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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF MICHAEL WATTERS

IN THE MATTER OF ARTICLE 114 OF THE JUDGMENTS ENFORCEMENT (NORTHERN IRELAND) ORDER 1981

IN THE MATTER OF AN APPLICATION BY THE ATTORNEY GENERAL FOR NORTHERN IRELAND

MAGUIRE J

Introduction

[1] The application before the court is that of the Attorney General for Northern Ireland. He wishes to be joined as a party to proceedings which have come before the High Court as a result of a referral by the Master sitting in the Judgments Enforcement Office ("the Master").

[2] The underlying proceedings, which led to the appointment before the Master, involve an on-going dispute between former partners which has been the subject of various cases and rulings in the Republic of Ireland in family proceedings.

[3] It appears that as a result of those disputes the female partner of Mr Watters (Ms O'Donnell) applied to have three costs judgments in her favour against Mr Watters registered in Northern Ireland for the purpose of enforcement.

[4] The application to register the orders was made in *ex parte* proceedings and resulted in an order by Master Bell on 2 April 2015. Thereafter, Ms O'Donnell's solicitors applied to have the cost orders enforced.

[5] This gave rise to a hearing before the Master at the Enforcement of Judgments Office. On 20 June 2017 it is alleged that Mr Watters having responded only in

response to a conditional order for issue of a warrant for arrest, appeared before the Master. The purpose of the attendance was that he was to be examined as to his means in connection with the enforcement proceedings. However, it is alleged that he refused, having been sworn, to answer any questions about his employment, his income or to provide any financial information.

[6] In these circumstances the Master made a reference to the High Court in accordance with Article 114 of the Judgments Enforcements (Northern Ireland) Order 1981. The reference was made by the Master of her own motion and pursuant to Article 114(2) she appears to have certified an offence. In these circumstances the effect of Article 114(3) is that the High Court, if satisfied that the offence certified has been committed, may deal with the offence in any manner in which it could deal with it if committed in relation to the court.

[7] Article 114, so far as material to these proceedings, reads as follows:

> "(1) This article applies where –
>
> (a) A person attends pursuant to a summons … refuses without just cause –
>
> (ii) To answer or to answer satisfactorily any question as to the means of the debtor, or the assets and liabilities of a debtor company or firm, properly put to him …
>
> (2) The Master …
>
> (b) On his own motion, in any case, may certify the offence…
>
> (3) The Master, on certifying or receiving a report of the offence … may refer it to the High Court, which may, if satisfied that the offence certified has been committed, deal with the offence in any manner in which the court could deal with it if committed in relation to the court."

The position of the Attorney General

[8] The Attorney General's application to the court is supported by an affidavit sworn by Ian Wimpress, a solicitor working in his office. In this affidavit he refers, in particular, to the Attorney's constitutional role in representing the public in litigation and the inappropriateness of judicial officers conducting proceedings such

as those involved in this case. In a case like the present one, Mr Wimpress averred, there will be a need to adduce evidence and for someone to have oversight of the proceedings and be able to review it (or even discontinue it, if that is the right course). The Attorney General, it is suggested, is a proper person to carry out this role. Mr Wimpress quoted extensively from the House of Lords decision in Attorney General v Times Newspapers Ltd [1974] AC 273. In particular he referred to the speech of Lord Diplock where he said:

> "… I commend the practice … whereby the Attorney General accepts the responsibility of receiving complaints of alleged contempt of court from parties to litigation and of making an application in his official capacity for committal of the offender if he thinks this course to be justified in the public interest. He is the appropriate public officer to represent the public interest in the administration of justice. In doing so he acts in constitutional theory on behalf of the Crown, as do Her Majesty's Judges themselves; but he acts on behalf of the Crown as "the fountain of justice" and not in the exercise of its executive functions. It is in a similar capacity that he is available to assist the court as amicus curiae and is a nominal party to relator actions. Where it becomes manifest…that there is a need that the public interest should be represented proceedings before courts of justice which have hitherto been conducted by those representing private interests only, we are fortunate in having a constitution flexible enough to permit of this extension of the historic role of the Attorney General."

[9] Mr Watters has filed a responding affidavit. Much of this relates to the history of this matter, including that part of the history dealing with the events in the Irish courts. Mr Watters does, however, make it plain that he sees no role for the Attorney General in these proceedings and claims that the approach the Attorney has taken is over-zealous.

[10] On 17 November 2017 the court convened a short hearing in respect of the issue of whether it should accede to the Attorney General's application to be joined as the moving party in these proceedings. Mr Watters has resisted this application.

[11] The court wishes to make it clear that in this short judgment it is deciding only the question of whether the Attorney General can be joined in the proceedings. It is not seeking to deal with the wide range of issues contained in Mr Watters'

affidavit and it will be open to Mr Watters subsequently to raise those issues in the forum which ultimately deals with this matter in so far as they are relevant.

[12] In respect of the joinder issue, the Attorney General argues, in essence, that he is an appropriate person to represent the public interest in the proceedings concerning the Master's reference. He also considers that the alleged contempt falls within the category of contempts which deserve punishment and he believes that it is his role in a case of this type to pursue the matter before the High Court in the interests of the administration of justice. In addressing the matter in this way the Attorney has relied on the decision of the House of Lords in Attorney General v Times Newspapers Limited [1973] AC 273. In addition to the passage already quoted above, Mr Finnegan, on behalf of the Attorney General, relied upon Lord Diplock's remarks at page 312E-G and on Lord Cross of Chelsea's remarks at page 326E-G. In respect of the latter remarks, Lord Cross stated:

> "It is, I think, most desirable that in civil as well as in criminal cases anyone who thinks that a criminal contempt of court has been or is about to be committed should, if possible, place the facts before the Attorney General for him to consider whether or not those facts appear to disclose a contempt of court of sufficient gravity to warrant his bringing the matter to the notice of the court."

[13] In this case the matter is already before the High Court as a result of the Master's referral but the Attorney General considers that it would be in the public interest for him to act in the name of the public by becoming involved in these proceedings.

[14] It is the Attorney General's view, moreover, that the reference before the court may be viewed as analogous to proceedings for criminal contempt with the consequence that it should be dealt with in accordance, *inter alia*, with Order 52 Rule 1(2) of the Rules of the Court of Judicature (Northern Ireland) 1980.

[15] Mr Watters, on the other hand, argues that at most the proceedings are concerned with civil contempt so that it would not be appropriate for the court to enable the Attorney General to enter the proceedings as a prosecutor or quasi prosecutor.

Civil or criminal contempt?

[16] The issue of whether contempt proceedings are civil or criminal has long been a difficult one. In Northern Ireland the Court of Appeal has acknowledged this in the case of Lord Saville of Newdigate v Harnden [2003] NICA 6 at paragraph [13].

In that paragraph the then Lord Chief Justice remarked: "The difficulty of classifying any given type of contempt is very well recognised".

[17] In Harnden the Court of Appeal considered the distinction between criminal and civil contempt at some length: see paragraphs [12]-[18]. The facts of Harnden have a resonance for the present case, in that it was a case of a person who refused to answer the questions of a Tribunal, just as here the respondent has apparently refused to comply with the requirements of an examination and has declined to provide answers to key questions.

[18] The traditional distinction between criminal and civil contempt referred to in Harnden was taken from Arlidge, Eady and Smith on Contempt and is as follows:

> "… A criminal contempt is an act which so threatens the administration of justice that it requires punishment from the public point of view; whereas, by contrast, a civil contempt involves disobedience of a court order or undertaking by a person involved in litigation."

[19] In Harnden the court noted that breach of court orders and injunctions are generally ranked as civil contempts whereas a refusal to answer a question at a trial if ordered to do so by a judge would constitute contempt committed in the face of the court and thus a criminal contempt.

[20] The Court of Appeal in Harnden approved the distinction between the two categories set out paragraphs 3-5 and 3-6 of Arlidge, Eady and Smith:

> "3-5 Although the distinction between civil and criminal contempt continues to be made, and has to be considered carefully, the two categories have rather more in common than their traditional separation would imply. The considerations of public policy underlying the contempt jurisdiction generally are the protection of the administration of justice and the maintenance of the court's authority. There lies at the heart of both civil and criminal contempt the need for society both to protect its citizens' rights and to maintain the rule of law.
>
> 3-6 Thus, although 'civil contempt' is concerned with breaches of court orders or undertakings in civil litigation, for the benefit of parties, the court may wish primarily in such cases to coerce parties into compliance with its orders; or alternatively, even in

> this context, it may be primarily concerned to punish disobedience (for example, where the time for compliance has passed). In such circumstances as these, deterrence clearly has a role to play. It is therefore possible, in many examples of civil contempt, to discern these two considerations in operation alongside one another."

[21] The conclusion in Harnden was as follows:

> "The availability of contempt proceedings, by holding a threat over the heads of witnesses summoned to give evidence, is designed to compel them to obey the command of the court and give the evidence within their knowledge and not to withhold it. If a witness persists in his refusal to answer questions on relevant matters, and proceedings are commenced to commit him for contempt, then he becomes liable to be punished by the court ... In our judgment that takes on the colouring of a criminal rather than a merely coercive matter. Taking into account also the nature and amount of the penalty which may be involved, we conclude, in agreement with the judge, that those proceedings are essentially punitive. We therefore hold that he was correct in classifying the present proceedings as being criminal in nature and dismiss the appeal."

[22] It seems to the court that this conclusion points in the direction of the present reference being related to proceedings for criminal contempt.

[23] In Harnden the Court of Appeal also considered the tests which are used in the field of Convention law as to what constitutes a criminal charge. It is well know that the approach taken by Convention law involves the consideration of three main criteria. The first relates to the classification of the matter in domestic law; the second relates to the nature of the alleged offence; and the third relates to the severity of the potential penalty which might arise in the proceedings concerned.

[24] It will be observed from the citation of Article 114 *supra* that what has been certified in this case to the High Court is an "offence". This suggests to the court that the matter is one which would be characterised in domestic law as criminal.

[25] It seems to the court that the nature of the subject matter in this case does not point clearly in the direction of the matter being civil or criminal. It may be that it

might be viewed as fitting into either category. However, the authority of Harnden as already noted, points in the direction of this matter being criminal.

[26] The penalty which may apply appears to the court to be a relatively serious one involving a term of imprisonment of up to two years. This, in the court's view, also points to the matter being criminal.

[27] On balance the court is inclined to the view that if this matter had to be characterised in terms of what constitutes a criminal charge for the purposes of the Convention, the likelihood is that it would be viewed as a criminal charge.

[28] In addition to the authority of Harnden, the Attorney General has raised with the court a recent case which went before a Divisional Court in Northern Ireland called AGNI v Patrick Coyle. This was dealt with by the Lord Chief Justice and Mr Justice Stephens (as he then was) in 2015. It arose out of the reference under Article 114 of the Judgments Enforcement (Northern Ireland) Order 1981. The court was informed by Mr Finnegan, who appeared for the Attorney General in the present case, that the only difference between that case and the present was that in Coyle the person to be examined refused to take the oath, whereas in the present case, the refusal is not to take the oath but to answer questions put by the Master. In the course of these proceedings, Mr Finnegan told the court that he also appeared for the Attorney General in the Coyle proceedings and that he had submitted a paper to the court which, *inter alia*, dealt with the nature of the proceedings as involving a criminal contempt.

[29] While there is no written judgment in the Coyle case dealing with the point here at issue, there is no reason to believe that the court would not have been alive to the distinction between civil and criminal contempt. The fact that the matter was dealt with by a Divisional Court strongly suggests that the courts saw the matter as one involving criminal contempt.

[30] Mr Watters relied on the case of In Re McKinney and Others [2008] NIQB 3 in support of his submission that the current issue before the court relates to civil contempt and not criminal contempt. That case involved an alleged obstruction of a receiver who had been appointed under the scheme of the Proceeds of Crime Act 2002 to gather in certain property. At interview before the receiver it was alleged that the respondent in a number of different ways had failed to provide information which had been requested. He additionally referred to passages in Oswald's Contempt of Court, which the court has considered.

[31] In McKinney Morgan J (as he then was) concluded that the case at issue was one of civil contempt. In doing so he distinguished the Harnden case. At paragraph [8] he said:

> "In that case the court concluded that the contempt was criminal by analogy with contempt in the face of the court. In this case, by contrast, the alleged contempt consists of a failure to comply with a court order. As appears from the summons one of the objects of the application is to require the respondent to comply with the court order. I consider that the purpose of the proceedings is primarily coercive or remedial. Accordingly I am satisfied that these are civil contempt proceedings."

[32] It seems to this court that the present proceedings are more analogous to those in Harnden than they are to those in the case of McKinney.

Conclusion

[33] The court is of the view that it should permit the joinder of the Attorney General to these proceedings. This would be consistent with the approach adopted in the Times Newspaper case and would enable the public interest to be represented in these proceedings.

[34] Moreover the court is minded to accept that the proceedings belong to the arena of criminal contempt. Consequently the proceedings, in accordance with Order 52 rule 1(2) should go before a Divisional Court. It will be necessary for the procedural route set out in Order 52 in respect of a Divisional Court to be followed.

[35] Assuming the proceedings continue, it will be open to Mr Watters, if he so wishes, to challenge before the Divisional Court this court's provisional view, as herein expressed, that the proceedings are concerned with criminal contempt.