

Neutral Citation No: [2021] NICH 24	Ref: McB11495
<i>Judgment: approved by the Court for handing down (subject to editorial corrections)*</i>	ICOS No: 19/100965
	Delivered: 11/03/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

WILLIAM DENIS McDOWELL

Applicant

v

HELEN HAWE

Respondent

**Mr Copeland (instructed by Joseph Donnelly and Co, Solicitors) for the applicant
Ms Hawe acted as a litigant in person and did not appear**

McBRIDE J

Application

[1] By summons dated 17 November 2020 William Denis McDowell, the applicant seeks an order of committal of Helen Hawe, the respondent, pursuant to Order 52 (1) (3) of the Rules of the Court of Judicature (Northern Ireland) 1980 (“the Rules”) on the basis that she is in breach of a court order made by Master Hardstaff on 16 January 2020 when he ordered as follows:

“(1) Helen Hawe is hereby removed as Personal Representative of the Estate of William George McDowell deceased and is hereby replaced by William Denis McDowell and that a fresh grant of Letters of administration (with the Will Annexed thereto) is issued forthwith to the said William Denis McDowell c/o Joseph Donnelly and Co Solicitors, Belfast.

(2) The said Helen Hawe do within 28 days hereof file an inventory and account verified upon oath of the

Administration of the Estate while she was appointed Personal Representative;

(3) The said Helen Hawe do forthwith surrender to the Probate Office, Royal Courts of Justice, Belfast the original and all certified copies of the Grant of Probate issued to her on 12 December 2018;

(4) PENAL NOTICE _ if you disobey this order you may be found guilty of contempt of court and may be sent to prison or fined or your assets may be seized." ("the Master's order")

Introduction

[2] The circumstances giving rise to the Master's order relate to the Will of William George McDowell, deceased, ("the deceased") who died on 21 March 2018. The applicant is the son of the deceased and the respondent is the applicant's sister. On foot of the deceased's Will, dated 17 January 2013, the deceased appointed the respondent as his executor. He then made a number of bequests in his Will to the applicant, the respondent and his grandson. In particular the deceased made a pecuniary legacy of £60,000 to the applicant.

[3] The respondent extracted a Grant of Probate on 12 December 2018, in person. She did not engage the services of solicitors. As of the date of the Grant of Probate the value of the estate was £170,000. By letter dated 11 March 2019 the respondent, in open correspondence, evinced an intention to transfer the necessary funds to the applicant to satisfy the gift made to him in the deceased's Will. In this correspondence, she stated:

"I will ask for funds to be transferred so that I can transfer to the account Denis has given. It might take a little time."

[4] The monies were not transferred to the applicant's account and therefore on 28 October 2019 Chancery proceedings were issued by the applicant against the respondent. There were a number of hearings before the Master and during this period the respondent corresponded with the court office by way of email. Ultimately, Master Hardstaff made the order dated 27 January 2020.

The Master's order

[5] On 16 January 2020 Master Hardstaff ordered, inter alia, that Helen Hawe do within 28 days hereof file an inventory or account verified upon oath of the administration of the estate while she was appointed personal representative and further ordered that she do forthwith surrender to the Probate Office, Royal Courts of Justice, Belfast, the original and all certified copies of the Grant of Probate issued to

her on 12 December 2018. That order was endorsed with a penal notice advising that if she disobeyed the order she may be found guilty of contempt of court and may be sent to prison or fined or her assets may be seized.

Evidence

[6] An affidavit provided from Stephen Morrison from the Sheriff's office, Scotland establishes that the Master's order was served personally upon the applicant on 6 February 2020.

[7] The applicant then issued the present contempt summons on 15 December 2020 alleging that the respondent had failed to comply with the Master's order and set out details of the alleged breaches on the face of the summons.

[8] As appears from the affidavit evidence by Peter Conlon, solicitor dated 27 October 2020 and 27 January 2021 filed in support of the contempt summons, the applicant has failed to pay the pecuniary legacy to the respondent and has failed to provide an inventory or account and has failed to lodge original and certified copies of Grant of Probate issued to her with the Probate Office, Belfast.

[9] The contempt summons and supporting affidavit was served by first class post. Service was effected by this method, rather than by way of personal service due to difficulties created by Covid restrictions.

[10] As the Rules require personal service the applicant then applied to the court to dispense with service. In addition the applicant sought leave to amend the summons to include particulars of breach of the Master's order on its face. On 11 February 2021 the court granted leave to amend the summons and acceded to the request that the requirement for personal service could be dispensed with and ordered that the amended summons be served by recorded delivery.

[11] The amended summons together with the supporting affidavits and details of today's hearing was served by recorded delivery on 26 February 2021 on the respondent. Despite being advised of today's hearing and being called there was no attendance by the respondent before the court today.

[12] Mr Copeland on behalf of the applicant submitted to the court that all the technical and substantive requirements to establish contempt had been proved.

Consideration

[13] The legal principles and procedural rules in relation to proving contempt were summarised in *Hurl v Lupari* 2017 [NIQB] 23 at para [25] as follows:

“[25] The procedural rules governing committal applications are set out in Order 52, Rules of the Supreme

Court (Northern Ireland) 1980. From these and the jurisprudence on committal a number of principles emerge:

A. Under Order 52 rule 1(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. A civil contempt includes disobedience of a court order.

B. Under Order 52, rule 4(1) an application for committal must be made by motion and be supported by an affidavit.

C. In accordance with Order 52 rule 4(2), "the notice of motion, ... accompanied by a copy of the affidavit in support of the application, must be served personally on the person sought to be committed." Thus the Notice and a copy of the supporting affidavit must be served personally unless the court orders otherwise.

D. Order 52 rule 4 (2) further provides, "the notice of motion, stating the grounds of the application.." The importance of this provision was outlined 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".

In Harmsworth v Harmsworth [1987] 1 WLR 1676, the County Court judge held that, although the application notice did not contain sufficient particularity, that defect was cured by the supporting affidavit. The Court of Appeal rejected this view and held that the allegations must be set out with sufficient particularity in the application notice itself and could not be supplemented by reference to some other document such as a supporting affidavit. Nichols LJ stated at page 1683:

"So the test is, does the notice give the person alleged to be in contempt enough information

to enable him to meet the charge? ... From the notice itself the person alleged to be in contempt should know with sufficient particularity what are the breaches alleged ..."

Further Woolf LJ in Attorney General for Tuvalu v Philatelic Distribution Corporation Limited [1990] 1WLR 926 at 924-935 stated:

"The essential point which the cases establish is that an alleged contemnor should be told, with sufficient particularity to enable him to defend himself, what exactly he is said to have done or omitted to do which constitutes contempt of court. The cases make clear that compliance with this rule will be strictly insisted upon since the liberty of the subject is at stake."

Males J in The Lord Mayor and the Citizens of the City of Westminster v Addbins Limited [2012] EWHC 3716 summarised the principles at para 43 when he said:

"In summary, therefore, the application notice must contain sufficient detail of what is alleged to enable the alleged contemnor to meet the case against him, but that requirement must be applied sensibly and the level of detail required to be included in order to satisfy this test will depend on the circumstances of the particular case, including the nature of the acts or omissions alleged."

E. 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.

F. To establish that someone is in contempt, it is necessary to prove the three elements set out in Masri v Consolidated Contractors International [2011] EWHC 2579, namely:

"(i) he knew the terms of the order,

- (ii) he acted (or failed to act) in a manner which involved a breach of the order, and
- (iii) he knew of the facts which made his conduct a breach."

G. Liability for contempt does not require any direct intention on the part of the alleged contemnor. This was clearly set out in the decision of the House of Lords in Re Supply of Ready Mix Concrete (No. 2) [1995] 1 AC 456.

H. An alleged contemnor is only required to meet the specified allegations of contempt made against him, which must be determined as at the date of the application notice. This appears from Tankaria v Morgan [2005] EWHC 3282 at para 27 when Laddie J said:

"... Perhaps of greatest significance in this case is the importance of the date and content of the application notice. The respondent's only obligation is to meet the 'charges' set out in the application notice. In other words, the charges are those specified in the application notice. The question of whether there has been contempt has to be determined as of the date of the application notice ..."

I. The liability of a principal in relation to the acts of his agents is set out in Arlidge, Eady and Smith [4th Edition] On Contempt, which states at para 12 -102 as follows:

"Where judgment or order is binding upon an employer or principal, and a servant or agent fails to comply with the judgment or breaches the order this may lead to a finding of liability on the basis of vicarious liability...."

The agent in an ordinary case is engaged to perform a particular task on a particular occasion and only has authority to do whatever is required for that purpose. If the authority of the servant or agent has been revoked before the act is done, this would in principle have

the consequence of the relevant would not be attributable on a vicarious basis".

This test was confirmed in Heatons Transport (St Helens) Limited v Transport and General Workers Union [1973] AC 15 when the court held:

"No new development is involved in the law relating to the responsibility of a master or principal for the act of a servant or agent in the present appeal. In each case the test to be applied is the same: was the servant or agent acting on behalf of, and within the scope of the authority conferred by, the master or principal?"

[14] I am satisfied that all the procedural requirements have been met in this case. This application alleges disobedience of a court order. The Rules provide that such an application can be made before me as a single judge. The application has been made by way of Notice of Motion supported by an affidavit. Although the Rules require personal service the court has made an order dispensing with personal service and ordered that service be by way of recorded delivery. The evidence establishes that the proceedings were served by recorded delivery upon the respondent. I am further satisfied that the Notice of Motion sets out the particulars of all the alleged breaches in a such a manner that the respondent was clearly aware of what was being alleged against her.

Has contempt been proved?

[15] To prove contempt it is necessary to prove the three elements set out in *Masri v Consolidated Contractors International* [2001] EWHC 2579, namely:

- “(i) the person knows the terms of the order;
- (ii) they acted or failed to act in a manner which involved a breach of the order; and
- (iii) they knew of the facts which made this conduct a breach.”

[16] I am satisfied that the respondent knew of the terms of the Master’s order, as it was brought to her attention by way of personal service on 6 February 2020. I am further satisfied that she understood the terms of the Master’s order especially as she was capable of extracting a Grant of Probate without the assistance of a solicitor and during hearings before the Master communicated with the court in such a manner as demonstrated an understanding of the issues in dispute in the case.

[17] Having read and considered the affidavit evidence filed in this application I am also satisfied that she failed to act as required by the Master's order and has therefore breached the order. It is quite clear that she has not to date provided the inventory or account upon oath of the administration of the estate of the deceased and has not surrendered to the Probate Office, Royal Courts of Justice, Belfast the original and all certified copies of the Grant of Probate issued to her on 12 December 2018. In addition she has not paid the pecuniary legacy due to the applicant on foot of the deceased's Will, although this did not form part of the Master's order.

[18] I am further satisfied that the respondent knew that her conduct constituted a breach of the Master's order. The applicant's solicitor has corresponded with the respondent but she has failed to respond or otherwise engage. During the course of these proceedings the respondent has not raised any legal argument or factual circumstances to counteract the allegations made by the applicant that her conduct constitutes a breach of the Master's order. I am satisfied that the respondent has deliberately breached the Master's order as she initially engaged with the court but since the Master's order has been made she has refused to participate in the court process and has chosen to ignore the Master's order.

[19] For all of these reasons I am satisfied the elements set out in *Masri* are met and I am satisfied that the respondent is in breach of the Master's order.

[20] Once satisfied the respondent is in contempt of court the court then has to consider what is the appropriate sanction or remedy to impose. This case involves a brother and sister. After hearing the submissions of Mr Copeland of counsel on behalf of the applicant I am satisfied that the applicant has no real desire to see his sister committed to prison. His desire is to ensure that she complies with the Master's order and more importantly that she pays to him the monies he was bequeathed by his father on foot of his father's Will.

[21] Before determining sentence in this case I intend to adjourn the case to allow the respondent to be made aware of the court's finding that she has acted in breach of the Master's order. The adjourned period will afford her a period of time to purge her contempt. I also wish to make her aware that when the matter is relisted for hearing the court will take into account her actions between now and the date of the adjourned hearing and this will be reflected in the sentence or sanction that it will impose. I adjourn the matter for a period of 6 weeks.

[22] Costs to be reserved.