

Neutral Citation No: [2018] NIQB 38

Ref: TRE10605

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

Delivered: 20/4/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

IN THE MATTER OF PHILIP JOHN HARRIS AND TRACEY HAWTHORNE

Defendants

AND IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002

AND IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF
PUBLIC PROSECUTIONS FOR NORTHERN IRELAND FOR AN ORDER
OF COMMITTAL AGAINST THE SAID DEFENDANTS

Before: Treacy LJ and Burgess J

TREACY LJ (delivering the judgment on behalf of the court)

Introduction

[1] By notice dated 21 January 2018 the Director of Public Prosecutions for Northern Ireland ("the Director") applied to the High Court for orders that the defendants Philip John Harris and Tracey Hawthorne be committed to prison for contempt of court by reason of their alleged failure to comply with the order of the court dated 15 May 2017, the said default being the disposal and/or removal of an asset, namely a Fiat Ducato camper van, without approval by the Director or upon application to vary the order of the court; and further by reason of their failure to serve in writing an affidavit on the court and on the Director informing the Director of all their assets whether inside or outside Northern Ireland.

[2] On 15 May 2017 Colton J made a restraint order against each of the defendants. The notice to the defendants states:

- “1. This order prohibits you from dealing with your assets. The order also requires you to serve an affidavit on the court and on the Director of Public Prosecutions and to bring into Northern Ireland assets which you currently hold outside this jurisdiction.
2. The order is subject to the exceptions at the end of the order, you should read it all carefully. You are advised to consult a solicitor as soon as possible. You have a right to ask this court to vary or discharge this order. You are advised to consult a solicitor as soon as possible who may be able to access public funding for legal advice and assistance that you may require. A solicitor may apply for funding using the appropriate application forms to the Northern Ireland Legal Services’ Commission ...
3. If you disobey this order you will be guilty of contempt of court and may be sent to prison or fined or your assets may be seized.”

[3] In respect of disposal of assets the order specifically provides as follows:

“The defendant, Philip Harris and Tracey Hawthorne, must not remove from Northern Ireland or in any way dispose of, or deal with, the following assets:

A Fiat Ducato camper van, registration number T26 HHS.
...”

The order then recites 5 other motor vehicles which are also subject to the restraint order prohibiting disposal of assets, but this application is concerned with the camper van.

[4] In relation to the disclosure of information the order provides as follows:

“1. The alleged offenders must each inform the Director of Public Prosecutions in writing of all their assets whether inside or outside Northern Ireland and whether in their own name or not and whether solely or jointly owned, giving the value, location and details of such assets.

2. The information must be furnished in an affidavit which must be filed with the court and served on the Director of Public Prosecutions within 14 days after this order has been served on the alleged offender.”

[5] The order then goes on to provide in the same paragraph at A-J the details which must be included in the affidavit that is required to be served.

[6] The order provides that it will remain in force until it is varied or discharged by further order of the court.

[7] It was submitted on behalf of the Director that on the available evidence contained in the affidavit of Martin Kinney (Financial Investigations Officer) that the defendants were both in breach of the restraining order imposed by Colton J on 15 May 2017.

Jurisdiction

[8] Committal for contempt of a Restraining Order pursuant to section 190 of the Proceeds of Crime Act 2002 (“POCA 2002”) is a civil, not a criminal contempt - see *R v O’Brien* [2014] UKSC 23. POCA 2002 does not provide that it is an offence to disobey a restraint order, but the court has an inherent power to treat such behaviour as contempt of court, for which it may impose punishment. There is a recognised distinction between civil contempt, namely conduct which was not in itself a crime but which was punishable by the court in order to ensure that its orders were observed, and criminal contempt. Although the penalty for a civil contempt contains a punitive element, its primary purpose is to make the court’s order effective. A person who committed that type of contempt does not acquire a criminal record.

Burden of proof and standard of proof

[9] The burden of proof lies on the party seeking committal see *R v Dean* [1987] 1 FLR 517. The standard of proof is beyond reasonable doubt see *Re Ramblevale Limited* [1970] CH 128.

What is to be proved

[10] To commit either defendant, the court must be satisfied, so that it is sure, that the defendant whose case they are considering failed to comply with the order of the court dated 5 May 2017 in that they:

- (i) disposed and/or removed an asset named in that order, namely the Fiat Ducato camper van, without approval by the Director or pursuant to an application to vary the order of the court; or

- (ii) failed to serve in writing an affidavit on the court and on the Director, informing the Director of all their assets whether inside or outside Northern Ireland or both.

Factual Background and Discussion

[11] Neither of the defendants challenged the evidence relied upon by the Director in this case. The affidavit evidence was accepted and live evidence was not required. Mr Tom McCreanor on behalf of his client, Harris, accepted that it had been proved to the criminal standard that his client was in contempt of court in disposing of the camper van and in failing to serve any affidavit in compliance with the order of the court. He did however seek to distinguish the English cases which were referred to in Mr Magee's skeleton argument on behalf of the Director. We agree with him that the disposal of the van in this case was as he put it "not artful" in that the authorities were aware of the van as is apparent from the face of the restraint order itself. Accordingly, if he disposed of the asset it was virtually certain that that would necessarily come to light. There was in our view nothing particularly sophisticated about the method of disposal and detection was probably inevitable. But that is probably true of any case where, in breach of the restraint order, the restrained person disposes of any asset specifically identified in the order. It is undoubtedly an aggravating feature that the disposal took place on the day of his conviction, immediately after it, and whilst he was on bail awaiting sentence. The English cases to which we were referred involved huge amounts of money and sophisticated steps leading to the removal and/or concealment or attempted concealment of assets. We agree that those features do distinguish those cases from the present in which by comparison a much more modest sum is involved and no particular sophistication employed in the method of disposal. In the present case the camper van was sold for £30,000. None of it has been recovered and no restitution is proffered. The purpose in making the restraint order in respect of the identified assets has been frustrated. Since the principal purpose of the restraint order was to preserve the assets in order to be able to satisfy any confiscation order that objective was deliberately thwarted by this defendant. Mr Harris was given a significant prison sentence for his offending, he having pleaded guilty on 4 September 2017. His earliest release date is October 2019.

[12] The matters which are the subject of the present application occurred post-conviction, were not taken into account by the sentencing judge and as I have already observed happened while Harris was on bail. We also recognise that as a matter of principle the sentence that this court imposes must be, save for exceptional circumstances, consecutive to the sentence which was imposed at the Crown Court. We are conscious that he is not due out until October 2019 and therefore any period of imprisonment that we impose will inevitably delay his ultimate release. At the request of the court we have also been furnished with the pre-sentence report which was before the sentencing judge. We asked for this because counsel for Harris was making submissions about the family circumstances of Mr Harris and we thought it

appropriate to have regard to its contents. We also asked for a copy of the expert report that was furnished to the sentencing judge to see whether there were matters contained within it which might be of some assistance by way of mitigation. Having regard to the English authorities to which we referred, the distinguishing features of the present case, the matters relied upon in mitigation by Mr McCreanor, the contents of the pre-sentence report and the expert psychiatric report we consider that the sentence in this case should be one of 3 months.

[13] In arriving at this figure we have taken into account the position in England and Wales which is that by virtue of section 258 of the Criminal Justice Act 2003 those committed for contempt are entitled to remission on their sentence. The parties informed the court that the position is different in Northern Ireland and is governed by the provisions of Part II of the Criminal Justice (Northern Ireland) Act 2008 which makes it clear that sentence does not include committal for contempt. Therefore, the sentence that we impose by way of committal for contempt is the actual sentence that the defendant must serve without remission. We make it clear that the period that we have determined as appropriate for the defendant to be committed for contempt is a composite period intended to encompass the two limbs upon which the contempt application was moved before us.

[14] So far as Tracey Hawthorne is concerned Mr O'Kane on her behalf acknowledged that she was in contempt by her failure to file the affidavit as required by the order of Colton J. So far as the disposal of the camper van is concerned Mr O'Kane reminded us that the case relied upon by the Director was a circumstantial case. Ms Hawthorne denied any involvement in the disposal or removal of the camper van. Whilst it may appear unlikely that she was unaware of and uninvolved in the disposal of the camper van we have come to the view that we cannot exclude the possibility that the asset was disposed of without her knowledge and without any involvement by her in its disposal.

[15] Accordingly, we cannot be satisfied beyond reasonable doubt that the defendant disposed of the asset and accordingly she falls to be dealt with only in respect of the contempt arising from the failure to file the affidavit, which has now been filed. Having regard to her personal circumstances which include the fact that she is in employment and has a number of young children and the contents of the pre-sentence report we consider that the appropriate disposal is a fine of £500.