

THE HIGH COURT

CIRCUIT APPEAL

[Record No. 2015/5 CAF]

IN THE MATTER OF THE JUDICIAL SEPERATION AND FAMILY LAW REFORM ACT, 1989 AND

IN THE MATTER OF THE FAMILY LAW ACT, 1995

BETWEEN

J.D.

APPLICANT

AND

M.L.

RESPONDENT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 25th day of May, 2017

1. The notice of motion brought by the applicant, dated 2nd February, 2017 sought a number of reliefs that can be summarised as follows:-

- an order directing the respondent to show cause why she should not be attached and committed for her failure to comply with the Order of this Court dated 15th April, 2016, 16th December, 2016 and subsequent orders;
- an order directing the respondent to comply with the Order of this Court dated 15th April, 2016 and 12th December, 2016 and subsequent orders;
- an order extending time for the respondent to vacate the family home;
- such orders as necessary and appropriate pursuant to s. 18 Family Law Act, 1995;
- if necessary, an order re-entering the within appeal;

This motion for attachment and committal was heard on 16th May, 2017. Both parties were present in court and both had full legal representation.

2. Two affidavits of service were produced, the first dated 23rd January, 2017 and the second dated 31st March, 2017. Mr. Kenneth Deale, solicitor for the applicant gave evidence of serving the respondent on both of the relevant occasions and actually re-swore his own affidavit of personal service to include his signature. It should be noted that no issue was raised by the respondent's legal team in relation to service and there was a clear acceptance that the respondent had been properly served.

3. Circuit Court Judge Murphy made an order on 27th March, 2014 directing the sale of the family home by 1st September, 2014 along with further orders regarding the ancillary reliefs.

4. Ms. L. appealed that order. The appeal came before this Court and judgment was delivered on 15th April, 2016. This Court upheld the Circuit Court order directing the sale of the family home and directed that the respondent vacate the family home within six weeks in order to facilitate the sale. As appears from the face of that order the respondent was ordered within to find alternative accommodation for the intervening months pending sale and under para. 4 of that order as and from the date of the vacation by the respondent of the family home, the applicant was granted the right to occupy the family home to the exclusion of the respondent.

5. The matter came before this Court again on 22nd July, 2016. The respondent held the position that she could not afford to vacate the family home and, on foot of that, this Court directed the applicant to pay over the sum of €4,000 to her through their respective solicitors to assist her in moving out of the family home so that she would be able to pay for a deposit on modest accommodation and some assistance towards rent as an interim measure. This sum was then to be recouped from the proceeds of sale of the family home. The cheque was sent duly to the wife, who returned same under cover of letter dated 10th August, 2016. The matter came before this Court again on 16th December, 2016. On foot of the willingness by the husband to afford further time, this Court extended the time within which the house was to be vacated by the wife to 31st January, 2017.

6. The husband's evidence was that the order of 15th April, 2016 directing his wife to leave the family home within six weeks was served personally on her as was the within notice of motion. It is the husband's case that the wife has failed consistently to comply with court orders throughout the Circuit and the High Court proceedings. The aim of having her move out of the family home was to allow the husband to have works done on the house to prepare same for sale. His claim is that the refusal to comply with court orders has been consistent on her part. The husband's evidence was that the €4,000 had been paid on a number of occasions but the cheque had been returned repeatedly some weeks later. In particular, he gave evidence that his solicitor sent a letter enclosing the cheque on 10th August, 2016 but the cheque was returned some weeks later.

7. The husband gave evidence that after the January hearing he believes the cheque was sent again and returned. A letter was sent dated 12th August, 2016 from the Legal Aid Board setting out that their instructions were to return the €4,000 cheque and that their client did not intend to vacate the family home at this time. By further letter dated 4th October, 2016 the €4,000 cheque was returned a second time. A cheque was sent on 16th December, 2016 the cheque was not cashed and the wife still retains that cheque and she still remains in the family home.

8. The husband described how the situation has not helped him in his employment situation. For the last two years he has suffered from chronic stress, lack of sleep and anxiety. His evidence was to the effect that he is still helping his two adult daughters both of whom are trying to finish their third level education. The eldest he says lives in a one bedroomed apartment and the second girl does

spend time with her mother but lives with him substantially. This is disputed by his wife.

9. The husband does say that he has concerns about mental health issues on the part of his wife but that his belief is that she is capable of retraining, refocusing and obtaining employment. At present he described his wife as not being willing to accept a job for which she is not trained. Reference was made by the husband to the wife having obtained a medical report in the context of these proceedings which verified that she was able to give instructions and that she had capacity and that he does not understand or know why she does not get work. The husband described the country as heading towards full employment and he felt that if she were to get employment it would help her socially and it would help her to move on with her life. Her husband believes her to have been given every possible chance and that it may have reached the stage where the situation requires an attachment and committal to give effect to the orders. He described his wife as being a fully qualified school teacher with a degree and a teaching qualification although she stopped teaching ten years ago.

10. Under cross examination in relation to the issue of potential incarceration of his wife, the husband gave evidence that he believed that it might cause her to come to a realisation or bring her to her senses. The husband described the position as being very difficult over the last four to five years where often she did not turn up in court or sent letters to the court instead of attending. In relation to the possibility which was put to him that she might remain in the family home pending its sale, he viewed this as not being possible. He felt that, even though the €4,000 was offered and given to her, he believed she will not cooperate. The husband pointed out under cross examination that even though the order was extended on a number of occasions, she refused to comply. The husband denies that the children are living with their mother and says that his older daughter has a lease on a property where she lives and that his younger daughter often stays both with him.

11. With regard to a court date of 10th March, 2017, the husband indicated that his wife had instructed she was unable to attend court but that he did not accept at that point that she was sick as she claimed and deemed her to have given that as an excuse. The husband said that it was him who actually proposed the extension of time to vacate the family home to 31st January, 2017. He indicated that he had already sent the €4,000 twice at that stage and it was returned twice.

12. The respondent gave evidence in relation to the orders of 15th April, 2016 in that she accepts that the order was made to place the family home on the market for sale and that at that stage she was given six weeks from that date to vacate the family home. She accepts that she has not vacated the house.

13. The respondent was cross-examined as to why she did not vacate the family home at the stage of the further court date on 22nd July, 2016. Her response was that she had broken an arm, was unable to drive, and that she had to attend hospital weekly. The respondent contends that she still has to have surgical work done on her wrist and that it will be a difficulty for a further two years as she was not in a position to have the surgery because of the trauma she felt at that time. The respondent accepted that time was extended at that point to allow her to vacate the family home by a four week period and in addition that her husband afforded to her the sum of €4,000 in cheque form but that she had returned the cheque. She said that it was not possible for her to vacate the family home at that stage as she had one daughter who slept on the floor in the family home while attending college and that she had another daughter who was struggling to pay rent. The respondent contended that both her daughters were "stressed out". The respondent indicated that she had no heat and no hot water in the family home for the previous five years and that on the night prior to this hearing she had to use mops to clear leaks.

14. Her explanation for not using the €4,000 cheque was because she did not wish to accept what she described as "contaminated" money. She stated that she is still in the family home and intends remaining so. The respondent confirmed that she had received the documents on 20th December, 2016. However, she contended that they were left on her door step and she noted that when she opened her door on that date it was daylight and she saw the applicant's solicitor but she contends that she did not accept the documents from his hands.

15. In relation to further service on 2nd March, 2017 at 6.50pm in the evening, the respondent indicated that she did not open the door as the Gardaí had advised not to but that the solicitor came to her bedroom window. She said that she was trembling with fear and that she felt bullied into opening the door in her dressing gown. Again, she indicated that papers were placed on the ground.

16. The respondent accepted that she was not present in court for the hearing on 7th April, 2017 and indicated that she had a bad flu and was not fit to drive a car she considered not to be roadworthy. She also indicated that she could not get an appointment with her general practitioner but that the chemist gave her some medication.

17. The respondent was asked what she understands in relation to the attachment and committal procedure. She said she understood that her husband was trying to put her in prison. She further indicated that she understands that her husband can put her in prison but she contends that she is not able to vacate the family home and not able to comply with the order. Her reason is that it does not make economic sense, that she would be paying €1,400 a month in rent and that she would require a lump sum.

18. The respondent was cross-examined about the availability of social welfare support to her and she indicated her belief that family income supplement would be based on her younger daughter being a student and on her husband's earnings. The respondent confirmed that she had not applied for any job in the previous twelve months. She stated that she only intends leaving the family home in the year 2025.

19. The respondent confirmed that she did never comply with the Circuit Court orders. She referred to her husband's family home and gave its address and argues that he will inherit in her view.

20. It was put to this witness that on 22nd July, 2016 when her husband had borrowed €4,000 to assist her moving out of the family home, that she was given a further four weeks to vacate same and she was given €4,000 but again she did not comply with this order and she confirmed this and that she shelved it as an issue and that she was taking trains to the West of Ireland and that she could not afford to either pay a deposit and one month's rent. The respondent appellant accepts that two days later she gave instructions to her solicitor to return the cheque for €4,000 and she confirmed again that she does not intend vacating this house being the family home until the year 2025. She accepted that she was non compliant with court orders which on the 16th December 2016 were extended to the 31st January 2017 and again reiterated her point of view that this did not have any economic sense and she agreed with Counsel that no matter how much money she was given she would not leave the family home until 2025 and she confirmed that this was correct. She confirmed further that it has never been her intention to leave the family home and she said that this must be a reality check for her husband that she could live in the family home for €200 a month payment by her husband rather than pay €1,500 a month to a stranger and that she had no intention of leaving the family home.

21. Under cross-examination this witness accepted that her husband had tried to accommodate her and she accepted that she was

wilfully in breach of the court orders.

The Law

22. Order 44 of the Rules of the Superior Courts prescribes the manner in which an application for an order for attachment and committal of any person is to be sought as follows:-

- "1. An order of attachment shall direct that the person against whom the order is directed shall be brought before the Court to answer the contempt in respect of which the order is issued, and shall be in the Form No. 11 in Appendix F, Part II.
2. An order of committal shall direct that upon his arrest the person against whom the order is directed shall be lodged in prison until he purge his contempt and is discharged pursuant to further order of the Court, and shall be in the Form No. 12 in Appendix F, Part II.
3. Save in respect of committal for contempt in the face of the Court or committal under rule 4 no order of attachment or committal shall be issued except by leave of the Court to be applied for by motion on notice to the party against whom the attachment or committal is to be directed.
4. When the person against whom an order of attachment is directed is brought before the Court on his arrest, the Court may either discharge him on such terms and conditions as to costs or otherwise as it thinks fit or commit him to prison for his contempt either for a definite period to be specified in the order, or until he shall purge his contempt and be discharged by further order of the Court.
5. A person against whom an order of committal is directed may apply to the Court to discharge such order. Every such application shall be by motion on notice to the party at whose instance the order of committal was made, and where on the hearing of such motion the Court discharges the order of committal, the Court may do so on such terms and conditions as to costs or otherwise as it thinks fit.
6. The Court may make an order of attachment where the application is for an order of committal, and vice versa.
7. Every order of attachment or committal shall be directed to the Commissioner and members of the Garda Síochána."

23. It is accepted that the respondent was served with the penally endorsed orders on 20th January, 2017 and the notice of motion and grounding affidavit on 2nd March, 2017. This Court is being asked to commit the respondent to prison for the alleged breach of the orders.

24. The applicant's case is that the respondent has blatantly breached the orders of this Court and has no intention of complying with the orders. Counsel for the applicant set out order 42 of the Rules of the Superior Courts which provides:-

"7. A judgement requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by order of attachment or by committal."

25. Counsel for the applicant cited Fennelly J. in the case of *Dublin City Council v. McFeely, O'Mahoney & Coalport Building Co. Ltd.* [2012] IESC 45 in relation to Order 44 as follows:-

"The object of these rules is to comply with the obvious need to respect fair procedures where a person is at risk of being imprisoned, that is to respect the rule of audi alteram partem. It is inherent in this system that the person be put on notice of the nature of the contempt alleged against him. In a case where the charge is that he is in breach of a court order, he should be told what the order is and how he is alleged to be in breach. It seems to me axiomatic that these procedures must be observed before the court makes a finding that the person is in breach of the order. That is what the contempt consists of."

26. Counsel for the applicant essentially submits that the wife has been given every opportunity to comply with the orders of the Court and is blatantly in breach. It is submitted that she has accepted that all documents have been served on her and she accepts that her continuing breach of these orders may result in imprisonment. It is further submitted that she has not given any sufficient justification or excuse for her continuing breach of court orders and the Court is left with no option but to attach and commit her.

27. It was submitted on behalf of the wife that contempt of court falls into two separate categories of civil and criminal contempt. Criminal contempt can take the form of contempt in the face of the court, scandalising the court and *sub judice* contempt which can be dealt with by way of a fine or a definite term of imprisonment. It was submitted that civil contempt is when a person refuses to comply with an order and states that they will continue to refuse to comply in the future. The court can then commit a person to prison for an indefinite period until the person purges their contempt and agrees to comply with the order.

28. Counsel for the wife is of the view that this is a case of potential civil contempt and referred to the case of *Ross Co. Ltd. & Shorthall v. Swan & Ors.* [1981] I.L.R.M. 416 where it was set out:-

"The jurisdiction of the court to imprison for an indefinite period for what is known as civil contempt is one which is exercised sparingly for a number of reasons. The procedure is primarily intended to be coercive rather than punitive."

29. Counsel for the wife accepts that she is not complying with the court orders and says that the wife cannot comply as she has nowhere else to live and no means to rent a property. It was submitted that because she is incapable of complying with the orders other course and orders should be adopted before an order for committal is made. Counsel for the wife cited the case of *Dublin City Council v. McFeely, O'Mahoney & Coalport Building Co. Ltd.* [2012] IESC 45 as follows:-

"It is essential that the courts should possess power to punish in a summary manner contempt of the court or of the courts' orders. If the courts did not possess this power then a person who has lawfully obtained relief from a court might find himself or herself unable to enforce that relief.

But the exercise of this power must, in my opinion, always be a matter of last resort, embarked on with manifest caution and great reluctance. This is because the contempt of court procedure have the potential to deprive a citizen of his or her liberty, not to mention property, without their being accorded the elaborate but very necessary protections normally

provided by the procedures of a criminal trial.”

30. Counsel for the wife further cited the case of *Irish Bank Resolution Corporation Ltd & Ors. v. Quinn & Ors.* [2012] IESC 51 as follows:-

“Where, following a finding of contempt, a person refuses to obey the court order, he may be imprisoned by order of the court until he undertakes to obey the order, i.e. purges his contempt. Imprisonment is not the only remedy. In certain types of case, a court has been known to impose a daily or other periodic fine.”

31. The essential position presented on behalf of the respondent is that there are alternative remedies available to this Court apart from committal. However, if the Court does come to the conclusion that an order or committal is necessary, a stay is sought in order to give her an opportunity to purge any alleged contempt. It is submitted that committing a person should only be used in the most sparing of circumstances and that all other potential orders should be considered first.

Conclusion

32. This Court finds clear evidence of a continuous and wilful refusal by the respondent to comply with the orders with which she has been served. In all the circumstances, this Court therefore grants the reliefs in terms of the notice of motion. In all the circumstances, she has failed to show any reason why she should not be attached and committed for her failure to comply with the orders of the Court dated 15th April, 2016 and the 16th December, 2016. This Court therefore attaches and commits the respondent M.L. and directs that she be imprisoned until she purges her contempt. However, this Court puts a stay on that order until 15th June 2017 to ensure adequate opportunity for her to consider seriously the position she is in, which has been explained to her.