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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **19/04/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

DIVISIONAL COURT

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IN THE MATTER OF AN APPLICATION BY EAMONN DONAGHY, JON D'ARCY, PAUL HOLLWAY AND ARTHUR O'BRIEN FOR JUDICIAL REVIEW

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Jonathan Kinnear KC and Philip Henry (instructed by KRW Law) for the applicants
Paul McLaughlin KC (instructed by the Crown Solicitor's Office) for the respondent

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TREACY LJ

Introduction

[1] On 20 May 2020, the applicants informed the court that they intended to pursue an application for civil contempt on the ground that they considered HMRC had not complied with the terms of this court's order of 24 September 2019. They requested the court to re-issue its order of 24 September 2019, with a penal notice attached, in order to commence contempt proceedings.

[2] HMRC responded to the applicant's letter on 21 May 2020 raising a preliminary issue about the interpretation of the court's order of 24 September 2019 and expressing the view that there had been no breach. It requested the court to deal with the interpretation issue first and, if the court ruled against HMRC, it would wish to review its position prior to commencement of any contempt application.

[3] The applicants have now agreed, subject to the court, that the interpretation issue should proceed first. The court requested submissions on that issue.

[4] The parties agree that in any application for civil contempt for non-compliance with an order, service of a copy of the order endorsed with a penal notice is an essential preliminary procedural step. The parties consider that the

request to issue the order with a penal notice falls within the ambit of the civil contempt process and is therefore an appropriate mechanism by which the court might determine the issue of interpretation. The parties also consider it a proportionate means of doing so, as it may avoid the need for a contempt application. Insofar as the issue of interpretation lies within the ambit of the court's contempt jurisdiction, the parties do not consider that the court is *functus officio*. The respondent also makes an application for an extension of time, in the alternative, pursuant to Order 42, rule 5. That provision, the respondent contends, provides an express jurisdictional basis for the court to consider the issue of interpretation.

Order of 24 September 2019

[5] The background to the making of the order is helpfully summarised in the respondent's written argument. The underlying proceedings concerned a challenge to the validity of five search warrants. In its judgment [2017] NIQB 123, the court found that the warrants were unlawful and allowed time to the parties to consider the issue of remedies. The parties ultimately agreed the terms of an order which was approved and issued administratively on 24 September 2019. The relevant part of the order followed the format of the order made by the Divisional Court in ***Re Martin O'Neill*** [2017] NIQB 37, in which an HMRC search warrant was quashed on very similar grounds. It provided for HMRC to return the items seized unless it made an application pursuant to section 59 of the Criminal Justice and Police Act 2001("the 2001 Act") within six weeks.

[6] Under section 59 of the 2001 Act a judge of the Crown Court may authorise the relevant investigating authority to retain the items seized and give directions for the "examination, retention, separation or return of the whole or any part of the seized property." [See s.59(7)].

[7] The warrants in the underlying proceedings in the present case related to the search of each of the applicants' homes and the KPMG offices. The items seized fell into three broad categories: (i) hard copy documents; (ii) electronic devices and (iii) electronic materials stored on KPMG servers (these were provided after the office search, to avoid seizure of office computer systems). Electronic devices were copied and returned at an early stage, save for those to which access had not been possible.

[8] Agreements were also reached between HMRC and solicitors for the applicants on: (i) the search parameters which would be used to examine the electronic devices in order to avoid inspection of potentially irrelevant or private materials; and (ii) the procedure to be followed following examination to enable the applicants to review seized materials for legally privileged items, prior to examination by HMRC investigators. The agreed protocol involves use of officers within HMRC who are not involved in the investigation; Forensic Science NI; solicitors for the applicants etc. These processes were taking place in parallel with the proceedings in this court during the period between judgment and the final order.

[9] The order of 24 September 2019 requires that HMRC return all items seized on foot of the quashed warrants unless, within six weeks:

> "3. …an application is made by the respondent to the Crown Court pursuant to s.59 Criminal Justice and Police Act 2001."

[10] The relevant chronology, which is not in dispute, is:

- 24 Sept 2019 - Order issued by Divisional Court.
- 30 Oct 2019 - S.59 Application filed by respondent.
- 30 Oct 2019 - Application posted to KRW Law by way of service.
- 5 Nov 2019 - Six week period expired.
- 16-21 Nov 2019 - All applicants submit objections to the retention application.
- 13 Dec 2019 - Application served on applicants personally.

Central Issue

[11] The issue of interpretation is whether the order required that the section 59 application must be filed within six weeks or whether it must be filed and served on each of the applicants within that time period.

[12] The matter has come back before the court because of a dispute about service which occurred following the filing of the s.59 application.

[13] The relevant procedure for applications of this nature is contained in a combination of rules 47 and 105 of the Crown Court Rules. In summary, the procedure provided for in the rules is as follows:

(i) Notice of the application must be given to the Chief Clerk [r.105(2)];

(ii) A copy of the application should also be "served" on any person with a relevant interest in it "at the same time" as notice is given to the Chief Clerk [r.105(4)]

(iii) Objections to the application should be "served on the applicant and the chief clerk" within seven days. [r.105(5)]

(iv) "Any notice or other document" which is required by the rules to be given to any person may be "served personally on, or sent by post to, that person or his solicitor." [r.47]

[14] The respondent filed the application on 30 October 2019. It was posted to KRW Law by the Crown Solicitors Office ("CSO") on the same day by way of

service. The CSO understood that KRW acted for the applicants on account of their involvement in the judicial review and also their ongoing representation of all four applicants in the underlying investigation. All four applicants each submitted representations directly to the court in response to the s.59 application, objecting to service of the application upon their solicitors. The application served on KRW had therefore clearly been brought to their attention. The applicants did not serve copies of their objections upon the CSO when filing them with the Clerk. The objections only came to the CSO's attention on 13 December 2019 when the s.59 application was listed before the judge. The application was then served by post upon each applicant later that day.

[15] KRW law acted for the applicants in the original judicial review proceedings. It was presumably on that basis the application was served by the Crown Solicitor Office on KRW at the same time it was filed. However, objections to the s.59 application complaining about service were not made until after the six-week period expired. I note that KRW now represent the applicants in the s.59 application, the application before this court and for the applicants in the application underlying this judgment.

[16] The applicants maintained their objection to service and a hearing took place before the Recorder on 20 December 2019. The Recorder handed down a written judgment on 16 January 2020. He concluded that service had not taken place in accordance with the Rules until 13 December 2019 but that this did not deprive him of jurisdiction to hear the application. He considered that it was a matter for the Divisional Court to determine whether the date of service ought to preclude the respondent from proceeding with the application.

[17] The relevant parts of the judgment state:

> "5. On the 30th October 2019 CHMRC made an application under section 59 to the Crown Court by causing the application to be delivered to the court offices at Laganside courthouse. On the same day a copy of the application was forwarded by first class post to two firms of solicitors…..
>
> 30. In the circumstances I consider that the application made on the 30th October 2019 was not properly served until the 13th December 2019. The application was therefore not formally made as required by the Rules until the 13th December 2019.
>
> 31. This court does not decline jurisdiction by virtue of this ruling….

> 32. This court considers that the application was properly made on the 13th December when the application was served on each of the IPs.
>
> 33. Whether the CHMRC can continue to retain the property it already holds under the quashed warrants ultimately turns on the interpretation of the order of Divisional Court of 24th September 2019, and it is for that court to determine how, and if, its orders are to be enforced."

[18] Following this judgment the parties exchanged correspondence in which the applicants asserted that the order of this court had not been complied with and requested return of the items. In a letter of 20 January 2020, HMRC disputed that there has been non-compliance and explained its reasoning. It indicated that it wished to proceed with the s.59 application. In summary the respondent's position explained in the letter is:

(i) The judgment clearly distinguishes between the application being "made" and being "served." It was made on 30 October 2019 and served on 13 December 2019.

(ii) The references to the application being "formally made" and "properly made" appear to be references to the date upon which service of the application was regularised and thus compliance with rule 105 achieved – thereby enabling the judge to proceed to hear the application. The delay in service did not affect his jurisdiction.

(iii) The Recorder made it explicitly clear that it was for the Divisional Court to interpret and enforce its own order. His ruling should not therefore be interpreted in a manner which purports to be binding on this court.

(iv) As a matter of principle, even if the Recorder had attempted to do so, he had no power to make a binding ruling on the meaning or enforcement of the Divisional Court's order. His jurisdiction is confined to determining whether compliance with the rules governing the s.59 application were complied with. This court would not therefore be bound by any such interpretation of the judgment.

Consideration

[19] I accept the respondent's submission that the principles governing the interpretation of a court order are akin to those applicable to statutory interpretation, insofar as the objective is to identify the intention of the court. They also share similarities with contractual interpretation, but the process cannot be entirely

assimilated to either set of principles. In ***Secretary of State for Business and Innovation v Feld*** [2014] EWHC 1383 the relevant principles were set out as follows:

> "27 In a court order one is concerned with the intention of the court in making the order, and this is closer to the exercise involved in construing the intention of the legislature when enacting a statute than it is to construing the intention of parties to a contract. On the other hand, it would be a rare and unusual case where a person to whom a statutory provision was to be applied (in a civil or criminal proceeding where the meaning of the statutory provision was at issue) had been involved in the drafting of that provision. But where a court order is to be applied to a person, such as Mr Feld, who had a hand in drafting the terms of the order, the court should be entitled to have regard, as part of the exercise of construing the order, to what that person could reasonably have been thought to have intended in drafting the order in a particular way, as far as that may be objectively determined on the basis of the evidence presented to the court.
>
> 28 The interpretation of a court order cannot be entirely assimilated to the exercise of interpreting a contract nor can it be entirely assimilated to the exercise of interpreting a statute. In all three cases, however, the common starting point is the natural and ordinary meaning of the words used in light of the syntax, context and background in which those words were used. What additional principles and factors come into play as part of the court's exercise of interpretation will depend on the nature of the writing to be interpreted (contract, court order or statute) and, of course, will be highly dependent on the facts of the specific case……"

[20] In the present case the legally represented parties agreed the terms of the order. As the respondent put it this was the product of the normal process of without prejudice discussions between counsel when the issue of remedies, costs and timescales were all unresolved. The final order represented a consensus on all issues. Since the discussions were without prejudice, there is no admissible evidence of what either party may have intended. The draft order was also approved by all members of the court. Applying the approach in ***Feld,*** I agree that the relevant question is what the court "could reasonably be thought to have intended" taking account of the relevant circumstances and available evidence.

[21] These were public law proceedings in which there had been a contested hearing and judgment in which the parties were represented by highly experienced lawyers The order was also approved by all members of the court. The court was therefore unanimous that it represented an appropriate outcome which reflected its findings.

[22] Both parties had a hand in the drafting of the order in this case. I agree that the views and intentions of the parties may therefore also be relevant, but they are not decisive and there is no evidence of any expressed common intention on the issue which has now arisen. The discussions between counsel were conducted on a without prejudice basis, with several issues under discussion.

[23] I agree with the very careful analysis of Mr McLaughlin KC. The Crown Court Rules recognise a distinction between the means by which a s.59 application is "made" and the separate obligation to "serve" it. The application is "made" when notice is given to the Chief Clerk. Rule 105(2) provides that "Notice of an application under section 59 shall be made in writing to the chief clerk." Rule 105(4), on the other hand, deals separately with the requirement for service. It provides:

> "Where the applicant is a person for the time being in possession of the property, the applicant shall, at the same time as the notice is given to the chief clerk, serve a copy on…."

As the Crown Court Rules expressly recognise this distinction, I accept that it is not likely that the court would use the word "made" but yet have intended that the two procedures should be assimilated.

[24] The distinction between "making" an application and "serving" it, is a well-established feature of civil procedure. Mr McLaughlin by way of analogy makes the point that time stops running for the purposes of limitation once proceedings have been "brought" (per Part II, Limitation (NI) Order 1989). This means filing the application. He submits that if service was required to stop time running for some form of procedure, express language to that effect would normally be found within the governing statute.

[25] The respondent points out that the Crown Court Rules are different to the Rules of the Supreme Court insofar as they require service of a s.59 application "at the same time" as filing (per rule 105(4)). However, it submits, even these provisions continue to recognise the normal distinction between filing and serving an application. These words within rule 105(4) are not a requirement for simultaneous service, nor are they a requirement that service must be effected within a fixed time period of filing. The Crown Court Rules permit postal service, service in person and service on a solicitor (per rule 47), which of necessity permits flexibility and a period of delay between filing and service (see the Recorder's decision at [13]). I agree with these submissions and therefore no reason to interpret the words "made" and

"serve" within the Crown Court Rules in a different manner than would normally be the case and consequently no reason to give them a different meaning in the court order.

[26] The Divisional Court (comprising two of the same judges – Gillen & Weir LJJ.) had very recently quashed a HMRC search warrant in the *O'Neill* case on almost identical grounds. In that case the court had made an order providing for the return of the seized items, conditional upon a s.59 application being made within a set time frame. However, the wording of the order in *O'Neill* did not form part of discussions between the parties. Unlike this case, the order in *O'Neill* was drafted by the court without input from the parties. It provides that HMRC must return the goods unless it "has made" a s.59 application within the specified time period. In common with the order in this case, it makes no reference to the issue of service.

[27] I agree that in the absence of express provision within the order relating to service, the court can reasonably be thought to have intended that the normal rules for service, would apply. In this case, they are contained in rules 47 and 105 of the Crown Court Rules. Since the parties did not invite the court to make any special provision within the order governing the method or timescale for service, the court is unlikely to have intended that anything other than that the governing Crown Court Rules would apply.

[28] As with other rules of court requiring service of proceedings, the essential purpose of rules 47 and 105 is to ensure that the parties with an interest in the application and whose rights may be affected are on notice of it and have the opportunity to make representations. It is possible that departure from the rules for service may go to jurisdiction, but not in every case. Whether or not departure from the rules regarding service goes to jurisdiction will depend upon the circumstances. I accept the respondent's submission that once the application has been filed, the assigned Crown Court judge has jurisdiction. The issue of compliance or non-compliance with the Crown Court Rules is no longer a matter for this court, but for the Crown Court judge. It is his responsibility to determine whether any question of non-compliance goes to jurisdiction and whether a fair hearing can take place. In the same way that the Recorder deferred to this court on the meaning I accept this court would not have intended to reserve for itself power to exercise continuing jurisdiction over the procedures followed by the judge.

[29] The Recorder closely examined the facts surrounding the service of the application and concluded that service was effected on 13 December 2019. While this was not in accordance with the requirement in rule 105(4) that service take place "at the same time" as the application was filed, he informed himself of the reasons for delay and, importantly, whether the applicants have had sufficient notice and opportunity to participate in the proceedings. He has concluded that he does have jurisdiction to hear the application and is clearly satisfied that a fair hearing can still take place. For this reason, he provided directions for the hearing of the application which are being followed.

[30] The order of the Divisional Court required the HMRC to return the items seized unless it "made" an application pursuant to section 59 of the 2001 Act within six weeks. As noted earlier I have taken the relevant question to be what the court could reasonably be thought to have intended by the term of the order under consideration taking account of the relevant circumstances and available evidence. In short, the relevant Crown Court Rules draw an express distinction as to when a s.59 application is made and the separate obligation to "serve" it. Under the Crown Court Rules the application is "made" when notice is given to the Chief Clerk. This was done on 30 October 2019. The sixweek period did not expire until 5 November 2019. If the court or the parties had intended that the six weeks would run from date of service of the order of the court would have been differently expressed.

[31] In the circumstances the court refuses the application to re-issue the court order with penal notice.

Extension of time – Order 42 rule 5

[32] The respondent submitted in the alternative that if, contrary to their submissions, the court considered that the word "made" means "filed and served in accordance with the Crown Court Rules", the respondent requests the court to exercise its power under Order 42, rule 5(1) to extend the time permitted by the order. Alternatively, it requests a stay of enforcement/relief against the requirement to return the seized items, pursuant to Order 45, rule 9, on the basis of events following the order of 24 September 2019. These Rules provide as follows:

Order 42, rule 5:

> "5.-(1) Notwithstanding that a judgment which requires a person to do an act specifies a time within which the act is to be done, the court shall, without prejudice to Order 3 rule 5, have power to make an order requiring the act to be done within another time, being such time after service of that order, or such other time, as may be specified therein."

Order 45, rule 9:

> "9. A party against whom a judgment has been given or an order made may apply to the court for a stay of enforcement of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief, and on such terms as it thinks just."

[33] The reasons relied upon in support of the extension application overlap considerably with those set out above. In summary the respondent contended:

(i) If the order required that the application is both filed and served, the word "made" is not as clear as it could be. Any obligation in a court order which may be enforced by way of contempt should be expressed with complete clarity so that the possibility of misunderstanding is avoided. If there is ambiguity, the appropriate process would be for the court to revise its order under the slip rule (Order 20, rule 11) and to allow time for compliance to be achieved. Equally, it would be inappropriate for such an ambiguity to be resolved after the event and with retrospective effect.

(ii) In those circumstances, any ambiguity in the order should be resolved in favour of the party who it is sought to hold in contempt. If the court does not consider that the slip rule is available, the more appropriate means by which to address the possibility of ambiguity is to extend time for compliance – which in this case has already been achieved.

(iii) Time expired for making the application on 5 November 2019. It was filed on 30 October and posted the same day to KRW. The representations subsequently made by each of the applicants, state that the application was received by KRW on 4 November 2019. Timely action was therefore taken by HMRC to effect service.

(iv) Rule 47 of the Crown Court Rules permits service of "any document or other notice" upon an individual's solicitor. KRW acted for all four of the appellants in the judicial review application and also in the underlying investigation. All items of seized property which had previously been returned by HMRC, were received by KRW. Any non-compliance with the rules was therefore understandable in the circumstances.

(v) The applicants themselves breached the rules for service. Contrary to rule 105(5), all four of the applicants submitted objections directly to the court, but did not serve copies of their objections upon the HMRC. The content of the objections focused upon the rules relating to service. The appellants plainly had access to the rules and did not explain their non-compliance. It was this omission which explains the lapse of time between 30 October and 13 December 2019. HMRC only became aware of the fact and content of the objections when the application was listed before the Recorder on 13 December 2019.

(vi) Any irregularity in service was cured immediately, by postal service upon each of the applicants on 13 December 2019. HMRC therefore acted promptly to cure service.

(vii) The applicants were in no way prejudiced by any irregularity in service since they did receive the application and have been aware of its content throughout.

[34] I found these alternative submissions very persuasive but in light of the court's decision on the interpretation issue it is unnecessary for me to express a concluded view.

The use issue

[35] Two further issues were raised by the applicants. The first concerned a contention that the Order of 24 September 2019 also prohibited the HMRC from making any *use* of the seized material pending determination of the s.59 application. They object to the use of the materials for the purposes of making tax assessments. This issue was raised by way of a discovery application. The purposes of the discovery application included facilitating an additional ground for committal. During the hearing the Court was asked by the applicants' counsel to "put aside" this application. Even had it been pursued such an application was not necessary for the purposes of deciding either the interpretation issue or the clarification issue to which I now turn.

The clarification issue

[36] The second issue was raised in an unorthodox manner. Whilst it was raised in *inter partes* correspondence and by submission it was not made on consent and no formal application was made. In written submission dated 17 November 2022 the applicants' contended that since the warrants were unlawful, HMRC could not review, consider or rely upon the seized material for any purpose. The Court was requested to clarify that this was the consequence of its judgment and subsequent order. The order is silent on the question of the use of the seized materials, pending the conclusion of the s.59 process. I agree with Mr McLaughlin's submission that the Order creates a conditional obligation to return the materials and goes no further. No request was made for a final Order prohibiting such interim use and the Order which the parties jointly invited the Court to issue did not address the point.

[37] The question of the use of the seized materials will be a matter for determination in the factual and legal context in which it arises which might include:

- Criminal Trial
- S.59 application
- Tax Tribunal

[38] The respondent submits that there are two further reasons of principle why the court should decline the request for clarification. The first concerns the unorthodox matter of procedure by which the request has been received and the absence of a reasoned application. I have touched on this already. The second is the

contention that the request for clarification of the order of 29.09.19 is "fundamentally different" to the application relating to the interpretation issue. Mr Mclaughlin contends that it is in substance a request for a ruling on the consequences/legal effects of the Court's Order which is more akin to an advisory opinion. As he identifies the court is being asked to offer a ruling on use, "without any identified context, ascertained facts or specified purpose." He submits that while the three contexts described in para [37] above might currently be foreseen "…one does not know in what other possible contexts a decision by this Court on use might be deployed or become relevant. If unforeseen circumstances arise, it is conceivably possible that one or other party might even feel compelled/entitled to return to this Court for 'clarification of the clarification.'" I agree that such a possibility runs contrary to the desirability of legal certainty and finality.

Conclusion

[39] The court refuses the application to re-issue the court order with a penal notice.