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Case No: FD11D03106

Neutral Citation Number: [2014] EWHC 4669 (Fam)

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14/03/2014

**Before :**

**MR JUSTICE NORRIS**

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**Between :**

<b>Sofia Arif</b>	<b><u>Petitioner</u></b>
<b>- and -</b>	
<b>Arif Anwar</b>	<b><u>1<sup>st</sup> Respondent</u></b>
<b>- and-</b>	
<b>Raziz Rehan</b>	<b><u>2<sup>nd</sup> Respondent</u></b>
<b>-and-</b>	
<b>Richard Hicken</b>	
<b>(Trustee in Bankruptcy for the First Respondent)</b>	<b><u>Intervener</u></b>

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**Duncan Brooks** (instructed by **Hughes Fowler Carruthers Ltd**) for the **Petitioner**  
**Valentine Le Grice QC** (instructed by **Zak Solicitors**) for the **1<sup>st</sup> Respondent**  
**Christopher Brougham QC** and **Nicholas Fairbank** (instructed by **Saints Solicitors**) for the  
**2<sup>nd</sup> Respondent**  
**Joseph Curl** (instructed by **Speechley Bircham LLP**) for the **Trustees in Bankruptcy**

Hearing dates: 14 March 2014  
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**Judgment**

**Mr Justice Norris :**

**This was the hearing of the Wife's adjourned application to enforce arrears accruing under an order for Maintenance Pending Suit and the Husband's cross-application for that order to be varied and for the arrears accrued to be remitted. Norris J first considered whether there should be sanctions imposed on the Husband for his failure to comply with an earlier order to issue his application by a certain date. Norris J gave judgment as follows.**

1. One of the applications before me is by the husband to remit Maintenance Pending Suit due. By my order of 18 December 2013 I directed that if he was to make any such application then it must be issued by 5 January 2014 and listed together with the adjourned application for enforcement of Maintenance Pending Suit. The husband did issue such an application but did not do so until 20 February 2014. The delay is not explained in evidence, but on instructions Mr Le Grice QC says the solicitor put the application for remission of arrears into the post on the last possible day for receipt by the court in time, that the application went astray and that it took him some time to realise that that was the position, although he accepts he did not then act as speedily as he should. And that accounts for the very lengthy delay in issuing the application.
2. In a short opening Mr Brooks submitted that the application could be dealt with by submissions based on the evidence that was already before the court. Mr Le Grice QC said he did not wish to adduce additional oral evidence in support of his application but that it would be necessary for him to cross examine the Petitioner, because he had queries about credits shown in her evidence which she sought in her application to enforce. He had queries because he says certain items were omitted, including a trip to Pakistan, and that there was an incomplete run of bank statements covering a number of days in relation to the Petitioner's bank account. He says also that Mr Brooks should in effect be required to cross examine the Respondent if he wishes to make the submission that the Respondent can afford to pay. All this will take time in a hearing slot allocated for the Petitioner's application for enforcement.
3. That is the context in which I have to decide what to do about the breach of my order. It seems to me whatever the disciplinary effect of so doing that it would be a waste of money to strike out the Husband's application because it was brought out of time. But it seems to me that there must be some consequence of the delay on the Husband's part, and it is not the first instance of delay in this case. The consequence will be that I will adjourn the hearing of the Husband's application to remit arrears to a date to be fixed in order that no time should be taken up in dealing with it given that Mr Le Grice QC says that oral evidence is necessary. I will not accordingly address the Husband's application to remit arrears at this hearing.

**Norris J next considered the Wife's application to enforce arrears accruing before the twelve months preceding her application. Norris J gave judgment as follows.**

4. On 24 August 2011 Deputy District Judge Crowther made an order for Maintenance Pending Suit in the approximate sum of £5,000 per month due from the Husband to the Wife. In addition the Husband had given an undertaking to meet the school fees for the child of the marriage which, and this is to his credit, is an undertaking which he has performed. He also gave an undertaking to continue to provide the Wife with

her current car for her exclusive use and to meet the costs of insuring it and maintaining it. That undertaking has not been complied with. The order for Maintenance Pending Suit was complied with for two months.

5. The context in which the order was made may be briefly summarised in this way. The Husband's business was failing. The Husband acknowledged that if he maintained his professional certification and took employment he could earn £150,000 a year. But he said that it was probably better to carry on with his ailing firm since that represented a better potential. But it was however recognised that he may go bankrupt, either on his own petition or on the petition of a creditor. It was recognised at the time the order was made that the Husband's then income would be insufficient to fund both the maintenance payments and his own expenditure. But the gap was to be bridged by informal borrowings within the family. This is unsurprising since it is clear from evidence which has subsequently emerged that there were mutual dealings between the Husband and the son from his first marriage. It was unsurprising that the son from his first marriage should in those circumstances wish to assist the Husband. The arrangements as to informal borrowings were not, according to the evidence, time limited in any way, but in making her order the Deputy District Judge focussed on the short term, pending the holding of the FDR hearing. That focus does not amount to a finding that the borrowing would only be available in the short term, merely that that was the period that was the principal focus of the order then being made.
6. As matters have turned out the Maintenance Pending Suit order has had to apply for a substantially longer period. As I have said the Husband made two payments under the Maintenance Pending Suit order. Then, as was contemplated at the time when the order was made, he entered bankruptcy, in fact on his own petition, and it is common ground now (though disputed earlier) that a commercial creditor would have been in a position to bring the petition. The bankruptcy of course does not affect the Maintenance Pending Suit order. As with many bankruptcies the fact of the making of a bankruptcy order did not impact on the realities of everyday life to a significant degree. The Husband continued to live in the eight-bedroomed house which he shared with the son of his first marriage. He continued to drive the sort of car that hitherto he had driven as the principal of an insolvency and accounting practice. He continued to pay – I emphasise, to his credit – his son's school fees. But he did not pay the Wife's Maintenance Pending Suit, the payment due for her rent, or, significantly, any part of the legal costs order which had been included in Deputy District Judge Crowther's calculations. The result has been that the Wife has been forced to take relatively low paid work and to accept accommodation arrangements which now comprise the share of a two-bedroom flat. In consequence, when the son of the marriage is with the Husband he lives in a grand house and is driven around in a grand car, but when he is with the Wife he sleeps on the sofa in a two-bedroom flat. The contrast is stark.
7. In these circumstances the Wife says that there should be some equalisation and that she should be entitled to receive that which the court has ordered she should receive, and she seeks to enforce the order for Maintenance Pending Suit. Her original application was dated 21 June 2013. This got caught up with other applications relating to fact-finding as to the assets available for distribution. But on 20 September 2013 Holman J ordered that nothing in the direction which he made should be taken to prevent the Wife from taking steps to enforce the maintenance that had accrued prior to the twelve months which had preceded the application.

8. What the Wife seeks is not merely to enforce arrears which had accrued before June 2012, but to go back to August 2011 and collect all arrears accruing since then. Section 32 of Matrimonial Causes Act 1973 provides that a person shall not be entitled to enforce any arrears due under an order for Maintenance without the leave of the court if those arrears became due more than twelve months before the application to enforce them is brought. If such an application is made the court may refuse or grant leave as it thinks proper. It is accepted that this is a general provision unencumbered by the need to establish any special circumstances. However it is also accepted that the Wife bears a persuasive burden; that is to say, she must advance some reasons why the court should grant relief.
9. In the instant case what is said is that there was following the making of the Maintenance Pending Suit order no such significant change in the realities of the lives of the respective parties that would cause a court now to say that an order formerly made ought not now to be enforced. I accept that submission. Of course, bankruptcy has intervened. But the bankruptcy has not significantly affected the style of life which the Husband enjoys nor the needs of the Wife. Nor is it demonstrated that the former source of any shortfall – namely family borrowings and intra-family assistance – has come to an end. It is true that the nature of the Husband's income has altered. There is outstanding an application by the Husband to remit some of the arrears and to vary the order. What I now say must therefore be a provisional view only. But my provisional view is that there are possibilities of full time employment available to the Husband that could significantly bridge what he now says is a gap in his income resources. He is at present employed on a consultancy basis with what is in effect a phoenix operation arising out of his old business which has, in addition to its own line of business, taken over a number of his former clients. There is, it seems to me, scope for extending that consultancy. In the open market, or even on a part time basis, the Husband can command a salary of £40,000 a year. In these circumstances his position is not so different from the reality of his position at the time when the Maintenance Pending Suit order was made. He did not, at any rate until 20 February 2014 make any application to remit or to vary the Maintenance Pending Suit order.
10. It is said against the Wife that neither did she seek to enforce the order. The explanation is given that at the time when the arrears arose and in the early days of those arrears she was much engaged in finding herself a job and finding herself accommodation. I suspect that she was also distracted by the bankruptcy and her attempt to annul the bankruptcy. But most significant to my mind is that the order had provided that she should receive a set sum each month for her legal costs. She was not receiving that, so therefore in essence lacked the means to bring proceedings to enforce that order, of which she had the benefit.
11. Assessing the circumstances in which the order was originally made, and assessing the circumstances that have pertained whilst the arrears have accrued due, and considering the circumstances in which an application to enforce the arrears could have been afforded by the Wife, in my judgment it is appropriate to exercise the discretion under section 32(2) by granting permission to the Wife to seek to enforce arrears of maintenance going back more than twelve months before the date on which she eventually did issue an application to enforce arrears, and I order accordingly.

**Norris J lastly considered the Wife's application for enforcement including oral evidence from the Husband in chief and in cross examination. Norris J gave judgment as follows.**

12. I must now deal with two applications relating to enforcement of orders. The first is for enforcement of the current Maintenance Pending Suit order which provides for the payment of roughly £3,000 per month in respect of maintenance and £2,000 a month in respect of legal fees and which proceeds on the footing that the Husband undertakes to pay the school fees of the child of the marriage. It is common ground that as at today no part of that order is being complied with. Even the undertaking as to the payment of school fees, which I had understood was being complied with and have the Husband credit for when deciding the previous application, proves to be wrong.
13. I must first determine the nature of the Husband's earning capacity. On paper the Husband is retained as a consultant by Rock Consortium Ltd trading as Rock Partnership. On paper he earns a monthly consultancy fee of £2,000, but of that the client retains £500 against the prospective liability to tax of the Husband. The Husband has but one client and takes no work for any other. The terms of his employment or engagement provide that he is entitled to receive a car and fuel allowance, in respect of which the client agrees to pay the P11D liability. In truth in my judgment the Husband is an employee of Rock Consortium Ltd. The revenue would not accept that he is providing services under a contract for service.
14. Against that sort of engagement there is no doubt that an attachment of earnings order may be made. The Husband's net income is of the order of £1,550 odd. The £50-odd derives from a pension. That pension has not hitherto been disclosed in these proceedings, and only came to light on a bank statement produced for this hearing. I say nothing about the circumstances in which the pension (which has included a lump payment of around £6,000) has emerged. I propose to make an attachment of earnings order in respect of the pension.
15. The question then arises of whether I should make an attachment of earnings order in relation to some other part of his income. It has emerged in the course of this hearing that the Husband has his accommodation and all of his household expenses provided to him by his son Raziz, that he has a car and fuel provided by his employer, that all his legal expenses are paid for by his son Raziz, to such a degree that although the Husband is the client of the firm he does not know what the firm is charging him, and has no idea what his legal charges in connection with these legal proceedings are. When it was put to him that they may be in the order of £100,000 he agreed that that was possible.
16. Those family arrangements which provide for the Husband to maintain a comfortable standard of living form the background to the applications which I have now considered. The Husband has an obligation, has given an undertaking, that he will pay N's school fees. These amount to approximately £1,250 a month. If he discharges that out of his current income, that would leave him with £250 a month as spending money, subject to his ability to earn more. I do not think it right to make any further order out of the income payments which the Husband receives.

17. But what I do propose to do is to order the payment of a lump sum in respect of the arrears and accruing unpaid maintenance payments. That payment is to be made by 1 June 2014. The object of providing that by way of an order is to enable the Husband to make such arrangements within the family as will enable him to satisfy that, or alternatively to seek additional employment out of which a sum can be saved towards the payment of that obligation. It seems to me that the most important thing is that N's school fees must be paid pursuant to the undertaking that was given. The second most important thing is that the Wife should receive some income. And the third most important thing is that the gap in what she is owed – which I understand to be well north of £100,000 – should be narrowed. This arrangement will obviously have to be revisited if it becomes apparent that the Husband's earning capacity can in fact be realised. So those are the orders which I propose to make by way of the current Maintenance Pending Suit payments due and the arrears outstanding.
18. I would attribute the lump sum payment as to 60% to maintenance and as to 40% to payments on account of legal costs. Both are current obligations. Both are the subject of substantial arrears under the existing order.
19. The second application which I must address is for *Hadkinson* relief. That is to say, the imposition of a condition upon the Husband's continued conduct of his defence in these proceedings and his desire to vary or remit part of the outstanding arrears. This is of course a jurisdiction to be exercised with caution, but I propose to approach the issue in the conventional way outlined in *Mubarak*. The conditions which it is suggested are that there should be a payment of a lump sum of £77,000 being one half of the outstanding arrears, and that until that condition is met the Husband should not be entitled to pursue either his defence in the preliminary issues or his application to vary or remit.
20. There is no doubt that the Husband is in contempt of the Deputy District Judge's order relating to Maintenance Pending Suit. Does this contempt impede the course of justice? The context in which that test was framed has generally been one of procedural default, but in my judgment it is equally applicable to contempt arising from non-payment of money due under Maintenance Pending Suit orders. The test is equally applicable. So, does the contempt impede the course of justice? It does in my judgment in two respects. First, the outcome of the Deputy District Judge's order was that the just course making interim provision pending resolution of the financial issues between the parties was that the Husband should pay about £3,000 per month by way of maintenance and £2,000 per month by way of legal costs. The course of justice as regards interim provision is undoubtedly impeded by what is occurring under the existing order.
21. Moreover, the course of justice in relation to the pursuit by the Wife of her provision is impeded by the failure to make payments due under the legal charges order. It is true that at present the legal team is operating under a 'Sear's Tooth' agreement, but it seems to me that such agreements inevitably impose constraints on what is done, and have about them an element of impermanence. It is wrong that those constraints should exist and that the continuing representation of the Wife should be the subject of doubt when the court has made an order to secure her due and proper representation. So in those two senses, in my judgment H's contempt in failing to make payments under the order does impede the course of justice.

22. The third question to be answered is, is there any other effective means of securing compliance? The answer to that is that there is great difficulty of ensuring compliance with the performance of undertakings or of the making of due payments under the order where the court cannot be assured that it has before it a full and accurate statement of the means of the Husband and the sources of funds that are available to him. In the instant case the Husband says that he simply only has £1,500 per month for ten hours' work per week because that is all that it is possible for him to obtain. The question really is, is he trying to do his reasonable best to meet the order which the court has made? And in that connection I am not satisfied that he is doing his reasonable best to obtain remunerative employment. It may be comfortable to work for ten hours a week as a consultant when all your living expenses are paid. But in my judgment the Husband's obligation is not simply to maintain a comfortable life for himself, it is also to satisfy his obligations under the court order. And I am not satisfied that he is doing his reasonable best to achieve that end. Nor am I satisfied that I have been given the full picture as to his access to funds. Historically many of the payments to the Husband have been in cash, where neither the receipt nor the expenditure leaves a footprint. The Husband now has a bank account, but I am not satisfied that the contents of that account represent the only funds to which he has access. In particular, he has a bank debit card in the name of his son for an account run by Rock Consortium Ltd with which the Husband told me in evidence his son has no actual remaining contact. There is a puzzle there but one need not solve the puzzle. It is sufficient to note that the Husband has unrestricted access to funds lying outside his own bank account, of which there has hitherto been no hint. So the resources that are available to the Husband and which might be brought into play in securing effective compliance with the order go beyond those in relation to which an attachment of earnings order can be made.
23. The fourth question is, is the contempt wilful? That is to say, is the non-payment brought about by some voluntary, deliberate and knowing act by a person who is in fact able to comply with order if he chose to do so? That test is satisfied in my judgment in the instant case, because I am satisfied that if the Husband chose to do so he could add to his earning capacity and work the sort of hours which the Wife works, who is in precisely the same relationship to N as is the Husband. Moreover, I think he would be able to comply with his obligations to give full disclosure of his means should he choose to do so and as he will have to do in relation to his application to vary and remit arrears.
24. Is a *Hadkinson* order, which has to be made as a last resort, appropriate in the circumstances of this case? I believe that it is. The possibility of *Hadkinson* relief has been foreshadowed on at least two previous occasions and applications for it have been made. The Husband has well known the risks which are run in relation to non-compliance with the order of the court and has chosen to run those risks.
25. Lastly, I must bear in mind that the Husband has outstanding an application to vary and remit. I must be careful not to decide in advance issues which ought properly to be decided at that hearing. I have sought to avoid doing so on this occasion, recognising the limitations on the material I have that has been deployed before me but that I am satisfied that it is proper for me to express the provisional views which have in the course of this judgment.

26. I am therefore minded to grant *Hadkinson* relief. I would propose that the Husband shall not be at liberty to pursue his application to vary or remit, save on terms that he duly makes the lump sum payment which I have indicated and duly complies with the undertaking to pay N's school fees. It would not in my judgment be appropriate on the state of the evidence as to the Husband's income and family money that is available to him to make an order that he should pay £77,500 before being able to pursue that relief. That would, I think, effectively stymie the ability to make that application, and that would not be just. I will not make any *Hadkinson* order in relation to the Husband's participation in the preliminary issues. That is because the preliminary issues are part heard, the hearing is far advanced, there is no sense in which the preliminary issues can be concluded without opposition from Raziz, and I do not see any advantage in preventing the Husband from making such final submissions as he wishes in support of Raziz, which is the position he has hitherto adopted. In these circumstances I will grant relief in relation to the application to vary or remit, but no other relief.

**Norris J ordered that the lump sum the Husband was required to pay to discharge the *Hadkinson* order was £25,000 in respect of the arrears accrued. Norris J next considered the Wife's application for costs. He ruled:**

27. I shall order that the Husband shall pay the Wife's costs of this application. I assess those costs in the sum of £10,000 inclusive of VAT. I direct that the costs shall be paid by 16 May 2014. The obligation to pay those costs will be added as a condition to the *Hadkinson* order.

**Norris J ordered that interest on this sum was to accrue from the date of judgment. He next heard an application from the Wife for a third party disclosure order against the Rock Consortium and from the Husband that the Wife be directed to file and serve certain bank statement. Norris J ruled that both parties should present this evidence in court at the next hearing as part of their duty of full and frank disclosure and that he would make no such direction.**