Neutral Citation Number: [2014] EWFC 48
IN THE FAMILY COURT

Date: 11 December 2014

Before :
THE HONOURABLE MR JUSTICE PETER JACKSON

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Between :

Mr R
Applicant

-and-

Mrs R
Respondent

- -

Both parties appeared in person

Hearing date: 18 November 2014

Judgment date: 11 December 2014

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JUDGMENT

IMPORTANT NOTICE

This judgment can be reported provided that the parties to the proceedings are not identified. Failure to comply with this order will be a contempt of court.

Mr Justice Peter Jackson:

Introduction

[1] This judgment follows a hearing on 18 November 2014 at which I allowed an appeal against a case management order made by a District Judge in proceedings under the Family Law Act 1996. The case highlights important principles, applicable to all such cases:

> (1) The default position of a judge faced with a without notice application should always be "Why?", not "Why not?" As has been repeatedly stated, without notice orders can only be made in exceptional circumstances and with proper consideration for the rights of the absent party.
> (2) The court should use its sweeping powers under the Family Law Act 1996 with

caution, particularly at a one-sided hearing. Where an order is made, it is the responsibility of the court (and, where applicable, the lawyers) to ensure that it is accurately drafted. This consideration applies with special force when a breach of the order will amount to a criminal offence.
(3) Extra injunctive provisions such as exclusion areas and orders prohibiting any direct communication between parties should not be routinely included in non-molestation orders. They are serious infringements of a person's freedom of action and require specific evidence to justify them.
(4) The power to penalise non-compliance with case management orders should be used firmly but fairly, in a way that supports the overriding objective rather than defeating it. The court should apply the rules (here specifically FPR r.4.6) with that aim.
(5) The court should be on guard against the potential for unfairness arising from the Legal Aid, Sentencing and Punishment of Offenders Act 2012, whereby the applicant is entitled to legal representation as a result of unproven allegations, while the respondent is not. In this case, the fact that one party had no legal advice at any stage was critical to the outcome.

[2] The circumstances disclosed by the appeal need to be recorded, and in doing so I shall disguise the identity of the family concerned.

[3] In a nutshell, on the evening of Friday 20 June 2014, Mr R returned from work as normal to the home at No. 23 X Street where he lived with his wife, Mrs R, and their six children. Soon afterwards, he was served with a Family Court order obtained by Mrs R that day which, amongst other things, forbade him with immediate effect from entering or attempting to enter X Street. The order had been made at a hearing of which he had no notice in proceedings of which he was unaware. Mr R duly vacated the property and, having done so, attempted over a period of months to challenge the order through proper court procedures. However, on the basis of an insignificant procedural failing, the court refused to hear his challenge. In the meantime, he was arrested for an innocuous breach of the original order to which he pleaded guilty without receiving legal advice and in consequence acquired a criminal record. And as if that were not enough, the effect of the original order was to deprive him of contact with his children for fully five months. All in all, Mr R could be forgiven for feeling like the hapless protagonist in Kafka's "The Trial".

[4] The Family Court is of course obliged to respect the right to a fair hearing, as guaranteed by Article 6 ECHR. The court has extensive case management powers, exercised through the Family Procedure Rules 2010, whose overriding objective is to enable the court to deal with cases justly. In this case, the without notice order should not have been made. It was drawn up in misleading terms that did not reflect the court's intention. The respondent was given no effective opportunity to challenge it within a reasonable time. The court's case management powers were then used in a Draconian way that compounded the injustice to an unrepresented party.

[5] When the matter came on for appeal, the orders were set aside. The matter was then dealt with by way of undertakings and the making of a child arrangements order.

The background

[6] Mr and Mrs R have been married for 20 years, have six children and had lived in X Street

in a jointly owned four-bedroom property for 14 years. Mr R works in a responsible position and Mrs R manages the home and the children. By May 2014, it is common ground that the marriage had been in difficulties for some time and discussions took place between the couple about a separation that would involve Mr R moving out.

[7] At around the end of May, finding that Mr R had not moved out, Ms R consulted a well-regarded firm of solicitors. They applied for legal aid for Mrs R on the basis that she was a victim of domestic abuse.

The without notice application

[8] On 20 June, the solicitors issued an application for a non-molestation order and an occupation order and requested a without notice hearing. This request was contained in a Certificate of Urgency signed by a partner, certifying that the application was of such urgency that it must be heard expeditiously. The reason given was that the applicant was at risk of significant physical and emotional harm should the respondent be given notice.

[9] The application was accompanied by a draft order forbidding Mr R from:

- Using or threatening violence to Mrs R
- Damaging property
- Communicating with Mrs R by letter, text message or any other means, except through her solicitors
- Harassing, pestering or molesting Mrs R
- Entering X Street (highlighted on a map)

[10] This application was supported by a statement signed on the same day by Mrs R. It runs to eight pages and contains the following assertions:

- During the course of the marriage, Mr R had pushed and shoved Mr R and thrown objects. On one occasion 17 years ago he had grabbed her arm and pushed her to the floor during an argument.
- He had sworn at her.
- He had at times expected her to engage in distasteful sexual practices, particularly early in the marriage.
- He would control the finances until she insisted upon his making changes.
- There had been a significant impact on Mrs R's health and self-esteem.
- The children were being affected by the disharmony and one was now self harming.

[11] The only recent incident referred to in the statement was an argument on 14 May 2014 about responsibility for a credit card bill. Mrs R says that Mr R was verbally abusive, shouting and swearing and calling her derogatory names. After he left the house to do the school run, she called the police. There were further arguments about money in the following days and social services had become involved.

[12] The statement ended with Mrs R saying that she was making her application for a non-molestation order without notice to Mr R because she would be deterred from doing so otherwise, fearing that she would be placed at risk of significant harm by him threatening and

harassing her. She said that she was scared of trying to separate from Mr R without the protection of orders.

[13] If accepted by the court, Mrs R's evidence may well have justified a non-molestation order after a hearing of which Mr R had notice. It in no way diminishes her account, however, to say that the evidence scarcely justified the making of an order without notice. The threshold appears at s.45(2) of the 1996 Act, which in summary requires the court, before making an order without notice to the respondent, to have regard to all circumstances, including any risk of significant harm to the adult or child, and whether it is likely that the applicant will be deterred from pursuing the application if an order is not made immediately. Those criteria are supplemented by FPR 2010 PD18A, which states that without notice applications can only be made where there is exceptional urgency, or where the overriding objective is best furthered by doing so. The exceptional nature of without notice procedures has been stated time and again in recent authorities.

The hearing on 20 June 2014

[14] The without notice application came before a Deputy District Judge on 20 June. The transcript of the hearing runs to just two pages. Mrs R was present and represented by counsel. The judge rightly made clear at the outset that she was not going to grant an occupation order removing Mr R from 23 X Street, and remarked that Mrs R's evidence was in general old. She then went on to consider the draft order, noting that the family lived in X Street. She said that she would make a non-molestation order including all the provisions in the draft order, but only for a few days.

[15] It is puzzling that the judge specifically made clear that she was not willing to make an order removing Mr R from the family home yet at one and the same time approved the order barring him from the street in which the home was situated. It is also unsatisfactory that Mrs R's lawyers did not point this anomaly out to the court.

[16] Nor was there any discussion about the justification for or effect of an order preventing Mr R from communicating with Mrs R except through her solicitors. It was an entirely unrealistic order in a case of this kind, where they have so many children needing their joint attention and where the judge contemplated the parties continuing to live under the same roof in the short term.

[17] The hearing cannot have lasted for more than five minutes. It led to the drawing up of an order in the exact terms of the draft order (paragraph 9 above), warning Mr R that he would be guilty of a criminal offence and liable to imprisonment of up to 5 years or a fine or both in the event of disobedience. The order was expressed to last for a year. Mr R was at the specific behest of the judge given permission to apply to vary or discharge the order on 24 hours notice and a hearing was fixed for an early date, 26 June. It was stated that the court would then consider whether the order should continue.

[18] All this was done without any effort being made by Mrs R, her solicitors or the court to communicate with Mr R so that he might have the opportunity to put his side of the case. It will be recalled that Mrs R had consulted solicitors some three weeks before the hearing, but they had not written to Mr R at any stage.

Service of the order

[19] The order, the application, the statement and accompanying documents were served by a process server on Mr R at 23 X Street at 8:15 p.m. It is a sign of the reality of the situation that Mrs R agreed to him remaining in the property overnight. Mr R left in the early hours of 21 June to go back to work, taking little or no personal property with him. He has not been back to the property since.

[20] The most obvious thing to observe is that both Mr R and, apparently, Mrs R, understood the court to have ordered Mr R out of his home, when it is clear that the judge had no such intention.

Mrs R goes to the police

[21] On 23 June, Mr R says that he received two telephone messages from Mrs R and a message from his eldest son saying that Mrs R wanted him to ring her.

[22] On 24 June, Mr R telephoned Mrs R, on his account because of her request. Whatever the situation, Mrs R reported this to the police on that date. Disclosure given by the police shows Mrs R's actual position at the time:

- She said that the marriage broke down because of Mr R's controlling ways.
- He had moved out following the order and had not been around since.
- He had been texting his 18-year-old son, and although this was not forbidden, she did not want it to happen.
- He had made a phone call to her on 24 June. It was not threatening: he just wanted to know if the court case was still going ahead and would she allow him to come home.
- She was upset to be told that he would be spoken to or arrested and begged that this should not happen.
- She said that she was not in danger from her husband.
- She refused to give a statement and said that she had not wanted to come to the police but her solicitor told her that she had to.
- She and the children were safe and well.

[23] Following this contact, the police at first sensibly decided to take no action. However, the next day they for some reason reached a different decision. They recorded that Mr R had failed to leave the house immediately and also that he had contacted his son on 23 June.

The return date hearing

[24] On 26 June, the matter came before an experienced District Judge in what will have been a busy list. Mrs R was represented by her solicitor. Mr R attended in person, accompanied by his brother as his McKenzie Friend, who signed the court's code of conduct. Objection was taken to the brother's presence and, while he was allowed to remain, the judge suggested that at future hearings an independent person rather than a relative would be more appropriate.

[25] In passing, it should be noted that there is nothing to prevent a family member acting as

a McKenzie Friend in the absence of a specific reason making this inappropriate. In circumstances where one party is entitled to legal aid but the other is not, the court should surely be careful to preserve such vestiges of equality of arms as can be salvaged.

[26] After a short hearing, the District Judge noted that Mr R objected to Mrs R's application. She suggested that the parties should mediate and urged them not to discuss their differences with the children. She made the following directions on the basis that the original order was to continue in the meantime:

- Mr R was to serve a detailed narrative statement in response to Mrs R's evidence no later than 30 June (he himself suggested this date).
- Mrs R could file a statement in response by 14 July.
- Mrs R was to file a medical report by 14 July.
- The police were to give disclosure by 31 July.
- The matter was to be listed for a contested hearing for one day on 23 September.

[27] Despite the requirement in the order of 20 June that the court should use the hearing on 26 June to consider whether the original order should continue, this did not happen. No comment was made about what had in effect amounted to an unintended occupation order. The first proper opportunity Mr R was given to put his case was over three months away. This unacceptable delay was in no way the fault of the District Judge, but was the result of listing pressures.

[28] It is with hindsight ironic that it was not until 30 June that the solicitors acting for Mrs R sent the typed draft of the order of 26 June to the court. It was approved by the District Judge on 1 July. The sealed order cannot therefore have reached Mr R before the time for him to file his statement had expired.

Mr R is arrested

[29] On the morning of Friday 27 June, the police telephoned Mr R saying that they had not been able to get hold of him. He went to the police station at their request at noon and was promptly arrested. He was then kept in custody and at 2:00 a.m. the following day he was charged with breaking the non-molestation order. He was brought before the magistrates on Saturday 28 June and bailed until Monday 30 June.

[30] On Monday 30 June, Mr R appeared before the magistrates, unrepresented. He pleaded guilty to breaking the order and was released with a sentence of one day's detention, i.e. time served. He was a man of good character who now has a criminal record.

[31] Although this court has not seen the information that was placed before the magistrates, it would appear that any possible offence committed by Mr R can only have been of the most technical and insignificant kind. Had he had legal advice, he would surely not have pleaded guilty, and I beg to doubt whether the matter would have been pursued at all.

Mr R writes to the court seeking extra time

[32] On the same day, 30 June, before leaving for the hearing at the Magistrates' Court, Mr R wrote to the Family Court from his temporary address. He said that he had been on

schedule to produce his statement by 30 June but that he was not now in a position to do so. He explained that he had been in custody at the weekend and that he had been emotionally and physically affected by his arrest and the way that he had been treated. He pointed out that the next hearing was not until September and asked for an extension of time until the end of July. He explained that he could not afford legal representation and that the situation whereby he could not communicate with his wife as a result of the order was making things very difficult. He did not feel that he could trust her solicitors because of what had happened. He concluded: "Your urgent help with the above would be greatly appreciated."

The court cancels the hearing in September

[33] In response to this letter, the District Judge made the following order:

> "Upon considering the Respondent's letter dated 30th June 2014
> The Court orders
> 1 Respondent has failed to comply with the order of 26th June 2014. Pursuant to FPR 22.10 he cannot now give evidence on 23rd September 2014.
> 2 If he still opposes the continuation of the order he must make a formal application and he must do so promptly.
> 3 The court cannot retain a day of court time when the Respondent cannot give evidence. The hearing on 23rd September is therefore cancelled. If the Respondent successfully applies to adduce evidence a new date will be fixed."

[34] On 9 July, the court office sent another reply to Mr R's letter of 30 June in terms that perhaps added insult to injury.

> "Thank you for your letter dated 30 June 2014. Your letter was referred to [the District Judge] for consideration. However, the Court does not conduct case management by correspondence letter and therefore cannot act as a legal adviser. If you require further assistance you are directed to consult a legal representative."

Mr R files his statement and applies to vary the orders

[35] On 13 July, Mr R signed a statement running to 10 pages and contesting each of Mrs R's accusations against him. The statement contains this passage:

> "I strongly protest in the manner that I have [been] removed from my property and access to my children by the completely inappropriate use of the legal system reserved for urgent and life threatening circumstances and misused by [Mrs R] to have access to legal aid and cause the maximum distress."

[36] A reading of the parties' statements would lead one to conclude that this marriage had broken down. However, without further investigation, it would be impossible to know which, if either, of the two accounts of past events should be preferred, and whether any injunctive order was justified.

[37] On 15 July, Mr R issued a formal application to vary the non-molestation and occupation orders. It is to be noted that he had been put in the position of applying to discharge an occupation order that had never been made.

[38] In his application, Mr R wrote (I quote verbatim):

> "Unfortunately, I failed to comply with the order of 26 June 14 due to I had to attend [name] Magistrates Court ... I wholeheartedly apologise for my failure in not applying within the stated time but due to no legal aid or legal advise I am not familiar with court etiquettes and procedures. I would be gratefull if another date could be given to me the Respondent so I can give evidence to contest this fabricated lies against me."

[39] On 19 July, a different District Judge considered this application. He ordered Mrs R to indicate by 30 July whether she opposed Mr R's application to adduce oral evidence.

[40] On 22 July, a GP report on Mrs R was filed with the court (though not sent to Mr R) by her solicitors. It referred to her complaints of abuse by her husband and symptoms of anxiety, but did not significantly alter the state of the evidence.

[41] On 30 July, Mrs R's solicitors wrote to the court (copied to Mr R) asking it to refuse Mr R's application to adduce oral evidence. They referred to the breach of the order and the criminal conviction and said:

> "In the circumstances we are concerned at the impact on the public purse in terms of an appropriate use of the Court's valuable time and our client's public funding certificate in allowing the Respondent to adduce oral evidence to oppose the making of an Order that he has already breached on at least one occasion."

[42] On 4 August, Mr R wrote to the court:

> "I am somewhat surprised by this opposition to oral evidence, when I have been evicted from my house for over six weeks and denied access to my children ... over a completely fabricated statement which has been hurriedly applied and without any notice or opportunity provided to me to refute the allegations. ... I have tried to refute all the false allegations against me in my statement dated 13 July 2014 and this has been my only opportunity thus far to express my version regarding this severe injunction against my welfare, livelihood, family life and human rights. I strongly protest ..."

[43] In a letter of 18 August, written to Mrs R's solicitors and copied to the court, Mr R expressed concern about the deprivation of access to his younger children and the retention of his personal items. He proposed mediation.

Mr R's application for "relief from sanction" is finally listed

[44] Mr R's application for relief from sanction should have been decided on paper, avoiding delay and satellite litigation. The Rule requires the application to be supported by evidence; it does not require a hearing to be held, though there may be cases where that is appropriate.

[45] Instead, on 29 August, six weeks after it was issued, the court listed Mr R's application for relief from sanction for hearing on 12 September, with a time estimate of 30 minutes. The net result was that the court had substituted a short, unproductive hearing on 12 September, for a longer potentially productive hearing on 23 September.

[46] In its order of 29 August, the court made no reference to Mr R's letter of 4 August.

The hearing on 12 September

[47] Mr R's application for relief from sanction eventually came before the original District Judge on 12 September. I have been provided with a transcript of the hearing and of the judgment.

[48] On this occasion, both Mr and Mrs R were unrepresented, Mrs R being accompanied by a support worker. Mr R explained that he had been in difficulties in filing his statement because of his arrest.

[49] After hearing from the parties, the District Judge gave this short judgment:

> "The rules are strict. It is very harsh but it would have applied equally to [Mrs R]. She was ordered to do some evidence and, had she failed to do that, that order could have been discharged. It is difficult when people do not have legal representation and I fully understand that. However, I reject entirely [Mr R]'s assertion that he left my courtroom not understanding exactly what he had to do and when he had to do it. It is unfortunate if he did breach the order, which I must accept he did if he admitted it in the Magistrates' Court – he is not going to come back to the County Court and deny it – and he spent some time in custody and had the inconvenience and difficulty of a court appearance. However, the fact is I have a clear recollection of that hearing and I know for a fact that I emphasised to [Mr R] and his brother the importance of the compliance with my order and the implications of failing to comply with it. That is always my practice. When people appear before me without legal representation, I fully understand that and I take so much time and care. However, I actually remember [Mr R]'s hearing with absolute clarity. That is not a good reason."

[50] Having so ruled, the judge ordered that the application for relief from sanction was dismissed and that the order of 20 June was to stand without amendment.

[51] On 14 September, Mr R wrote to the court enclosing another copy of his letter of 18 August and saying that he had had no reply from Mrs R's solicitors to his proposals concerning contact to the children or collection of his belongings. He wrote:

> "It has been 4 weeks since my request and this appears to be ignored. I am currently disillusioned with the Justice system in this country, which removes me from my home and family with a completely fabricated statement and process and the only way I can retrieve my belongings and have communications with my children is to request it through the Applicant's Solicitors and this is ignored!" I would like the court to provide an explanation ..."

Mr R appeals

[52] On 30 September Mr R applied for permission to appeal. The application was referred to the Designated Family Judge, who listed the matter before me because of the practice issues that arose.

[53] The hearing occurred on 18 November, when both parties were unrepresented, with Mrs R being accompanied by a supporter. She opposed the appeal on the basis that Mr R was involving the children in adult disputes and she asked the court to prevent him from having any contact with them.

[54] I granted permission to appeal and allowed the appeal, setting aside all previous orders, on the basis that each of the following steps in the process was wrong:

1. A without notice application should not have been made.
2. A without notice order should not have been granted on this evidence.
3. The order that was granted did not reflect the judge's intention.
4. The orders preventing access to the street and banning direct communication were unnecessary and disproportionate.
5. At the first hearing attended by both parties, the court did not review the without notice order to ensure that there were no obvious errors of the kind that existed here.
6. The date given for a contested hearing of Mrs R's application was too distant to be meaningful.
7. Mr R's request for extra time to file his statement should have been granted at the outset.
8. The hearing date for Mrs R's application should not have been cancelled.
9. The application for relief from sanction should have been considered on paper and granted.
10. The date given for a contested hearing of Mr R's application for relief from sanction was again too distant to be meaningful.
11. The District Judge did not correctly apply the rules governing relief from sanction. Had she done so, she would have concluded that there was no good reason for refusing to admit Mr R's statement.

[55] At the time of the appeal in November, a solution was inevitably much easier to find than it had been in June. By now, both parents accepted that the marriage was over. Mr R was, without prejudice to his account of events, prepared to give a non-molestation undertaking and an undertaking not to return to the family home except to collect and return the children. A child arrangements order was made so that he could see the youngest child, and the older children were to be allowed to see him when they wanted. On this basis, the proceedings were brought to an end, at least for the present.

Relief from sanctions

[56] Despite everything that went wrong in this case, I have considerable sympathy for the position of the District Bench in situations of this kind. The judge conducting a busy list does not have the time to pore over every detail in the way that can occur on an appeal. For the system to function, it is necessary for a robust view to be taken about compliance with directions. That much has been said by the President of the Family Division on a number of occasions: see, for example, Re W, Re H [2013] EWCA Civ 1177, where he emphasised that orders must be obeyed or extensions of time sought.

[57] Likewise, there has over the past year been evolving guidance from the Court of Appeal in the parallel context of the Civil Procedure Rules in the cases of Mitchell v MGN [2013] EWCA Civ 1537 and Denton v TH White [2014] EWCA 906. It may be that the uncompromising approach taken by the District Judge in the present case reflected the

influence of the decision in Mitchell, which has since been further refined in Denton.

[58] However, despite the manifest strains on the system, the fundamental obligation to deal with cases justly must prevail. The Family Court's task is to apply the Rules to the facts. In this instance, Rule 4.6 of the Family Procedure Rules reads as follows:

> Relief from sanctions 4.6
> (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –
> (a) the interests of the administration of justice;
> (b) whether the application for relief has been made promptly;
> (c) whether the failure to comply was intentional;
> (d) whether there is a good explanation for the failure;
> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
> (f) whether the failure to comply was caused by the party or the party's legal representative;
> (g) whether the hearing date or the likely hearing date can still be met if relief is granted;
> (h) the effect which the failure to comply had on each party; and
> (i) the effect which the granting of relief would have on each party or a child whose interest the court considers relevant.
> (2) An application for relief must be supported by evidence.

In the present case, the sanction against giving oral evidence arose from Rule 22.10, which provides that if a witness statement is not served on time, the witness may not give oral evidence unless the court gives permission.

[59] A fair application of Rule 4.6 will enable the court to identify those cases where relief should be granted in the interests of justice, and those where it should not. A swift decision can be taken in light of all the circumstances and the specific considerations set out in the Rule. This can usually be done without an oral hearing. On any view, this was a case where every single one of the eight relevant considerations listed in the Rule spoke in favour of granting relief. As the history shows, an unduly strict or narrow approach can cause delay, expense and injustice. Conclusion

[60] Despite all that has happened in these proceedings, the court has never actually determined the merits of the parties' cases, and in describing the history I do not imply that one account of the problems in this marriage is to be preferred to the other. I have given this judgment for different reasons: firstly, to draw attention to the principles that apply in a case of this kind, and secondly to attempt some reparation to Mr R for a series of events that should never have occurred.