Neutral Citation Number [2007] IEHC 212

THE HIGH COURT

Record Number: 2005 No. 15 MCA

BETWEEN

LAOIS COUNTY COUNCIL

APPLICANT

AND

RICHARD SCULLY, MICHAEL SCULLY, EILEEN SCULLY, SCULLY'S SKIPS LIMITED, AND EDWARD BOYHAN

RESPONDENTS

Judgment of Mr Justice Michael Peart delivered on the 23rd day of January 2007

The present application for an order of attachment and committal of the first, second, third and fifth named respondents comes before the Court because an order made by this Court on the 7th April 2006 following the delivery of judgment on the 18th January 2006 has not been complied with. That order was made following an application by the applicant local authority for orders pursuant to Section 57 of the Waste Management Acts 1996-2003 requiring the respondents to cease an illegal land filling operation at lands at Knockacrin, Timahoe. Co. Laois, to remove all waste on that land to an authorised waste disposal facility, and to remediate the land.

It is convenient to refer to my judgment on that application when I stated as follows:

> "The respondents accept that they are not the holders of a waste permit or waste licence such as would have entitled them to operate the land in question as they have done. They also accept that no such permit was applied for. The only matter in dispute really is the measures which must now be taken in order to remediate the lands. The applicant has set forth what in their view is necessary, but the respondents are of the view, and they have submitted some expert evidence which they say supports their view, that measures less than those required by the applicant, and therefore less costly and which they can afford, will be sufficient to remediate the lands. The applicant's proposals require the removal of all waste brought onto the lands to an authorised waste facility (such facility to be approved in advance by the Council), and for the land then to be filled and restored to the standard of normal agricultural land for the area. The respondents on the other hand say that these works will cost in the order of €1.5 million and that they cannot afford such a sum."

That paragraph sets out in a brief way the issue which arose then. My judgment noted the applicant's response to the contention that the respondents could not afford to deal with the matter as the applicant authority required. I stated in that regard that:

> " …… [the authority official] makes the point that having brought in approximately ten thousand tonnes of waste onto the site – a figure not in dispute to any great extent – the respondents have operated a very profitable business, and that in accordance with the principle that 'the polluter must pay' it is inappropriate for the respondents to submit a proposal, especially one which does not achieve the objectives of the Waste Management Directive, and the legislation, so that they can retain as much as possible of the profits from their unauthorised and unlawful activity."

I decided that an order should be made so that the matter be dealt with according to the method required by the applicant, rather than the less expensive and slower method proposed by the respondents. In deciding to make the order I stated:

> "In any event I will list the matter again before me so that I can be addressed as to the precise terms in which the order of the court should be made, and I bear in mind the necessity where the Court is making an order of this kind, that those whose duty it is to comply with the order should know what precisely is required of them in order to achieve compliance, to include precise detail of what has to be done and the time-frame within which any particular matter must be attended to within the overall time-frame. I would strongly urge the respondents to co-operate with the applicant in agreeing such a timetable of events, so that the terms of any order made by the Court can reflect such a consensus, but in the event that no such consensus is forthcoming the Court will make such order as it deems appropriate having heard submissions from all concerned.

Following the delivery of judgment I adjourned the matter so that the parties could have discussions in the light of my judgment so that if at all possible whatever terms were to be included in the order to be made by the Court would have the input, and if possible, the agreement of the respondents. I indicated that if consensus was not possible then the Court would make such order as seemed necessary to deal with the matter in accordance with the applicant's requirements.

According to an affidavit from Gavin Cobbe, executive engineer with the Council, the respondents subsequently submitted a "draft plan of action" to the Council following a meeting with the Council which took place on the 22nd February 2006. He states that the Council required certain amendments to that draft plan, whereupon the respondents submitted a revised plan. Yet further amendments were required, and the Council sent the amended revised plan back to the respondents' environmental consultant on the 3rd April 2006. That final plan contained substantial and significant amendments to the first draft plan submitted by the respondents in February 2006. Mr Cobbe's said affidavit sets forth the reasons for those amendments and there is no need to set out those reasons out.

The matter came before this Court on the 7th April 2006 so that an order could be made pursuant to s. 57 of the Act. On that date, Counsel for the applicant, and Counsel for the respondents appeared. The Court was informed that a plan of works had been agreed by the parties which could form the basis of the order to be made, except that the respondents sought a larger timeframe for completion of the works than that set forth in the document. It was agreed by all that the document entitled "Proposed Terms for Inclusion in the Order" and of which the agreed revised plan of action formed part, would be received and made a rule of court.

An order of the Court was drawn up in the following terms:

> "IT IS ORDERED that
>
> 1. The said Motion be allowed
>
> 2. The document headed 'Proposed Terms for Inclusion in Order" be received and filed and made a rule of Court and attached hereto as a Schedule
>
> 3. The works set forth in the document referred to in Paragraph 2 hereinbefore mentioned be carried out in

accordance with the document headed 'Remedial Action Plan' document reference number GC52 save that the deadline for the completion of the said works be the 29th day of September 2006 and that this document be received and filed and made a rule of Court and attached hereto as a Schedule

4. The Respondents do pay to the Applicant the costs of this Motion when taxed and ascertained.

Liberty to Apply"

Before detailing subsequent events, I ought to make some references to the Action Plan itself. This Plan was first prepared by Wood Environmental Management Ltd, ("WEML"), the advisers to the respondents. The local authority's advisers O'Callaghan Moran & Associates ("OCM") reviewed the plan to which, as I have stated, certain amendments were required. But it was eventually agreed in the form now before the Court.

The Introduction to the Plan states:

> "This document represents Laois County Council's (the Council) requirements for the remediation of lands at Knockacrin, Timahoe, County Laois the subject of proceedings issued in the High Court by the Council against [the respondents] and bearing Record Number 2005 No 15 MCA. It is based on O'Callaghan Moran & Associates' (OCM) review and amendment of the Remedial Action Plan (RAP)/Method Statement prepared by Wood Environmental Management Ltd (WEML). The review was requested by Laois County Council."

The paragraph which follows at 2 is entitled "Objective" and states:

> "The objective of the WEML Method Statement shall be to identify the actions that must be taken to characterise and remove the waste material deposited on the lands at Knockacrin. The aim is to ensure that:-
>
> The Respondents and each of them shall jointly and severally remove all deposited waste from the lands at Knockacrin, Timahoe, County Laois, the subject of the proceedings between the Council and the Respondents (the site), shall dispose of or recover that waste at authorised facilities to be approved by the Council, and shall remediate the site. In doing so, the Respondents shall ensure that the following objectives are achieved:-
>
> · Site reclamation activities do not pose a risk of pollution to the environment.
>
> · Deposited waste materials are appropriately characterised and removed for disposal at authorised waste facilities.
>
> · The site is restored to a state that does not pose a risk of pollution to the environment.
>
> · The long term effectiveness of the remedial measures is demonstrated.
>
> If there is any ambiguity in this Plan, or any part of it, the Respondents or their agents must ask the Council what the Plan means. They must not carry out any action until they have established how the Council interprets the provision(s) in question. The Respondents and their agents shall comply with the Council's interpretation unless and until the High Court orders the contrary."

The document over the following twenty six pages describes how the action to be taken is to be achieved and organised, and provides a detailed timeframe at paragraph 13 thereof for the various stages of the works. The expected completion date was stated to be 29th August 2006. It is that completion date which the respondents sought to have extended and the Court's order made an adjustment in that regard to the 29th September 2006.

The headings under which the plan is divided in the Action Plan are as follows: Topographic Survey, Surface Water & Leachate Management, Sampling Plan, Waste Evacuation, Waste Disposal & Recycling, Environmental Monitoring Programme, Site Management & Security, Site Reclamation Activities, Site Infrastructure, Equipment and Plant, Risk Assessment & Emergency Response Plan, Remedial Action Plan Timescale, and finally, Environmental Liability Risk Assessment Reporting.

While the "Objective" paragraph clearly states that it is the respondents and each of them who shall remove all the waste from the lands and remediate the lands, the document goes on in its subsequent paragraphs and pages to describe how, for example, "WEML shall arrange and supervise a suitably qualified engineer/surveyor to carry out a detailed topographic survey of the site….". or "WEML shall commence the taking of the samples within one week after completion of the site works outlined above …" or "WEML shall keep a daily record of all waste consignments leaving the site for disposal". In other words, while the overall objective is required to be achieved by the respondents, and it is only they who are the subject of the Court Order, many of the individual steps to be taken on the journey to the end are ones stated or required to be taken by WEML as opposed to by the respondents personally. WEML are of course engaged by the respondents to assist them in their task of disposal and remediation, and are not themselves respondents.

It must be borne in mind that the evidence has been that there are more than 10,000 tonnes of waste material on these lands and which now must be removed. The Council has estimated that the cost of removing the waste to a licensed landfill and remediating the lands is €1,500,000. It is necessarily going to be a massive and complex task which could not under any circumstances be undertaken solely by the named respondents. It is obvious that they would have to engage expert help and other assistance to get the task completed to the Council's satisfaction. There would in any imaginable circumstances have to be persons, coming within the category of servants or agents of the respondents, who will have a significant input into the achievement by the respondents of the objective of compliance with any order made by the Court on foot of the application by the Council.

I mention these matters since one of the submissions made by Peter Bland BL on the behalf of the respondents on the present application for attachment and committal of the respondents is that the Court order on foot of which attachment and committal is sought is not clear as to precisely what is required to be done the respondents. He has referred to the fact, for example, that the Action Plan to which the order refers states that many individual tasks are to be undertaken by WEML rather than by the respondents themselves, and submits therefore that in as much as the Court has made its order by reference to the Remedial Action Plan, it is unclear as to the manner in which the respondents have failed to comply. I will return to this aspect of the case in due course.

After 7th April 2006
Having made the order on the 7th July 2006, the Court put the matter back for mention on the 7th July 2006 so that progress could be reviewed in the light of the timescales contained in the Remedial Action Plan. For the purpose of that date, an affidavit was sworn on the 30th June 2006 by an Acting Scientific Officer with the Council, namely Íde O'Connell. In same she states that she took over this case from Mr Cobbe on the 11th May 2006, and that she is responsible for monitoring compliance with the Court's order. She states also that OCM was asked to inspect the site, and that Mr Sean Moran of that firm and Ms. O'Connell visited the site on the 16th May 2006, and that she was most concerned at what she saw on that date. It should be noted that according to the agreed time frame contained in the Action Plan, the respondents were to have by the 16th May 2006 carried out the "Initial Topographical Survey" prior to any excavation taking place, put in pace a Monitoring Programme, diverted a stream and installed cut off sumps in connection with the management of surface water and leachate management, as well as being two weeks into the "Sampling Plan" which involves marking out the site, taking samples, laboratory analysis, data review, and preparation of an excavation plan. However, Ms. O'Connell states that on her visit to the lands on the 16th May 2006, she discovered that very little site preparation had been carried out, and what had been done was to a very low standard. She states that in particular a few trenches had been dug around the site which were facilitating the discharge of contaminated leachate from the waste body, while the sump to drain the leachate was not deep enough to collect it. She is of the view also that on that date the site was in a dangerous condition, since the sump was liable to collapse in wet weather risking injury to those working near it. Mr Moran issued a report to the Council dated 17th May 2006, and which the Council received on that 23rd May 2006. Having considered that report, the Council was of the view that the respondents were in breach even at that date of the terms of the order given the time by which the works were to be completed under the terms of the order, but decided to keep the matter under review. That report is before the Court and it certainly justifies the concerns expressed by Ms. O'Connell as to the standard of what little works had been done, particularly in relation to the diversion of the stream and the construction and operation of the sump referred to.

Ms. O'Connell in her affidavit went on to state that on the 6th June 2006 a Mr John Joe Fitzpatrick, who described himself to her as a Plant Hire and Environmental Recycling contractor, called to the Council's offices. She says that he told her that he had been engaged by the respondents to provide an estimate of the work required to be done in order to remove the waste from the site. After she spoke to him she contacted relevant personnel in other midlands Councils in order to find out if they had ever heard of him, since he was not known by Laois County Council as a waste collector. She was able to ascertain that he did not have a waste collection permit for the region in which these lands are situated, although she stated that he may have one for other counties. She stated that if he was to apply at that time for such a permit, it would not be processed in time to enable him to carry out the remedial works. The Council formed the view that he was not an appropriate person to carry out the work and they so informed him as well as the respondents' solicitors.

She visited the site again on the 1st June 2006 and found that remediation had not commenced. She instructed the Council's solicitors to write to the respondents solicitors. That letter dated 28th June 2006 drew attention to the fact that remediation had not yet commenced, and to the poor quality of any works which had been done, and that they posed an environmental risk, and that no topographical survey had been received by the Council. The solicitors also stated that an authorised waste collector should be engaged with a view to complying with the Court's order. Other matters are referred to but do not need to be set out herein, save that the letter concluded with the following paragraph:

> "In all the circumstances, we shall be putting the above matters on affidavit *and serving a penal endorsement on your clients* prior to the 7 July when the case is listed for mention." (my emphasis)

The underlined portion of this sentence is relevant to another of Mr Bland's submissions regarding the validity of the service of the order, given the requirements of Order 41, rule 8 RSC, to which I will return in due course.

In her affidavit she states that for the purpose of forming a view as to the respondents' compliance with the directions of the Court she treats all deadlines in the Action Plan as being one month later than set forth given the further month for completion of the works which the Court allowed on the 7th April 2006, and makes the point that these directions are based on a document originally drawn up by the respondents, albeit substantially modified by the Council – a matter to which I have already made reference. She states that on the 29th June 2006 she was in contact with Mr Andrew Woods of WEML, the environmental consultant engaged by the respondents, and that he told her that he was at that time still awaiting direction from the respondents regarding reinstating works at the site, and that he last visited the site on the 11th May 2006, and that the absence of any instructions from either the respondents or their solicitors prevented him from replying to the Council's letter to him dated 12th June 2006.

As I have said, the Court listed the matter for mention on the 7th July 2006 to review progress. The solicitors acting for the respondents issued a Notice of Motion for that date also in which they sought leave of the court to come off record for the respondents. That application was grounded upon an affidavit of William X. White, solicitor. He refers to the Court order made on the 7th April 2006 and the directions contained therein, and the review date for the 7th July 2006. He goes on to state that the preliminary testing that was agreed to be carried out on the lands was to be conducted by the Mr Andrew Woods of WEML already referred to, and that while a certain amount of that work was carried out, no further testing has been done. He says that he believes that there is an issue of costs between the respondents and Mr Woods in relation to the testing of the site. He goes on to state that the disagreement between the respondents and Mr Woods means that Mr Woods will not do anything further, and that in such a situation he also has been unable to make progress with the respondents save to point out the seriousness of the situation to them. He had been unable to obtain further instructions and sought to come off record.

On the 7th July 2006, the respondents were in Court. They were aware of the application to come off record by their solicitors and did not resist same. The Court made the necessary order in that regard, in view of the fact that those solicitors had ceased to enjoy the cooperation of their clients in the matter of instructions. The Court then *adjourned the matter to the 28th July 2006* so that the respondents could have an opportunity to address the situation presented by the departure of both Mr Woods and the solicitors, and the contents of the affidavit of Ms. O'Connell.

On the 7th July 2006 the applicant's solicitors served a copy of the order dated 7th April 2006, with a penal endorsement thereon, on the respondents' solicitors, prior to the order being made allowing them to come off record. It is also a fact that Counsel for the applicant on that occasion asked that the service of the order on those solicitors be deemed good and sufficient in view of the situation then arising where no solicitors were on record, and that the Court did so. In a further affidavit of Íde O'Connell dated 16th October 2006 she states that "due to a photocopying error in the documentation served, a further copy was served on the respondents by registered post….". A copy of the letter from the applicant's solicitors dated 18th July 2006 which accompanied the further copy order (and penal endorsement) being sent by registered post indicates that the error referred to in relation to the service of the order on the respondents' solicitors on the 7th July 2006 was that some pages of the order were missing.

Prior to the further mention date on the 28th July 2006, there was a meeting between the respondents and the Council at the

Council's offices. Ms. O'Connell states in her affidavit that it was emphasised to the first named respondent and to his son Gerard Scully who also attended at that meeting that it was important that prior to the 28th July 2006 sampling must be commenced, and that they file an affidavit setting out the progress made. However by that date the sampling had not commenced and no affidavit was filed. On that date the Court urged the respondents to seek advice and try and re-engage Mr Woods or some other suitable expert to assist them, and made it clear that it was necessary that the order of the Court be complied with. The Court indicated that it would put the matter back further so that the respondents could address the situation.

Ms. O'Connell states in her affidavit sworn to ground the present application for attachment and committal of the respondents that following the Court hearing on the 28th July 2006 the respondents sought a further meeting with the Council, which took place on the 2nd August 2006. It was attended by a son of the second named respondent, namely Gerard Scully who informed the Council that indeed Mr Woods had been retained again and that he would be assisting in the remediation work. Following that meeting the Council's solicitors wrote to the respondents. *Inter alia*, they noted that it was intended to start work on what is referred to in the Action Plan as Area 'A' on the 14th August 2006. Reference was made also to a discussion which took place at that meeting about the need perhaps to raise money for this work by mortgaging assets. She states that on the 5th September 2006 she was told by Gerard Scully in a telephone conversation that the respondents were seeking a mortgage to raise funds to carry out the work and that they would be in further contact about that. However by the date of swearing of that affidavit on the 16th October 2006, there had been no further contact. Her affidavit goes on to refer to concerns which the Council has about other activities of the respondents and in particular that they seem now to be illegally storing waste material in the yard of their home premises at Main Street, Ballyroan, Co. Laois, as well as on other lands owned by them at Cullenagh. While these activities are not in breach of any Court Order, the Council is nevertheless concerned about this unlawful activity and its effect on the environment, and submits that it is indicative of a general lack of regard for the law on the part of the respondents. She goes on to state, however, that on the 6th October 2006 she visited the Knockacrin lands, the subject of the Court's order and saw on that occasion a skip load of waste, and that she returned on the 13th October 2006 and saw that the skip was gone. She is concerned that the respondents are removing waste from the lands in contravention of the Court Order in as much as waste is being removed other than under the supervision of Mr Woods as required by the Remedial Action Plan which is part of the Court's order. Ms. O'Connell concludes her grounding affidavit by stating that the lands in question are now in the same condition as they were when the Council commenced the present proceedings against the respondents back in March 2005, apart from the work done since the order of April 2006 to which reference has already been made. She goes on to state that those works have in fact only served to make matters even worse by enabling leachate to escape more easily into the environment. An affidavit by Sean Moran of OCM, environmental consultants to the Council, filed for the present application confirms this deterioration in the situation.

When this present application for attachment and committal came before the Court on the return date the 10th November 2006, the Court was informed that Messrs. Ferrys solicitors were instructed and Mr Bland appeared instructed by them. In circumstances where this new legal team had been recently instructed, the Court adjourned the application for hearing.

On the present application. Ms. Nuala Butler SC appeared with Niamh Hyland BL for the Council. She informed the Court that of the various reliefs set forth in the Notice of Motion, only that at paragraph (4) was presently being proceeded with, namely for the attachment and committal of the respondents. She referred to the history of the case much of which has been set forth already herein, but referred also to the fact that the first Notice served on the respondents under s. 55 of the Act had been served as far back as the 2nd December 2002. She characterised the actions or inaction of the respondents as a blatant disregard of the order of this Court and of the rule of law, and referred to the fact that the terms in which the Court had made its order had resulted from negotiations between the Council and the respondents resulting in the Remedial Action Plan which was attached to the Order in question.

Submissions of the respondents
Mr Bland made submissions under a number of different headings, none of which attempt to justify or excuse the fact that the Court's order has not been complied with, but rather are an attempt to satisfy the Court now that the applicants, because of procedural defects since the making of the Court order, as well as the way in which the Court's order is drawn up, cannot succeed in its application for attachment and committal. I will address these various submissions are made:

1. There is no evidence of personal service of the order of the Court duly endorsed with a penal endorsement on the respondents, as required by the O.41, r.8 RSC.
Mr Bland has submitted that there is no evidence that this order was served personally on the respondents, and refers to O.41, r.8 RSC which provides:

> "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered, shall state the time, or the time after service of the judgment or order, within which the act is to be done; and upon the copy of the judgment or *order which shall be served upon the person required to obey the same* …… there shall be endorsed a memorandum in the words or to the effect following, viz:-
>
> > 'If you the within named A.B. neglect to obey this judgment or order by the time therein limited, you will be liable to process of execution including imprisonment for the purpose of compelling you to obey the same judgment or order.'
> > " (my emphasis)

I shall refer to the memorandum referred to above as a 'penal endorsement' since that is the name by which it is commonly known. Mr Bland has submitted that this order was never served personally on the respondents after it was made. The respondents were of course present in Court on the 7th April 2006 when the order was pronounced, as were their solicitor and counsel. But it will be recalled that by letter dated 28th June 2006, the Council's solicitors wrote to the respondents' then solicitors stating *inter alia*:

> "In all the circumstances, we shall be putting the above matters on affidavit *and serving a penal endorsement on your clients* prior to the 7 July when the case is listed for mention."

What happened, as I have set out above already, was that when the matter came before the Court on the 7th July 2006 for mention, and on which occasion the respondents' solicitors applied to come off record, the Council's solicitors served those solicitors with a copy of the order and penal endorsement. They asked that this service be deemed good, and the Court acceded to that request. However, it appears that the copy order and endorsement in fact served had, through a photocopying error, omitted some pages. The Court was of course unaware of this fact when it deemed service upon the respondents' solicitors to be good service of the order.

This defect was sought to be corrected by letter dated 18th July 2006 from the Council's solicitors sent by registered post to the individual respondents (since they were no longer legally represented) in which the Council's solicitors stated that the reason they were serving the order and penal endorsement again was that some pages were missing from the copy served on their previous

solicitors on the 7th July 2006. But, as Mr Bland has also pointed out, by the time this was attended to, even if it was to be found to have been correctly attended to, the time for doing some of what was required to be done under the terms of the Remedial Action Plan by that date had expired, even though the date for ultimate completion of the work i.e. 29th September 2006 had not been reached.

Mr Bland, in support of his submission that personal service of the order is required has referred to the judgment of Meredith MR in *Century Insurance Co. Ltd v. Larkin* [1910] IR 91. That was a case in which an order for possession of certain premises was made in the presence of the defendant, and the court warned the defendant that he should not disobey the order, but nonetheless the defendant refused to give up possession of the premises. The defendant in this case was not represented by solicitor or Counsel. The plaintiff's solicitors omitted to personally serve the defendant with a copy of the order with a penal endorsement endorsed thereon. The plaintiff moved to attach, and the defendant did not appear on that application. The learned Master of the Rolls held that the absence of personal service of the order, properly endorsed with the penal notice, on the defendant was a bar to the relief being sought by way of attachment even though the defendant was well aware of the terms of the order made, he having been present in Court when the order was made. Mr Bland has referred to a more recent case of *McClure v. McClure* [1951] IR 137 to like effect. In that case the defendant was legally represented in Court and was himself present in Court when the order was made. But a copy of the order, which required the defendant to leave certain lands within two months from the date of the order was defectively served upon the defendant since it was not endorsed with the penal notice at the time of service. This was sought to be cured by further service of the order, but the date on which this was effected was outside the period of two months from the date of the order.

Two further Rules have been referred to in relation to the question of personal service of an order. These are O. 70, r. 68 RSC which provides;

> "*When it is necessary to serve personally* any judgment or order, the original judgment or order, or an attested copy thereof, shall be produced to the party served, and annexed to the affidavit of service." (my emphasis)

I should refer to the fact that this rule appears in a part of the Rules relating only to matrimonial causes and matters, and could be seen therefore as referable only to judgments and orders in such cases. But Mr Bland refers also to O. 121, r. 8 RSC which provides:

> "When a party, who has sued or appeared in person, has by a solicitor given notice in writing to the opposite party that such solicitor is authorised to act in the case or matter on his behalf, any document which has thereafter to be delivered to or served upon such first mentioned party may be delivered to or served upon such solicitor, *except where personal service is required*." (my emphasis)

Mr Bland submits that it is clear that such an order as was made by the Court in the present case on the 7th April 2006 must have been properly and personally served upon the respondents before any order of attachment and committal could be made by the Court. He submits that the obligation to serve personally and not just on the respondents' solicitors is clear both from the Rules themselves which speak of serving the judgment or order "upon the person required to obey same", and the case law referred to such as *Century Insurance Company Limited v. Larkin*, and *McClure v. McClure*.

Nuala Butler SC has relied upon the fact that on the 7th July 2006 this Court deemed service good following the service of the order upon the solicitors then acting for the respondents prior to later that morning the order being made allowing them to come off record. She refers to the fact that there was a penal endorsement on the order served. She stated that any defect in the copy served on those solicitors was cured when a further copy of the order with the penal endorsement thereon was sent by registered post to each of the respondents by letter dated 18th July 2006. She submits that what was required to be done by the respondents was clear to them both on the 7th April 2006 when they were in Court when the order was made following their agreement to the terms of the Remedial Action Plan, and also was clear to them when they were in court on the 7th July 2006.

Conclusion on this issue
It does not seem clear to me that, under O.41, r.8 RSC or any other rule to which the Court has been referred, personal service of an order upon a defendant is required before such defendant may be attached and committed, so long as the order has been served. Forgetting the elderly case law to which the Court has been referred for a moment, it is clear from, for example, O. 121, r. 8 RSC and O. 70, r. 68 already referred to that there are situations where personal service of a judgment or order may not be required.

There is a footnote to O.121, r. 1 RSC in *O'Floinn: Rules of the Superior Courts* at page 968 which, refers to the fact that personal service is required of a summons under O. 9, r. 2 RSC, and a footnote to O.41, r. 8 RSC refers to the fact that personal service of an order made under O. 84, r. 1 RSC is required. In that regard, O. 84, r.1(3) specifically provides that "every order referred to in this rule shall be served personally on the person to whom it is directed, unless the Court otherwise directs". It is clear therefore that the Rules provide for the cases in which personal service of an order is required, and it is obvious that there will be also situations and cases where such personal service of an order or judgment is not required.

Even O. 70, r. 68 RSC referred to by Mr Bland (but which relates only to matrimonial causes or matters as already mentioned) commences with the words "When it is necessary to serve personally any judgment or order…..", clearly envisaging that there are situations where it is unnecessary to serve such an order personally.

I notice that the case referred to by Mr Bland, namely *Century Insurance Company limited v. Larkin* was a case in which no solicitor was on record for the defendant, and that the defendant appeared personally in court. On the other hand the point at issue in *McClure v. McClure* was not so much the question of personal service as the fact that the order when originally served did not contain a penal endorsement and that is why service was found to have been defective. There is no perceivable injustice in my view in a situation where an order made is served upon a person's solicitor at a time when that solicitor is still acting for the person.

Order 41, r. 8 RSC makes no reference to personal service being required. There is simply a requirement in relation to an order requiring a person to do an act, to state the time after service by which it has to be done, and that the copy order served be endorsed with a penal endorsement. It seems to me that under the Rules of the Superior Courts an order such as the present one is not an order which the Rules require to be served personally on a defendant bound by it. It is not an order under O. 84, r. 1 RSC for example. It seems to me therefore that where an order of this kind is made against a defendant for whom a solicitor is on record, service on that solicitor is permitted, since the Rules themselves have not required service to be personal service. The cases to which I have referred can be distinguished on their facts. That is not to say that out of an abundance of caution a plaintiff's solicitor ought not to in fact effect personal service of such an order duly endorsed upon the defendant personally, but it does not appear to be a requirement.

In passing I notice that under the equivalent Rule, namely O.45, r.7 of the Rules of the Supreme Court 1965, referred to in The

Supreme Court Practice 1988 at page 708, it is, unlike the rule here, a requirement for enforcement of an order requiring a person to do an act, that "the order has been *served personally* on the person required to do or abstain from doing the act in question." (my emphasis)

This replaced the previous rule at Order 41, r. 5 of the Rules of the Supreme Court 1883, which for all practical purposes was in identical terms to that in O. 41, r. 8 RSC in this jurisdiction. There is, however, a footnote in some older volumes of the White Book (e.g. the 1941 edition at page 827 under heading 'Service of order disobeyed) that the order to be enforced must be served personally. I note however that the helpful and detailed footnote refers *Century Finance v. Larkin* [supra] in support of this. But as I have pointed out, that was a case where there was no solicitor on record for the defendant.

In so deciding, I am dealing only with the general question as to whether an order of the kind in this case is one which must be served personally when there are solicitors on record for the defendant. I am not overlooking that in the present case the service of the order on solicitors which was deemed to be good by the Court, was deemed good before it was realised that there was a defect in the copy order and penal endorsement which was actually served. That is another matter altogether. It is a fact, which came to light only after the Court deemed service good on the 7th July 2006, that the copy served upon the solicitors was defective. The Council's solicitor sought to rectify this by serving a further copy of the order by registered post together with a letter explaining why this was necessary. If one forgets altogether about the purported service on solicitors on the 7th July 2006 since it is accepted that the document was not a correct copy of the order, then the question remains whether the applicant's solicitor was entitled to serve the order on the respondents by registered post on the 18th July 2006, and whether it could be proper service for the purpose of an application for attachment and committal when the date of service was after some of the dates by which some parts of the work comprised in the Remedial Action Plan was to be completed.

In my view, this order, being one for which personal service is not required as set out above, service was to be effected in accordance with O. 121, r.1 RSC. Since by the time the defect became known to the applicant's solicitor, the respondents' solicitor was no longer on record, the document had to be served on the now unrepresented respondents themselves. But since personal service is not mandated by the Rules, service by registered post on the respondents was the appropriate method for service under O. 121, r. 1 RSC, and this is what was done. It is certainly well settled that the mere fact that the respondents were themselves in Court when the order was made does not remove the need to serve the order when perfected. What then arises is simply the correct method of doing so under the Rules.

The important question and one which must not be overlooked is that behind the requirement for service is that the person bound by an order must see the particular order in written form which binds him or her. Such person cannot be expected to take in and understand what order is made by the Court, simply because he or she has heard it being pronounced. Not only that, but it is an unavoidable requirement under the Rules that the copy order served contain the penal endorsement thereon, which warns the person bound by it as to the consequences of disobedience.

My conclusion therefore under this heading is that if the copy order, duly endorsed with the penal endorsement, had been a correct copy of the order and endorsement when it was served upon the respondents' solicitor on the 7th July 2006, that would have constituted good service, forgetting for the moment the question as to whether service should have taken place much earlier and nearer to the date on which the order was made; and further that, subject to that question also, service by registered post of the order was good service under the Rules once solicitors had ceased to be on record, since the Rules of the Superior Courts, 1986 do not require personal service of this category of order.

2. That service of the Court's order in accordance with the Rules of the Superior Courts could not be valid given that the time specified for compliance with the order had expired.
The question remains as to whether the service of the order by registered post on the 18th July 2006 occurred too late for it to be the basis for an application for attachment and committal, since some of the deadlines referred to in the Remedial Action Plan had already passed by that date.

It is relevant at least to recall at this point that what the respondents were required to do according to the order itself was to carry out the works set forth in the remedial Action Plan by the 29th September 2006, and this date was still some time away on the 18th July 2006.

It is quite clear from authorities such as *Century Finance Co. Limited v. Larkin* [supra] that where an order requires that an act be done by a certain date, the order so requiring must be served on the person bound in sufficient time prior to the date. In that case the order was not served until three days after the date for yielding up possession of the lands. It was of no avail to the plaintiff that the defendant had been present in Court when the order was pronounced, since the penal endorsement on the order was crucial to the obtaining of an order of attachment and committal. If in the present case the council was relying simply on the fact that by for example the 15th July 2006 the actions required to be taken and completed by the respondents had not been completed in accordance with the Action Plan, then the service of the order upon them on the 18th July 2006 would be ineffective since the 15th July 2006 would have passed before service of the order. But in the present case the Council issued its Notice of Motion seeking attachment and committal only after the expiration of the completion of all the works, namely the 29th September 2006. In such circumstances I am satisfied that service on the 18th July 2006 is good service for the purpose of the present application. This is in spite of the fact that some of the dates by which some of the work was to have been completed had passed.

3. That the Court order itself lacks sufficient particularity to enable the respondents to know precisely what is required to be done by the respondents and the time by which it is required to be done.
Being satisfied that service has been effected in accordance with the Rules of the Superior Courts and at an appropriate time, albeit not until the 18th July 2006, the question remains as to whether the terms in which the Court made its order on the 7th April 2006 are sufficiently precise and clear so as to ensure that the persons bound by the terms thereof know what must be done by them and by what date.

Mr Bland has submitted that the terns of the order are unclear. He has referred to a number of cases where it has been held that before a Court will punish a person for breaching an Order the terms of that order must be clear and unambiguous. He referred to *R. v. City of London Magistrates' Court* [1997] 3 All ER. 551 at 558 where Scott Baker J. stated:

> "Although there is an obligation to comply strictly with the terms of an injunction the courts will only punish a person for contempt upon adequate proof of the following: (1) That the terms of the injunction are clear and unambiguous: see *Iberian Trust Limited v. Founders Trust and Investment Co Ltd* [1932] 2 KB 87 at 95, [1093] All ER rep 176 at 179 per Luxmore J. (2) That the particular defendant in contempt proceedings had proper notice of such terms (see RSC Ord. 45, r.7), (3) That he has broken those terms."

Mr Bland has submitted that the Court's order dated 7th April 2006 is unclear as to what is to be done and by whom, in as much as it is not clear from the order exactly who is to do the work required to be done, and as I have already referred to he has pointed to the undoubted fact that the Remedial Action Plan by reference to which the Court has ordered the respondents to do certain acts, in fact refers to Mr Andrew Woods or WEML as the person to do much of what has to be done. He has referred in particular to paragraph 3 of the operative part of the order which I have already set forth above. He states that the order is silent as to who is to do the works referred to, and that the Court in drawing up its order ought to have set forth in the body of the order exactly what work was to be done, rather than to refer to the works in question only by reference to an annexed document such as the Remedial Action Plan.

Ms. Butler submits that this submission is disingenuous since the document referred to as the Remedial Action plan and by reference to which the works are to be carried out is a document which emanated from the respondents' own environmental consultant, albeit that the Council required certain amendments to be made to it. She submits that it is not therefore open to the respondents to claim now that the order is unclear or that they are not and were not aware of exactly what was required to be done by them in order to comply with the order made by the Court.

It must be remembered that the order in the form in which it appeared resulted from the agreement of Counsel on both sides. The respondents' Counsel agreed on the occasion in question that the Remedial Action Plan represented the work which the respondents were required to perform in order to comply with the Council's requirements and that is why the document entitled " Proposed Terms for Inclusion in Order" was handed into Court together with the Remedial Action Plan.

It would on the other hand have been preferable, I think, if the order as drawn actually contained within it the clauses appearing in the document entitled "Proposed Terms for Inclusion in Order", rather than that the document be simply referred to in the operative part of the Order. I also notice that while that document refers to the Remedial Action Plan as being attached to the order as "Appendix 1", the order as drawn describes it as being attached "a Schedule" to the order. In spite of this, however, there can be no room for doubt that the respondents knew which document contained the details of what they were required to do under the order, since they themselves, and through their lawyers, agreed the document and produced it to the Court for inclusion in the order being made. The important paragraph in the Order is that at paragraph 3 of the operative part of the order, and this states clearly that the works set forth in the "Proposed Terms for Inclusion in Order" document are to be carried out in accordance with the Remedial Action Plan, and that they must be completed by the 29th September 2006.

The "Proposed Terms" document states that it is the respondents and each of them who must do the works required and that such work be done in accordance with the Remedial Action Plan, and it further provided that any party could come back to Court in order to seek any clarification on any issue arising out of that Plan.

Mr Bland is correct to point out that the order itself (as opposed to the documents to which it refers) does not direct the respondents to do the works. Again, it would be preferable that the order of the Court itself should contain the direction to the respondents and each of them, rather than that this should occur indirectly by reference to a document referred to in the order.

I am of the view, in spite of the fact that the respondents themselves and their advisers negotiated the Remedial Action Plan, and that the proposed terms for inclusion in the Court's order were agreed between the parties, that the order as drawn up subsequently is not a model of clarity. Nevertheless, it is of absolute importance to remember that this was an order effectively made by consent of all parties who had negotiated the terms on which the Court would base its order. I am in no doubt that the respondents in fact are and always were perfectly aware of what they were bound to do in order to comply with the order being made. I will consider this aspect of the matter again when dealing with the submission that the Notice of Motion which was issued and served does not comply with O. 52, r. 4 RSC.

Mr Bland referred in the context of that submission to a judgment of Sir John Donaldson M.R. in *Chiltern D.C. v. Keane* [1985] 1 WLR.619, but there is a passage within that judgment which has some relevance to the present submission under consideration, and it appears at page 622:

> "Every notice of application to commit must be looked at against its own background. The test, as I have said, is: does it give the person alleged to be in contempt enough information to enable him to meet the charge? If, for example, a defendant is subject to an injunction to leave a stated house not later than a particular time on a particular day, then it would be sufficient to say that he had failed to comply with that order, because it permits of one breach, namely failure to leave the house by the time stated. But where the order is not in such a simple form and it is possible for the defendant to be in doubt as to what breach is alleged, then the notice is defective."

I refer to that passage now only to note that the order in the present case is not such a simple one as that exampled in that case, namely to leave a house by a particular date. The Remedial Action Plan required many things to be done over many months by the respondents, either personally or through their servants and agents, even though the ultimate task, stated generally, was to have all the works contained in the Remedial Action Plan completed by the 29th September 2006.

4. Without prejudice to these matters, the Council has not satisfied the Court beyond a reasonable doubt that there has been any breach of the order by these respondents.
Without dealing with this submission in great detail, I am satisfied beyond any reasonable doubt that the order of the Court has not been complied with by any of the respondents. One has only to read the affidavits filed and the reports exhibited of visits to the lands since the making of the order herein to know without any doubt that the order has not been complied with.

5. That the Notice of Motion itself in which the relief of attachment and committal is sought is defective in that it fails to comply with the requirement of Order 52, rule 4 RSC to set forth in general terms the grounds of the application.
This rule states:

> "Every notice of motion for attachment, or to strike off the rolls, shall state in general terms the grounds of the application."

The Notice of Motion which the applicant issued states at paragraph 4 that the applicant seeks:

> "An order pursuant to Order 42, Rule 7 and/or Order 44 of the Rules of the Superior Courts directing the attachment and committal of [the respondents] for their contempt in the face of the order of Mr Justice Michael Peart of the 7 day of April 2006 (sic)."

Dealing with a virtually identical rule in England in the case referred to, namely *Chiltern D.C. v. Keane* [supra], Donaldson M.R. stated

at page 622:

> "[The Notice of Motion] only stated the grounds of the application to commit in general terms. It recited the undertaking and the injunction, and then alleged that there had been a breach. This, on the authorities, is not sufficient. It has been said in many cases that what is required is that the person alleged to be in contempt shall know, with sufficient particularity to enable him to defend himself, what exactly he is said to have done or omitted to do which constitutes a contempt of court."

There is no description, even in general terms, of the manner in which it alleged that the respondents are in contempt of the Court's order. It simply states that they are in contempt in the face of same. Regrettably, a Notice of Motion in a case such as the present one, where the terms of the order are not simple, does not comply with the rule of court.

6. That the Court should exercise its discretion in favour of refusing to make the order sought, since it is unlikely to produce the desired result, and the possibility exists for the Council to initiate criminal prosecution for an offence under s. 10 of the Waste Management Act, 1996.
Mr Bland has submitted that the Court should order committal to prison only as a last resort, and has referred to the judgment of O'Hanlon J. in *Ross Company Limited (in receivership) v. Swan* [1981] 1 ILRM 417 in that regard, where the learned judge held that the jurisdiction to commit for contempt of a court order should not be exercised when it is unlikely to produce the desired result and where there is some reasonable alternative course available, and that where there is no such alternative course open to the Court then it may commit to prison in order to vindicate the authority of the Court. It is submitted that an alternative remedy to be pursued by the Council is to prosecute the respondents for an offence under s. 10 of the waste Management Act, 1996 in respect of which on summary conviction, a person is liable to a fine not exceeding £1500, or to a term of imprisonment for as term not exceeding twelve months, or on conviction on indictment to a fine not exceeding £10,000,000 or to imprisonment for a term not exceeding ten years, or to both imprisonment and a fine.

In my view, while such a prosecution may well be open to the Council to pursue, a conviction and consequent penalty under the section will not achieve the desired result, namely the remediation of these lands. It is not such a reasonable alternative as would, of itself, justify the exercise of the Court's discretion not to make the order for committal.

Discretion generally
By way of summary of conclusions thus far, I have concluded first of all that the respondents have not complied with the order made by the Court, in the sense that there is no doubt that the works to be carried out according to the Remedial Action Plan have not been completed by the 29th September 2006. That cannot be gainsaid.

I have concluded that the service of the order on the respondents' then solicitor on the 7th July 2006 was not good service since it has later transpired that the documents served were, through a photocopying error, not correct and complete. The fact that the Court deemed that service good cannot get over that error, since the Court was not aware of its existence at the time, and could not have made that order had it known of the problem.

I have concluded that the second service of the order upon the respondents by registered post on the 18th July 2006 is in accordance with the Rules of the Superior Courts, the order not being one of the type for which the Rules require personal service.

I have concluded that the service of the order on the 18th July 2006 is service within an appropriate time, since the time for completion of the works had a considerable time yet to run from the date of service.

I have concluded on the other hand that the order as drawn, and as served, is not a model of clarity, and should have directly ordered the matters contained in the document entitled "Proposed Terms for Inclusion in order", rather than done so simply by reference to that document and the Remedial Action Plan.

I have concluded that the Notice of Motion in which an order of attachment is sought is not in accordance in as much as it does not set out even in a general way, as is required, the way in which it is alleged that the respondents are in breach of the order of the Court.

I have concluded that the alternative remedy proposed by the respondents is not one which would be effective in achieving the objective of the Court's order.

What remains to be considered and decided is whether the largely technical objections made by the respondents, should be allowed to frustrate the order of the Court, particularly in circumstances where the Court is fully certain that these respondents were at all relevant times, and are now, fully aware, regardless of any apparent infirmity in the wording of certain documents, of what they had to do in order to comply with the order made. It was after all the work of the respondents themselves and their expert environmental consultants, who, with additional input from the Council, produced the very document which forms the basis for the order made by the Court.

It is undoubtedly true that Courts over many years and decades, if not centuries by now, have refused to deprive a person of his or her liberty unless and until the rules and procedures provided for in relation to such applications are scrupulously complied with. It is important that the Court should be vigilant to ensure that nobody is deprived of their liberty other than in accordance with law, and this includes by reference to procedures laid down by Rules of Court. Nevertheless, the Court must ensure that justice is done for all parties and not simply the person whose attachment is sought. There is also the very important question of upholding the authority of the Court in the face of what may well be a flagrant and deliberate breach of a Court order. In such situations, the Court must look closely at the objections put forward as to non-compliance with rules of procedure, so as to ensure that mere form is not permitted to triumph needlessly over substance. Rules of Procedure exist to enable things to be done and steps to be taken, and must not become instruments of obstruction. They must be our servants and not our masters. They for the most part make provision for steps to be taken in proceedings and causes of all kinds in a way which accords to all parties concerned their natural justice rights and entitlements. It would be a truism to state that nobody should suffer any order to be made against them in which their substantive rights are affected, and even more so their liberty, unless they are put on proper notice of the possibility that this could occur and have the appropriate opportunity to be heard. The rules of court provide appropriate mechanisms for this to happen. That is an objective and purpose of the rules.

The difficulty to be considered sometimes, and the present case is such a case, is whether, where that objective has been achieved, but without a strict adherence to the rules of court, and where no actual injustice or prejudice can be perceived, the Court must nevertheless refrain from making an order which it would otherwise be content to make, even an order for committal, and require the

moving party to recommence the pursuit of the remedy sought so that the rule may be strictly observed. In cases of contempt of a Court order an important consideration can be to maintain the authority of the Court, something so necessary in any democratic society.

The question of whether the traditional and longstanding approach of absolute adherence to rules of procedure particularly where a person's liberty is at stake is appropriate in all cases, even those where no actual injustice or prejudice has occurred or is likely, has been the subject of considerable examination and scrutiny in the English Courts. An example of this more traditional approach can be found in, for example, *Gordon v. Gordon* [1946] 1 All ER. 247, [1946] P99, CA. I have found no recent Irish authority directly touching on this subject.

A new approach is evident in England, such as the cases of *M v. P, and Butler v. Butler*, reported at [1992] 4 All ER 833.

The later case of *Nicholls v. Nicholls* [1997] 2 All ER (CA) 97 is helpful in as much as Lord Woolf felt that it was necessary to review the previous authorities in this area in order to give greater clarity as to the present state of the law in England, given the departure from the previous approach to irregularities in relation to committal orders.

In *Nicholls v. Nicholls*, Lord Woolf refused to set aside a committal order since the respondent had not suffered any prejudice from defects in the terms of the order which was served, and since he had been present in Court when the order was being made. It is instructive to examine the reasoning of the Master of the Rolls before considering the same question in terms of the present application. In doing so, I am conscious that in the case before this Court at the moment, the Court is considering possible frailties in the injunction order itself as opposed to the terms of an actual committal order, and that the order under scrutiny in the present case is not one which itself deprives the respondents of their liberty. But that distinction at the end of the day may have no relevance.

But I am putting this matter back for further argument on this point, and will finalise my judgment after these submissions have been heard and considered.

Further conclusions delivered on the 16th day of May 2007 following further submissions
Before considering the further submissions made by both Ms. Butler for the applicants and Mr Bland for the respondents, I will set out some detail in relation to the judgment of Lord Woolf in *Nicholls v. Nicholls* [supra].

In that case the Master of the Rolls was considering the effect of procedural irregularities on the validity of committal orders made following findings of breaches of undertakings given to the court by the respondent in family law proceedings. As already noted, the present application is somewhat different in the sense that it is the order of the Court of which the respondents are in breach that is the subject of complaint, and the Notice of Motion seeking attachment and committal, rather than any committal order made in the light of the breach. The Court in the present case has to consider whether the frailties already found to exist in the injunction order itself are such as to emasculate it so completely that the respondents' breach of the order must go unpunished or addressed – in other words whether the Court's order, made effectively with the respondents' consent as described earlier, never bound them to do what they agreed to do.

In *Nicholls v. Nicholls*, the husband respondent had given two undertakings to the court, one being a non-molestation undertaking, and the second being not to dispose of the contents of the family home and a motor car. These undertakings were reduced to writing and signed by the husband under a statement which read: "I understand the undertaking I have given, and that if I break any of the promises in the Court I may be sent to prison for contempt of court".

In due course the wife applied for and was granted a committal in respect of certain proven breaches of these undertakings, the detail of which do not need to be set forth. However, it was later alleged by the husband that certain defects existed in the committal order as drawn by the court, in as much as the committal order as drawn failed to give details of the contempts found proved, and also that the Committal Order erroneously stated as a contempt finding an incident which the judge had found not to have been proven. The Master of the Rolls was satisfied that the defects alleged rendered the Committal Order defective, but at the same time concluded that no such defect caused the respondent any prejudice whatsoever. Counsel for the husband submitted that these defects rendered the Committal beyond remedy and that this was unaffected by the fact either that the respondent had been in Court when the order of which he was in breach was pronounced, or that no prejudice to the respondent resulted.

In his judgment, Lord Woolf reviewed the state of the law from *Gordon v. Gordon* [supra] in which the strict adherence to rules is emphasised as a requirement especially in matters concerning a person's liberty. However, he noted that in *Gordon v. Gordon*, a case involving the handing over of custody of an infant, Lord Greene had stated also:

> "When one comes to deal with the case of an infant the position is fundamentally different, because orders in respect of infants are not made for the benefit of any litigating party, such as a party to a divorce suit. They are made for the benefit of the infant and, therefore, one would expect to find that the rules relating to enforcement of orders in the matter of infants by committal or attachment would recognise that fundamental difference."

Having reviewed a large number of cases decided since *Gordon v. Gordon*, he considered the cases of *M v P (contempt: committal), Butler v Butler* [1992] 4 All ER 833, [1993] Fam 167, and stated as follows:

> "It is now necessary to refer to the critical case of *M v P (contempt: committal), Butler v Butler* [1992] 4 All ER 833, [1993] Fam 167. The two cases were heard together before Lord Donaldson of Lymington MR, Nolan and Scott LJJ so that this court could provide clarification as to the proper approach to the same problems which the court is again considering in this judgment. In the first case the contemnor attended the hearing but the committal order was not served on him personally although a copy was sent to the solicitors representing him. In the other case, again in the contemnor's presence, the judge committed him to prison for eight months. No copy was served on the contemnor and the order was drawn up using the wrong form. Despite the nature of the procedural errors which occurred, both contemnors' appeals were dismissed. In his judgment Lord Donaldson MR refers to many of the authorities cited including those to which he was a party. He then referred to *Williams v Fawcett* [1985] 1 All ER 787, [1986] QB 604, which was one to which he was also a party and pointed out that in the course of his judgment in that case he considered whether it was a breach of the rule of stare decisis, having reached the conclusion that the earlier authorities betrayed a manifest slip or error, to correct the decision and he concluded that it was not. He then went on to say that in this case the court was again in the same position ([1992] 4 All ER 833 at 842, [1993] Fam 167 at 177-178):
>
> > 'The rule of law which seems to have evolved, or at least to be evolving, is that "a failure to comply with the requirements of CCR Ord 29, r 1(5) is fatal to the lawfulness of the committal" ... and that in contempt cases the

court's powers under s 13(3) of the Administration of Justice Act 1960 will be used only in exceptional cases.'

Lord Donaldson MR referred to s 13 of the 1960 Act and *Linnett v Coles*. Having done so, he then went on to make the following statement of principle ([1992] 4 All ER 833 at 842-843, [1993] Fam 167 at 178-179):

'In all contempt cases, justice requires the court to take account of the interests of at least three categories of person, namely (a) the contemnor, (b) the "victim" of the contempt and (c) other users of the court for whom the maintenance of the authority of the court is of supreme importance. The interests of the alleged contemnor require that he should have the right to be informed of the charges which he has to meet, to be advised and represented if he so wishes (subject to his being eligible for legal aid or otherwise able to finance his defence), and to be given a full and fair opportunity of meeting those charges and, if found guilty of contempt of court, to be informed in sufficiently clear terms of what has been found against him. In all these cases the court has been concerned to ensure that these fundamental requirements are met in the way in which, particularly in the case of the county courts, they are intended to be and should be met. However, we have tended to overlook the fact that they may in some circumstance be met in other ways. Whilst this court should always be quick to identify and condemn any departure from the proper procedures, the interests of the victim and of maintaining the authority of the courts require that, in deciding what use to make of its powers under s 13(3) of the 1960 Act, this court should ask itself whether, notwithstanding such a departure, the contemnor has suffered any injustice. It does not follow that he has. Nor does it follow that the proper course is to quash the order. If he has not suffered any injustice, the committal order should stand, subject, if necessary, to variation of the order to take account of any technical or procedural defects. In other cases it may be possible to do justice between the parties by exercising the court's power under s 13(3) by making "such other order as may be just". If the circumstances are such that justice requires the committal order to be quashed, amongst the options available is that of ordering a retrial ...' "

Having considered some further judgments in other cases, Lord Woolf stated:

"I have cited extensively from the previous authorities to indicate that they show no common pattern of approach. The later cases do, however, make it clear that it is now recognised that Ord 59, r 10(3) and s 13(3) of the 1960 Act do give a court the power to rectify procedural defects both in the procedure leading up to the making of the committal order and after a committal order has been made. Like any other discretion, the discretion provided by the statutory provisions must be exercised in a way which in all the circumstances best reflects the requirements of justice. In determining this the court must not only take into account the interests of the contemnor but also the interests of the other parties and the interests of upholding the reputation of civil justice in general. Today it is no longer appropriate to regard an order for committal as being no more than a form of execution available to another party against an alleged contemnor. The court itself has a very substantial interest in seeing that its orders are upheld. If committal orders are to be set aside on purely technical grounds which have nothing to do with the justice of the case, then this has the effect of undermining the system of justice and the credibility of the court orders. While the procedural requirements in relation to applications to commit and committal orders are there to be obeyed and to protect the contemnor, if there is non-compliance with the requirements which does not prejudice the contemnor, to set aside the order purely on the grounds of technicality is contrary to the interests of justice. As long as the order made by the judge was a valid order, the approach of this court will be to uphold the order in the absence of any prejudice or injustice to the contemnor as a consequence of doing so.

In the future therefore it should not be necessary to revisit the authorities prior to the decision in *M v P, Butler v Butler*. It should be recognised that Ord 59, r 10 and s 13(3) of the 1960 Act give the court a discretion which they are required to exercise. To decline to exercise that discretion because of a technical error in the notice of application to commit or the committal order itself, in the absence of any prejudice, is to derogate from that discretion."

Lord Woolf concluded his judgment by setting out guidelines for future cases as follows:

The guidance which can be provided for future cases is as follows.

(1) As committal orders involve the liberty of the subject it is particularly important that the relevant rules are duly complied with. It remains the responsibility of the judge when signing the committal order to ensure that it is properly drawn and that it adequately particularises the breaches which have been proved and for which the sentence has been imposed.

(2) As long as the contemnor had a fair trial and the order has been made on valid grounds the existence of a defect either in the application to commit or in the committal order served will not result in the order being set aside except in so far as the interests of justice require this to be done.

(3) Interests of justice will not require an order to be set aside where there is no prejudice caused as a result of errors in the application to commit or in the order to commit. When necessary the order can be amended.

(4) When considering whether to as set aside the order, the court should have regard to the interests of any other party and the need to uphold the reputation of the justice system.

(5) If there has been a procedural irregularity or some other defect in the conduct of the proceedings which has occasioned injustice, the court will consider exercising its power to order a new trial unless there are circumstances which indicate that it would not be just to do so."

I have set out in an extensive way the relevant passages from this judgment, given that I am unaware of any case in our courts which has considered this question in recent times. There are two features of *Nicholls v. Nicholls* which are of importance to note. Firstly, the errors being discussed are errors not in the primary order disobeyed but in the application of committal itself and in the committal order made on foot of same. Secondly, the application arose in relation to family proceedings where sometimes special considerations apply.

Mr Bland, referring to the earlier part of my within judgment, which I had circulated to the parties prior to the later submissions which I am now addressing, refers to the fact that I have decided that the order of the 7th July 2006 does not direct the respondents specifically to do anything, and that the question of any relaxation of the need for strict adherence to the Rules of the Superior Courts can speak only to the Notice of Motion to commit in this case and not to the primary order since the respondents cannot be held to be in breach of an order if that order does not direct them to do anything. He submits that the approach taken by Lord Woolf

must, if at all, be confined to the application to commit or an order made on foot of that application, and cannot be adopted in order to permit an order which is not directed to the respondents to be taken as directing them to do something. Mr Bland in his written submissions has stated that this Court "has already held that the Order does not have the effect urged by the Applicant". I cannot agree that what I have stated in relation to the order of the 7th July 2006 as drawn can be so simply characterised. I certainly have stated that it would have been preferable that the order should have specifically directed the works to be carried out by the respondents, and also that it was not "a model of clarity", but I concluded that part of my consideration by saying that I would consider the matter again at a later stage given my other conclusion that I was in no doubt but that the respondents knew exactly what was required to be done by them in order to comply with the order made.

Mr Bland submits that to commit the respondents for a breach of the order in the circumstances of this case and in the light of the way the order has been drawn would amount to an unlawful deprivation of liberty in circumstances where they are charged with unspecified breaches of an Order that does not direct them to do or not to do any act or thing. He urges also that if the order has been perfected in a way which does not direct the respondents to do anything, then they cannot be the subject of an application for committal for breach thereof, and that it is irrelevant that there may be a failure to have complied with the intent of the order. He refers to *Iberian Trust Limited v. Founders Trust and Investment Co Ltd* [1932] All ER 176 per the judgment of Luxmore J. at p.179 as already referred to above.

Ms Butler urges the Court to adopt the approach taken by Lord Woolf in *Nicholls v. Nicholls*, and not to permit the Court's order to be frustrated by the sort of technical arguments being put forward by the respondents. She points to the fact that the respondents cannot be in any ignorance of what was required to be done by them in order to comply with the Court's order dated 7th April 2006 since it was made by reference to a document negotiated between their own advisers and the applicant Council. In effect she states that it was a consent order.

Ms. Butler has referred to a number of cases in England which have followed the new approach taken in *Nicholl v. Nicholls*, such as *Re: Scriven* [2004] EWCA Civ. 683, *Olk v. Olk* [2001] EWCA Civ. 1075, and *Tuohy v. Bell* [2002] 3 All ER 975. All of these cases deal with committal orders made following breach, rather than the order which was breached. There is no need to refer to these in any detail. Ms. Butler submits that the strength of authority in England deriving from these cases supports the view that the time has come for a robust attitude to be adopted to applications for committal here, where no prejudice to the contemnor has been shown to exist from any procedural or technical defect in either the order of the Court dated 7th April 2006 or the Notice of Motion served in order to ground the application for attachment and committal for breach thereof. While she has not been able to point to any similar authority in this country, she has referred to a passage from the judgment of Finnegan P. (as he then was) in *Shell E & P Limited v. McGrath and others* [2006] IEHC 108 where the learned judge:

> "Where the interests of justice of the public in general is engaged or where there is a gross affront to the Court, it would be appropriate for the court to proceed of its own motion to ensure that its orders are not put at nought. I am satisfied that such a power must be inherent in the courts. In the words of Judge Curtis-Raleigh: 'The law should not be seen to sit by limply while those who defy it go free and those who seek its protection lose hope' ".

Ms. Butler points to the largely technical nature of the defects in the order which have been found by this Court to have occurred, and even though some exist in the order itself of which the respondents are said to be in breach of, she submits that nevertheless there is no reason why the Court's approach to the present application should be any less effective that that advocated by Lord Woolf in *Nicholls v. Nicholls*, given the absence of any prejudice to those respondents.

Finally, another aspect of the present case is highlighted by Ms. Butler. That is what I could loosely refer to as the European dimension to the obligations of the applicant Council which they are attempting to comply with and carry out by the application brought against the respondents and which led to reliefs being granted under Section 57 of the Waste Management Acts 1996-2003 in respect of illegal dumping. In this regard she has referred to the fact that this legislation was enacted in order to give effect to a number of European Community instruments and in particular Council Directive 75/442/EEC on waste as amended by Council Directive 91/156/EEC. This Waste Directive in her submission has stated four principles:

> 1. The self sufficiency principle which requires that Member States should become self-sufficient in waste recovery and disposal facilities (Articles 3-5);
>
> 2. The prevention principle which requires that waste be prevented at source (Articles 3 and 4);
>
> 3. The proximity principle which requires that waste disposal facilities be located close to areas where waste is generated (Article 5); and
>
> 4. The polluter pays, whereby the person who caused the pollution should pay for the clean-up.

Ms. Butler has added that the polluter pays principle has been enshrined in Article 175 of the Treaty, and that if the technical objections now made by these respondents were allowed to prevail this would have the effect of undermining Community law principles on waste and would not be in accordance with the requirement that national rules which lay down procedures and remedies for breach of EC law comply with the principles of effectiveness and equality, and in this regard she has referred to *Case 312/93 Peterbroeck* [1995] ECR I-5483). She refers also to the judgment of the Court of Justice in *Case C-494/01 Commission v. Ireland* dated 26th April 2006 where that Court found that Ireland had failed to comply with its obligations under the Waste Directive including obligations under Article 8 thereof, the Court noting at para. 106 of the judgment the Commission's contention that the Irish authorities had tolerated the continuation of unauthorized activities and that the few penalties imposed had no deterrent effect. Ms. Butler has submitted also that it is not simply the executive arm of government which is bound by obligations under Community law but also the courts of a Member State, and that accordingly if this Court can interpret the rules of contempt, attachment and committal so as to conform with principles of effectiveness under Community law, that way should be adopted in preference to one which fails to do so.

Conclusion

I have set out at an early stage of this judgment the fact that after the Court gave its judgment in January 2006 in relation to an order under s. 57 of the waste management Acts, it adjourned the matter to a later date so that the respondents and their advisers could, if at all possible, agree a programme of work necessary to remediate the lands which could be included in the order to be made in that regard by the Court. I indicated at that time that if the parties could not agree such a programme then the Court would make an appropriate order. I stated in that regard, as already set forth above:

> "I would strongly urge the respondents to co-operate with the applicant in agreeing such a timetable of events, so that

> the terms of any order made by the Court can reflect such a consensus, but in the event that no such consensus is forthcoming the Court will make such order as it deems appropriate having heard submissions from all concerned."

In the event a consensus was agreed with the exception that the respondents wanted an additional month within which to complete the works, and the Court permitted that to be included. That consensus was reflected in the Remedial Action Plan agreed with the Council and was presented to the Court for inclusion by consent in the order. This is reflected in the wording of the 'Proposed Terms for Inclusion in Order'. The order as perfected included that

> "The works set forth in the document referred to in Paragraph 2 hereinbefore mentioned be carried out in accordance with the document headed 'Remedial Action Plan' document reference number GC52 save that the deadline for the completion of the said works be the 29th day of September 2006 and that this document be received and filed and made a rule of Court and attached hereto as a Schedule".

The respondents now say that they are not bound by this order since they are not specifically directed to do anything.

In my view such a statement is an affront to the dignity of the court, and a direct challenge to the authority of the Court, being a blatant attempt to avoid complying with the requirements of the Remedial Action Plan which they agreed to and agreed to form the basis of the Court's order. It cannot for one moment in my view be contended by the respondents, given their involvement in the preparation of the document, that they were or are unaware of precisely what they had to do in order to comply with the order. The matter had been put back specifically so that what was to be done would be presented to the Court on the basis of consensus between the parties Court's. There is no possibility that the respondents have been taken in any way by surprise or been prejudiced by any frailty in the way in which the order made by the Court has been reflected in the perfected order. What happened following the making of the order dated 26th April 2006 was that by the time the matter came before the Court again on the 7th July 2006 was that the respondents had discharged their environmental consultant, and their solicitors saw fit to make an application to come off record. That application was unopposed by the respondents. The Court made an order on that date allowing the solicitors to come off record, and the respondents were permitted some time to consider their position. The matter came before the Court again when the respondents appeared without legal representation, and at no time on such occasions did the respondents at any time indicate to the Court that they were unaware of what was needed in order to comply with the Court's order and the Court permitted more time for the respondents to take steps to comply. The Court made it clear to the respondents that the matter of non-compliance with the order of the Court carried with it potentially very serious consequences. The respondents were fully aware of what those consequences might be, including that committal for contempt was within the power of the court. The Court indicated to the respondents that this was a step of last resort but that at the end of the day, the Court would be forced to ensure that the order was complied with. The applicant refrained from making any application for attachment and committal until the entire period for compliance contained in the Remedial Action Plan had expired. In other words, even though the Plan prescribed that certain steps were to be taken within certain periods of time, all the works were to be completed by the end of September 2006. This did not happen. The only works carried out by the respondents resulted in a situation where the lands in question were placed in an even worse position as set forth in the applicants' affidavits grounding the application for attachment and committal. The only reason ever put forward by the respondents for lack of action on their part to comply with the order of the Court was lack of resources. It is worth noting that within the terms of the Remedial Action Plan was provision whereby the respondents could seek from the Council clarification as to what was required to be done in the event that they were in any doubt from time to time.

By the time the respondents sought legal representation from their present legal team, when the application for attachment and committal was commenced, the only response was to make submissions to the effect that because of the manner in which the Court's order was drawn, they appeared to have been directed to do nothing and that they could not therefore be held to have breached the order.

It is in such circumstances that this Court now considers that this is not acceptable and that to accede to such a submission is to enable the respondents to escape their responsibilities on grounds which are specious, disingenuous and amounting to an abuse of process and an affront to the dignity of the court.

It seems to me that the change of direction announced by *Nicholls v. Nicholls* was because of the supremacy of interests other than those merely of the contemnors, where no prejudice could realistically be argued to exist to the contemnor. The point is made that there are interests at stake other than those of the contemnor. There is the interest of the victim, and there is also the interest of justice and the authority of the Court. Those were family law proceedings. In such proceedings there can be the interest of children at stake which may take precedence over mere technical objection.

In the present case there are interests at stake which in my view should take precedence over mere technical errors which cause no prejudice, real or otherwise, to the respondents. There is the authority of the Court. There is also the point made by Ms. Butler that these proceedings arise in the first place as a result of the Waste Directive which has been given effect in this jurisdiction, and as a result has placed obligations under European law on this State, and this Court is part of the mechanism by which those obligations are fulfilled.

For this Court to stand by idly by allowing these respondents to claim the benefit of some infelicity in the manner in which the order of the court has been prepared and perfected, even though these do not cause any prejudice to the respondents would permit a situation to exist where this State fails to honour its international obligations in the very important matter of environmental pollution, and to allow form to triumph over substance, and therefore over justice.

The scale of the respondents pollution of the lands in question is truly enormous as has been detailed in the earlier judgment of this Court, and is not denied by the respondents. The only matter raised by them against the application for an order under s. 57 of the Waste Management Act was the method by which the lands should be remediated.

In my view, even though *Nicholls v. Nicholls* was a case where the defects alleged were in the committal order rather than the primary order of which the respondent was in breach, there is no reason not to extend the principles emerging from the judgment of Lord Woolf therein to the circumstances of the present case and to permit this Court to make an order for the committal of the respondents for their failure to comply with the order which quite clearly required the respondents to remediate the lands by the end of September 2006 in accordance with the plan of work contained in the Remedial Action Plan which they themselves through their advisers had agreed with the applicant Council and which was presented to the Court for inclusion in its Order by consent.

Only by so deciding can this Court do its duty in ensuring that the EU Directives in question are given effect to. The Court is therefore satisfied that there is no reason why, even allowing for the fact that the order of the Court dated 7th April 2006 might have been worded differently, and even though the Notice of Motion seeking the order of attachment and committal was worded in a way

which has not complied strictly with the Rules of the Superior Courts, these technicalities should be allowed to stand in the way of justice being done and the authority of this Court being maintained and respected.

The Court also notes that at no time since the application for attachment and committal have the respondents sought to excuse their non-compliance in any way, or sought the Court's indulgence by permitting additional time within to complete the works required to be done as agreed by them. They have simply sought now, having submitted terms of the Remedial Action Plan to the Court, to rely on the technical matters relied upon by them in order to avoid doing what they agreed to do, and which they agreed should be contained in the order of the Court.

The Court will therefore order the committal of the first, second and third respondents to prison for a period six months, but will now suspend this order for a period of twelve months, on condition that these respondents have completed within that period of twelve months the programme of works contained in the same Remedial Action Plan referred to. It is clear that the fifth named respondent is not a person who has flagrantly breached the order. He has not been served in any case with the order or Notice of Motion herein.