

**Mann v Mann [2014] EWCA Civ 1674**

Appeal concerning the question whether Mostyn J had jurisdiction to order the Husband to make payments to the Wife prior to the determination of the Wife's enforcement proceedings

The parties separated in 1997. A consent order was sealed in April 1999 which provided for H to pay W periodical payments at the rate of £24,000 p.a. In the ensuing years, H applied for a downward variation, while W applied for secured provision/capitalisation and an upward variation.

In 2005, Charles J heard the case over several days. He found for W. H's application for a downward variation was dismissed. W's periodical payments were capitalised in the sum of £1.3m and H ordered to pay arrears of c.£75,000.

In April 2010, W issued a statutory demand for c.£2m (including interest). W's claim was compromised in November 2011 when the parties entered into a binding agreement to mediate. In the meantime, H was to pay to W:

- a lump sum of £20,000;
- £4,000 pcm; and
- the deposit and rent of a specified property.

Mediation failed and W issued an application pursuant to FPR 2010 r33.3(2)(b) seeking "such method of enforcement as the court may consider appropriate". Mostyn J was seized of the substantive application in February 2014. Significantly, he found that the financial arrangements set down in the November 2011 agreement qualified those clauses as a maintenance agreement.

The matter was restored before Mostyn on 12 May 2014 when Mostyn J ordered that H shall pay to W interim periodical payments at the rate of £120,000 pa and arrears of £42,000. He further ordered that H should appear before him in June to be examined as to his means and to show cause why he should not be committed to prison.

H was granted permission to appeal and a stay of the enforcement proceedings by way of committal.

At the hearing in June, Mostyn J ordered that H only be allowed to make payment to his solicitors if he paid a corresponding amount on each occasion to W, in partial discharge of his debt to her.

The Decision of the Court of Appeal

The May Order for interim periodical payments

The Court of Appeal relied upon the dictum of Lord Scarman in *Minton v Minton* [1979] AC 593:

"Once an application [for periodical payments] has been dealt with upon its merits, the court has no future jurisdiction save where there is a continuing order capable of variation or discharge under section 31 of the Act".

Pursuant to s.31(1) and (2) of the Matrimonial Causes Act 1973 there was no order capable of variation. The Court of Appeal did not accept W's argument that the case of *Hamilton v Hamilton* [2013] EWCA Civ 13 was authority for the proposition that the court could, and should, reinterpret the 2005 order to insert a provision that the order for periodical payments would only be discharged upon payment of the lump sum.

H's appeal was allowed; the jurisdiction of the court to make further orders ceased in June 2005 in accordance with the order of Charles J.

The June Order imposing terms on payments to H's solicitors

This order provided for the mechanics of payment of an order that was itself made ultra vires. H's appeal was allowed.

Summary by Tom Harvey, 1 Hare Court

Neutral Citation Number: [2014] EWCA Civ 1674

Case No: B6/2014/1719

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM HIGH COURT (FAMILY Division)

MR JUSTICE MOSTYN

FD98D03022

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: Friday 19th December 2014

Before :

LORD JUSTICE PATTEN

LADY JUSTICE MACUR DBE

and

LORD JUSTICE BURNETT

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Between :

David Anthony MANN Appellant

- and -

Shelley MANN Respondent

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(Transcript of the Handed Down Judgment of

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Official Shorthand Writers to the Court)

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Mr S Trowell and Mr M Brunsdon Tully (instructed by Sears Tooth Solicitors) for the Appellant  
Mr R Howling QC (instructed by Direct Access) for the Respondent

Hearing dates : 2 December 2014

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Judgment

Lady Justice Macur DBE :

INTRODUCTION:

1. These appeals are brought against two orders directing a former husband (H) to pay monies to a former wife (W) made by Mostyn J on 12 May 2014 and 12 June 2014 respectively. They raise both jurisdictional and procedural issues as to the making of such orders following the discharge of a previous order for periodical payments by capitalisation of the same in circumstances when that consequent order for a lump sum has not been satisfied and enforcement proceedings are pending.

2. H is represented by Mr Stephen Trowell and Mr Matthew Brunsdon Tully, neither of whom appeared in the court below but who have adopted the skeleton argument in all significant respects of Mr Justin Warshaw who did. W appeared as a litigant in person in the court below but has been represented in this court by Mr Rex Howling QC. She opposes the appeal in relation to the order on 12 May, but is "neutral" as regards that of 12 June. In the event that this appeal succeeds, W seeks permission to appeal the order of Charles J out of time to provide that the order for periodical payments should only be discharged upon payment of the lump sum.

BACKGROUND

3. The relevant background facts are as follows. The parties separated in 1997. An order sealed on 20 April 1999, expressed to be by consent and subject to undertakings as to discharge of mortgage and other payments and orders for child maintenance, provided that H was to transfer the former matrimonial home to W, pay to her a lump sum of £50,000 in two instalments (within 14 days and 12 months of the order) and pay periodical payments to her at the rate of £24,000 per annum during their joint lives, until W's remarriage or further order. On 13 November 2002 H applied to reduce the quantum of periodical payments saying he could no

longer afford them. On 29 May 2003 W applied for secured provision and/or capitalisation of her periodical payments alleging lack of full and frank disclosure and manipulative procedural tactics by H, taking advantage of her vulnerable financial position. Subsequently, on 9 March 2005, she applied for an upward variation of her periodical payments prior to any order for secured provision or capitalisation that might be made.

4. Charles J heard the case over several days. He found for W. H's application for downward variation was dismissed. W's periodical payments were capitalised in the sum of £1,300,000 and H ordered to pay arrears in the sum of £74,428 odd by 8 June 2005. H appealed. Thereafter the parties mediated and an order was made by the Court of Appeal on 12 January 2006 granting permission to H to withdraw his notice of appeal on agreed terms. The terms required payment of specified lump sums over the course of four years. In the event that £700,000 had not been paid by the end of 2006, the order for the full capitalised sum was to become "immediately enforceable". In the meantime, H undertook to "continue paying the rent of [W's] present accommodation...until the completion of the payment of £700,000." H reneged upon the agreement. The order of Charles J revived.

5. W issued a statutory demand for payment of approximately £2m (including interest) on 21 April 2010. H applied to set the demand aside. Hearings followed and once again H discontinued the appeal he had launched and W's claim was compromised, both parties, who were legally represented at the time, signing a written agreement on 2 November 2011. In short, H and W agreed to enter into a binding mediation as to the outstanding balance due and terms as to the payment of instalments. In the meantime, H was to pay to W £4,000 per month until an agreement was mediated, a lump sum of £20,000, and the deposit and rent on a property specified, with a personal guarantee of the rent due.

6. Mediation failed. W moved house. H paid £4,000 per month and the lump sum but ceased to pay rent in October 2013. On 16 December 2013, W issued an application pursuant to Family Procedure Rules (FPR) 2010, r 33.3(2) (b) seeking "such method of enforcement as the court may consider appropriate" (general enforcement) in relation to the sum of £1,942,660. H disputes the figure.

7. Mostyn J was seized of the substantive application on 26 February 2014. Significantly he found that the clauses in the November 2011 agreement containing financial arrangements qualified those as a maintenance agreement, albeit that the clauses relating to mediation could not be so classified. He found that H had no ongoing obligation in relation to W's rent and had otherwise complied with the 2011 agreement's financial terms. He adjourned W's application for eight weeks to enable the parties to mediate, and ordered further disclosure against H. W did not engage in mediation. The matter was restored before Mostyn J on 12 May 2014 on which occasion he ordered, "without prejudice" to the sums owed by H to W under the terms of the May 2005 order, that H "shall pay to [W] interim periodical payments at the rate of £120,000 per annum...[H to] be given credit for the payments of £4000 since 1 November 2013" and payment of arrears of maintenance in the sum of £42,000 by 19 May 2014. H failed to pay the arrears. W contacted Mostyn J to alert him to this fact. H applied to vary the order. Mostyn J directed the parties to appear before him on 22 May 2014 and on that day directed H "on 4 June 2014...to attend personally before [him] (a) to be examined as to his means; and (b) to show cause why [H] should not be committed to prison pursuant to section 5 of the Debtors Act 1869 for having refused or neglected to pay the sums due ...where he has or has had the means to do so..."(This hearing was later adjourned to 12 June 2014).

8. In the meantime, H had applied for permission to appeal the order made on 12 May 2014 and sought a stay of the enforcement proceedings by way of committal. A stay was granted by Gloster LJ and subsequently, permission to appeal was given by McFarlane LJ. Mostyn J interpreted the stay to preclude him from proceeding to commit H immediately to prison but not from conducting the necessary judicial investigation itself. Further intervention of this court was necessary to prevent Mostyn J proceeding with his intended course; Longmore LJ making clear that the stay "cannot be qualified or limited by reference to [the single Lady Justice's] reasons" for the order.

9. On 12 June, 2014, Mostyn J "re-characterised" the periodical payments order he had made on 12 May as "a scheduled court directed part payment of the outstanding lump sum" and made an order that H only be allowed to make payment to his solicitors if he paid a corresponding amount on each occasion to W in partial discharge of his debt to her. Subsequently, at a hearing on 19 September 2014, Mostyn J adjourned examination of the H's means and committal

proceedings to 16 March 2015 with a time estimate of 2 days.

#### AMBIT OF APPEAL

10. With all due respect to the 14 grounds of appeal drafted on H's behalf in relation to the order made on 12 May, as amended in terminology by Mostyn J's ruling on 12 June, and the five grounds of appeal in relation to the order he made on 12 June 2014, the real issue is whether the judge had jurisdiction to order H to make payments to W, other than after the determination of W's enforcement proceedings in accordance with FPR 2010 R 33.16 (1) or (2). If H succeeds on the jurisdictional point, all other criticisms of Mostyn J's orders are otiose, albeit that the process the judge adopted in making the orders may well then inform the order of this court.

#### DISCUSSION

11. Section 23 (1) of the Matrimonial Causes Act 1973 provides the various financial provision orders which may be made on grant of divorce, nullity or separation to include:

(a) an order [for payment of spousal]...periodical payments, for such term, as may be specified in the order; and ...

(c) an order [for payment of spousal] lump sum or lump sums, as may be so specified.

Section 23 (3) (c) provides for  
"the payment of [lump] sum ordered...by instalments.

Section 31 (1) and (2) of the Act provides for the "variation, discharge, etc" of:

(b) any periodical payments order; and...

(d) any order made....for payment of lump sum by instalments.

W was therefore entitled to apply for variation of her periodical payments but not the lump sum ordered.

12. However the relevant provisions of section 31(7A), (7B) and (7C) enabled the court which discharges a [spousal] periodical payments order to make an order for the payment of a lump sum and to provide for the payment of that sum by instalments. In addition to any power arising from subsection (7) the court is empowered pursuant to (7B) (c) "to direct that the party in whose favour the original order discharged or varied was made is not entitled to make any further application for – (i) a periodical payments...order..."

13. The order of Charles J discharged the order for periodical payments as from 8 June 2005 and ordered the payment of the lump sum referred to above. He did not make an instalment order. Mr Howling, on behalf of W argues that in the absence of an express direction pursuant to (7B) (c) she is not estopped from making further application for periodical payments in the circumstances of H's failure to pay the lump sum capitalisation of her previous order and consequently Mostyn J had jurisdiction to order interim periodical payments in anticipation of such an application.

14. A restricted reading of (7B) (c) as only applicable to subsection (7A) appears to support this argument. Why else would the Court be given the power to prevent further applications upon discharge or variation? However, subsection (7B) (c) is not so limited but is expressed to relate to "this subsection", that is the whole of subsection (7) and therefore applications made for variation or discharge of orders other than periodical payments or secured periodical payments including lump sums payable by instalments, pension sharing provisions, settlements and sale of property.

15. In *Minton v Minton* [1979] AC 593 @ 608 E Lord Scarman propounded that :

"Once an application [for periodical payments] has been dealt with upon its merits, the court has no future jurisdiction save where there is a continuing order capable of variation or discharge under section 31 of the Act".

16. Ward LJ in *G v G (Periodical Payments: Jurisdiction)* [1997] 1 FLR 368 @ 378, made clear that: "Minton does not narrowly refer only to cases where the claim for periodical payments was dismissed. The speech ranges much wider...Lord Scarman therefore spoke of dismissal or

discharge or termination as displacing the court's power."

17. This is undoubtedly correct. The semantic distinction arises by reason of the direct object in consideration. Mr Howling's attempt to distinguish between a dismissal which bars further application and the discharge of order as permitting further applications in the absence of an express direction to the contrary is thereby dealt a death blow.

18. In the alternative, Mr Howling prays in aid the case of *Hamilton v Hamilton* [2013] EWCA Civ 13 as authority that this court can and should re-interpret the provisions of the 2005 order in order to insert a provision that the order for periodical payments would only be discharged upon the payment of the lump sum. I disagree that *Hamilton* establishes any such principle of redrafting. The 2005 order is entirely unambiguous and accords with Charles J's express intention to frame an order to aid enforcement and prevent H's continual applications for downward variation. The date upon which the orders for discharge of the periodical payments and the payment of the lump sum were to take effect were specified, and, it appears was in accordance with the draft order produced by W's counsel at the time.

19. I am satisfied that the jurisdiction of the court to make further order ceased on 8 June, 2005 in accordance with the order of Charles J. The concession made by Mr Warshaw to the effect that Mostyn J could make "a new one", whether interim or final, was wrongly made and is incapable of affording jurisdiction where none otherwise exists. Mr Howling does not attempt to pursue an argument to the contrary despite initial indication that he would do so in his skeleton argument.

20. What therefore of Mostyn J's judgment on 12 June 2014 at paragraph 9 to the effect that: "An order for periodical payments obviously cannot count as payments towards a lump sum. Therefore in acceding to Mr Warshaw's submission, I agreed to a re-characterisation of the order of 12th May so that it was not interim periodical payments pursuant to section 23(1) (a) of the Matrimonial Causes Act, but rather was a scheduled court directed part payment of the outstanding lump sum". Does it make a difference to the thrust of the appeal? Is the terminology used merely a "technical point"?

21. In my opinion, this attempt of Mostyn J to relieve W's impecuniosity or otherwise head this appeal off at the pass is doomed to failure. The mechanism plainly described is not a legitimate response other than upon an application for variation of a lump sum directed to be payable by instalments, which is an order amenable to variation, or else in response to a judgment summons pursuant to FPR 2010, r 33.16. (1) and (2). Neither of these situations appertains here.

22. Neither Mostyn J nor Mr Howling have sought to justify the orders made in May and June 2014 as being by way of alteration of a subsisting maintenance agreement. For the avoidance of doubt, I consider that W's failure to participate in "the Mediation" defined as "a mediation in which the Parties intend to participate by the 31 January 2012", by that date or subsequently, renders the November 2011 agreement as at an end. W clearly thinks so in pursuing enforcement proceedings. Section 35 of the Matrimonial Causes Act 1973 only permits application to alter a subsisting maintenance agreement.

23. W's stance in relation to this second appeal is described by Mr Howling to be neutral; I anticipate on the basis of the Hadkinson arguments for otherwise the same jurisdictional points arise as in relation to the mechanics devised to order periodical payments/scheduled court directed part payment of the outstanding lump sum as in relation to the first appeal set out above.

24. The grounds, skeleton argument and oral submissions made by Mr Trowell in support of the appeal against the £1 for £1 order of 12 June 2014 apparently contemplate Mostyn J's intention to be to prevent H's participation in default proceedings in similar vein to the prevention of a contemnor prosecuting his/her own application, (see *Hadkinson v Hadkinson* [1952] P 285; *Laing v Laing* [2007] 2 FLR 199) or else imposing terms which must be met before allowing participation in the defence of substantive applications as in the case of *Mubarak v Mubarik* [2007] 1 FLR 722.

25. The submission fore-warned in H's written skeleton argument challenging the correctness of the decision in *Mubarak* has not been developed; in my opinion rightly not. However, without prejudice to the argument that Mostyn J had no jurisdiction to make any order for interim payment, what is properly urged is the lack or wrongful exercise of judicial discretion in

potentially depriving H of legal representation in committal proceedings without any apparent or adequate regard for the fact that part of the Debtors Act enforcement process requires investigation of whether H is in wilful default. That aspect of the case should not be pre-judged.

26. Whilst the outcome of the £1 for £1 order may well have resulted in H's non representation at proceedings in which his liberty was at stake, I do not find this intent to be reflected in the substance of Mostyn J's judgment on 12 June, which clearly reveals the judicial objective to be payment of outstanding sums utilising a process adapted from the approach of Bodey J in Mubarak above. If I am wrong in this interpretation, then clearly, without articulation of the manner in which he purported to exercise his discretion, Mostyn J's judgment is liable to be interpreted as punitive and not for the purpose of ensuring procedural justice and must be struck down without more. However, in any event, this order in providing for the mechanics of payment relates to an order itself made ultra vires.

## OUTCOME

27. FPR 2010 R 20.2 lists the orders for interim remedies which may be granted by a court "at any time". They do not include interim payments, save for "the payment of income from relevant property until an application is decided". W has initiated enforcement proceedings in relation to an outstanding lump sum. The outcome awaits due process. There is no interim relief that can be provided in the absence of orders capable of application for variation. There are none in this case. I would allow these appeals.

28. W's application for permission to appeal out of time the order of Charles J, in order to seek to insert a provision that the order for periodical payments will not be discharged until payment of the capitalised lump sum, lacks any realistic prospect of success. The elapse of time aside, the parties have compromised H's intended appeals against the order and other proceedings initiated by W by mediated agreements, partially satisfied by each party. Charles J made clear the basis of his decision was to enable W to enforce the award rather than to counter successive applications to vary periodical payments. W was represented by Counsel who did not seek to argue for deferred discharge of the order. All these things militate against her. In any event, rectification of the order will not bring her the relief she seeks. If H has assets the purpose of her judgment summons will succeed. If he doesn't, there is nothing available to meet

an order for periodical payments. I would dismiss her application.

29. The stated perception of H during the first instance proceedings that Mostyn J has "made up his mind about [H's] ability to pay" is objectively confirmed by the intemperate judicial dialogues recorded in the transcripts of the proceedings between February and June 2014. During that time Mostyn J's frustration is palpable and clearly arises from his obvious belief that H is deliberately and maliciously avoiding his legal and moral responsibilities to W. These views are recently moderated in the hearing conducted on 19 September 2014 when Mostyn J appears to row back from previous indications and prepare W, a litigant in person, to the possibility that she is "clutching at straws" in certain major respects; however his previous interventions and expressed hostility towards H will not have helped to manage her expectations in the uncertain world of litigation. Objectively, I consider that Mostyn J is compromised in continuing to deal with this case and would direct that it should be listed before another judge of the division.

Lord Justice Burnett :

29. I agree

Lord Justice Patten :

30. I agree