

Neutral Citation No. (2002) NICH 2

Company insolvency – public examination of director – failure to attend – powers of the court – arrest of the director – compatibility of Article 114 of Insolvency Order with Art. 5 of ECHR

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

<i>Ref: GIRF3573</i>

<i>Delivered: 14.01.2002</i>

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION
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(COMPANIES WINDING UP)

IN THE MATTER OF H G HOLDEN (CONTRACTS) LIMITED

-and-

**IN THE MATTER OF THE INSOLVENCY (NORTHERN IRELAND)
ORDER 1989**

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GIRVAN J

H G Holden (Contracts) Limited (“the company”) was ordered to be wound up by the court on 26 April 2001. Herbert George Holden (“the director”) held the position of company director from 15 February 2000 until the commencement of the winding up. On 27 April 2001 a letter was sent to the director requesting him to attend the deputy Official Receiver’s office on 8 May 2001. The letter referred the director to the provisions of Article 199 of the Insolvency (Northern Ireland) Order 1989. Article 199 of the 1989 Order

provides that. Every officeholder of the company shall give such information concerning the company and its promotion, formation, business, dealings, affairs or property as the officeholder may from time to time after the effective date be reasonably required to furnish and attend on the officeholder at such times as the latter may reasonably required. The liquidator of the company is the appropriate office holder.

The letter was in error in referring to Wednesday 8 May as the relevant date for the director to attend with the information. This should have referred to 9 May and a further letter was sent correcting the date. The director did not attend on 9 May nor did he contact the office to explain his failure to attend.

On 9 May 2001 a further letter was sent to the director asking him to attend on 7 June 2001. The letter pointed out that any non-co-operation on the part of the director was to be reported to the court and an order would be sought requiring his attendance and an application would be made for his public examination. The director did not attend and did not contact the examiner to explain his delay.

On 18 June a further letter was sent requesting his attendance on 28 June 2001. This letter was returned marked "addressee has gone away".

Investigation through the NIE revealed that the defendant was now living at 9 Warren Road, Donaghadee, County Down. A letter was sent to him at that address on 4 July 2001 requesting his attendance on 26 July 2001. He did not attend or contact the office to explain the reason for his failure to

attend. A further letter was sent to him on 27 July 2001 requesting him to attend on 2 August 2001. This letter informed the defendant that failure to attend would be reported to the court and that that would lead to an application to have him publicly examined. Again the director failed to attend and failed to give any explanation for his non-attendance and a further letter was sent to him on 6 August 2001 requesting him to attend on 10 August 2001. He did not attend or provide any explanation for his failure to attend.

The deputy Official Receiver applied for the appointment of a public examination under Article 113(1)(c) of the 1989 Order. By order filed on 12 October 2001 Master Redpath ordered the director to attend the court on Thursday 8 November 2001 for the purpose of being publicly examined. The order contained a warning that if he failed without reasonable excuse to attend his public examination at the time and place set out he would be liable to be arrested without further order under Article 114(2) of the 1989 Order and he would be guilty of contempt of court under Article 114(1) of the 1989 Order and liable to be committed to prison or fined.

The director did not attend and the Master adjourned his public examination on 6 December 2001 at 10.00 am. A letter was sent by the Insolvency Service to the director so informing him and again warning the director of the consequences. On 20 November 2001 personal service of the court order of 11 October 2001 and a report to the court dated 17 September 2001 was effected.

The relevant statutory provision Article 113 provides that when a company is being wound up by the court the official receiver may at any time before the dissolution of the company apply to the court for the public examination of any person who is or has been an officer of the company. On such an application the court shall direct that a public examination of the person to whom the application relates shall be held on a day appointed by the court and the person shall attend on that day and be publicly examined as to his promotion, formation or management of the company or as to the conduct of its business and affairs or his conduct or dealings in relation to the company.

Article 114 provides that a person without reasonable excuse fails at any time to attend to a public examination under Article 113, he is guilty of a contempt of court and liable to be punished accordingly. Article 114(2) then provides:

“In a case where a person without reasonable excuse fails at any time to attend the examination under Article 113 or there are reasonable grounds for believing that a person has absconded, or is about to abscond, with a view to avoiding or delaying his examination under that Article the High Court may cause a warrant to be issued to a constable:

- (a) for the arrest of that person; and
- (b) for the seizure of any books, papers, records, money or goods in that person’s possession.”

Article 114(3) provides that:

“In such a case the High Court may authorise the person arrested under the warrant to be kept in custody and anything seized under such a warrant to be held in accordance with the rules until such time as the court may order.”

Article 5 of the ECHR provides that no-one shall be deprived of his liberty save in the cases set out in paragraph (a) to (f) of the article and in accordance with the procedure prescribed by law.

Paragraph (b) is relevant in the present context. This permits the “lawful arrest or detention of a person for non-compliance with the lawful order of the court or in order to secure the fulfilment of any obligation prescribed by law”.

In the present case having regard to the director’s failure to co-operate with the liquidator his public examination is necessary for the proper conduct of the liquidation and the attendance of the director for his public examination has been properly required by an order of the court. Accordingly the power of the court to exercise its powers under Article 114(2) is not in question provided that the power is exercisable in a manner which is proportionate and provided the director is brought promptly before the court for the specific purpose for which he has been arrested that is to say for his public examination.

Article 114 contains alternative powers that may be exercised by the court, that is to say a power to punish the director for contempt or to direct his arrest for the purpose of being brought before the court for his examination. Punishing a person for contempt by way of imprisonment is a somewhat more draconian remedy than simply having him arrested for a short period of time with a view to bringing him before the court for the purpose of his public examination. On the other hand the court may by a

suspended order for committal achieve the desired result without having to actually deprive the director of his liberty which would be brought about by his arrest. In this case however the director has blatantly disregarded all correspondence directed to him and the order of the court and has failed to co-operate with the official receiver in the liquidation of the company. I am satisfied that it is lawful, fair and proportionate to direct his arrest for the purpose of having been brought before the court for the purposes of his public examination. Accordingly the court is entitled to exercise the powers conferred on it by Article 114(2). I shall hear counsel on the appropriate return day for the warrant. When the appropriate date has been fixed the warrant will specify that date as the date upon which he is to be arrested and for the purpose of being brought before the court for his public examination.

If there is continued disobedience by the director an application for his committal will be entertained.

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