haynesboone

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Bring back debtors' prison? – Contempt of court and other sanctions for unpaid judgments or awards

By Robert Blackett

Consider the following scenario. A wealthy individual (call him Crassus) has been ordered to pay money, either by an English court or by an arbitral tribunal, with the English court then having entered a judgment in the terms of the award. Crassus does not pay despite having the means to do so. Crassus's ample assets are all beyond the creditor's reach in Crassus' home country of Tinpotia, a kleptocracy where an arbitral award / English judgment cannot be enforced against him. Crassus will not pay, but has complied with all the other court orders against him. So, for example, he complied with an order that he provide details of all his assets (they're in Tinpotia) and a post-judgment worldwide freezing injunction, requiring that he not dispose of, deal with or diminish the value of his assets up to the judgment amount (he's duly kept the relevant quantity of assets languishing in Tinpotia).

Crassus however loves visiting England. Is he at risk of being arrested and imprisoned for his brazen contempt of our courts in refusing to pay as he has been ordered to? He is not. He could, however, have been imprisoned if he had breached orders to disclose his assets or orders to refrain from moving them, but he can flout the order which matters most - the one requiring him to actually pay the money because English law does not allow people to be arrested and imprisoned for failing to pay such debts. Historically 'can pay' debtors like Crassus could have been imprisoned for such contempts. But Parliament did away with that power in 1970. This article argues that the reasons for having done away with that power were unsound, and it should be resurrected, giving English courts a power to arrest such 'can pay' debtors and commit them to prison until they pay, subject only to their creditors being prepared to foot the bill.

An unfortunate history

Up until the 19th century judgment creditors could easily have people who failed to pay court judgments locked up. They would stay in prison until they died, paid their creditors in full, or their debts were forgiven. Today, the prison population in England and Wales is around 78,000 out of a population of 59 million (0.13%). In the 18th century the prison population was much smaller. In 1774, for example, the prison population was around 4,000 people out of a population of six million (0.07% so around half the present level in relative terms). The majority of those prisoners were people who had been imprisoned for having failed to pay debts, with around 10,000 people each year being imprisoned on that ground. Imprisonment for crime, on the other hand, was relatively rare since the punishments for any but the most minor offences were hanging, flogging or transportation to Australia.

'Debtors' prison', is something of a misnomer because it was rare to have separate prisons purely for debtors. Rather there were 'gaols', which housed remand prisoners (i.e. people awaiting trial), people awaiting punishment, people who had failed to pay criminal fines and people sent for imprisonment by the civil courts (mostly debtors). There were also 'bridewells' (or 'houses of correction') intended to punish and reform the idle and disorderly poor, who had been convicted of minor offences like vagrancy or begging. But these institutions ultimately converged, with bridewells and gaols each taking on functions of the other, further blurring the distinction between poverty and criminality.

In 18th century England such prisons were run for profit by private individuals, who would buy the right to operate a prison from the crown or an ecclesiastical authority. Jailers might receive some payment from the state to cover the cost of accommodating remand or criminal prisoners. Debtor prisoners, on the other hand, were the jailer's

key source of revenue. They could be charged rent and had to feed and clothe themselves and furnish their rooms. Food, clothes, furnishings and commodities like candles, straw (to sleep on) and fuel for fireplaces (if present) could be bought or hired, from the jailer. The jailer enjoyed a monopoly on supply and there were no price controls, so jailers could tailor the prices charged to each prisoner to a prisoner's (or their relatives') ability to pay. Those with access to funds could occasionally buy other privileges too such as being released to work or being allowed to operate shops or restaurants on the prison premises. As the industrial revolution progressed, these prisons came to function increasingly as factories, with prisoners able to pay for food through their labour.

Sometimes prisons would receive sufficient charitable donations to keep providing some food to debtor prisoners who could not pay, but generally debtors who were unable to pay and had no outside support would starve. Marshalsea prison (where Charles Dickens' father was imprisoned, and where Little Dorritt's father is imprisoned in Dickens' book of the same name) was divided into a 'common side' and the 'master's' side. The master's side offered 50 rooms for rent. The common side consisted of nine small unfurnished rooms, in which around 300 people were confined, 30+ to a room, from dusk till dawn without space for everyone to lie down. In 1729 a parliamentary committee reported that at Marshalsea 300 such prisoners had died in the space of three months. The threat of the common side served as an incentive to keep rental money flowing from the families and friends of those on the masters' side, even if they could not afford to clear the original debt. In some instances, jailers took a less roundabout approach to incentivisation, simply torturing prisoners with thumbscrews, vices and similar implements, charging their relatives a fee to cease doing so (a practice known as 'easement of irons' or the 'trade in chains').

Recovery and payment orders

Originally the practice of the common law courts had been to order the debtor to pay the creditor the amount owed. Failure to pay an ordered sum was viewed as a contempt of court punishable by imprisonment. As the debtor's prison model fell out of favour, the common law courts sought to ameliorate its iniquities by ceasing to order specific performance of payment obligations. Instead they would make orders recognising the creditor's entitlement to recover (i.e. recording that the debtor owed the creditor a certain amount, but not ordering him to pay it). These 'recovery orders' could be enforced against the creditor's property, but not against his person, thus preventing people being imprisoned for such debts. The courts of chancery, however, continued to order specific performance, perhaps because they were dealing with payment obligations which arose from breaches of fiduciary obligations, and duties to maintain one's dependents and honour the wishes of the deceased, breach of which was thought more worthy of censure than failing to pay an ordinary debt.

The 1869 Act and the 'can pay' exception

The nineteenth century saw extensive reforms of criminal justice and of prisons, with prisons increasingly funded and operated by the state and imprisonment increasingly used as means of punishing crime. By 1869 the tide of public opinion had turned firmly against imprisonment for debt, helped in part by the portrayal in Dickens' *Little Dorritt* and other works. In the Debtors Act 1869 Parliament largely abolished imprisonment for debt ("*no person shall be arrested or imprisoned for making default in payment of a sum of money*").

There were, of course, some exceptions. The salient one for this article was found in Section 5, which allowed someone to be imprisoned for a term not exceeding six weeks, or until earlier payment, if they refused or neglected to pay a debt not exceeding £50 (equivalent to £6,086 in 2020) which they had the means to pay and was due under an order or judgment of a court.

The reason for the £50 cap seems to have been that £50 was the minimum which a creditor had to be owed in order to present a bankruptcy petition and, absent the threat of imprisonment, creditors would have no means to compel payment of smaller debts. Placing an upper limit on the debts for which one can be imprisoned does seems to treat people who borrow a little money more harshly than perhaps wealthier people who are able to borrow a lot. In any case, this £50 cap on imprisonable debts proved evanescent and was removed in 1883.

As for the 6-week time limit on imprisonment, the rationale might have been that this was about the maximum 'punishment' which it was felt someone might deserve for refusing to pay £50 which they owed when they had the means to do so. Alternatively, it might be that the cost of imprisoning someone for six weeks was the most the state was prepared to spend to help someone try to recover a debt of £50. Once the £50 cap on imprisonable debt vanishes, though, the 6-week time limit on the length of imprisonment seems impossible to justify in principle. If refusing to pay a £50 debt which one has the means to pay deserved 6 weeks imprisonment (or the public interest in a debtor recovering a £50 debt justified the public cost of 6-weeks-of-prison-time) then refusing to pay a £100 debt which one had the means to pay deserved 12 weeks imprisonment (and refusing to pay a £1 million debt which one has the means to pay deserved 2,307 years imprisonment).

Judicature Act 1873

In the Judicature Act 1873 the jurisdictions of the common law court and chancery court were merged into the High Court, albeit that it retained separate divisions for chancery and common law business. However, judgments in the King's/Queen's Bench Division continued to be in the 'recovery' form whereas judgments in the Chancery Division continued to be in the 'payment' form.

The 'can pay' exception may well, therefore, have been irrelevant in most ordinary commercial cases which will have been heard in the King's/Queen's Bench Division, because the resulting money judgments will have been in the 'recovery' form, and that will have operated to prevent people who breached such orders being committed for breaching them (*Re Oddy* [1906] 1 Ch 93 seems to confirm this analysis). In 1966, however, the English procedural rules ushered in a new common format whereby all money judgments came to be expressed in the form 'do pay', so the payment / recovery distinction ceased to be relevant. This will suddenly have caused the 'can pay' exception to be of potential relevance in far more cases.

The 1970 Act and the removal of the 'can pay' exception

Four years later, however, by Section 11 of the Administration of Justice Act 1970, the courts' power to imprison 'can pay' debtors for up to six weeks was abolished, save only in respect of debts owed to public authorities and maintenance orders (i.e. orders requiring parents to maintain dependent children or spouses/civil partners to maintain each other in accordance with their means). This decision to get rid of the 'can pay' exception reflected (in part) the recommendations of the Payne Committee. The Committee's reasoning was explained to Parliament by the Attorney General (Hansard (HL) Deb (4 February 1970) Vol. 795 Col. 452):

> "*We are, I think, the only country in Western Europe where imprisonment for civil debt has been retained.*"

This was probably untrue since German, Greek and Dutch law (at least) all still seem to feature imprisonment for civil debts today. 'Do what some other countries do' is also an unreliable heuristic for improving one's legal system. The Committee went on to note that it:

> *"… found that the present system does not enable the debtor's means and circumstances to be*

> *properly investigated before the order is made. It found that the vast majority of debtors received into prison were "… inadequate, unfortunate, feckless or irresponsible persons …" in need of help rather than dishonest or plausible debtors who might merit imprisonment. It therefore concluded that it was undesirable to send merely inadequate persons to prison simply because imprisonment was a means of extracting money from the recalcitrant. It accordingly recommended that imprisonment for debt should be abolished.*"

Section 5 conferred a power to imprison people who had the means to pay but chose not to, even in defiance of a court having ordered them to do so. It was accepted that such 'can pay' ("*dishonest*") debtors "*might merit imprisonment*". But "*the present system* [did] *not enable the debtor's means … to be properly investigated*", and that was causing 'can't pay' debtors (who do not merit imprisonment) to be mistaken for 'can pay' debtors (who might). The Committee's solution was to investigate debtors' means properly, to avoid imprisoning people who could not pay, not to cease imprisoning all debtors.

> *"It will, incidentally, be of considerable assistance in relieving overcrowding in our prisons, since it is estimated that at least 2,750 people would be kept out of prison each year as a result of these proposals. The House may think that that is indeed a valuable step."*

To that, one might retort that legalising theft (or all crime, as in *The Purge* films) would also result in a lot of people being kept out of prison. The fact that some posited reform will keep people out of prison is not an argument for that reform unless one has already concluded that the people in question do not need or deserve to be in prison (or do not need or deserve to be in prison *enough* to justify continuing to incur the cost of imprisoning them). Expressing the benefit in terms of "*relieving overcrowding*" (rather than saving money) adds nothing further to the debate. If population density in a prison exceeds the target level which you consider humane, you could reduce the density back to the target level by releasing prisoners or by building a larger prison. Which you choose must depend on whether the utility in retaining the excess prisoners exceeds the cost of building a bigger prison.

When the government proposed getting rid of imprisonment for 'can pay' debtors, it acknowledged that it was doing so in spite of there being some utility in imprisoning 'can pay' debtors (they are "*dishonest*" and "*might merit imprisonment*"). The justification for the reform was not that imprisoning can pay debtors was not useful, but that the cost of imprisoning them outweighed the benefit.

The public cost of arresting and imprisoning people

One point in favour of the barbarously dystopian 18th Century prison system described above was that it will have cost the taxpayer almost nothing. Today, it costs the taxpayer an impressive £42,670 to house, feed, clothe, guard, educate and entertain one person for one year (according to the MoJ's *Costs per place and costs per prisoner by individual prison*, 29 October 2020).

Meeting the needs of one prisoner for one year thus costs more than the average person in the UK earns and hugely more than the average person pays in tax. £42,670 is over £11,000 more than the average full-time worker earns per year in the UK. Eleven such average people working full time for a year would not pay enough income tax to cover the cost of locking up one prisoner for one year (the gross median average salary in 2020 was £31,461, which means paying £3,790 in income tax and £2,635 in National Insurance, £42,670 / £3,790 = 11.25 people paying that level of income tax to cover the cost of one prison place). It is striking that if the cost of meeting one prisoner's needs for a year could instead be spent on malaria chemoprevention, bed nets, vitamin A supplements or vaccine incentivisation then doing so would reliably save 12 to 20 innocent lives (based on £42,670 = $60,359, and $3,000 to $5,000 to save a child's life, according to givewell.org).

The cost of arresting and imprisoning people is thus very high. Where 'can pay' debtors are imprisoned for failing to pay their debts, there may also be an opportunity cost involved – the person you've locked up cannot work, earn money / generate profit and pay tax. And there may be other costs associated with a spell of imprisonment - someone might lose their job, be unable to pay their mortgage, suffer marital breakup, suffer a long-term reduction in their earning potential, and contribute less (or take more) from society as a result over their lifetime. A concern to limit these indirect, longer term impacts on people lives and prospects might be a reason for having originally limited imprisonment of 'can pay' debtors to six weeks. Given the high cost of arresting and imprisoning people, no doubt the costs of imprisoning the debtor would exceed the debt in a great many cases, making this a very inefficient means of enforcement (it would be more efficient to just pay off the debtor's debt at public expense, rather than lock them up at public expense in the hope of persuading them to pay). But measuring the cost impact of 'can pay' imprisonment is not straightforward. The mere fact that imprisonment is a possibility might persuade some people to pay who otherwise wouldn't have done, or to pay more quickly, than would otherwise have been the case and save costs elsewhere.

The public benefit of enforcing contracts

Most of the debts which ceased to be imprisonable under the 'can pay' exception will have been debts arising out of contracts. Much ink has been spilled on the question of why the law enforces (some) contracts. One explanation is that breaking a promise is immoral, and the state has a sufficient interest in punishing immoral behaviour to justify doing so independent of the creditor's interest in securing payment. A more pragmatic view is that, unless contracts were routinely complied with modern society would fall apart. All the benefits of the modern age hinge on complicated, large scale, long term, complex transactions between unaffiliated parties where performance and payment do not take place simultaneously. Such transactions confer enormous social benefit, but they will not happen unless each participant is sufficiently confident that each other participant will perform. Enforcing contracts supplies that confidence, allowing those hugely beneficial transactions, and delivering a public good.

Accepting that enforcing promises, and the debts which flow from them, is a public good, and the state should provide machinery doing so, should the cost of operating that machinery be borne by the immediate beneficiaries (creditors) or shared among the wider public? One could have a self-funding system whereby all the costs of this public machinery for enforcing contracts/debts are paid by the system's users (creditors, who pay the fees in the first instance, but with the fees being added to the debt so that they are ultimately borne by the debtor). Alternatively, one could have the machinery funded, or partly funded, by the taxpayer. In that model the public is being required to bear some of the risks of the debtor's default, effectively subsidising the creditor's business and allowing the creditor to make riskier loans with less, or less adequate security.

Of course, the state might, as a matter of policy, want to subsidise the provision of riskier credit, to improve people's access to it. Spending public money to enforce a contract does have a wider societal benefit beyond securing repayment for the individual creditor whose debt is enforced. By enforcing a few broken promises, you signal that contracts generally are enforceable, securing the widespread compliance and confidence on which society depends. It is unclear to what extent the public does subsidise the enforcement of contracts. In 2018/19 HM Courts and Tribunal Service received an operating income of £781 million, mostly fees, against operating expenditure of £1.992 billion, so it is not a self-funding institution, but the figures do not seem to be broken down as between criminal and civil matters, so it is not possible to work out how much of the cost of the civil courts is covered by the fee income they generate (HM Courts & Tribunals Service Annual Report and Accounts 2018-19).

The obvious solution?

It could be argued that the obvious solution, rather than denying creditors the utility of the 'can pay' exception altogether to save public cost, would have been to preserve the 'can pay' exception, but shift the cost of imprisoning debtors from the taxpayer to the creditor. If a creditor wants a recalcitrant 'can pay' debtor imprisoned, let them pay the cost of doing that. All the (supposed) reasons for getting rid of imprisonment for 'can-pay' debtors vanish. The problem of 'can't pay' debtors being wrongly imprisoned is addressed, because (on the whole) creditors will only be willing to fund imprisonment if they are very sure that the debtor in question can pay and the sum in issue justifies the outlay. The direct cost to the public is zero.

"*Ordinary debts*"

One way, it seems, to imprison someone for debt is to get a court order requiring them to pay it, having then failed to do so, then get them to give an undertaking that they are definitely going to pay it in order to secure some collateral advantage in the litigation, and then have them breach that.

In *Bates* v *Bates* (1888) 14 PD 17 a party was ordered to pay a sum of money into court or alternatively provide a bond as security for the other party's costs. He failed to pay the monies as ordered or provide the bond. He claimed that this was a "*default in payment of a sum of money*" so that he enjoyed the protection of Section 4 of the 1869 Act. The court held that the object of the 1869 Act was to prevent imprisonment for non-payment of "*ordinary debts*" and Section 4 had to be construed in that light. Breaching an order to deposit money into court by way of security was not "*default in payment of a sum of money*" within Section 4.

In the recent case of *Hussain* v *Vaswani and others* [2020] EWCA Civ 1216, Hussain, an investment banker, rented an apartment in London from the Vaswanis in respect of which he owed in due course a substantial sum in rent arrears. The Vaswanis obtained an order for possession and an order that Hussain pay the outstanding rent. Hussain sought permission to appeal and a stay of execution. Permission was refused on the money judgment, but the court listed the application for a stay in relation to the possession order. Hussain claimed he could afford to pay the arrears (around £92,000) in three days and gave an undertaking to pay within a certain period. He then attended another hearing with a document purporting to show the monies had been paid. The judge found there had been a change of circumstances and granted a stay of execution of the possession order. Hussain gave a further undertaking to continue paying rent at the agreed rate.

The money never arrived. The Vaswanis sought Hussain's committal proceedings for breach of undertakings. Hussain argued that Section 4 of the 1869 Act prevented the court committing him to prison for breach of the undertakings. The first instance court committed Hussain to prison for 12 months. The Court of Appeal upheld Hussain's committal:

> "*As Bates v Bates makes clear, section 4 must be purposively construed. As Cotton LJ stated, its purpose is to prevent imprisonment for non-payment of ordinary debts. Mr Hussain gave the undertakings in order first to establish a change of circumstances which would open the door to a reconsideration of the refusal of a stay and secondly to persuade the court to exercise its discretion in his favour by granting a stay. Thus the undertakings were the price Mr Hussain paid in order to obtain court orders in his favour and adverse to the Vaswanis. In such circumstances it is vital that the court should be able properly to enforce undertakings given to it. Mr Hussain did not comply with his undertakings. True it is that the non-compliance manifested itself in a failure to pay money to the Vaswanis, but in the circumstances that was not a failure to pay an ordinary debt. On the contrary, it was a failure to honour extra obligations to the court which Mr Hussain assumed, over and above the ordinary debts he owed, for the purposes of obtaining advantages in the proceedings.*"

It is not obvious why, faced with the words "*default in payment of a sum of money*" in Section 4 of the 1869 Act, one is compelled to apply the gloss that this must be payment of a sum of money pursuant to an "*ordinary debt*", there being some other, nebulous category of payment obligations which are in some sense 'special', for default in which parliament must have intended that people could continue to be imprisoned. The fact is that Section 4 already contains a list of payments which parliament considered to be 'special', and chose to exempt from the operation of Section 4:

> "*There shall be excepted from the operation of the above enactment:*
>
> *(1) Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract:*
>
> *(2) Default in payment of any sum recoverable summarily before a justice or justices of the peace:*
>
> *(3) Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control:* [**Note**: this might have been intended to reflect the existing practice, whereby courts of equity would make 'payment' orders for such debts – see above under the heading "***recovery and payment orders***"]
>
> *(4) Default by a solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order:*
>
> *(5) Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorised to make an order:*
>
> *(6) Default in payment of sums in respect of the payment of which orders are in this Act authorised to be made: …*"

However desirable it is that the courts should be able to imprison people for breaching undertakings to pay money, failing to pay money one has undertaken to pay just is a "*default in payment of a sum of money*". There is no suggestion that the exceptions in subsections (1) to (6) were just examples, with the courts being free to invent further exceptions when expedient. It has all the appearance of being a closed list.

Consider that the draughtsperson considered each of the things listed in sub-sections (1) to (6) to have been an example of a "*default in payment of a sum of money*" which would otherwise have been caught by the general prohibition in Section 4 – hence the need for a specific exception. This includes "*payment of a penalty*" – i.e. an obligation to pay a criminal fine, which is hardly an "*ordinary debt*", was assumed to be caught by the wording "*default in payment of a sum of money*".

Irrespective of whether one is persuaded by the reasoning, *Vaswani* is a Court of Appeal authority confirming there are debts which are not "*ordinary debts*", and one can be imprisoned for failing to pay them. However, this exception is of no utility in Crassus' case. He makes no secret of the fact that he does not intend to pay and has no reason to give any undertaking to do so.

The penalty exception

As noted above, Section 4(1) of the 1869 Act provides an exception for "*default in payment of a penalty*", and this was unchanged by the 1970 Act. This seems to suggest a further possible means of imprisoning someone for a debt. Under CPR 81.9(1) the court can impose a fine for contempt. In the case of the High Court, there is no limit on the fine that can be imposed. The decision in *Nash* v *Lygren* [2020] EWHC 3088 is a recent example of individual respondents being fined £25,000 and a company being fined £100,000 for breaching an injunction in the context of a commercial dispute.

A court orders a 'can pay' debtor to pay a sum of money. The debtor refuses. This is a contempt of court, and so it would seem to be open to the court to order the debtor to pay a fine for that contempt. If the debtor failed to pay the fine, the court could then imprison the debtor for that. There seems to be a suspicious absence in the case law, however, of any cases in which this has been done. There are several hurdles. One would have to persuade the court to impose a sufficient fine. One would have to persuade the court to impose a custodial sentence to punish the failure to pay (generally considered the last resort). The debtor could cure their default by paying the fine, leaving the debt still unpaid, in which case the creditor would only have succeeded in depleting the assets available to pay them with. And, in most cases, 'can pay' debtors who are subject to the jurisdiction of the English courts are going to be people whose assets are within reach of the English courts, so that there will be easier enforcement options available.

An incoherent landscape

A creditor can obtain an order that a debtor provide information about his assets. If the debtor refuses, he can be committed for contempt. A creditor can obtain an order to prevent the debtor moving or disposing of assets. If the debtor moves his assets, again he can be imprisoned for contempt. People with notice of such orders who aid the creditor in disposing of their assets can, likewise, be guilty of contempt, imprisoned or fined and then ultimately imprisoned for failing to pay fines (see above). The purpose of these orders is to make it easier for the creditor to obtain payment of what is owed. It is strikingly incongruous that one cannot be imprisoned for *not paying* but one can be imprisoned for *preventing or hindering the creditor from obtaining payment*. This smacks of formalism and casuistry. The end result of the debtor's behaviour is in each case identical: the debt goes unpaid. The exact same point can be made about all the other enforcement measures which are (ultimately) backed-up by the threat of imprisonment. A creditor can obtain a writ of control, allowing a court officer to force entry to the creditor's premises. A debtor who resists, or tries to remove goods, or exclude the enforcement officer, risks being arrested, charged and imprisoned (for breach of the peace, or some offence against the officer's person).

In support of getting rid of the power to imprison 'can pay' debtors, the Attorney General said:

> "*… we could not abolish imprisonment without substituting another means of enforcement, and the attachment of earnings seems to be the best means which could be devised …*"

Attachment of earnings is the process whereby a court orders a debtor's employer to pay a proportion of the debtor's salary to the creditor. The purpose, again, is to secure payment of money. If the debtor fails to facilitate this, by failing when ordered to provide the relevant information, regarding the nature of their employer, then they can be arrested and imprisoned for contempt. If the creditor's employer fails to make the payments as ordered, they can be guilty of contempt, fined and (ultimately) imprisoned for failing to pay the fine.

A creditor can similarly obtain a garnishee order, requiring someone who owes the debtor money to pay it to the creditor. Failure to comply is, again, contempt and (ultimately) punishable by imprisonment. A debtor who gives an *undertaking* to pay a sum and fails to do so can (it seems) be imprisoned. A debtor who fails to pay a sum

they have been ordered to pay can (it seems) be fined, and then imprisoned if they fail to pay the fine. All this begs the question – why have this peculiar rule that A can't be imprisoned for *not paying* B a sum of money, but then set up all these peripheral tripwires so that A can be imprisoned if they do things to prevent B from *taking* that same money? There is simply no principled distinction to be made between 'not paying' and 'preventing taking' – in each case the outcome is the same and the debtor has the same intention. It is just a matter of luck whether the debtor happens to be in a position to achieve his intended outcome (keeping his money) through inaction or action. The legal outcome should not rest on such stochastic distinctions.

Does it matter?

It is suggested, then, that there would be merit in reintroducing the possibility of imprisoning for debt, subject only to the restriction that the creditor should pay the costs of the debtor's arrest and imprisonment. There should be no six week cap on the maximum prison term, since someone who owes a sufficiently material amount might well not be persuaded to pay unless by the threat of a commensurately material sentence. It is notable, too, that in each of the instances discussed above, where a debtor can be imprisoned for preventing or hindering a creditor from obtaining payment, the debtor's imprisonment is not capped at six weeks.

Crassus' hypothetical is unusual in that: (i) his assets are entirely out of reach of the English courts; but (ii) if an English court made an order for his committal, that would nonetheless be meaningful, or at least inconvenient, for him because he needs/wants to visit England (or, say, some third country which extradites to the UK); and (iii) he has committed no contempt besides his failure to pay. In such a case, the ability to have Crassus imprisoned for that contempt (at the creditor's expense) would fill a lacuna in the creditor's armamentarium.

While this is hardly a common scenario, it undoubtedly does arise, and one can occasionally see echoes of it in the case law. An example is to be found in *Cruz City 1 Mauritius Holdings* v *Unitech Limited and others* [2014] EWHC 3131 (Comm). The first defendant was one of India's largest real estate and development companies, worth some US$1.6 billion. After a dispute arose, the claimant obtained an arbitral award for around US$300 million. The defendants did not pay and resisted enforcement of the awards in India, where their assets were located. The claimant applied for the appointment of receivers by way of equitable execution over the first defendant's shareholdings in four companies, incorporated in India, the Isle of Man and Cyprus. The court made the orders sought, saying (<u>emphasis</u> added)

> "*38. … It is … irrelevant that the defendants' assets over which the receivership is sought are not located in England and that the courts in India will not (and the courts elsewhere may not -- the position is disputed) recognise an order for the appointment of receivers made by this court. That means that one possible way of giving effect to an order of this court, that is to say by enforcing the order in the foreign court, will not or may not be available. <u>But the sanction of contempt proceedings here will remain. In circumstances where directors of the defendants may wish to come to this country on business or for pleasure, the prospect that their next visit may be for a more extended duration and in less comfortable accommodation than anticipated should provide a real incentive to comply with an order. Likewise if the defendants wish or need to do business here, whether by raising money on the international capital markets or otherwise</u>.*"

There might well be less extreme cases, too, where the posited power would be valuable. A debtor who works for an employer in England so that attachment of their earnings is possible, but who has significant overseas assets. The threat of a spell in prison might secure prompt payment of the debt in a single lump sum, rather than in monthly increments deducted from salary. And there will, no doubt, be cases where a debtor has assets in England against which a judgment could be enforced, but for one reason or another, it is quicker, cheaper and

easier to secure payment by wielding the threat of imprisonment at the debtor's cost, rather than to go through the elaborate dance of the normal enforcement process.

The posited reform might have other benefits besides securing payment in these occasional cases. Everyone living in England, or at least everyone who has a sufficient connection with England that they are likely to be present there on occasion, is suddenly vulnerable to being imprisoned if they fail to pay any sufficiently material which a court has determined that they owe. Any prospective creditor has an additional guarantee of such a person's *bona fides*, allowing such a person to, in effect, use their liberty as collateral on any loan, enabling them to obtain credit more cheaply than might otherwise have been the case.

One cannot pretend that reintroducing imprisonment for 'can pay' debtors (subject to the safeguard of its being at the creditor's expense) is some desperately urgent, hugely consequential reform. But it would make for a simpler, more principled and coherent landscape in this area of the law and would, on occasion, supply a deserving party with a meaningful remedy in circumstances where presently they have none. And it seems to be a reform which creates little in the way of pubic costs / externalities or unfairness, since it is always entirely within the 'can pay debtor's power to avoid imprisonment if they want to.