

Neutral Citation No.: [2008] NIQB 111

Ref: MOR7290

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

Delivered: 17/10/08

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF CIVIL COMMITTAL PROCEEDINGS PURSUANT
TO ORDER 52 OF RULES 1 (3) AND 4 OF THE SUPREME COURT
(NORTHERN IRELAND) 1980

IN THE MATTER OF THE SERIOUS ORGANISED CRIME AGENCY
AND MARK MCKINNEY AND OTHERS

AND IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002

Between:

THE SERIOUS ORGANISED CRIME AGENCY

Plaintiff;

-and-

MARK NIALL MCKINNEY

-and-

MMK INTERNATIONAL TRANSPORT LTD

Defendants.

MORGAN J

[1] This is an application by the plaintiff for an order of committal arising out of an alleged breach by the defendants of an Interim Receiving Order made on 24 February 2006.

[2] All of the evidence before me is on affidavit. All parties accept that this is an allegation of civil contempt arising from the alleged breach of the Order. I am satisfied that the standard of proof is proof beyond reasonable doubt (see re Bramblevale Ltd [1970] 1 Ch 128). There was no application to cross-examine any of the deponents and in those circumstances I am content to

approach the factual issues in this case on the basis of the admissions made by the first named defendant.

[3] The Interim Receiving Order was served on the defendants with the requisite penal notice. The order provided in paragraph 1 for the preservation of property.

"The Defendants must not:

- (i) remove from Northern Ireland any Schedule 2 property which is in Northern Ireland whether in his or their own names or not and whether solely or jointly owned; or
- (ii) in any way dispose of or deal with or diminish the value of any Schedule 2 property to this order whether it is in or outside Northern Ireland whether in his own or her or their own names or not and whether solely or jointly owned."

Paragraph 12 (b) dealt with exclusion in respect of reasonable legal expenses reasonably incurred.

"There shall be an initial exclusion from this Order of such a sum as may be required to discharge the Respondents' reasonable legal expenses reasonably incurred in accordance with Order 123 Rule 7 (b) and the respondents shall deal with the exclusion in accordance with the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005"

Schedule 2 included various bank accounts and in particular included a relevant Ulster Bank Account in the name of the second named defendant.

[4] Shortly after being served with the Order the first named defendant retained the services of Patrick Russell who apparently practises as "Prudentus International Corporate Lawyers" or "Emerald Consulting International" from offices in the Republic of Ireland. It is not clear what if any professional or other qualifications possessed by Mr Russell made him suitable for this kind of advisory work.

[5] Despite the terms of the Interim Receiving Order Mr Russell requested payment for the very modest services provided by him. The request was made orally without any presentation of an invoice or a statement scheduling

the work completed. No application was made for an exclusion order in respect of these payments.

[6] I accept that the first named defendant made three payments of £5,000 each to Mr Russell at his request on 29 March 2006, 27 April 2006 and 5 May 2006. These payments were made by cheque out of the relevant Ulster Bank Account. The payee on the first payment was left blank as Mr Russell was apparently unsure which of his 2 corporate entities would carry out the work and the last two cheques were made payable to Mr Russell. In or about September 2006 the defendants retained their present solicitors. The Interim Receiver has endeavoured to speak to Mr Russell but has been unable to do so. She has been able to secure invoices in respect of the three payments.

[7] The Interim Receiver requested an explanation by letter dated 11 December 2006 about payment of Prudentus International corporate lawyer's fees. In a reply dated 22 December 2006 the defendants present solicitors said that the payment of £5,000 to Prudentus of which the receiver was then aware was the only payment which had been made to that firm. The first named defendant accepts that he was aware that three payments had been made to Mr Russell at that time but believes that there may have been some confusion with his bookkeeper.

[8] The circumstances of these payments first came to the attention of the plaintiffs in May 2007 and thereafter they have sought explanations leading to the institution of these proceedings.

[9] In the course of this hearing it has also come to the attention of the plaintiffs that in March 2008 the first named defendant received a tax cheque by way of refund in the sum of £22,931.94. At the same time he received a cheque from NIE in the sum of £1000. He lodged both cheques to a small account held by him in the Portadown Credit Union. Some of that money was used to purchase a car for his daughter although he explains in a later affidavit that she reimbursed him. The sum of £23,500 was apparently forwarded to a named individual in Spain for the purpose of effecting repairs to a villa owned there by the first named defendant. All this was done without the knowledge of the Interim Receiver. The plaintiffs rely on this as evidence of an intention to dissipate.

[10] The first named defendant contends that he was led into error by Mr Russell and I accept on the material before me that Mr Russell purported to provide legal services but in fact encouraged the first named defendant and the second named defendant to breach the Order. I do not consider, however, that this exonerates the first named defendant. It was his obligation to read the Order and to obtain appropriate legal assistance if he required it. On any reading of the Order the account out of which the payments were made was

clearly subject to it. There were significant features which should have put Mr McKinney on inquiry;

- (a) The payment was requested without presentation of an invoice;
- (b) The payment was requested without a statement of work done or work to be done;
- (c) The payee on the first cheque was to be left blank;
- (d) On the evidence before me the first named defendant had no apparent basis for believing that Mr Russell could provide appropriate legal services.

In my view these factors would have raised obvious concerns to any businessman in the position of Mr McKinney. Despite this no inquiry was apparently made by him to establish that the payment was within the terms of the Order. His failure to provide accurate instructions to his solicitors in December 2006 also suggests a grossly careless approach to his responsibilities under the Order.

[11] The admitted breach of the Order in this case goes to the very heart of the purpose of the Proceeds of Crime legislation. The making of an Interim Receiving Order is designed to ensure where it is proportionate to do so that property in respect of which there is an arguable case that it is the proceeds of crime should be preserved pending a determination of that issue. The actions of the first named defendant in this case have put a considerable sum subject to such an Order outside the jurisdiction. Although I have accepted that Mr McKinney was encouraged by his then legal adviser to breach the Order I consider that it is evident that he has been guilty of gross lack of care in adhering to his responsibilities and that his conduct is worthy of a severe sanction.

[12] It is submitted that with the trial only three months away his imprisonment would imperil the fair conduct of the case and possibly put back the trial date. I do not consider that there is substance in this submission. There are many people who have to prepare for their trials while in prison and I see no reason why Mr McKinney could not do so.

[13] It is submitted that Mr McKinney is a key person in his business and that his imprisonment would imperil the business thereby affecting the recovery by the Agency as well as his own position. I do not consider that this weighs materially in the respondent's favour. The risk to which he is exposed is brought about by his own conduct. The Agency seeks the Order and must be aware of the consequences. Most importantly, however, the purpose of the

contempt jurisdiction is to assert the critical importance of compliance with Orders of the court.

[14] It is further contended that delay should be a factor causing the court to be cautious about imposing a severe sentence. Although I accept that there may be some merit in this one has to bear in mind that the plaintiff only became aware of the default in May 2007 and that matters have proceeded expeditiously since the issue of these proceedings.

[15] By far the most significant matter in mitigation is that Mr McKinney has now indicated that with the assistance of a friend he will be able to reimburse the £15,000 which has been lost. I understand him to be giving an undertaking that the said monies should be held by the Interim Receiver in substitution for the monies lost and dealt with by the court on that basis and his counsel has now confirmed this.

[16] Taking all these factors into account I consider that the appropriate sentence is one of three months imprisonment. I consider, however, that the undertaking offered by the first named defendant coupled with his apology for his conduct represents an indication by him of an intention to abide by the Orders of the court in future. Taking into account the remedial as well as the punitive aspect of civil contempt I will suspend the sentence for a period of 12 months. I make no separate order in respect of the second named defendant.