

Neutral Citation No: [2023] NICA 45

Ref: KEE12226

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 14/18172/A01

Delivered: 07/07/2023

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

JOHN BRIAN STELFOX

Appellant

-and-

CLAIR ELIZABETH STELFOX

Respondent

Mr MacCreanor KC with Mr Bready (instructed by Reid Black) for the Appellant
The Respondent appeared as a litigant in person
The Attorney General instructed Mr Colmer KC and Ms Ellison to act as amicus
to the court

Before: Keegan LCJ and Scoffield J

KEEGAN LCJ (*delivering the judgment of the court*)

Background

[1] The appellant challenges the order for committal made by Mr Justice O'Hara on 28 March 2023. By that order, the appellant was ordered to be committed to prison for six months. The basis for the order was that the appellant had failed to comply with an earlier order of the judge, made on 21 July 2021.

[2] The judge issued two judgments reported at [2021] NI Fam 26 and [2023] NI Fam 6. We will not repeat the history set out therein. Suffice to say that the judge did not believe that the appellant could not pay maintenance arrears from 2017 and found his evidence to be unconvincing. He found that, even when the appellant had money available (which the appellant had accepted), he made no attempt to meet his obligations to make maintenance payments towards his children. He also declined to remit the outstanding arrears. Mr MacCreanor acknowledged that the factual findings made by the judge below, including those mentioned above, are not under appeal. Therefore, the only real lines of argument in this appeal – other than

procedural issues which were rectified by this court making a further maintenance order in respect of the outstanding amounts – were that: (i) as the appellant had served one prison term, his capacity to pay has reduced; and (ii) as will become apparent, he has through some acquaintances been able to provide a part payment in the course of the appeal proceedings. It is in that context that we must determine the appeal.

Grounds of appeal

[3] The appellant advanced four grounds for his appeal: (i) procedural issues; (ii) whether the elements of contempt were made out; (iii) whether committal was appropriate; and (iv) double jeopardy or double counting in relation to the term imposed. We need only deal with the procedural aspect of the appeal as we found no merit in any of the other grounds. We also observe that, notwithstanding the presence of senior and junior counsel at first instance for the respondent and counsel for the appellant, none of the procedural issues were drawn to the attention of the judge. This was a serious failing in a contempt case, which we trust will not be repeated. There are certain elementary requirements of contempt applications which flow from the governing rules, which we set out in full below. It has been made clear in authority on several occasions that procedural rigour is required in applications for committal for contempt in order to ensure that the alleged contemnor breached clear and specific requirements of an order of which he was aware and that he has had fair warning both of the potential consequences of such contempt and of the application for committal.

Procedural requirements of contempt

[4] Order 52 of the Rules of the Court of Judicature (Northern Ireland) 1981 (“the Rules”) governs contempt as follows:

“Committal for contempt of court

1.-(1) The power of the High Court or Court of Appeal to punish for contempt of court may be exercised by an order of committal.

(2) Where contempt of court -

(a) is committed in connection with -

(i) any proceedings in the High Court, or

(ii) criminal proceedings, except where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court, or

- (iii) proceedings in an inferior court, or
- (b) is committed otherwise than in connection with any proceedings, then, subject to paragraph (3) and rule 5, an order of committal may be made only by a court of the High Court consisting of two or more judges, and in this Order the word "Court" shall be construed accordingly save where the context or paragraph (4) otherwise requires.

[The reference to rule 5 should be to rule 7.]

(3) Where civil contempt of court is committed in connection with any proceedings in the High Court, an order of committal may be made by a single judge.

(4) Where contempt of court is committed in relation to the Court of Appeal or in connection with any proceedings therein, an order of committal may be made by that Court as well as by the Court under paragraph (2).

(5) Every order of committal may be directed to any police officer or to such other person as the Court may order.

(6) A court of two or more judges exercising jurisdiction pursuant to this rule shall be called a Divisional Court.

Application to the Court

2.-(1) Except under rule 1(3), no application to the Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

(2) An application for such leave must be made ex parte to a judge in chambers or to a single judge of the Court of Appeal and must be supported by a statement setting out the name and description of the applicant, the name of the person sought to be committed and the grounds on which committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than the preceding day to the Crown Office

and must at the same time lodge in that Office copies of the statement and affidavit.

(4) Where an application for leave under paragraph (2) is refused, the applicant may make a fresh application for such leave to the appropriate court.

(5) An application made by virtue of paragraph (4) must be made within 8 days after the judge's refusal to give leave or, if the appropriate court does not sit within that period, on the first day on which it sits thereafter.

Application for order after leave to apply granted

3.-(1) When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion to the appropriate Court and, unless the Court or judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.

(2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.

(3) Subject to paragraph (4), the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2, must be served personally on the person sought to be committed.

(4) Without prejudice to the powers of the Court or judge under Order 65, rule 4, the Court or judge may dispense with service of the notice of motion under this rule if it or he thinks it just to do so.

Application for order under rule 1(3)

4.-(1) An application for an order of committal under rule 1(3) must be made by motion and be supported by an affidavit.

(2) Subject to paragraph (3), the notice of motion, stating the grounds of the application and accompanied by a copy of the affidavit in support of the application, must be served personally on the person sought to be committed.

(3) Without prejudice to its powers under Order 65, rule 4, the Court may dispense with service of the notice under this rule if it thinks it just to do so.

Where person sought to be committed fails to appear

5. Where on the hearing of the motion the person sought to be committed fails to appear the Court may make an order of committal against him if it thinks it just to do so.

Saving for power to commit without application for purpose

6. Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the High Court or Court of Appeal to make an order of committal of its own motion against a person guilty of contempt of court.

Contempt in presence of judge

7.-(1) Without prejudice to rule 6, any person who, in the presence of a judge sitting in the High Court or Court of Appeal appears to be guilty of contempt of court, may be immediately called upon to show cause why an order of committal should not be made against him or he may be ordered to appear on some future date, with or without recognizances before the High Court or Court of Appeal to show cause why an order of committal should not be made against him.

(2) Where the High Court or Court of Appeal directs that recognizances shall be entered into, the Court shall determine the number of sureties, if any, the amount in which the person who appears to be guilty of contempt and any sureties are to be bound and the conditions to be indorsed on the recognizances with a view to the recognizances being taken subsequently.

(3) Any such recognizance may be entered into before a master who before taking the recognizance of a surety must satisfy himself that the surety is a suitable person to enter into a recognizance.

Provisions as to hearing

8.-(1) Subject to paragraph (2), the Court hearing an application for an order of committal may sit in private in the following cases, that is to say -

- (a) where the application arises out of proceedings relating to the wardship or adoption of a minor or wholly or mainly to the guardianship, custody, maintenance or upbringing of a minor, or rights of access to a minor;
- (b) where the application arises out of proceedings relating to a person suffering or appearing to be suffering from mental disorder within the meaning of the Mental Health (Northern Ireland) Order 1986 or any other incapacitating condition;
- (c) where the application arises out of proceedings in which a secret process, discovery or invention was in issue;
- (d) where it appears to the Court that in the interests of the administration of justice or for reasons of national security the application should be heard in private; but, except as aforesaid, the application shall be heard in open court.

(2) If the Court hearing an application in private by virtue of paragraph (1) decides to make an order of committal against the person sought to be committed, it shall in open court state -

- (a) the name of that person,
- (b) in general terms the nature of the contempt of court in respect of which the order of committal is being made, and
- (c) the length of the period for which he is being committed.

(3) Except with the leave of the Court hearing an application for an order of committal, no grounds shall be relied upon at the hearing except the grounds set out in the statement under rule 2. [There should be added: "or as the case may be, the notice of motion under rule 4."] The

foregoing provision is without prejudice to the powers of the Court under Order 20 rule 8.

(4) If on the bearing of the application the person sought to be committed expresses a wish to give or adduce on his own behalf, he shall be entitled to do so.

(5) In this rule references to a court sitting in private include references to a court sitting in camera and a judge in chambers.

Power to suspend execution of committal order

9-(1) The Court by which an order of committal is made may by order direct that the execution of the order of committal shall be suspended for such period or on such terms or conditions as it may specify.

(2) Where execution of an order of committal is suspended by an order under paragraph (1), the applicant for the order of committal must, unless the Court otherwise directs, serve on the person against whom it was made a notice informing him of the making and terms of the order under that paragraph.

Discharge of person committed

10.-(1) The Court may, on the application of any person committed to prison [until further order] for any contempt of court, discharge him. [The words "until further order" should be omitted (as was done in the English rule) because under the Contempt of Court Act 1981, any committal to prison must be for a fixed period.]

(2) Where, a person has been committed for failing to comply with a judgment or order requiring him to deliver anything to some other person or to deposit it in court or elsewhere, and an order of sequestration has also been issued to enforce that judgment or order, then, if the thing is in the custody or power of the person committed, the sequestrators appointed by the order of sequestration may take possession of it as if it were the property of that person and, without prejudice to the generality of paragraph (1), the Court may discharge the person committed and may give such directions for dealing with the thing taken by the sequestrators as it thinks fit.

Saving for other powers

11. Nothing in the foregoing provisions of this Order shall be then as affecting the power of the court to make an order requiring a person guilty of contempt of court, or a person punishable by virtue of any statutory provision in like manner as if he had been guilty of contempt of the High Court, to pay a fine or to give security for his good behaviour, and those provisions, so far as applicable, and with the necessary modifications, shall apply in relation to an application for such an order as they apply in relation to an application for an order of committal."

[5] The Attorney General was joined as an amicus curiae and filed a skeleton argument which has been of great assistance to us. We extract some of the points made as follows. First, we note the principles which flow from *Hurl v Lupari* [2017] NIQB 23, particularly from para [25], as follows:

"The power to commit for contempt must be exercised only where the court is sure, to the criminal standard of proof that the alleged contemnor is in breach of an unambiguous order. The burden of proof is upon the applicant."

[6] This court is also mindful of the warning given by Cross J in *Re B (IA) (an infant)* [1965] Ch. 112, at 117, when he said:

"Committal is a very serious matter. The court must proceed very carefully before they make an order to commit to prison; the rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations."

[7] The obligation under Order 45, rule 5 of the Rules to serve a copy of an order with a penal notice endorsed thereon is subject to the proviso in para [7], as follows:

"[7] Without prejudice to its powers under Order 65 rule 4, the Court may dispense with service of a copy of an order under this rule if it thinks it just to do so."

[8] The obligation under Order 52, rule 4(2) to effect personal service of an application for committal is subject to the proviso in para [3] as follows:

“[3] Without prejudice to its powers under Order 65, rule 4, the Court may dispense with service of the notice under this rule if it thinks it just to do so.”

[9] Within this legislative matrix the valid point made by the appellant was whether the underlying order was properly endorsed or served. Flowing from that the appellant’s main claim was that the underlying order was one which was incapable of being subject to an application for committal.

[10] This claim emerges from Order 45, rule 4(1)(a). In short, that rule provides that where a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time then such an order may be enforced by an order of committal under Order 52.

[11] Order 45, rule 4 is therefore a “gateway” to enforcement under Order 52. The appellant contended that the application for committal does not get through the gateway because the underlying order did not require him to do any act within a time specified in the order. We accepted this argument and issued a revised unambiguous order as discussed further below. In addition, the appellant also contended, with justification, that the notice of motion served on behalf of the respondent was deficient in a number of respects.

Order of the Court of Appeal

[12] The operative terms of the order made on 2 June 2023 are as follows:

“IT IS ORDERED that:

The appeal shall be allowed on the basis of the procedural deficits accepted by all parties;

A revised Order is made on terms which have been accepted by the parties as accurate on the following terms:

- (i) The respondent/appellant do pay the liquidated sum of £110,625 to the petitioner/respondent by 4.00 pm on 9 June 2023;
- (ii) This Order contains a penal notice which warns the respondent/appellant that he is liable to imprisonment should he disobey this Order.
- (iii) This Order will be personally served on the respondent/appellant before 5.00 pm on 2 June 2023, the appellant/respondent having indicated

through counsel that he will accept such personal service;

- (iv) This case shall be adjourned to 12 June 2023 to deal with ancillary issues and any matters of contempt if the sum ordered to be paid is unpaid within the time stipulated at (i) above.”

Subsequent events

[13] When the case returned to court on 12 June 2023, we were told that a part payment of £11,000 had been made. We directed that proof of payment and provenance in relation to this amount be provided; and asked the respondent to comment upon this payment and file any motion for contempt of our order prior to the case returning to court on 30 June 2023.

[14] On 30 June 2023 the appellant made no further proposal to clear the arrears. The limited proposal made would only go some way to meeting his ongoing liabilities, unless the ongoing maintenance order is the subject of a successful variation application. His counsel submitted that he would look for jobs and from September pay £100 a month from his state pension for ongoing child maintenance. The appellant also maintained that some family would pay one child’s educational fees although no actual flesh was put on the bones of that. He applied for remittal of all arrears.

[15] In reply, the respondent submitted that whilst she did not want the arrears remitted, she did not wish to file her own motion for contempt. She personally has no wish to see the appellant imprisoned again but just wants his obligations to his children to be met. She also referred to a suggestion that a businessman would lend the appellant funds to help pay £50,000 at one stage but then that offer was removed.

[16] Ms Ellison advised us that we could commit of our own motion pursuant to Order 52 rule 6. At the hearing on 30 June 2023, we indicated that that was what we intended to do but we would reflect on the terms until today. Nothing has happened since. That is unfortunate as, had the appellant made a further substantial payment (of the order suggested in the respondent’s skeleton), we would have seriously considered whether any further period of imprisonment was justified.

Conclusion

[17] It is a given that contempt powers should be used sparingly. They should only be exercised as a last resort where other less drastic remedies are not available. However, it may be necessary for a court to act to protect the processes of the court and an element of deterrence is a proper consideration.

[18] This is a sad case in which the appellant has maintained a position which has already resulted in imprisonment. It is accepted that he is in contempt of court beyond a reasonable doubt for failing to pay the sum specified in the order of this court which simply defined the sum which was the subject of O'Hara J's previous order to make it an unambiguous order for payment of a lump sum within a specified period with a penal notice attached.

[19] The appellant faces a further six months' imprisonment if we uphold O'Hara J's approach. In one sense this may be justified given that there is now contempt of an order of the Court of Appeal. However, against that there is some mitigation which we must consider as follows. First, the appellant has made some payment albeit only around one tenth of what he owes. Second, he has indicated an intention going forward of paying some money for child maintenance. That is a material change from his previous stance of paying, and offering, nothing. Third, unlike in the court below the respondent herself is not pushing for imprisonment. In addition, this is a case where contempt will continue and there comes a time when courts in the matrimonial jurisdiction must draw a line.

[20] We do not think that the line is drawn yet in this case, although we are bound to say that a further application for contempt for these same arrears is not likely to succeed given the principle of double jeopardy (albeit the unremitted arrears will remain owing). The problem in this case is twofold, namely that the appellant still has made no apology for his conduct and the amount he has paid off the arrears is not enough to avoid imprisonment. Otherwise, the deterrent aspect of contempt becomes meaningless. Matrimonial orders for maintenance must be complied with and are as serious as any other orders. Notwithstanding the respondent's gracious approach at the most recent hearing, this court must act to ensure that the orders of the court in this case are not rendered meaningless and confidence in the administration of justice thereby undermined.

[21] We decline to remit the arrears as no argument has been made to us which undermines O'Hara J's conclusion on this. In addition, we point out that a further variation application could be made by the appellant as to ongoing maintenance. It is not for us to determine that issue. We are left with a limited question as to what the proportionate punishment is for the remaining breach of our order.

[22] Regrettably, we consider that the custody threshold remains passed despite the urgings of this court to the appellant to settle the debt or substantially settle the debt. We would have considered suspension if we were told that more time would yield a further lump sum. We were given no such assurance. As such we must set a proportionate term given the mitigation we have referred to above. Taking those factors into account, we think a period of imprisonment of three months is appropriate.

[23] The appellant should present himself at Laganside Courthouse on Monday 17 July 2023 to be taken into custody. Should the appellant pay the £50,000 lump sum

previously mooted in correspondence to the respondent within the next seven days he can apply to this court, and we will consider suspending or varying the order.