THE HIGH COURT

[2016 No. 1920 S.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

SEAMUS MCQUAID (AND BY ORDER OF 30TH MAY, 2017)

BEN GILROY AND CHARLES MCGUINNESS

DEFENDANTS

JUDGMENT of Mr. Justice Brian McGovern delivered on the 25th day of July, 2017.

1. By notice of motion dated 10th July, 2017, the plaintiff ("the bank") seeks, *inter alia*, an order pursuant to O. 44, r. 3 of the Rules of the Superior Courts for leave to issue an order for the attachment and committal of the defendants in these proceedings by reason of their failure to comply with the order of this Court made on 30th May, 2017, as varied by undertakings given to the court by the defendants on 19th June, 2017.

2. This matter came before the court on 17th July, 2017, when the application, insofar as it concerned an assertion that the defendants were guilty of civil contempt, was adjourned in order to permit the defendants to issue a notice of motion seeking liberty to cross examine Mr. Philip Butler who swore an affidavit on behalf of the bank on 8th July, 2017.

3. What remains before the court is an assertion made by the bank that the second named defendant, Mr. Ben Gilroy, is guilty of criminal contempt on account of the content of his affidavit in these proceedings and in response to the application for attachment and committal on 27th June, 2017. The plaintiff, as a party to the proceedings, was entitled to raise the issue of criminal contempt but the court is also entitled, of its own motion, to conduct an inquiry as to whether or not the contents of Mr. Gilroy's affidavit constitute criminal contempt.

4. The criminal contempt issue was adjourned to 21st July, in order to give the second named defendant time to consider the legal authorities which were put before the court on 17th July and to enable him to consider the content of his affidavit. On the 21st July, an application was made, on behalf of Mr. Gilroy, for legal aid and this was granted. The matter came back before the court on the 25th July. Mr. Gilroy has pleaded guilty to criminal contempt arising out of the contents of the affidavit affirmed by him on 27th June, 2017, in these proceedings.

Background

5. By order of the High Court (Haughton J.) dated 2nd February, 2017, the bank obtained judgment against the first named defendant in the sum of €3,256,217.49 together with interest. The court placed a stay on the execution of the judgment for a period of twelve months; however, by order of the High Court (Haughton J.) dated 28th April, 2017, the stay was lifted in circumstances where the first named defendant declined to furnish undertakings as sought by the bank.

6. By order of the High Court (McGovern J.) dated 30th May, 2017, the bank was granted *ex parte* relief restraining the first named defendant from dissipating his assets below the sum of the judgment obtained by the bank against the first named defendant on 2nd February, 2017. The court also made an order joining Mr. Gilroy and the third named defendant, Mr. Charles McGuinness, as defendants in the proceedings and made other mandatory orders designed to ensure the preservation of the assets of the first named defendant against whom the bank has an unsatisfied judgment.

7. It is not necessary at this stage to consider whether these orders have been complied with since the civil contempt aspect of the application stands adjourned to a later date at which time the court will make a determination having heard the parties in respect of it.

The Affidavit

8. Mr. Gilroy has affirmed an affidavit dated 27th June, 2017, in response to the application for attachment and committal brought by the bank in these proceedings. It is necessary that certain portions of that affidavit be set out in this judgment in order to put the application in context.

9. Paragraph 2 of the affidavit stated:-

> "This matter came *coram non judice* and the principle of *nulla poena sine lege* should have been observed. The said threats were made in order to compel me to do things and also refrain from doing acts which I am perfectly entitled to do and and (sic) same is a criminal offence under section 9 of the Non-Fatal Offences Against the Person Act 1997 which states:-
>
> '(1) A person who, with a view to compel another *to abstain from doing or to do any act which that other has a lawful right to do or to abstain from doing, wrongfully and without lawful authority –*
>
> (a) uses violence to or *intimidates that other person* or a member of the family of the other'." (Emphasis in original).

The remainder of the section is not quoted in the affidavit.

10. Mr. Gilroy explains the context in which he has responded to the motion for attachment and committal in the following terms at para. 3 of his affidavit:-

> "Because of the criminal intimidation and threats and the fear of kidnapping and being held somewhere against my will, I will give in to the said threats, the same way I would if a thief put a gun to my head and asked for my wallet, I would just hand over my wallet."

11. He continued in the followings terms at para. 4:-

> "All the said threats which are *contra legem* have come from persons whom (sic) are members a (sic) semi-secretive society normally wearing wigs or black cloaks and normally believed they have some superior position above all others not part of their society. The greatest trick they use to cloak and hide their criminality is they refer to their society as 'a law society' to give it the appearance of respectability. However they do not allow any audio or video recordings at the meetings or hearings when the said criminal threats are being made. At such a meeting or hearing I was threatened recently and when I suggested that these members had no jurisdiction over me, the said superiority complex kicked in, from what it appears to be one of their leaders because he sat above everybody and without reason, explanation or any proof just proffered that he 'was satisfied he had jurisdiction over me' (sic) imagine if we all suffered from this superiority complex and then threatened everyone else."

12. The affidavit then continues at para. 5:-

> "The said threats required me to fully inform their society members of what property was transferred from Seamus McQuaid to an irrevocable private contract trust. Some of the property had charges registered in favour of a banking cartel and there is an undeniable link between banking cartels and this semi-secretive society."

13. Mr. Gilroy then continued to itemise certain properties and assets said to have been transferred to the said irrevocable private contract trust. As mentioned previously, the extent to which Mr. Gilroy has complied with the order of this Court for the purposes of the civil contempt application stands adjourned in order to permit the defendants to issue a motion for leave to cross examine, which they have since done. The court is not required at this point to consider the extent of the compliance by the second named defendant to these orders.

14. Mr. Gilroy continues at para. 9:-

> "I have given great leeway to all the intimidators in this matter because of their mindset within their organisation they sometimes cannot see the wood for the trees and are never challenged on these matters. However, it must be remembered *ignorantia juris non excusat* and I will not be as forthcoming or forgiving if any member of their society ever intimidates or threatens me again. I will pursue anyone who intimidates or threatens me again to the full extent of the law."

15. He continues at para. 10:-

> "In the future it may even be necessary for me to bring private criminal prosecutions against any such intimidator or *hostis humani generis* because of the close relationship between the gardaí and this semi-secretive society."

16. He continues at para. 11:-

> "I furthermore state that I am mindful of the wisdom of Thomas Jefferson when he commented, '[w]e all know that permanent judges acquire an *espirt de corps*; that, being known, that they are liable to be tempted by bribery; that they are misled by favor (sic), by relationship, by a spirit of party, by a devotion to the executive or legislative; that it is better to leave a cause to the decision of cross and pile than to that of a judge biased to one side'. It is, in part, with that inspiration that I do not and did not surrender to the jurisdiction of the above named administrative process. I was also shocked at how comfortable Mr. McGovern was in breach of his oath of office and to allow and take part in the criminal activity in front of his eyes."

17. The affidavit then continues to advise the judge to "take heed" of the following:-

> "(a) the sovereignty of the State resides in the people thereof.
>
> (b) the people of this State do not yield their sovereignty to the agencies which serve them.
>
> (c) any judge or judicial record may be impeached by evidence of a want of jurisdiction in the court, or of collusion between the parties, or of criminal coercion against a party or of fraud in the party offering the record, in respect to the proceedings.
>
> (d) the State cannot diminish rights of the people.
>
> (e) the assertion of any rights, when plainly and reasonably made, cannot be defeated under the name of local practice or threats of imprisonment.
>
> (f) there can be no sanction or penalty imposed upon one because of one's exercise of his rights."

18. The penultimate paragraph of the affidavit states as follows at para. 13:-

> "Ms. Callanan, her counsel and others should take heed that the following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of court:
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> (a) misbehaviour in office, or other wilful neglect or violation of duty by a solicitor, counsel, clerk, Judge, or other person appointed or elected to perform a judicial, administrative or ministerial service;
>
> (b) abuse of the process or proceedings of the court or falsely pretending to act under authority of an order or process of the court;
>
> (c) to criminally coerce another with a view to compel that another (sic) to abstain from doing or to do any act which that other has a lawful right to do or abstain from doing, wrongfully."

19. The affidavit ends with the statement "for now I consider the matter at an end". While Mr. Gilroy may have considered the matter at an end at that point, the court, of its own motion and at the behest of the plaintiff, considers the content of the affidavit in circumstances where Mr. Gilroy has now accepted that he is guilty of criminal contempt.

The Law

20. In *Laois County Council v. Hanrahan* [2014] 3 I.R. 143, Fennelly J. stated at 157:-

> "The law with regard to contempt of court has traditionally made a clear distinction between criminal contempt, on the one hand, and civil contempt, on the other. The object of criminal contempt is punitive; it is to uphold the law generally and the authority of the courts. The object of civil contempt is coercive: it is to enable one party to litigation to ask the court to compel another party to obey an order of the court which the first party has obtained. These categories are not entirely mutually exclusive but they are still the basic guide."

21. In *State (Commins) v. McRann* [1977] 1 I.R. 78, Finlay P., as he then was, in the High Court stated at 89:-

> "The major distinction which has been established over a long period and by a long series of authority between criminal and civil contempt of court appears to be that the wrong of criminal contempt of court is the complement of the right of the court to protect its own dignity, independence and processes and that, accordingly, in such cases, where a court imposes sentences of imprisonment its intention is primarily punitive. Furthermore, in such cases of criminal contempt the court moves of its own volition, or may do so at any time."

22. In *Keegan v. de Burca* [1973] I.R. 223, Ó Dálaigh C.J. explained the nature of criminal contempt in the following terms at 227:-

> "Criminal contempt consists in behaviour calculated to prejudice the due course of justice, such as contempt in *facie curiae*, words written or spoken or acts calculated to prejudice the due course of justice or disobedience to a writ of *habeas corpus* by the person to whom it is directed – to give but some examples of this class of contempt…Criminal contempt is a common-law misdemeanour and, as such, is punishable by both imprisonment and fine at discretion, that is to say, without statutory limit, its object is punitive: see the judgment of this Court in *In Re Haughey* [1971] I.R. 217."

23. The learned Chief Justice in the course of his judgment observed that it was unnecessary, in the circumstances of that case to consider whether a person accused of criminal contempt shall be tried by a jury pursuant to Article 13.6 of the Constitution on the basis that: "[t]he present case is one in which the defendant stood accused of criminal contempt *in facie curiae* and could be dealt with summarily by the court". At 228, Ó Dálaigh C.J. recognised that: "[t]he other examples of criminal contempt which I have already given are also within the category of those which may be tried summarily". It is relevant to note that this includes words "written or spoken".

24. In *State (Commins) v. McRann*, Finlay P. also recognised the long-established jurisdiction of the courts to punish in a summary manner, criminal contempt *in facie curiae*. At pp. 87-88, he stated as follows:-

> "…I am further satisfied that there is an additional reason why it would be quite incorrect to interpret Article 38 of the Constitution of 1937 as depriving the Courts of the long-established jurisdiction (which they undoubtedly had) to punish in a summary manner contempt of court whether the contempt was committed in the face of or outside the court, and whether it is classified as criminal or as civil contempt."

25. In *Attorney General v. O'Kelly* [1928] I.R. 308, a Divisional High Court (Sullivan P., Meredith and Hanna JJ.) considered an application to attach and commit for alleged contempt in the face of the court in circumstances where the defendant, a newspaper editor, had published certain statements concerning the manner in which a judge presided over a criminal trial. Extracts from the publication included the statements "contempt for Free State Courts" and "Judge's Insolence to Jurors". In considering the matter, Sullivan P. approved of the test set out by Lord Russell of Killowen on behalf of the court in *R. v. Gray* [1900] 2 Q.B. 36 where he stated at 40:-

> "…as these applications are, happily, of an unusual character, we have thought it right to explain a little more fully than is perhaps necessary what does constitute a contempt of Court, and what are the means which the law has placed at the disposal of the Judicature for checking and punishing contempt of Court. Any act done, or writing published, calculated to bring a Court, or a judge of the Court, into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done, or writing published, calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke L.C. characterised as "scandalising a Court or a judge" (In *Re Read and Huggonson* (1742) 2 Atk. 469). That description of that class of contempt is to be taken subject to one, and an important, qualification. Judges and Courts are alike open to criticism; and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could, or would, treat that as contempt of Court."

26. This decision was considered and affirmed by the then Supreme Court in *Re Earle* [1938] 1 I.R. 485.

27. In *Attorney General v. Connolly* [1947] I.R. 213, a Divisional High Court (Gavan Duffy P., Maguire and Davitt JJ.) considered a case where it was alleged that the writer of a newspaper article had scandalised the court. In giving the judgment of the court, Gavan Duffy P. cited the decision of Lord Russell of Killowen in *R. v. Gray* and summarised the principles enunciated in that case as follows at 220:-

> "…any writing published, calculated to bring a Court into contempt or to lower its authority, is a contempt by scandalising the Court and that a contempt of that sort, not falling within the right of public criticism, has to be dealt with directly, but the jurisdiction is to be exercised with scrupulous care and only when the case is clear beyond doubt; otherwise the Court should leave the Attorney-General to proceed by criminal information."

28. The learned President of the High Court continued by stating:-

> "If the law has not been changed, the administration of justice is entitled to look to the High Court for vigorous protection, once the necessary conditions are fulfilled. And they are clearly fulfilled in a case of public scandal, where the defendant has held up the judges in a capital trial to the odium of the people as actors playing a sinister part in a caricature of justice…This Court will always, I trust, be vigilant to protect the constitutional right of fair criticism. It is said that the article was only a political attack on the Government, and it is quite true that we are in no way concerned to protect the Government against its adversaries; but a political opponent cannot be allowed, under cover of an attack on the Executive, to present a Court to public obloquy as a mischievous and wicked sham."

29. In *State (D.P.P.) v. Walsh* [1981] I.R. 412, O'Higgins C.J. (with whom Parke J. agreed) considered the form of criminal contempt

described as "scandalising the court". The learned Chief Justice stated at 421 – 422:-

> "Such contempt occurs where wild and baseless allegations of corruption or malpractice are made against a court so as to hold the judges '. . . to the odium of the people as actors playing a sinister part in a caricature of justice' – per Gavan Duffy P. in *The Attorney General v. Connolly* at p. 220 of the report. It is not in dispute that what is complained of in this case can fall within this description; nor is it disputed that, if it does, it amounts to a serious crime."

30. Returning to *Keegan v. de Burca*, it is useful to cite the following extract from the judgment of the Supreme Court which highlights the manner in which the court should approach incidences of criminal contempt at 228:-

> "The law with regard to criminal contempts is well summarised by Mathew J. in *In re Davies* [1882] 21 Q.B.D. 236 at p. 238 of the report, where he said:-
>
> 'It should be borne in mind that contempt of Court is a criminal offence, punishable as a misdemeanour by fine and imprisonment or both: 4 Blackstone, 337; 2 Hawkins, P.C., bk. 2, c. 22. The punishment should be commensurate with the offence. It may be severe where the contempt is grave: as for instance in the rare cases where an insult is offered in court to the judge who presides, or where a deliberate attempt is made to interfere with the due and ordinary methods of carrying out the law, as in the case of *Onslow v. Skipworth* [1873] L.R. 9 Q.B. 230…'"

31. In *Murphy v. British Broadcasting Corporation* [2005] 3 I.R. 336, McKechnie J. in the High Court restated the established position that, in the context of "contempt *in facie curiae*[,]…every court can summarily deal with such matters". The learned trial judge stated that "an essential ingredient of the crime of contempt is *mens rea*". This was also held to be a necessary ingredient following the judgment of Keane J. in *Kelly v. O'Neill* [2000] 1 I.R. 354 (see p. 380 thereof). A determination of that issue does not arise in the present case because Mr. Gilroy has pleaded guilty to the criminal contempt. McKechnie J. continued to describe the classification of criminal contempt in the following manner at 364:-

> "Criminal contempt on the other hand is not so confined. It has many species. It may consist of conduct in the face of the court which is obstructive or prejudicial to the course of justice. It may have its focus on pending proceedings which may be interfered with or prejudiced by what is said or done. A third example might be what is described as 'scandalising the court', which would occur where the matters complained of were calculated to endanger public confidence and thereby to obstruct and interfere with the administration of justice: see O'Higgins C.J. in *The State (D.P.P.) v. Walsh* [1981] I.R. 412 at p. 421 and Keane J. in *Kelly v. O'Neill* [2001] 1 I.R. 354 at p. 374. Whatever form it may take, 'criminal contempt is a common law misdemeanour and, as such, is punishable by both imprisonment and fine at discretion, that is to say without statutory limit, its object is punitive' (see Ó Dálaigh C.J. in *Keegan v. de Burca* [1973] I.R. 223 at p. 227)."

32. It is clear that any committal on foot of a criminal contempt of court must be for a defined period. Such was the view of the Supreme Court in *Keegan v. de Burca* and recently restated in the concurring judgment of McKechnie J. in *Laois County Council v. Hanrahan* (see p. 183).

33. From these authorities, the following principles emerge:-

> (i) the object of criminal contempt is punitive in order to assist the court to protect its own dignity, independence and process;
>
> (ii) there are categories of criminal contempt which may be tried summarily, *i.e.* without a jury;
>
> (iii) such summary categories include contempt *in facie curiae* and contempt for scandalising the court *i.e.* making statements which are calculated to bring a court or a judge of the court into contempt, or to lower his or her authority or to make baseless allegations of corruption or malpractice against a court so as to hold the judges "to the odium of the people as actors playing a sinister part in a caricature of justice" and such categories of contempt may be performed by way of the written or spoken word;
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> (iv) the court must exact criminal standards in satisfying itself that a criminal contempt has occurred *i.e.* there must be present *actus reus* and *mens rea* and that the accusation must be proved beyond a reasonable doubt (that does not arise in this case because Mr. Gilroy has admitted criminal contempt);
>
> (v) the court should exercise caution in making a finding that a person is in contempt of court when an individual fairly exercises his right of criticism and has not acted in malice such that he presents a court proceeding "to public obloquy as a mischievous and wicked sham"; and,
>
> (vi) criminal contempt may be punishable by a term of imprisonment of fixed duration and/or a fine.

34. In this case, Mr. Gilroy has pleaded guilty to criminal contempt and the court assesses the matter on that basis.

35. Mr. Gilroy must be given credit for this admission and his full apology, which has been offered to the court.

Discussion

36. There is no dispute as to the words written by Mr. Gilroy which arise for consideration in this matter. The words are his own and contained in his own affidavit. The words were not part of a spontaneous and intemperate outburst in the pressurised atmosphere of a courtroom; rather, they were the considered words of somebody preparing an affidavit in answer to a motion for attachment and committal for failing to comply with a court order as varied by an undertaking given by him to the court.

37. In his affidavit, Mr. Gilroy accuses the court of "criminal intimidation and threats", including kidnapping, and compares the action of the court to that of a thief putting a gun to his head and robbing him of his wallet. He describes the threats as unlawful and coming from members of a semi-secretive society who believe they are superior to other members of society and who act in a clandestine fashion so to "hide their criminality". He accuses the judge of having a superiority complex on account of being satisfied that the court had jurisdiction over him and refers to threats made to him. Having referred to the judge and the lawyers as being part of a "semi-secret society" he goes on to state at para. 5 of his affidavit that there is "an undeniable link between banking cartels and this semi-secretive society" suggesting some improper connection which would put the court in a position of bias. At paras. 9 and 10 he threatens the court and at para. 11 he quotes from correspondence between Thomas Jefferson and the French cleric Abbé Arnoux in 1789 wherein Thomas Jefferson offered the view that it would be better to leave a cause to be decided by the toss of a coin

rather than to a judge biased against one side. Having quoted from that correspondence, he then accuses the judge of being "…in breach of his oath of office" and of taking part in and allowing criminal activity to take place in front of him. His affidavit contains further threats against the judge and the solicitor and counsel for the bank which is to be found in paras. 12 and 13.

Conclusion

38. It is important that people have confidence in the administration of justice. Attempts to deliberately undermine the authority of the courts cannot be permitted if the rule of law is to flourish. The laws on contempt are not there to shield judges from legitimate criticism; they exist to protect the rule of law for the benefit of all.

39. The affidavit of Mr. Gilroy affirmed on 27th June, 2017, was nothing short of a direct attack on the court and the administration of justice and was calculated to bring the administration of justice into disrepute and diminish the authority of the court. These views were set out in an affidavit and not in the heat of the moment and that is an aggravating factor.

40. On the other hand, Mr. Gilroy must be given credit for the fact that he has admitted that he has committed criminal contempt and has unreservedly apologised to the court for the contents of that affidavit and his behaviour. These are factors that I take into account in assessing the appropriate sentence.

41. Without those mitigating circumstances, the correct punishment, in my view, would have been a term of imprisonment of six months. Giving him credit for his admission of liability and his apology to the court and his withdrawal of the offending remarks, I think the appropriate term of imprisonment would be three months.

42. However, I have considered whether or not I should make a community service order in this case pursuant to the provisions of the Criminal Justice (Community Service) Act 1983, as amended by the Criminal Justice (Community Service) (Amendment) Act 2011.

43. Section 4 of the Act provides:-

> "(1) A court shall not make a community service order unless the following conditions have been complied with:
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> (a) the court is satisfied –
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> (i) having considered the offender's circumstances,
>
> (ii) having considered the assessment report prepared by a probation officer pursuant to a request under section 3(1B), and
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> (iii) where the court thinks it necessary, having heard evidence from such an officer,
>
> that the offender is a suitable person to perform work under such an order and that arrangements can be made for him or her to perform such work;
>
> (b) the offender has consented to the making of such an order."

44. I have been informed by counsel for Mr. Gilroy that he consents to the making of such an order. In my view, this is the appropriate way in which to deal with the matter in this case, subject to a suitable report being obtained from a probation officer. I will, therefore, request the Probation Service to prepare an assessment report in respect of Mr. Gilroy pursuant to s. 3(1B) of the Criminal Justice (Community Service) Act 1983 as amended and will relist this matter for 6th October, 2017, for further order having considered the content of that report.