sole name in September 2003.

[17] In December 2010 the shop was full of jewellery and in that calendar year had turned over $762,000 (although for reasons which I will explain there are question marks in relation to the accounts of the business for that and previous years).

[18] On 31 December 2010 the parties had a row (in which the respondent's father, mother and brother participated); the applicant left the family home with their son and went to stay in a hotel. Thus the marriage came to an abrupt end. This led the husband and his father to take dramatic action. The CCTV was turned off and they stripped the shop bare. According to the respondent's father, who gave evidence before me pursuant to a witness summons issued by the applicant, this exercise took between 2 and 4 days, and involved packing up thousands of boxes which were taken, he believed, by the respondent in his car to the family home. He was not able to say how many journeys this involved.

[19] On 23 January 2011 the respondent turned the CCTV back on as he knew that the applicant intended to visit the shop and he wanted to record her behaviour to protect himself. Although I was given DVDs of the footage on that occasion nobody could provide me with versions which actually worked. I was, however, given a summary of what they showed, which was not challenged, together with some still photographs. These show that the shop had been stripped utterly bare. They showed the respondent and his father packing items into jiffy bags.

[20] At that point the respondent had not formed the intention of quitting the USA, according to the evidence which he gave to me. That did not arise until he was served with divorce proceedings on 4 March 2011 – he left the following day. He told me that he sold all the stock for a pittance to friends, gas station owners, and creditors. Apart from the sale of some of the silver jewellery to Legacy Jewellers, for which there are invoices totalling about $40,000, the respondent has not produced a single invoice for the sale of the rest, in circumstances where the gold items comprised the great majority of the inventory. He was not able to explain to me, given his obligations to make accurate tax returns, why there was not in existence a single invoice or voucher in respect of these alleged sales. Even the invoices to Legacy Jewellers were said by him to be inaccurate – he received only about a quarter of the price stated.

[21] Following the service on him of the divorce proceedings the respondent left the following day, as I have stated, and travelled to the UK. However, he appointed a local attorney, Mr Estes, to represent his interests who filed on his behalf an answer denying the jurisdiction of the Georgia court.

[22] Following his arrival in the UK the respondent then embarked on a lengthy tour abroad. He travelled first on 31 March 2011 to Tanzania, where he has relations; on 23 April 2011 he travelled to Kenya where he also has relations; he then travelled to Mumbai in India where his father and brother owned a property; he then travelled to Dubai on 29 May 2011 where he spent a number of days. Following this grand tour he arrived back in the United Kingdom.

[23] Meanwhile the proceedings in Georgia were advancing. I assumed that there must have been pleadings (although I was not shown these), and I know that there were financial affidavits, although again I was not shown these.

There was a discovery process. It is noteworthy that the Georgia statute for equitable division following divorce is similar to our own.

[24] On 24 August 2011 the cause, which included the divorce itself, as well as the applicant's claims for financial provision, custody of their daughter, and child support came before Judge Blum.

The hearing before Judge Blum

[25] At the hearing the applicant was represented by Mr Maddox and the respondent by Mr Estes. I have to assume that Mr Estes was fully instructed by the respondent; certainly he did not indicate that he was not. The applicant attended the hearing together with a witness namely Ms Laurie Dyke, a forensic accountant. The respondent did not attend.

[26] I have been given a copy of the transcript of the proceedings as well as of the exhibits adduced on behalf of the applicant.

[27] The hearing began with a motion by Mr Estes, renewing his earlier motion (which presumably had been refused), arguing that Georgia did not have jurisdiction. This was refused.

[28] The applicant's Exhibit 2 was a diagram of the layout of the shop which was prepared on her instructions by the accountant. This denoted the various areas of the shop by zones which were called Zones 1A, 1B, 2A, 2B etc. Exhibit 4 was a document described as 'Inventory by Store Zone'. This was carefully prepared by the applicant and was her estimate of the quantity and value of jewellery in each zone (as denoted in the shop diagram Exhibit 2) as well as the jewellery which was not on display and kept in one of the two safes. It was not the actual inventory derived from the shop's trading records. This was made clear.

[29] Exhibit 5 was a collection of photographs, taken in 2008, which showed the shop in normal trading mode. It is possible to cross-refer the photographs to the diagram and in turn to the inventory, at least in some instances. For example, there is a photograph of the display unit to the right of the front door which is denoted zone 3A in the diagram. In the photograph you can see 20 necklaces individually displayed. In the inventory the applicant makes her estimate for Zone 3A by reference to 20 necklaces. Thus there is internal consistency between the various exhibits.

[30] The inventory prepared by the applicant gave an estimated value of the stock held in the shop in the range of $4.85m–$5.26m. She testified that typically they would fetch a minimum retail value of $5m in the shop.

[31] Mr Estes mounted a wholesale objection to the inventory. He claimed that it could not possibly be described as such; that the applicant did not have sufficient knowledge to compile it; and that it was fundamentally irrelevant. The objections were overruled. I note at this stage that I was told by Mr Green that the first time he or his client had seen or even known of this inventory was on the first day of the hearing before me. While I of course accept this in relation to Mr Green I completely reject the respondent's suggestion that he was ignorant of the existence or contents of this document. On the contrary, his own attorney in Georgia had debated it with the court at great length and had cross-examined the applicant about it.

[32] The applicant gave extensive evidence-in-chief and was extensively cross-examined on behalf of the respondent. The cross-examination reveals

that Mr Estes had been given full instructions. Those instructions extended to putting to the applicant an allegation of adultery.

[33] The applicant then called the forensic accountant Ms Dyke. She produced schedules, Exhibit 8, being summaries of the business's tax returns as provided in the respondent's financial disclosure. She pointed out that there were some odd aspects to these. First, she would have expected the gross profit margin for a business like this to have been 50% but here it was very much less. Secondly, the opening and closing balances of the sums recorded as representing inventory did not reflect transactions during any given year. Thirdly, there was no compensation recorded for the owners. Fourthly, there was an almost complete absence of records of inventory given in disclosure so that it was '*very very difficult to reconstruct what the actual inventory is*'. It was noteworthy that for the year 2010 no amount was recorded for inventory at all. Fifthly, the income as disclosed on the tax returns bore no relationship to the family expenditure (as summarised in Exhibit 10 – about $108,000 pa), nor did they bear much relationship to the respondent's personal tax returns (the summary of which was Exhibit 9).

[34] Finally the expert witness produced Exhibit 11, which was her estimate of the marital balance sheet. This calculated the marital assets as follows:

	US $	
Cash	32,539	
Investments	4,514	
	37,053	
Marital Home	200,000	
Mortgage	(150,253)	
Line of Credit	(49,451)	
	296	
Cars	16,000	
Business		
Cash in bank	263,405	Per 2010 tax return
Cash in hand	20,000	based on ledgers
Accounts receivable	102,365	Per 2010 tax return
Inventory	3,033,222	see *Note* below
	3,418,992	
Liabilities	(1,105)	
Total Assets	3,471,236	
Note		

W's estimate	5,055,370	midpoint
less discount 40%	(2,022,148)	
Subtotal	3,033,222	

[35] The calculation of the value of the inventory was after deducting a discount of 40% to reflect what was described as a 'scrap gold sale'. She did not include within the total of $3.47m the value of the applicant's personal jewellery which she said had been taken by the husband, which the applicant estimated at $250,000, nor the value of the respondent's interest in a property in Finchley (which as I will explain he admits), nor of any interest which he may have in two other London properties or in a property in Mumbai (which he denies saying that these are the properties of other members of his family).
[36] In closing submissions Mr Estes argued that both the schedule of family expenditure and the marital balance sheet had been greatly exaggerated and that it was 'quite a stretch to think that they carried $4m in inventory in that store on a regular basis'.
[37] Mr Maddox argued for a lump sum of $2m. He argued that if one ignored potential assets in the form of foreign property and concentrated only on the marital balance sheet, and on the value of the wife's jewellery which had been spirited away, the overall pool was of the order of $4m and that, therefore, a lump sum of $2m was eminently justifiable.
[38] Judgment was reserved and was delivered a week later on 31 August 2011. The following findings were made by Judge Blum:

(i) At the time of the separation the shop was a fully stocked and operating jewellery store. The applicant had familiarity with the business generally and with the inventory. She had given uncontroverted testimony that the inventory had a retail value in excess of $4.85m and cash in hand of $263,405.
(ii) Immediately preceding the filing of the action the respondent had closed down the business and removed the inventory and cash from the jurisdiction of the court.
(iii) The respondent had told the applicant that they had accumulated sufficient wealth so that he could retire and they could live comfortably 'the rest of their lives somewhere on a beach'.
(iv) After being served with the petition the respondent had left the United States and had travelled extensively for business and pleasure.
(v) Despite having notice and opportunity to do so, the respondent did not return to the USA for the final trial of the action. He was, however, represented by counsel who did 'an excellent job in representing his interests'.

[39] Judge Blum made an award of $2m as lump sum alimony. Although there were no specific findings made as to the precise scale of the assets it is implicit that she found them to be no less than $4m in accordance with the marital balance sheet augmented by the missing jewellery of the applicant, as had been urged on her by Mr Maddox.

Subsequent events and these proceedings

[40] Since that order was made, the respondent has made no attempt to comply with it, not even to pay the $4,000 per month provided for in the second limb of the order.

[41] For the purposes of these proceedings the respondent has made two affidavits of means and has replied to a questionnaire. Basically he says he has no money at all and is living on State benefits. He used to own all of 116 Mayfield Avenue, Finchley, London N12 but in 2003 transferred 75% of its value to his parents as a gift. That is rented out but he receives none of the rent – it all goes to his mother, despite being paid into an account in his name. In his solicitor's letter dated 29 June 2012 he estimated the value of his 25% share to be £92,000. He proposed to sell that to his parents for that sum and to pay £35,000 to his solicitors and to transfer the balance to the applicant. But he has not done so.

[42] Understandably, the respondent was asked detailed questions about the sale of the business and its inventory. The respondent's replies were that the business was dissolved by a telephone call to the company accountant. Although the respondent valued the stock at the time of dissolution at $600,000 he sold it all for $66,000 from which he paid $59,000 of debt leaving him with $7,000. The only documents which he produced by way of verification were the invoices I have referred to above in relation to the sale of the silver items, which themselves are said to be incorrect.

The hearing before me

[43] I have mentioned that at the commencement of the hearing the respondent alleged that he had never before seen the applicant's estimate of the inventory. Although I was very sceptical I allowed a 2-hour adjournment so that counsel could take the respondent's instructions on it.

[44] At the hearing before me I heard oral evidence from the applicant, the respondent and the respondent's father pursuant to a witness summons. The applicant gave evidence along the same lines as she had in Georgia in August 2011. She was similarly cross-examined and it was put to her that she had grossly over-estimated in particular the value of gold at the time that she prepared her schedule. It was suggested that in the early part of 2011 gold was trading at about $1,000 per ounce, rather than the $2,000 that her calculations were based on. Moreover, it was suggested that in terms of numbers of individual items and their weight she had grossly exaggerated. She stood firm in her testimony and I judged her to be a truthful and convincing witness.

[45] The respondent gave evidence. I made it clear to Mr Green that the respondent was under no obligation to do so, nor otherwise to incriminate himself. In his evidence in chief he stated that the price of gold between January and March 2011 was about $1,200 per ounce; it went up to $1,700 later in the year. She stated that the weight attributed by the wife to individual items was much too high; the idea of 50g being the weight of gold in a bangle was, he said, absurd – it would be more like 5g–10g. An Indian woman would wear perhaps 10 bangles on one arm and the idea of her carrying around half a kilogram in weight on her arm was fanciful. He stated that the idea that there was as much value in the safe as on display was equally fanciful. He completely disagreed with the applicant's estimates in relation to silverware which he said was grossly exaggerated. He stated that he had sold everything

that was in the shop between January and March 2011 but had kept no receipts and that he had not completed a US tax return for 2011. He said he was at the time heartbroken and distressed; he had lost his home and his family and so just got rid of the stock quickly and for a pittance. He confirmed that he went to Africa, India and Dubai to see his family and that he had also enjoyed holidays in Thailand and Europe.

[46] Under cross-examination he accepted that the wife's inventory was dated 24 August 2011 and that at the time it was produced, the value of gold that she asserted was correct. He was not able to give any explanation as to why he turned off the CCTV on 31 December 2010 other than to say he 'didn't need it any more'. He confirmed that on 23 January 2011 he turned it back on in order to protect himself when the applicant came to visit. He said that he had placed the items into the jiffy bags in order to ship them back to the people who had bought the stock, as well as to return items that were on sale and return. He said that he did not attend the hearing because he feared he would be arrested at the behest of the wife who was prone to making false allegations against him. He agreed that Mr Estes had advised him to appeal the judgment and order but he was not able to give any explanation as to why he had not done so. He stated that nobody had ever asked him to produce paperwork to show what he had got from the sales (which was a strange answer given that the questionnaire directly asked for this). He was not able to explain why in the business's 2010 tax return the inventory had completely disappeared. He agreed that Tanzania, Kenya, India, and Dubai were countries in which it was very easy to trade in gold items. He explained that the high payments to garages on his credit cards were referable to the cars of his brother and parents.

[47] The husband's father gave evidence in Gujarati which was interpreted. As mentioned above, he confirmed that it took 2–4 days to clear out the shop and to pack up the jewellery into thousands of boxes which were taken by the respondent in his car to, he believed, his home. He did not help with any subsequent sale.

My conclusions

[48] These are my conclusions. The evidence given in Georgia and the findings made by Judge Blum establish a case for the respondent to answer. That is accepted by Mr Green. However, the applicant has gone much further than merely establishing a case to answer. Basically the financial remedy case has been reheard. On the basis of the evidence I have heard I am satisfied so that I am sure that there was inventory in December 2010 in the shop in Decatur with a retail value of around $5m. I reject the respondent's attempt to cast doubt on the applicant's evidence. His evidence was unpersuasive and was advanced at the fifty-ninth minute of the eleventh hour in circumstances where I am satisfied that he must have been fully aware of the applicant's case from the time of hearing before Judge Blum on 24 August 2011.

[49] Immediately following the breakdown of the marriage the respondent selfishly took steps to appropriate all that value for himself and sought to cover his trail by disabling the CCTV and by later pretending that there is no documentation as to its alleged disposal. I am not in a position to find whether the items have since been sold in Africa, India or Dubai or whether they have been placed for safekeeping there or elsewhere. However, either the items

themselves are, or money representing their value is, retained by the respondent either directly or by members of his family. Of this I am sure.

[50] It follows that I am wholly satisfied so that I am sure that the respondent has at all times had the means to pay the award and has refused to do so. This is a case where the scale of the default is extremely high and where the position has been seriously aggravated by the completely false evidence which has been given to me by the respondent. I therefore sentence him to serve the maximum period in prison that s 5 allows, namely 6 weeks. The question is whether this shall be suspended for a period to allow him time, even now, to comply with its obligations. Generally speaking the power under s 5 is coercive. Almost invariably the first order will be a suspended sentence thereby supplying the necessary coercion. I see no reason why that should not be adopted in this case. Therefore I suspend the sentence for a period of 3 months. If the sum has not been paid within that period the matter must then be returned before me before any warrant of execution may be issued.

[51] In my decision of *Young v Young* [2012] EWHC 138 (Fam), [2012] 3 WLR 266, [2012] 2 FLR 470 I attempted to summarise the law in relation to passport impoundment orders. It was implicit in my reasoning that the modern form of order is an injunction restraining the respondent from leaving the jurisdiction and requiring his passport to be held either by the tipstaff or, as in this case, the applicant's solicitors. The writ ne exeat regno is a charming historical relic but must be regarded as an anachronism given the availability of the modern form of order. The decision of *B v B (Injunction: Jurisdiction)* [1998] 1 WLR 329, [1997] 2 FLR 148 establishes that after judgment an injunction restraining movement out of the jurisdiction cannot be made as a freestanding measure of enforcement. It has to be linked to another measure and must be time-limited. Accordingly, I discharge the existing writ and make a fresh injunction which will endure until the matter is returned to me pursuant to the preceding paragraph, or until the respondent discharges his obligations, if earlier.

[52] As indicated by me during counsel's speeches I further intend to make a charging order in relation to the respondent's 25% interest in 116 Mayfield Avenue. Normally the first such order would be an interim order because the application would be made ex parte. However given that both parties are represented before me it is appropriate for me to make a final order now. For the avoidance of doubt I waive the requirement on the applicant to file an application for general enforcement under FPR 2010 r 33(2)(b). Plainly if the respondent satisfies the award save as to £92,000 (being the value of 16 Mayfield Avenue covered by the charging order) then he must be taken to have satisfied it entirely.

[53] I direct that a copy of this judgment be supplied to Judge Kristina Blum, Superior Court of Gwinnett County, Georgia, USA.

Order accordingly.

Solicitors: *James Maguire & Co* for the applicant
Hodge Jones & Allen for the respondent

SAMANTHA BANGHAM
Law Reporter