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Neutral Citation Number: [2018] EWHC 1684 (Admin)
Case No: CO/1374/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Cardiff Civil Justice Centre
2 Park Street
Cardiff CF10 1ET
04/07/2018

B e f o r e :

LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE SINGH

Between:

Powys County Council	**Appellant**
- and -	
John Bernard Hurst	**Respondent**

Jonathan Elystan Rees (instructed by Solicitor, Powys County Council) for the Appellant
The Respondent in person

Hearing date: 19 June 2018

HTML VERSION OF JUDGMENT APPROVED

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Lord Justice Singh :

Introduction

1. This is an appeal by way of case stated against the decision of District Judge (Magistrates' Court) Neil Thomas given on 18 February 2018. By that decision the District Judge held that the Appellant was required to consider proceeding under the Attachment of Earnings Act 1971 ("the 1971 Act") as an alternative method of recovering unpaid council tax before applying to commit the Respondent to prison for non-payment of that tax. Accordingly he discharged the earlier order for committal which he had made but then suspended on terms.

2. The District Judge reached his decision on the basis that it was open to the Appellant to seek an attachment of earnings order in the County Court in respect of the Respondent's pension. The main issue in this appeal is whether that course is open to a billing authority such as the Appellant as a matter of law.

3. At the hearing before this Court, which took place in Cardiff, we heard submissions from Mr Jonathan Elystan Rees on behalf of the Appellant. We also heard from the Respondent, who appeared in person. We are grateful to them both for their submissions. At the hearing the Respondent applied for an adjournment. We refused that application and said that we would set our reasons for doing so in our written judgment, which we now do (at paras. 54-55 below).

Factual background

4. For present purposes the relevant factual background can be summarised very briefly.

5. The Appellant is the relevant billing authority for the purposes of council tax. The Respondent is liable to pay council tax. The Appellant has pursued council tax liabilities against the Respondent over a number of years. Liability orders were obtained by the Appellant.

6. On 1 December 2016 an order was made by the District Judge committing the Respondent to prison for non-payment of council tax. It was found that the Respondent had wilfully refused to pay. That committal was suspended on payment terms. The Respondent subsequently defaulted on payment and so, on 29 September 2017, the Appellant applied to the Court for an order committing the Respondent to prison in accordance with Regulation 47 of the Council Tax (Administration and Enforcement) Regulations 1992 (SI 1992 No. 613) ("the 1992 Regulations").

7. The District Judge observed that the Respondent was in receipt of a police pension and raised the issue whether an application could be made under the 1971 Act. The Appellant indicated that this option was not open to it and therefore had not been considered. The application to commit was adjourned on a number of occasions for reasons which are unconnected to this appeal.

8. A further hearing took place on 18 February 2018. On that occasion the District Judge held that pensions are income for the purposes of the 1971 Act; that a liability order is a "judgment debt" within the meaning of that Act; and therefore that the Appellant was not precluded from applying to the County Court for enforcement. On that basis he was of the view that all other enforcement options had not been exhausted prior to the application to commit. Accordingly the District Judge quashed the committal order which had been made on 1 December 2016.

The case stated for the opinion of this Court

9. The two questions stated for the opinion of this Court are:

> "(i) Are the local authority precluded from applying to the County Court for an attachment of earnings order under the Attachment of Earnings Act 1971?
>
> (ii) Was I entitled to dismiss the application and quash the commitment because I concluded that the local authority had not satisfied me that they had exhausted all alternatives to custody before applying to commit Mr Hurst to prison?"

The Legal Framework

10. It is unnecessary for present purposes to rehearse the legal framework in great detail. It was helpfully set out by Hickinbottom LJ in *R (Woolcock) v Secretary of State for Communities and Local Government and others* [2018] EWHC 17 (Admin); [2018] 4 WLR 49 ("*Woolcock*"), at paras. 3-17. Here I will do no more than to outline the legislative scheme by reference to the judgment of Hickinbottom LJ.

11. Council tax is a system of local taxation introduced by the Local Government Finance Act 1992 ("the 1992 Act") to replace the community charge. It is now used in England, Wales and Scotland to fund approximately one-quarter of expenditure on local services. The applicable law and procedure in England (where there are 326 billing authorities) and Wales (where there are 22 billing authorities) is materially the same: see para.3 of *Woolcock*.

12. Section 14(3) gives effect to the provisions of Sch. 4 to the 1992 Act. That schedule is entitled 'Enforcement: England and Wales' and contains provisions about the recovery of council tax: see para. 9 of *Woolcock*.

13. Para. 1 of Sch. 4 to the 1992 Act confers a power on the Secretary of State to make regulations in relation to the recovery of council tax. By Article 2(a) of, and Sch. 1 to, the National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999 No. 672) and para. 30(2)(a) of Sch. 11 to the Government of Wales Act 2006, in respect of Wales that function now lies with the Welsh Ministers, to whom is also devolved general competence in respect of "Local Government Finance" (sections 107-108 of, and para. 12 of Sch. 7 to, that Act) see para. 10 of *Woolcock*.

14. The relevant regulations which have been made under para. 1 of Sch. 4 to the 1992 Act are the 1992 Regulations. They enable council tax to be collected in monthly instalments. Regulation 23 requires a local authority to send out a reminder notice to a council tax payer when an instalment is missed, giving him 7 days to pay the outstanding instalment. If no payment is made, the right to pay by instalments is lost, and the entire amount of council tax becomes due. If the taxpayer fails to pay that sum, and does not respond to a final notice served under Regulation 33, then the authority can seek a liability order from the Magistrates' Court, under para. 3 of Sch. 4 to the 1992 Act and Regulations 33-36 of the 1992 Regulations: see para. 12 of *Woolcock*.

15. At para. 13 of his judgment Hickinbottom LJ said:

> "A liability order confirms the amount of the outstanding debt, and the identity of the liable person. It is, in many ways, the equivalent of a judgment, which can be enforced in any of the ways set out in Regulation 52 of the 1992 Regulations, i.e. (i) making an attachment of earnings order (Regulation 37 of the 1992 Regulations); …"

16. Para. 8 of Sch. 4 to the 1992 Act provides that Regulations made under para. 1 may provide for a council tax debtor, who is an adult, who is the subject of a liability order and who has been the subject of the Sch. 12 procedure (that is a reference to Sch. 12 to the Tribunals, Courts and Enforcement Act 2007) but has been found to have insufficient goods to satisfy the amount due, to be committed to prison: see para. 14 of *Woolcock*.

17. After setting out the provisions of Regulation 47 of the 1992 Regulations and referring to earlier authority, at para. 17 Hickinbottom LJ set out a number of propositions which are now well-established and uncontroversial. It is unnecessary to set them all out here in full but I commend that summary of the relevant principles.

18. The power to commit is coercive. It is intended to be used to extract payment of the debt from those who are able to pay, not to punish the debtor: see para. 17(i) of *Woolcock*.

19. Before applying for committal, the local authority must first obtain a liability order and seek to enforce payment by taking control of the subject's goods and selling them under the Sch. 12 procedure, and a bailiff must have reported that he was unable to find any or sufficient goods to enforce payment: see para. 17(iv).

20. Notice of an application to commit must be made and served: see para. 17(v).

21. Before making a committal order, the Magistrates' Court must conduct a means enquiry in the presence of the debtor: see para. 17(vi).

22. The Court must consider, and determine, whether the failure to pay is the result of "wilful refusal or culpable neglect" since any committal order (included one which is suspended) can only be made if that is so: see para. 17(vii).

23. Before making any committal order (including a suspended order), the Magistrates' Court must consider enforcement options to secure payment other than imprisonment: see para. 17(ix).

24. At para. 17(x) Hickinbottom LJ said:

> "If, and only if, the Court is of the opinion that the subject's failure to pay is due to his wilful refusal or culpable neglect, it may, if it thinks fit, issue a warrant of commitment, or make a suspended committal order (i.e. fix a term of imprisonment and postpone the issue of the warrant until such time and on such conditions as the Court thinks just, usually of course as to payment of the arrears)."

25. It is usual, although not obligatory, for Magistrates to suspend at least a first committal order on condition that the subject makes regular instalment payments towards the arrears. However, they cannot make any unreasonable order for repayment. Furthermore, the period for which instalments are to be paid must be reasonable. Generally this will be a period of no more than 2 or 3 years: see para. 17(xiii).

26. The maximum period of imprisonment that may be specified in a committal order (whether suspended or not) is three months: see para. 17(xv).

27. The serving of a term of imprisonment does not formally eradicate the subject's debt but it does make that debt unenforceable. Service of the term of imprisonment is, to that extent, in lieu of enforceable payment: see para. 17(xvi).

28. No general appeal lies from a committal order, which may only be challenged in the Divisional Court by way of judicial review or an appeal by way of case stated (the latter being the procedure which has been adopted in the present proceedings).

The Appellant's submissions

29. On behalf of the Appellant authority Mr Rees adopted the written submissions which were made to the District Judge by Mr Robert Brown (solicitor for the Appellant) and also made supplementary submissions to this Court.

30. Mr Rees submits that the billing authority is not able to obtain an attachment of earnings order under the 1971 Act in respect of the Respondent's private pension. He points out that Regulation 32 provides that, for the purpose of the 1992 Regulations, the phrase "attachment of earnings order" means an order under Regulation 37. Regulation 37(1) provides that:

> "Where a liability order has been made and the debtor against whom it is made is an individual, the authority which applied for the order may, subject to paragraph (4), make an order under this Regulation to secure payment of the appropriate amount."

31. Regulation 37(2)(a) requires an order under Regulation 37 to be "in the form specified in (and accordingly contain the matters specified in) Schedule 3". That form is headed "Deductions by Employer under Attachment of Earnings Order", which defines "attachable earnings" in terms of "the earnings which remain payable to the debtor on [a particular payday]". That brings one to the definition of "earnings" set out in Regulation 32.

32. Mr Rees submits that the decision of the District Judge failed to have sufficient regard to the difference in the definition of "earnings" which is to be found in the 1992 Regulations and the 1971 Act. Section 24 of the Act defines "earnings" for the purposes of the Act. They include any sums payable to a person

(b) "by way of pension". The term "earnings" is also defined in the Regulation 32 of the 1992 Regulations. However, that definition does not include a pension.

33. Mr Rees also submits that the decision of the District Judge that a liability order is enforceable as a "judgment debt" is contrary to the provisions of Regulation 35(3) of the 1992 Regulations, which states:

> "The amount in respect of which a liability order is made is enforceable in accordance with this Part; and accordingly for the purposes of any of the provisions of Part III of the Magistrates' Courts Act 1980 (satisfaction and enforcement) is not to be treated as a sum adjudged to be paid by order of the court."

34. For reasons that will become apparent I will summarise the Respondent's submissions later, after I have set out what I consider to be the correct legal analysis, to see whether his submissions cause me to alter that analysis.

Analysis

35. The central question which arises in the present appeal is whether the scheme for enforcement of liability orders under the 1992 Regulations is self-contained and exclusive. On behalf of the Appellant Mr Rees submits that it is. He submits that as a matter of law it was simply not open to the billing authority to go to the County Court and seek to enforce the liability order, whether directly or indirectly by "converting" it into a judgment debt. Accordingly, he submits that the District Judge fell into error because he considered that it was open to the Appellant to go to the County Court and thereby obtain an attachment of earnings order under the 1971 Act. Before I address that central issue I will deal with one aspect of the District Judge's reasoning which, in my judgement, reflected an erroneous approach on his part.

36. At para. 8 of the case stated, the District Judge stated that Part III of the Magistrates' Courts Act 1980 ("the 1980 Act") is "the provision which deals with fines enforcement in the Magistrates' Court." That is not accurate. Part III of the 1980 Act in fact deals with convictions and orders made by the Magistrates' Court. It does not deal only with fines.

37. Also at para. 8 of the case stated, the District Judge said:

> "… It does not lead me to conclude that a liability order is not a judgment debt within the meaning of the Attachment of Earnings Act."

38. At para. 9 of the case stated the District Judge said:

> "… I was aware that any Local Authority could apply to the County Court to enforce by way of charging order but of course in this case this Local Authority had not tried to obtain an Attachment of Earnings Order and so there was no definitive judgment upon which they could rely to demonstrate that they were not permitted by law to apply.
>
> The skeleton argument failed to persuade me that they could not do this and I found nothing in their submissions to satisfy me they were precluded from applying to enforce in the County Court.
>
> I came to the view that the Local Authority ought to have applied to the County Court for an Attachment of Earnings Order and that the absence of that enquiry was fatal to their application."

39. Earlier, the District Judge had set out his reasons in writing. In those written reasons, at para. 12, he referred to the decision of this Court in *Woolcock*. In that case, at para. 13, Hickinbottom LJ did refer to a liability order as being in many ways the "equivalent of a judgment". However, he went on to say that it "can be enforced in any of the ways set out in regulation 52 of the 1992 Regulations, ie (i) making an attachment of earnings order (regulation 37 of the 1992 Regulations); …" Those dicta could be regarded as lending some support for the view taken by the District Judge in the present case but also

some support for the submissions made on behalf of the Appellant. However, the issue of law which arises in the present appeal was not before this Court in *Woolcock* and was not resolved by it in that case.

40. In my view, the appropriate starting point in addressing the central issue in this appeal is to be found in sections 1 and 2 of the 1971 Act. Section 1(2) provides that the County Court may make an attachment of earnings order to secure "(b) the payment of a judgment debt, other than a debt of less than £5 or such other sum as may be prescribed by Rules of Court". Section 1(3) expressly deals with when a Magistrates' Court may make an attachment of earnings order and provides that it may do so to secure "(c) the payment of any sum required to be paid under regulations under section 23 or 24 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012." That provision in subsection (3) is clearly immaterial to the present appeal. The District Judge did not suggest otherwise.

41. The phrase "judgment debt" in the 1971 Act is defined by section 2(c) to mean a sum payable under

> "(i) a judgment or order enforceable by a Court in England and Wales (not being a Magistrates' Court);
>
> (ii) an order of a Magistrates' Court for the payment of money recoverable summarily as a civil debt; or
>
> (iii) an order of any Court which is enforceable as if it were the payment of money so recoverable,
>
> but does not include any such sum payable under a maintenance order or an administration order; …"

42. In my view, a liability order in the context of the enforcement of council tax does not fall within that definition of "judgment debt". It is not an order of a Magistrates' Court for the payment of money recoverable summarily as a civil debt. Further sub-paragraph (i) expressly excludes a judgment or order made by a Magistrates' Court in other circumstances.

43. This is to be contrasted with provisions in the Magistrates' Courts Act 1980. Section 87(1) provides for the enforcement of payment of fines by the High Court or the County Court. It provides that:

> "Subject to the provisions of subsection (2) below, payment of a sum adjudged to be paid by a conviction of a Magistrates' Court may be enforced by the High Court or the County Court (otherwise than by issue of a writ of control or other process against goods or by imprisonment or attachment of earnings) as if the sum were due to the designated officer for the Magistrates' Court in pursuance of a judgment or order of the High Court or County Court, as the case may be."

44. That provision is to be contrasted with the absence of any similar provision rendering a liability order in the context of council tax a judgment debt or providing that it should be treated like a judgment debt and so enforceable in the High Court or the County Court.

45. The second important stage of the analysis is that one needs to consider the combined effect of section 25(6) of the 1971 Act and Regulation 35(3) of the 1992 Regulations. Section 25(6) of the 1971 Act provides:

> "This Act, so far as it relates to Magistrates' Courts, and Part III of the Magistrates' Courts Act 1980 shall be construed as if this Act were contained in that Part."

46. Regulation 35(3) of the 1992 Regulations provides:

> "The amount in respect of which a liability order is made is enforceable in accordance with this Part; and accordingly for the purposes of any of the provisions of Part III of the Magistrates' Courts Act 1980 (satisfaction and enforcement) it is not to be treated as a sum adjudged to be paid by order of the Court."

47. Mr Rees submits, and I accept, that the combined effect of those two provisions is that a liability order is to be regarded as falling within the provisions of Part III of the 1980 Act and is not to be treated as a sum adjudged to be paid by order of the Court. For that reason, amongst others, it cannot be regarded as a "judgment debt" within the meaning of section 2(c) of the 1971 Act.

48. The third element of the correct analysis, in my view, is to be found in the definition of "earnings" in the 1992 Regulations as contrasted with the definition of "earnings" in the 1971 Act.

49. Section 24 of the 1971 Act defines "earnings" in the following way. It provides that:

> "(1) For the purposes of this Act, but subject to the following subsection, 'earnings' are any sums payable to a person –
>
> (a) by way of wages or salary ….
>
> (b) by way of pension …
>
> (c) by way of statutory sick pay."

50. There is a significant contrast between that definition of "earnings" and the one to be found in regulation 32(1) of the 1992 Regulations, which provides that:

> "'Earnings' means sums payable to a person –
>
> (a) by way of wages or salary … or
>
> (b) by way of statutory sick pay …"

51. Those two definitions are materially in identical terms save for the important omission of the reference to "pension" in the meaning of "earnings" in the 1992 Regulations. That omission must be taken to be deliberate on the part of the legislator.

52. The underlying social policy which that provision no doubt reflects is that it was considered that a person's pension should be insulated from the possibility of an attachment of earnings order being made against it. If the District Judge were right and it is possible for the billing authority to go by way of the County Court to obtain a judgment in its favour to reflect the liability to pay council tax, and then to obtain an attachment of earnings order within the meaning of the 1971 Act, it would be able to obtain such an order in respect of a person's pension. In my view, that would be contrary to the underlying policy behind the more limited definition of "earnings" which is to be found in the 1992 Regulations. In that sense it would be to enable the billing authority to bypass the purpose of the legislation read as a whole.

53. Finally, Mr Rees submits that there is a "general rule" that "where an Act creates an obligation, and enforces the performance in a specified manner … that performance cannot be enforced in any other manner": see *Doe d.Murray v Bridges* (1831) 1 B & Ad. 847, at p. 859 (Lord Tenterden CJ), which was quoted with approval by Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, at p. 185. I would observe that that was said in the context of a different question of law, namely whether a cause of action in tort can be found to exist for breach of statutory duty where legislation provides for criminal penalties for certain conduct. Nevertheless, I would accept that this reflects a more general principle, that specific legislation which governs a particular subject matter will usually be regarded as dealing with that subject matter even if there is more general legislation in that area of law. I would accept Mr Rees's submission that this lends some support to the Appellant's interpretation of the legislation in this case.

The Respondent's submissions

54. The Respondent appeared before this Court in person. His main submission was that the hearing of this appeal should be adjourned. The Respondent submits that the legislation which falls to be interpreted in this appeal is ambiguous and that research needs to be done in relation to what was said in

Parliament when the legislation was enacted. In my view, there are at least three difficulties with that submission.

55. First, I do not consider the relevant legislation to be ambiguous or that any of the other criteria for the admissibility of Hansard which were set out by the House of Lords in *Pepper v Hart* [1993] AC 593 are met. Secondly, the present appeal concerns in part at least secondary legislation (the 1992 Regulations), not only primary legislation. Thirdly, and in any event, there has been nothing to prevent the Respondent from doing research into Hansard if that were considered to be relevant to this appeal.

56. In relation to the substantive merits of this appeal, the Respondent submits, first, that there has been a miscarriage of justice which forms the background to this case. In that context he cited para. 419 in Halsbury's Laws, vol. 8(2) (Reissue) in which it is said that, in cases "where no illegal act and consequently no action lies, but the subject deems himself to be unduly oppressed by the sentence of a judge or the conduct of an official, the law of the constitution has provided a remedy by petition to the Crown." The Respondent submits that he has suffered an injustice and oppression even if not an illegal act, something which deserves a legal remedy. The difficulty with that submission is that what the passage from Halsbury's Laws is concerned with is not any legal remedy (since, as that passage says, no illegal act has been committed and "no action lies") but with the right of the subject to petition the monarch. No one has interfered with that right and, in any event, this has nothing to do with the present appeal. On this appeal this Court is limited to answering the questions which are set out for its opinion in the case stated by the Magistrates' Court.

57. Next the Respondent submits that the 1992 Regulations cannot "repeal" the 1971 Act. However, in my view, that is not the effect of either the Appellant's argument in this appeal or of the above analysis, which I believe to be correct. The two pieces of legislation need to be read as a whole and sit together. There is simply no question of one "repealing" the other.

58. Next the Respondent submits that the interpretation which I believe to be the correct one is "unconstitutional" and for that reason in breach of the Bill of Rights 1689. Suffice to say that I do not consider that submission to have any merit for the reasons that I have already given.

59. Finally the Respondent relies upon the decision of the Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61 (the "Brexit" decision). In that case the Supreme Court held that it was not open to the executive to give notice under Article 50 of the Treaty on European Union ("EU") that the United Kingdom will leave the EU by exercising the royal prerogative and that it could only do so if authorised by an Act of Parliament. In my view, there is nothing inconsistent with the analysis which I believe to be the correct one in the present appeal and the decision of the Supreme Court in *Miller*. If I understood the Respondent's submission correctly, it is that in some way the above analysis would lead to the executive being able to disapply an Act of Parliament (the 1971 Act). I do not consider that submission to have any merit, again for the reasons I have already set out.

Conclusion

60. For the reasons I have given I would allow this appeal and answer the two questions which have been stated for the opinion of this Court in the following way:

(1) The Appellant local authority was precluded from applying to the County Court for an attachment of earnings order under the Attachment of Earnings Act 1971.

(2) The Magistrates' Court was not entitled to dismiss the Appellant's application or to quash the earlier commitment on the ground that it had not exhausted all alternatives to custody for applying to commit the Respondent to prison.

61. In the circumstances I would remit this matter to the Magistrates' Court (a District Judge other than DJ Thomas) for redetermination in accordance with the judgment of this Court.

62. After this judgment was circulated to the parties in draft in the usual way the Respondent filed further written submissions on 3 July 2018. Those submissions were filed late. Furthermore the Court did not

invite further submissions. The normal practice is that a draft of a judgment is circulated to the parties on a confidential basis so that typing corrections and obvious errors can be pointed out to the Court before a final version of its judgment is handed down. This does not (and should not be taken to) provide an opportunity to make further submissions as to the substance of the case. Nevertheless, since the Respondent is a litigant in person and so as to avoid any possibility of injustice, I have taken into account what the Respondent has said in his most recent document but find nothing in it which causes me to change the views to which I have come in this judgment.

Lord Justice Hickinbottom :

63. I agree with both the analysis and conclusion of my Lord, Singh LJ.

64. Insofar as it might be said that para. 13 of *Woolcock* suggests that a liability order is indistinguishable from a judgment debt, it was never intended to do so. The point raised by this appeal (i.e. whether the enforcement scheme for liability orders set out in the 1992 Regulations is self-contained and exclusive) was not in issue in that case, and that paragraph does not assist one way or the other in determining it. For the reasons given by Singh LJ, in my judgment, the scheme is intended to exclude recourse to methods of enforcement outside those set out in the 1992 Regulations themselves. Those, of course, to an extent replicate methods of enforcement found elsewhere; but, crucially for the purposes of this appeal, not in respect of attachment of earnings orders to sums payable by way of pension.

65. I also agree with the disposal suggested by Singh LJ. Having answered the questions posed to this Court as he indicates in para. 60 above, this appeal will be allowed and the matter remitted to the Magistrates' Court (a District Judge other than DJ Thomas) for redetermination in accordance with the judgment of this Court.

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