Neutral Citation Number: [2020] EWHC 252 (Fam)

Case No: FD19F00024

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2020

Before :

MRS JUSTICE LIEVEN

- -

Between :

MAGALI MOUTREUIL

Claimant

and

(1) PETER RICHARD ANDREEWITCH
(A.K.A. RICHARD ANDREEWITCH)
(2) PIER INVESTMENT COMPANY LIMITED

Defendants

AND

Case No. ZC18P04081

IN THE CENTRAL FAMILY COURT

Between :

MAGALI MOUTREUIL

Applicant

and

PETER RICHARD ANDREEWITCH
(A.K.A. RICHARD ANDREEWITCH)

Respondent

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Mr James Weale (instructed by **LSGA Solicitors**) for the **Claimant**
Mr Peter Andreewitch was **unrepresented**

Hearing dates: **3 February 2020**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This is an application for committal made by Ms Montreuil (the Claimant) against Mr Andreewitch (the Defendant) for breach of a Freezing Order made on 22 March 2019 by DDJ Hodson (the Order) sitting at Central London Family Court. The Claimant was represented before me by Mr Weale, the Defendant acted as a litigant in person. I explained to the Defendant at the start of the hearing that he had a right to be represented and a right to legal aid. He was entirely clear that he wished to proceed with the hearing, and was fully aware of his rights. The Defendant made submissions to me, and gave oral evidence on oath.

2. Mr Weale made clear at the start of the hearing, and in his Skeleton Argument, that the Claimant was not seeking an order to commit the Defendant at the hearing, but rather sought findings in respect of breach of the Order, and the matter to be adjourned to a further hearing.

3. The background to the application is that the Claimant and Defendant were in a cohabiting relationship for nearly 20 years, approximately 1998 to 2017 and have five children. There are three sets of proceedings ongoing between the parties:

    a. The Claimant's application (with case number ZC18P00514) in the Central Family Court pursuant to section 8 of the Children Act 1989 (the "Welfare Proceedings");

    b. The Claimant's application (with case number ZC18P04081) in the Central Family Court pursuant to Schedule 1 of the Children Act 1989 (the "Schedule 1 Proceedings");

    c. The Claimant's claim under Part 7 of the Civil Procedure Rules (with claim number FD19F00024) seeking a determination of the parties' beneficial interests in the Shares and/or the Property as defined below (the "Ownership Proceedings").

4. The Claimant has made various allegations of abuse and control against the Defendant. Although those have little direct relevance to the matters before me, it is appropriate that I have regard to the judgment of HHJ Meston dated 24 August 2019 in the Welfare Proceedings with respect to the Claimant's credibility. At [102] the Judge said;

> *"At times he was evasive in response to cross examination; and as the hearing proceeded, I had increasing reservations about the credibility of the father and came to find his explanations and justifications to be implausible and unconvincing".*

5. Throughout their relationship, the parties lived at the Property 62 Christchurch Street, London SW3 (the Property). Based on recent valuation evidence, the Property is understood to be worth c. £2,150,000 and has no mortgage.

6. The registered owner of the Property is, and to the best of the Claimant's knowledge has been since 1993, Pier Investment Company Limited "the Company". On 31 July 2000, the Defendant procured the transfer of the entirety of the shares in the Company

(the "Shares") to the Claimant. It is the ownership of these Shares which is the subject matter of the substantive dispute. His explanation for the transfer (referred to at para.10.2 of the Particulars of Claim) was that it was to *"shield my UK properties from future exposure".* For the following 15 years, the Defendant filed accounts at Companies House which stated that the Claimant was the beneficial owner of all the issued shares in Pier and, on 23 November 2016, the Defendant filed a confirmation statement at Companies House stating that the Claimant was the only "person with significant control". In late 2017, after the parties' relationship finally broke down, but while they were still living with the children in the Property, the Defendant began to insist to the Claimant that she had no rights or interests in the Property.

7. It is the Claimant's case that she has outright ownership of the Shares/Property, albeit she feels a moral obligation to the Defendant and the family. The Defendant's position is that the Claimant has no interest whatsoever in the Property/Shares. It is not necessary for the purpose of this judgment to go into greater detail about the respective arguments on ownership of the Property. The Claimant's Skeleton Argument goes into considerable detail about the arguments on who owns the Shares, and the actions that the Defendant has taken inconsistent with his case that the Claimant has no interest in the Shares or the Property. However, the matter before me is simply whether there has been a breach of the Order.

8. The immediate backdrop to the making of the Order was that on 26 February 2019 the Claimant's solicitors wrote a letter before action to the Defendant making clear her claim to the Shares/Property. On 28 February the Defendant purported to transfer the Shares to the parties' son Philipp (then aged 15) who was living with the Defendant.

9. Against that background, the Court imposed a Freezing Order at the subsequent hearing on 22 March 2019. The terms of the Freezing Order (at paragraph 10) were as follows:

> *"Until such time as the parties' respective claims in these proceedings and in case number FD19F00024 have been finally determined by the court, the applicant and the respondent must not in any way dispose of, deal with or diminish the value of the following assets whether they are in or outside England and Wales, namely:-*
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> *(i) The shares of Pier Investment;*
> *(ii) Christchurch Street;*
> *(iii) any other income or assets of Pier Investments except insofar as is necessary for Pier Investment to meet its tax or other liabilities".*

10. Following the hearing on 22 March the Defendant was ordered to respond to the Claimant's Schedule 1 Questionnaire and request for documents (which included a request for bank statements). Save for one page he failed to do this. On 9 December 2019 Cobb J ordered the Defendant to disclose the bank statements from February 2018 to 9 December 2019.

11. The details of what is shown in those bank statements is set out in the Claimant's first witness statement dated 13 January 2020. Paragraphs 27-33 state;

27.The Bank Statements showed that Mr Andreewitch had effectively used the Bank Account as his personal piggy bank, making regular payments out of it, not only from his first substantive bank statement supplied (11 May 2018) to 22 March 2019 when the Freezing Order was made, but also after the Freezing Order was made.

28. The first payment following the Freezing Order was made on 25 March 2019, and payments continue to the last statement provided, on 29 November 2019. In short, Mr Andreewitch appears to have paid no attention whatsoever to the Freezing Order.

29. As regards the purpose of the withdrawals and transfers from the Bank Account, the Bank Statements show that they were almost all of them were made in respect of Mr Andreewitch's personal expenses, with no conceivable benefit to Pier.

30. Payments included grocery shopping at Waitrose, Marks & Spencer, Tesco, Morrisons and Sainsbury's; and Mr Andreewitch's personal rent for his flat in Acton from August 2018 to August 2019.

31. From September 2019, the Bank Statements show that Mr Andreewitch used the Bank Accounts to make payments to his partner Ms Metcalfe, some characterised as "repayment" and some as "rent". Pursuant to the order of Mr Justice Cobb made at the 9 December Hearing, on 6 January 2020 Mr Andreewitch disclosed a "Lodger's Agreement" between himself and Ms Metcalfe, pursuant to which he appears to be renting from her "Two bedrooms for Peter Andreewitch and his son, Philipp Andreewitch. Access to communal areas, kitchen, bathroom, sitting room and office" for £850 per month. Total payments to Ms Metcalfe between 12 September 2019 and 29 November 2019 were £3,800.

32. Mr Andreewitch further paid from the Bank Account £20,800 of his personal legal fees, to four different firms of solicitors. He paid £10,800 before the making of the Freezing Order on 22 March 2019, comprising (in December 2018) £3,400 of costs he had been ordered to pay to my solicitors, LSGA, for failure to provide disclosure at a hearing in the Schedule 1 Proceedings in November 2018; and in October £5,000 of fees to Irwin Mitchell LLP (plus a further £1433 in January 2019) who contacted my solicitors in October 2018 in respect of the Schedule 1 Proceedings).

33. Mr Andreewitch paid a further £10,000 of his personal legal fees from the Bank Account after the making of the Freezing Order: £5,000 on 21 May 2019 to Clyde & Co who informed my solicitor that they acted for him in connection with the Ownership Proceedings, and on 28 October 2019 £5,000 to Sinclair Gibson for representing him at a hearing on 21 November 2019 in connection with the Welfare Proceedings. Irwin Mitchell, Clyde & Co, Sinclair Gibson and a fourth firm, Aston Bond (who do not appear to have taken any money from Mr Andreewitch), all appear in the meantime to have ceased acting for Mr

> *Andreewitch. I do not know whether Mr Andreewitch informed them of the existence of the Freezing Order before the paying the fees of above firms of solicitors. In any event, I do not believe that he had any right to do so in light of the terms of the Freezing Order.*

12. The Defendant does not dispute that the payments were made, or that they were made by him, acting on Pier's behalf. The issue therefore is solely whether they were made in respect of Pier's "other liabilities" under (iii) of the order and therefore there was no breach of the Order.

The legal framework

13. The procedure for a committal application is set out in Part 37 of the FPR. The present application seeks committal for a breach of an order (FPR 37.1(1)(a)). The jurisdiction to commit is set out in FPR 37.4(1) as follows:

> *"(1) If a person –*
> *(a) 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) disobeys a judgment or order not to do an act*
> *then, subject to the Debtors Act 1869 and 1878 and to the provisions of these Rules, the judgment or order may be enforced under the court's powers by an order for committal"*

14. The Defendant was present at the hearing at which the Freezing Order was made and it is expressly referred to in his Defence in the substantive proceedings dated 24 May 2019. It was also the subject of inter partes correspondence (see letters of 20-23 May 2019). The Defendant was served with the Order by the Central Family Court. Insofar as necessary, the Court is invited to dispense with personal service pursuant to FPR 37.8.

15. The procedural requirements for a committal are further set out in FPR37. The Freezing Order contained a penal notice prominently displayed on the front of it thereby complying with FPR 37.9.

16. The Application complies with FPR 37.10:

    a. It has been made by an application notice using the Part 18 procedure in the proceedings in which the Freezing Order was made;

    b. The Application Notice set out in full the grounds on which the committal application is made;

    c. The Application is supported by one or more affidavits containing all the evidence relied on.

    d. The Application and supporting evidence (save for the Claimant's recent updating affidavit) was personally served on the Defendant by the Claimant before the hearing on 14 January 2020 (a copy of the Application and Affidavit (without the exhibit) having been emailed to the Defendant on 13 January 2020). The

Application was then considered, and (in open court) it was ordered to be listed by Judd J on 3 February 2020. The Defendant takes no point on service.

17. Whether or not a Freezing Order has been breached turns simply on the proper construction of that Order. In terms of contempt proceedings there is no difference between a Freezing Order and any other court order in civil litigation, see Arlidge, Eady & Smith on Contempt (5th ed.) ("Arlidge") (at §12-161).

18. In order to establish contempt, it is not a requirement to demonstrate that the contemnor intended to and/or believed that the conduct in question constituted a breach. It is sufficient merely to show that the contemnor deliberately intended to commit the act/omission in question. The position was set out in the judgment of Flaux LJ (giving the leading judgment) in Pan Petroleum AJE Limited v Yinka Folawiyo Petroleum Co Ltd [2017] EWCA Civ 1525 as follows at §43:

> *"I have already indicated that it is not contended on behalf of Pan Petroleum that the appellants wilfully breached the Order, but that does not preclude a finding of contempt. Where the Court concludes that the party in contempt has acted on the basis of an interpretation of the Order which was not reasonably arguable, it is not necessary for an applicant to also show that the breach of the Order was committed with actual knowledge. Christopher Clarke J put this point clearly in Masri v Consolidated Contractors [2011] EWHC 1024 (Comm) at [155]:*
>
> *"In my judgment the power of the court to ensure obedience to its orders for the benefit of those in whose favour they are made would be inappropriately curtailed if, in addition to having to show that a defendant had breached the order, it was also necessary to establish, and to the criminal standard, that he had done so in the belief that what he did was a breach of the order – particularly when a belief that it was not a breach may have rested on the slenderest of foundations or on convenient advice which was plainly wrong."*
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> *As that passage demonstrates, equally it is no defence for the party in breach to show that it acted on the basis of legal advice. That will only go to issues of mitigation, not to whether there was a contempt: see the judgment of the Restrictive Practices Court (Megaw J President) in The Tyre Manufacturers' Conference Ltd's Agreement [1966] 1 WLR 1137 at 1162D-H.*

19. Nevertheless, the contemnor's state of mind is relevant to the penalty which applies to the breach. As explained in Arlidge at §12-108:

> *"What is clear, however, is that the bona fides of contemnors and their reasons, motives and states of mind have long been recognised as relevant factors in mitigation. It seems, for example, that:*
>
> *"…no casual or accidental and unintentional disobedience of an order would justify either commitment or sequestration. Where the court is satisfied that the conduct was not intentional or reckless, but merely casual and accidental and committed under circumstances which*

> *negative any suggestion of contumacy, while it might visit the offending party with costs and might order an inquiry as to damages, it would not take the extreme course of issuing an order either of commitment or of sequestration.""*

20. The Claimant's proposal to adjourn consideration of the applicable sanction – to give the Defendant an opportunity to purge his contempt – is in line with the approach taken in recent cases in the Family division including in Reilly v Shamrez [2019] EWHC 3112 (Fam) and Shokrollah-Babaee v Shokrollah-Babaee [2019] EWHC 2975 (Fam).

Submissions

21. Mr Weale argues that the Defendant has treated Pier's account as his personal account and has depleted the balance for his personal use.

22. The Defendant, who gave evidence on oath, accepted the fact of the payments out of Pier's account having been made by him, but denied he was in breach of the Order. He also accepted that he had received the Order and understood its terms. He argued that the Claimant had no interest in the Property and the Shares. However, as I have already set out, this is irrelevant to the issue which I have to decide, namely whether there has been a breach of the Order. I therefore will express no view on the merits of the substantive argument.

23. In respect of the payments out, the Defendant raises three arguments. Firstly, he says he had a right to (and thus Pier a legal liability to pay) an annual salary as the Company director, of £8,500. Secondly, he says that payments were made as a repayment of loans that he had made to the Company in the past. Thirdly, he says payments were made in respect of Pier's legal fees.

24. On the alleged salary, the Defendant argues that he was entitled to take a salary because he was the director of the Company and he was working on its behalf. The Company's sole asset, subject to what I say below, is the Property. Until 2017 the parties were living in the Property and thus it generated no income. However, when they separated they agreed that the Property should be let, and they moved separately into cheaper rented accommodation. It was let, initially using a letting agent John D Wood. The Claimant argues he undertook work on the Property and that the salary was merely recompense for this. He says there was no salary before 2018 because the Company had no income.

Conclusions

25. As Mr Weale points out, there is no documentary evidence of there being any agreement for a salary or what its terms were. The Company accounts which have been filed make no reference to a liability for any salary. This may not be determinative because it is not clear what the information requirements on the accounts would be, but it is another place where there is a lack of any reference to the salary. The Defendant accepts that the figure of £8,500 per annum was fixed on to be "tax efficient" and there is nothing in writing in respect of the amount of the salary. He said in oral evidence that the liability to pay arose annually, but he could take the salary as he wished. He says that as he was, in effect, contracting with himself he did

not think there was any need for a written agreement and said that this was the position in German law and thought it was the same here.

26. The Defendant is correct that a legal liability could arise without any written agreement or documentary evidence of the salary. Documentary evidence is however relevant to whether I accept that the liability did actually exist. I note that no mention of the alleged right to a salary was made when the Order was made, or in the Defendant's Form E. The Defendant said that he was "overwhelmed" at the Freezing Order hearing and therefore agreed to the Order, but it is surprising that if the Company had a liability to pay him a salary he did not mention that. The first time the salary was mentioned was before Cobb J in December 2019, and the Defendant said he had not realised he could apply to vary the Order. I find this exceptionally difficult to believe, partly because the Defendant is an experienced businessman, but also because he was receiving legal advice on some matters throughout the period as the third issue shows. The correspondence shows that certainly by May 2019 he was aware that he could apply to vary the Order.

27. Secondly, the Defendant argues that the payments out of the account was repayment of longstanding loans that he had made to the Company and which had been used to buy properties in the eastern part of Germany in the mid-2000s. Again, there is no documentation to support the argument that these were loans to the Company, when and in what sum they had taken place, and what the terms of repayment (if any) were. The first time the alleged loans were raised was on 12 January 2020. They are not mentioned in the Form E, although on the Defendant's case now they plainly should have been.

28. Thirdly, the Defendant argues that the payments made out of the account to Sinclair Gibson and Clyde and Co, were payments towards Pier's legal fees. However, the documentation from these firms is all directed personally to the Defendant, and makes no mention of being in respect of advice to the Company. The Defendant has not produced any client care letters, or letters of instruction, or any other documentation, that suggests that the Company was instructing these firms and incurring a liability to pay fees.

29. Finally, the Defendant argues that he has no other income and that he needs the money in order for him and Philipp to be able to live. One of the liabilities that he says that he has incurred is rent to his new partner, with whom he and Philipp have been living.

30. There is some correspondence with two individuals where it appears that they were in some business transaction with the Defendant and that money was held in a Citibank account with an address given in Ireland. The division of ownership between the two individuals and the Defendant is wholly unclear. There remains $100,000 in this account and the Defendant accepted that he could access this money, although he said he had a moral obligation to inform the two individuals as some if not all of it was their money.

31. In my view the Defendant's arguments are not credible, and I find that he is in breach of the Order, and knowingly so. I apply the criminal standard of proof to my findings.

32. On all three of the defences he raised there is no documentary evidence to support his case, and the defence therefore rests on the Defendant's credibility. I have referred above to Judge Meston's findings on credibility in the Welfare Proceedings, and I entirely agree with them. The Defendant, in my view, was making matters up as he went along as excuses for using the money in the account as he wished and then hoping to persuade a court there was no breach of the Order. There is nothing to suggest there was ever an agreement for a salary, and importantly the suggestion of a salary was only raised in December 2019. I have no doubt that if there had been a liability for a salary the Defendant would have raised it when the Order was made. He is an intelligent man, who has considerable familiarity with law and with business affairs. In my view the alleged right to a salary was made up at the point when the Defendant wanted to draw money for his living expenses. There is no automatic right to a director getting a salary from a company, and I do not accept the Company had any liability to pay a salary. In any event, even if I am wrong on this, the payments out were well in excess of £8,500.

33. Even more clearly, I do not accept that there was any liability on the Company to repay loans to the Defendant. As I understood the Defendant, the loans were very longstanding, dating back to the 2000s when the German properties were purchased. There was nothing in writing to explain the terms of the alleged loans, whether interest was payable, and the terms of any repayment. It seems to me far more likely that the properties were bought as an investment and there was no agreement that the money invested would be repaid as a loan on demand. The intricacies of the Defendant's tax affairs, and the relationship between the German properties and the Company are well outside my remit. However, I do not believe the story about there being loans which the Company had a liability to repay to the Defendant on demand. If the money had been paid as loans I would expect clarity on the terms of repayments, but also such loans should have been mentioned in the Form E. Again, in my view the evidence points inexorably to the Defendant having made up the loans to justify taking money from the Company account, in clear breach of the Order.

34. Further, I do not accept that there was any money owed by the Company, as opposed to the Defendant, in respect of legal fees. The documentation from the solicitors all refers to the Defendant and not the Company and I have seen nothing that suggests that the firms were instructed on behalf of the Company. The solicitors firms involved are major firms, doubtless with very careful invoicing procedures. If the bills were owed by a company then that would have been recorded.

35. The Defendant's argument about being impecunious and needing the money for he and Philipp to live are largely if not wholly irrelevant to the question before me today as to whether he knowingly breached the Freezing Order. He did not apply to vary the order, until he was before Cobb J. In any event, I find it highly unlikely that he has a legally binding agreement to pay his new partner rent for living in her house. That appears to me to be the type of non-commercial arrangement which is well known in the world of housing benefit, and gives rise to no legal liability, if such an agreement existed at all. As for whether the Defendant has other sources of income I find that impossible to know. The Defendant's finances are extremely opaque. There is the Citibank account which still has a large balance in it.

36. I have found the Defendant to be an unreliable witness, and I do not accept that he has no other source of income.

37. The Defendant argues that the committal application is defective because it does not state the date of the payments. I reject this argument. The application gives the range of the dates, and the allegation of breach is that throughout this period the Defendant withdrew sums of varying amounts in breach of the Order. The dates therefore cover a period, rather than one specific day, and there is therefore no defect in the application.

38. On the criminal standard of proof, I have found that the Defendant did breach the Order, and did so in deliberate and full knowledge that he was in breach of it.