Case No: B4/2014/2518

Neutral Citation Number: [2015] EWCA Civ 1019

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE FAMILY DIVISION
SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION
FD12P02046

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2015

Before :

LORD JUSTICE SULLIVAN
LADY JUSTICE BLACK
and
LORD JUSTICE FLOYD

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J (CHILDREN)

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- -

Mr James Turner QC & Mr Edward Devereux (instructed by **Dawson Cornwell Solicitors**) for the **Appellant**
Mr Christopher Hames QC & Miss Laura Morley (instructed by **Miles & Partners LLP**) for the **1st Respondent**
Mr David Williams QC (instructed by **Brethertons LLP**) for the **2nd Respondent**

Hearing date: 29th July 2015

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Judgment

LADY JUSTICE BLACK:

1. This appeal is the last stage in long standing litigation about two of the five children of the appellant father and the respondent mother. The children are J, who was born in January 1998 and is now 17 years old, and T, who was born in January 2000 and is now 15 years old. They have an older sister and two younger siblings. The focus of the appeal is the order made by the President of the Family Division dated 9 July 2014.

2. The sad history of the case need not be recounted here. A number of the judgments that have been given along the way are readily available to provide the full picture. The mother is Welsh. The father is Spanish. They married in 1995 and separated in 2008. The family was based in Spain but following the breakdown of the marriage, the mother retained the children in Wales. That led to the first of two orders under the 1980 Hague Convention for the return of the children to Spain and they went back. However, in 2012, they were not returned to Spain following a holiday with the mother in Wales and a second set of Hague proceedings was commenced. The oldest daughter went back without an order and return orders were made by Hedley J on 9 October 2012 in relation to the other four children. They were not handed over to their father as ordered and by the time the police attended at the mother's property to enforce a collection order, the mother and her partner had absconded with them.

3. Extensive court involvement followed. The two youngest children returned with the father to Spain in mid October 2012 but J and T refused to go. Exhaustive attempts were made to secure their return. The response of the authorities was rigorous. The detail can be found elsewhere but it included the following. The mother and her partner were arrested and taken into custody following the initial failure to return the children. J and T were placed with foster carers where they remained for some weeks. Whilst the children were in foster care, social workers tried to assist in achieving the return of the children but were unsuccessful. Contact between the children and the father in this country did not change things either. When J and T were seen by an experienced CAFCASS officer at the end of November 2012, they were adamant that they would not return; as there appeared to be no purpose in them continuing to live with foster carers, they were returned to their mother's care. However, the court continued to attempt to achieve compliance with the return order. The children were seen again by the CAFCASS officer and remained steadfast in their refusal and determined to resist any effort to enforce the return order. The matter came before Theis J in January 2013. In the judgment that she gave at the conclusion of that hearing, she condemned the mother for her refusal to comply with the return order and for putting the children in an impossible situation where their relationships with their siblings were fractured, to their long term detriment. Theis J left the return order in place but decided to provide a respite from the threat of enforcement by committal in the hope that relationships could be restored and the parties could reflect on their positions. Regrettably, this strategy worked no better than had the tougher approach.

4. In July 2013, the President of the Family Division heard proceedings brought by the Solicitor General against the mother for contempt in relation to her failure to produce the children in October 2012 for their return to Spain, dismissing the

proceedings on the basis that contempt had not been proved as it had not been established that, at the relevant time, it was within the mother's power to comply with the order (see [2013] EWHC 2579 (Fam)).

5. In August 2013, the President was asked by the father to make a further order requiring the return of the children to Spain. His judgment dealing with that application (*Re Jones (No 2)* [2013] EWHC 2730 (Fam)) can be found on www.bailii.org. For present purposes, the important passage commences at §14 where the President explained that the mother's answer to the father's application was that it would be impossible for her to comply with any order for implementation of the return order because J and T would refuse to co-operate. The President's approach to this submission can be found at §§15 and 16 of his judgment:

> "15. The normal approach of the court when asked to grant an injunction is not to bandy words with the respondent if the respondent says it cannot be performed or will not be performed. The normal response of the court is to say: "The order which should be made will be made, and we will test on some future occasion, if the order which has been made is not complied with, whether it really is the case that it was impossible for the respondent to comply with it." There is a sound practical reason why the court should adopt that approach, for otherwise one is simply giving the potentially obdurate the opportunity to escape the penalties for contempt by persuading the court not to make the order in the first place. That said, I have to recognise that the court – and this is a very old and very well established principle – is not in the business of making futile orders. How does one balance those two somewhat contrasting propositions?
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> 16. The answer, it seems to me, is that one has to evaluate the degree of likelihood that the order, if made, will be futile, which, in the present case means that one has to evaluate the degree of likelihood that the order, if made, will be frustrated, not by the actions of the mother, but despite her best endeavours to ensure compliance, by the obdurate opposition of the children."

6. The President recorded at §17 of his judgment that it was accepted by the father that there was a real degree of risk that the order, if made, would be frustrated by the obduracy of the children, although the father complained that if the children *were* obdurate, then it was because of the success of the mother's campaign to frustrate the orders of the court. The President decided that he would not be deflected from making the order by fears that it would not succeed, and made an order requiring the return of the children. He explained his conclusion as follows:

> "21. I am not so foolish as to imagine that the order I am about to make will necessarily bear fruit. It may be that it will be as ineffective as the previous orders which have

> been made, but I am not persuaded that the likelihood of futility is such as to justify my declining to make the order the father seeks. I think there is a prospect, even at this late stage, that an order directed to the mother will have the desired effect, if not in relation to each of the two children perhaps in relation to one, the younger. In my judgment if the court is faced with a parent as obdurate and as in default of her parental obligation as this mother the court should not be deterred from making the appropriate order unless satisfied, and I am not satisfied, that the order will be a futility. Accordingly, I propose in principle to make the order which the father seeks."

7. The President's order required the mother to return or cause the return of the children to Spain by 4 September 2013, or "[i]n the event that it is impossible for [her] to comply with" that, by 11 September 2013 or, failing that, by 18 September 2013.

8. This order was no more successful than any of the previous orders. The father applied for the committal of the mother for breach of it and for breach of a further order that the President had made requiring the mother to bring the children to London on 21 August 2013 so that they could speak to the CAFCASS officer again. The matter came again before the President who gave judgment on 9 July 2014 ([2014] EWHC 2264 (Fam), hereafter "the committal judgment").

9. The President uncompromisingly endorsed Theis J's assessment that much of the responsibility for the unhappy state of affairs facing the court rested with the mother who, he said, "in very significant part bears responsibility for the children's intransigence and for …. 'this fractured family'" (§8 of the committal judgment). He said (§22 ibid) that he was left, by the end of the evidence, with "the very distinct impression that the mother had really done very little either to persuade the children to come to London, let alone to return to Spain *[sic]*" and "that what she did was indeed not much more than going through the motions". He accepted counsel for the father's characterisation of her efforts as superficial, minimal and utterly inadequate. Despite this condemnation of the mother, the President nevertheless refused the father's committal application because, in his judgment, the father was required to prove to the criminal standard of proof that the mother could have ensured compliance with the orders and he had not achieved this (§25 ibid).

10. It was against this refusal that the father appealed, having obtained permission to appeal from McFarlane LJ. At the conclusion of the argument before us, we announced what our decision would, in due course, be, namely that the appeal would be dismissed. We said that we would give that decision in writing together with our reasons and this judgment fulfills that purpose.

The President's reasoning

11. The President approached the committal application upon the basis that he had set out, sitting in the Court of Appeal, in *Re L-W (Enforcement and Committal:*

Contact); CPL v CH-W and Others [2010] EWCA Civ 1253, [2011] 1 FLR 1095, citing §34 of that decision which reads as follows:

> "34. What I derive from these authorities are the following further propositions: (1) The first task for the judge hearing an application for committal for alleged breach of a mandatory (positive) order is to identify, by reference to the express language of the order, precisely what it is that the order required the defendant to do. That is a question of construction and, thus, a question of law. (2) The next task for the judge is to determine whether the defendant has done what he was required to do and, if he has not, whether it was within his power to do it. To adopt Hughes LJ's language, Could he do it? Was he able to do it? These are questions of fact. (3) The burden of proof lies throughout on the applicant: it is for the applicant to establish that it was within the power of the defendant to do what the order required, not for the defendant to establish that it was not within his power to do it. (4) The standard of proof is the criminal standard, so that before finding the defendant guilty of contempt the judge must be sure (a) that the defendant has not done what he was required to do and (b) that it was within the power of the defendant to do it. (5) If the judge finds the defendant guilty the judgment must set out plainly and clearly (a) the judge's finding of what it is that the defendant has failed to do and (b) the judge's finding that he had the ability to do it."

12. He added (§13 of the committal judgment) that the question of impossibility had to be determined by reference to the state of affairs at the date fixed for compliance, reiterating what he had said at §84 of *Re L-W* to the effect that if it was not established that it was within the defendant's power to do what the order required, it did not matter that he may have brought about this state of affairs himself, by earlier acts or omissions.

13. Before the President, the father's submission was that the orders made against the mother did not merely require her to bring about the stipulated outcome but also to use all lawful means to do so and that, accordingly, contempt was established on the basis of her failure to do those things she lawfully could do (§17 of the committal judgment). The President rejected that submission on the basis that an injunction must be drafted in terms which are clear, precise and unambiguous, and implied terms cannot be read into an order of the court as the father's argument would, in his view, require (§18 ibid).

14. The President's concentration was therefore upon whether the father had established that the mother had it in her power to comply with the orders. He heard evidence from the mother and her partner and from J herself. J said that there was nothing that her mother could have said or done to persuade her or T either to come to London or to return to Spain. The President described her as "adamant" that she would not return to Spain and found her "clear, settled and determined in her views" which had remained unchanged since her interviews

with the CAFCASS officer (§24) and which had led that officer to say to Theis J in November 2012 that he saw no prospect of anyone prevailing on the children to comply with the orders for their return and to describe their resistance as "exceptional, in my experience", and, following a further interview with the children, to write in a report in January 2013 that he could not identify any means by which their compliance might be secured. The President concluded that the father "falls well short" of establishing that the mother could have ensured that the children returned to Spain and, although his case was much stronger in relation to bringing the children to London, it was not strong enough to meet the criminal standard of proof in relation to that order either (§25).

15. The President dealt in §§27 – 29 with the father's argument, which drew upon the provisions of the ECHR, that where, as here, the mother had, by her failure to take any meaningful steps to implement the relevant orders, impeded the process of testing whether it was really impossible for her to implement them, it was not fair or just to expect the father to prove that compliance *was* possible. The father argued for strict liability, or at least a reverse burden of proof so that proof by the father of the bare fact of non-compliance would be sufficient unless the mother could satisfy the court on the balance of probabilities that compliance was impossible. The President rejected that argument as contrary to established authority to the effect that the burden of proof was on the applicant throughout. That law was, in his view, compliant with the ECHR, and the relevant authorities were not decided *per incuriam*.

<u>The practical reality in relation to these children</u>

16. The 1980 Hague Convention ceases to apply when a child attains the age of 16 years, see Article 4. J attained the age of 16 in January 2014 so, whilst she was within the age limits of the Convention when the President made the further order as to implementation in August 2013, that was no longer the case by the date of the committal application with which we are concerned. In less than six months' time, T will also be 16 and outside the scope of the Convention.

17. It was not argued that the President had no power to entertain a committal application in relation to J. However, the age of the children focuses attention on the central issue of what these proceedings can now possibly achieve. Mr Turner QC, who with Mr Devereux represented the father before us and also before the President, accepted that the practical reality was that there was no chance of J returning to Spain now unless it be under her own steam. Given that attempts to achieve a return against her will have been continuing since 2012, with all possible approaches having been tried, this was an inevitable concession. That being the case, I cannot see any hope of T being returned either, unless he chooses to go. In so saying, I do not intend to undermine the very critical observations made about the parents by the judges in the Family Division who have had the opportunity to assess the role that the parents have played in the evolution of this state of affairs; I am merely looking at the practicalities of the present position. The President described listening to J's evidence as one of the saddest experiences of his time on the Bench and remarked upon the division of the five siblings between two countries and two parents in a bitterly divided family. He emphasised how vital it is that a solution be found for the children and I can only agree.

18. Pressed to set out what purpose the appeal could serve in the circumstances, Mr Turner concentrated upon the value of the court's decision in settling the principles in relation to contempt in a case such as this. He did not identify any practical advantage that it would, or even may, secure for this family.

19. Mr Williams QC, representing J here as below, addressed us about the impact of the proceedings upon J. The purpose of the application for committal before the President was to achieve the imprisonment of the mother. J was a party to it. She and her brother have been in suspense about whether the mother would be sent to prison pursuant to the father's application for over a year and this was preceded by the earlier committal application by the Attorney General. On behalf of the father it was submitted that it was "difficult to see how an appeal to the Court of Appeal on legitimate points of law would cause the children …. to suffer" (§50 of the father's skeleton argument). However, Mr Williams submitted that, even if imprisonment was no longer the objective of the father, the continuing proceedings were bound to affect J. I agree. J and T have lost several years of their adolescence to this litigation and it is fanciful to suggest that it could be continued now, in order to resolve the law in the interests of children generally, without a significant impact upon them. At earlier stages in these proceedings, whilst the court was endeavouring to achieve compliance with its orders and whilst the proceedings might still have produced a benefit for the children, continuing litigation was a price that had to be paid. In my judgment, that point has now been passed. I was not inclined to decline to hear the appeal on the basis that it was an abuse of process, as Mr Williams sought, but instead would determine it by upholding the President's decision for the reasons I set out below. However, I have reached the clear view that the proceedings in relation to these children have run their useful course and should now be brought to an end. I would therefore set aside the return order made by Hedley J on 9 October 2012 in relation to both children and any other orders which might have a continuing effect. I would hope thereby to release the children from the uncertainties of the last three years and to give them the confidence to resume a normal relationship with their father and their siblings.

20. It was suggested in argument that mediation might assist this family. We were told that J would like to heal the rift and would be prepared to try mediation, as would the mother. The parties may find that the end of litigation in this country enables them to find their own solution, but otherwise I would commend mediation to them because expert help of that type might well enable them to overcome whatever obstacles remain.

<u>The father's arguments on appeal</u>

21. The father sought, by his appeal, to change the law in order that the courts can more effectively enforce orders requiring a parent to do something in relation to their child which requires the co-operation of the child. His argument was that too often the parent fails to take any steps to persuade the child to co-operate (or even persuades the child not to do so) but the other parent's committal application fails because he cannot prove that the order could have been complied with had the defaulting parent gone about it in the right way. This, in his submission, was the consequence of a line of authorities which had been decided *per incuriam*, namely *Re A (Abduction: Contempt)* [2008] EWCA Civ 1139, [2009] 1 FLR 1 (a decision

of Keene, Thomas and Hughes LJJ as they then were), *Re L-W* (supra, a decision of Sedley, Jacob and Munby LJJ as they then were), and *Re K (Return Order: Failure to Comply: Committal: Appeal)* [2014] EWCA Civ 905 (a decision of Maurice Kay, McFarlane and Kitchin LJJ).

22. Mr Turner's principal argument was that the appropriate approach was for contempt to be established by proof simply of the fact that the order had not been complied with, here that the children had not been returned to Spain/taken to London as required ("the strict liability argument"). On this approach, the question of whether it was within the parent's power to comply with the order would be addressed when considering the penalty to be imposed for the contempt rather than, as required by the *Re A* line of authority and as the President did, when determining whether there had been contempt at all.

23. Mr Turner's alternative argument was styled by him "the reverse burden argument". On this approach, once the father had established the fact of non-compliance, the burden would shift to the mother to satisfy the court on the balance of probabilities that compliance was impossible. If she failed to prove this, contempt would have been established.

24. It was part of the father's submission that to follow the *Re A* line of authority rather than adopting the strict liability or the reverse burden approach would offend against sections 2 and 3 of the Human Rights Act 1998 and give rise to the prospect of a breach of Article 8 of the ECHR. In particular, it was argued that by following the *Re A* approach, the State would be in breach of the obligation established by ECtHR jurisprudence to take all reasonable steps to enforce orders such as those made in this case and to take positive steps in support of Article 8 rights.

25. As Mr Turner acknowledged, the submission that the *Re A* line of authority was decided *per incuriam* developed whilst the case was proceeding on appeal. I initially refused permission to appeal on the papers. When the application for permission was renewed orally before McFarlane LJ, the arguments in support of the grounds of appeal had been augmented by reference to a line of authorities drawn together in the judgment of Bodey J in *Mubarak v Mubarik (No. 2)* [2006] EWHC 1260 (Fam), [2007] 1 WLR 271 which, with an eye to practicality rather than strict accuracy, I will call the *Mubarak* line of authority. Mr Turner sought to argue that this line of authority established that contempt did not involve any element of culpability, mere non-compliance with an order being sufficient. Neither the President in the present case nor, it would appear, the Court of Appeal in the *Re A* line of authority was referred to the *Mubarak* line of authority.

26. A further alternative argument advanced on the father's behalf in counsel's skeleton argument was that a purposive construction of the orders in this case required the mother to take all lawful (or at least all reasonable) steps within her power to comply with the orders and that since she did not do so, she should be found to be in contempt. This argument was not elaborated particularly in oral argument. This may have been because it was considered by counsel to be, "in reality, simply a different way of putting the arguments as to strict liability and/or reverse burden", see §48 of the appellant's skeleton argument. However, it seems to me that it would have been very hard for Mr Turner to advance such an

argument alongside his submission that it was not open to the President to have made an order requiring the mother to take all reasonable steps to secure the return of the children and/or their attendance in London. I perhaps need to explain a little of the background to this latter submission. When I refused permission, I suggested that the original order might have been worded in this way, thus removing some of the difficulties in establishing breach. At the oral permission hearing, responding to this, Mr Turner informed McFarlane LJ that the President had ruled out the possibility of some form of "best endeavours" order because it would not stipulate with sufficient clarity what was required. Mr Turner did not seek to challenge that approach of the President but rather adopted it as part of his submissions yet, it seemed to me, his purposive construction would, to all intents and purposes, amount to the same thing as a best endeavours order.

Discussion

27. This case gives rise to potentially far-reaching questions which might have the capacity to affect the conduct of litigation not only in the family law sphere but also in the wider field of civil litigation. The argument did not, however, expand beyond the boundaries of family law. I am therefore distinctly wary of deciding anything more than is strictly necessary to despatch this appeal.

28. There was little citation of cases from outside the family law context except in so far as they featured in the *Mubarak* line of authority. For my part, I would have felt more comfortable had we at least been taken to authorities such as *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15, [1972] 3 All ER 101 HL (and see further the authorities cited in Halsbury's Laws of England, volume 22, under the heading of "Civil Contempt", including particularly paragraph 66), even if ultimately they proved to be of no assistance in the present case, for example because of the nature of the injunctions there in question or perhaps because family law has legitimately evolved differently from other areas of civil law in response to different imperatives.

29. Furthermore, orders and undertakings of the "best endeavours" type are far from uncommon. Given the way in which Mr Turner put the case to us, I am prepared to proceed, for the sake of argument, upon the basis that such an order could not have been granted in this case. However, I would not wish to endorse (or, still less, lay down) any rules as to the use of such orders without having heard a good deal more argument on the point.

30. As I shall now explain, my conclusion that the appeal should be dismissed emanates from the particular circumstances of the case and I have not therefore felt myself compelled to determine the rights and wrongs of Mr Turner's arguments. In my judgment, it is necessary to look at the making of the orders against the mother in August 2013 and the father's application for the committal of the mother for contempt as a whole. This was not a case in which the possibility of compliance with the proposed order was investigated before the order was made, in the sort of depth that it might have been in a civil case, or even perhaps in another type of family case. The President decided to exercise his discretion by making orders despite the acknowledged risk that the children would frustrate them. His recognition of the potential impossibility of compliance is clear not only from what he said in his August 2013 judgment but also from his

inclusion in the order of alternative dates for the return of the children. It can be assumed that, in deciding what to do, he had the *Re A* line of authority well in mind, no doubt particularly *Re L-W* in which he gave the lead judgment and from which he quoted when dealing with the committal application. It follows that, in making the order in the face of the risk that it would be impossible for the mother to fulfil it, he would have proceeded upon the basis that no finding of contempt could be made against her unless it was established to the criminal standard of proof that it was within her power to do what was required.

31. When it came, later, in the context of the contempt application, to a closer examination of whether fulfilment of the orders was possible, the President found that J was clear, settled and determined in her long-held views and found that the father had fallen "well short" of establishing to the criminal standard that the mother could have achieved the return of the children to Spain and nor was his case was strong enough in relation to the children being brought to London either. In these circumstances, even had Mr Turner succeeded in his strict liability argument, with the result that the mother was in contempt of the orders, it would have been a pyrrhic victory. On the facts of this case, and particularly given the basis on which the President originally made the orders, I can see no prospect of a penalty being exacted for that contempt. The only possible foundation for imposing a penalty would be that the mother had not done all that she lawfully could to overcome the children's resistance. However, if a penalty were to be exacted on that basis, it seems to me that that state of affairs would be all but indistinguishable from proceeding by means of an order requiring the mother to take all reasonable steps or to use her best endeavours, which on Mr Turner's submission would be impermissible. Indeed, on this scenario, the mother may even find herself in a less favourable position than she would have been had she been the subject of an application for committal for contempt in relation to a best endeavours order. There, it would have been for the applicant father to establish to the criminal standard that she had not done what she should. In contrast, on the strict liability approach to contempt propounded by Mr Turner, in order to avoid a penalty, the mother would have to "satisfy the court" "to the appropriate standard" (see §§34 and 35 of the father's skeleton argument) that she had done her best.

32. It must be remembered that an appeal is against an order and not against a judgment. As relevant, the President's order was as follows:

> "The father's application ….for the committal of the mother to prison for breaching the orders of this court dated 20 August 2013 and 21 August 2013 is dismissed."

It has not been established that that order was wrong and I would dismiss the appeal against it.

33. In the circumstances, I need hardly say anything about the legal argument that we heard. The obstacles in Mr Turner's way are significant and a definitive examination of whether they could, and should, be surmounted will have to await another day. Not the least among them is the *Re A* line of authorities which stands between Mr Turner and his proposed approach to contempt in cases such as this one. As I have said, he seeks to improve his attempts to overcome that obstacle by reliance on *Mubarak v Mubarik (No. 2)* and the cases referred to in it.

34. *Mubarak v Mubarik (No. 2)* was a decision of Bodey J in the context of financial proceedings following a divorce. The wife had been awarded a large lump sum order and periodical payments. The husband had paid only a small fraction of the lump sum and the wife's efforts to enforce the orders gave rise to considerable litigation, of which this decision was part. Part of her difficulty was that the husband's disclosed assets were held through a structure which, as Bodey J put it, distanced them from easy enforcement. At the head of the structure was a trust set up by the husband, and the wife was seeking various orders in relation to it so as to enable her to surmount the problems that it posed in her attempt to enforce. Bodey J had to determine a preliminary application by the wife for a *Hadkinson* order (see *Hadkinson v Hadkinson* [1952] P 285) preventing the husband from participating in the hearing of her applications in relation to the trust.

35. Bodey J set out the basic principles applicable to *Hadkinson* applications, starting with *Hadkinson* itself, see §§47 to 50 of his judgment. He had to determine, however, whether on a *Hadkinson* application regarding non-compliance with an order to pay money, the applicant has to prove culpability i.e. that the non-paying party could have paid. He thought that the outcome would almost certainly be the same in practice whether one regarded the question of the respondent's ability to pay as being an essential element of contempt or as a factor informing the exercise of a discretion triggered by the mere fact of non-payment (§52). He went on, however, to look at a number of authorities dealing with non-payment of money, namely *Baker v Baker (No 2)* [1997] 1 FLR 148 (husband in breach of a lump sum order) in which the court considered *Leavis v Leavis* [1921] P 299 (husband in breach of orders for payment to the wife of costs and maintenance), *Gower v Gower* [1938] P 106 (husband in breach of a costs order), *Federal Bank of the Middle East Ltd v Hadkinson* [2000] 1 WLR 1695 (application for a *Hadkinson* order against a party allegedly in breach of a *Mareva* injunction), and *Mubarak v Mubarik* [2004] 2 FLR 932 which dealt with an earlier *Hadkinson* application in the *Mubarak* case. His conclusion from these was that, on a *Hadkinson* application, (§65) non-payment in breach of a matrimonial order to pay money is in itself a contempt of court, with no requirement that it should be shown to have been culpable, i.e. that the payer had the means to pay, and (§66) that questions of culpability come into play when the court is exercising its discretion as to whether and how to act on the contempt.

36. Mr Turner argued that the authorities reviewed by Bodey J in *Mubarak* established, as Bodey J concluded, that culpability was not a necessary element in establishing contempt and that this was so not only in relation to orders for the payment of money but also in relation to orders such as those made by the President in the present case. Therefore, he submitted, the *Re A* line of authorities is wrong.

37. That is a bold argument and not only because the contrary approach (as summarised by the President in the passage I have set out above at §11) has been established and endorsed in three cases over a period of seven years by three entirely different constitutions of the Court of Appeal. Those cases did not concern money orders, as did the *Mubarak* line of authorities. In *Re A*, the alleged contempt was the father's failure to return to this country a child he had abducted, he said for reasons beyond his control. In *Re L-W*, the alleged contempt was a

failure to make a child available for contact, the child having refused to have contact. In *Re K*, the alleged contempt was the father's failure to return a child to this country, he said because of the actions of the grandparents who were looking after the child.

38. To have succeeded in his *Mubarak* argument before us, Mr Turner would have had to show a) that the line of authorities considered by Bodey J in *Mubarak* did actually establish a principle that the payer would be in contempt by mere non-payment, whether or not he had the means to pay b) that that principle was applicable to orders other than for the payment of money and c) that it was applicable not only in relation to *Hadkinson* applications but also when the application was to commit the party in breach to prison for contempt. In the light of the way in which I have decided this case, I do not intend to go into any detail in relation to these matters. I would simply observe that none can be taken as a given. In relation to b), one may expect in relation to money orders that the court would have considered, before imposing the order, whether the payer had the ability to pay; certainly that is so in respect of financial relief orders and associated costs orders, which are made following a review of the parties' financial positions. The present case demonstrates that in orders relating to children, the feasibility of compliance is not always considered at the time when the order is made. In the light of this, "strict liability" may more easily be accepted in relation to money orders than in relation to children orders. In relation to c), it is readily apparent that there are very significant differences between *Hadkinson* applications and committal applications which may render the approach in one unsuitable to the other. The purpose of each is different, the basic standard of proof is different, and the consequences for the defendant are different. The one is a civil matter, the other is to be treated as a criminal matter.

39. As I have said, I neither need nor intend to decide the fate of Mr Turner's arguments now. I would simply dismiss the appeal for the reasons I have explained earlier and invite counsel to consider which of the existing orders in the case need to be discharged in order to bring this litigation to a final close.

LORD JUSTICE FLOYD:

40. I agree.

LORD JUSTICE SULLIVAN:

I also agree.