

THE HIGH COURT

[2014 No. 106/SA]

**IN THE MATTER OF THE ESTATE OF JENNIFER MAUD ELINOR DAVIDSON, DECEASED, LATE OF ARDSILLA, DELGANY IN THE
COUNTY OF WICKLOW**

AND

**IN THE MATTER OF THE ESTATE OF JAMES NORRIS GODDARD DAVIDSON, LATE OF DONARD DEMENSE, DONARD IN THE COUNTY
OF WICKLOW, RETIRED FILM PRODUCER**

BETWEEN

NIKOLAUS DAVID SEAN BOULTING

APPLICANT

AND

JOHN CONDON

**(A SOLICITOR CARRYING ON PRACTICE UNDER THE
STYLE AND TITLE OF McMAHON & TWEEDY,
SOLICITORS)**

RESPONDENT

RULING of Kearns P. delivered on 31st day of July, 2015

This is an application for attachment and committal of the respondent solicitor for failing to comply with an order of this Court made on 18th May, 2015 that he pay over the sum of €23,000 to the applicant which he had been holding along with other monies in respect of fees allegedly due for work connected to the administration of two estates.

BACKGROUND

The applicant is the executor of the last will and testament of Ms. Jennifer Maud Eleanor Davidson made on 4th August, 1989 in respect of which probate issued on 26th April, 1994, and of the last will and testament of Mr. James Norris Goddard Davidson made on 31st August, 2004 in respect of which probate issued on 13th June, 2003. Ms. Davidson and Mr. Davidson were the applicant's aunt and uncle and passed away on 25th December, 1993 and 22nd April, 1998 respectively.

The respondent solicitor was instructed in relation to the administration of the two estates. However, in or about November 2007 the applicant instructed Mr. Joseph M. Bowe of Beauchamps Solicitors to take over from the respondent, citing frustration with delays to the administration on the respondent's part. Issues subsequently arose in relation to the transfer of the various documents and assets. Mr. Bowe wrote to the respondent on 15th December, 2009 and enclosed two letters of authority signed by the applicant which terminated the retainer of the respondent in respect of both estates. The respondent was directed to deliver up to the office of Beauchamps Solicitors all files, papers, deeds, accounts, assets, and documents held in relation to the estates.

The applicant was not satisfied with certain aspects of the transfer of the file to Beauchamps and made a complaint to the Law Society in 2010. Ultimately, on 16th December, 2010 this Court directed that all relevant files be handed over by the respondent to Beauchamps. The respondent solicitor complied with this order but retained certain funds in relation to the estates as a result of certain undertakings he had provided. The applicant contended that these undertakings were given without his consent and therefore set about obtaining a statement of account from the respondent outlining all sums held by him on behalf of the estates and details of the various undertakings.

By notice of motion dated 24th July, 2014 the applicant sought an order directing the respondent to deliver an account of all monies or securities which the respondent had in his custody or control in relation to the estates and an order directing him to pay over all monies held in respect of the estates. The matter has since come before the Court on approximately twenty separate occasions.

On 3rd November, 2014 it was ordered that the respondent would, within one month, deliver to the applicant an account of all money or securities held in relation to the estate. When the matter came before the Court on 8th December, 2014 the Court was told that the statement provided was difficult to understand and the matter was adjourned to allow the respondent to clarify certain matters, particularly in respect of obligations outstanding to the Revenue Commissioners. On 20th January, 2015 an order was made directing the exchange of affidavits between the parties detailing communications and correspondence with Revenue over the previous six months in relation to the undertaking.

On 2nd February, 2015 the applicant informed the Court that a cheque had been handed over by the respondent in Court for the vast majority of the sum claimed. The respondent indicated that a sum had been retained in respect of fees and the matter was adjourned for one week. On 9th February, 2015 the Court was informed that a sum of €35,000 had been retained by the respondent in respect of fees which he claimed were due and owing and the applicant sought a complete breakdown of how this figure was arrived at. The respondent indicated that there would be no difficulty with this and the matter was adjourned peremptorily for 21 days to allow the respondent to furnish a detailed bill of costs.

On 2nd March the Court was informed that while the respondent had undertaken to provide a bill of costs, this undertaking was not complied with as Mr. Condon had been hospitalised in the intervening period. A further adjournment for a period of three weeks was granted and it was directed that the respondent furnish a bill of costs to the applicant before the matter next came before the Court.

On 23rd March the Court was informed that no breakdown of the €35,000 charged by the respondent in respect of outstanding fees, over and above its previous fee notes which had been paid, had been provided to the applicant. The respondent had issued seven previous fee notes in connection with the administration of the estates totalling €88,732.50 which were discharged in full. Counsel for the respondent told the Court that a new legal costs accountant had been retained and was in the process of compiling the bill of costs but would require time to do so. The matter was adjourned to 13th April, 2015 by which time the Court indicated the bill should be furnished.

The applicant was eventually served with a bill of costs on the morning of 13th April and requested that the matter be adjourned to allow time to consider it. On 20th April the Court was informed that there was a dispute in relation to the fees and the matter was fixed for hearing on this point.

The matter was subsequently adjourned on three occasions before being heard on 18th May, 2015. On that date, after hearing submissions from both sides in relation to the level of fees and the nature of the work completed the Court directed that the respondent pay over the sum of €23,000 to the applicant within seven days with the option to either side to pursue legal proceedings in respect of any outstanding disputed balance. On 8th June, 2015 the Court was informed that the respondent had failed to comply with the order of the Court. The matter was adjourned for one week and the Court indicated that non-compliance with the order could have serious consequences for the respondent. It is important to record that the respondent did not plead inability to pay nor did he appeal the order of the Court or request any stay.

By notice of motion dated 15th June the within application for an order for the attachment and/or committal of the respondent for failing to comply with the order of this Court dated 18th May, 2015 was commenced.

SUBMISSIONS OF THE APPLICANT

Counsel on behalf of the applicant submits that the respondent solicitor was first instructed in relation to this matter in the early 1990s and that now, some twenty years later, little or no progress has been made in relation to finalising the administration of the estates and the present application is moved only as an absolute last resort.

It is submitted that throughout the course of these proceedings the respondent has at every stage attempted to frustrate the applicant's ability to ensure the timely and orderly administration of the estate and has repeatedly, wilfully, and flagrantly failed to comply with the directions of the Court, culminating in his failure to comply with the order of 18th May, 2015.

It is submitted that the matter has been adjourned on numerous occasions due to the deliberate actions and unacceptable conduct of the respondent solicitor. Counsel contends that the respondent has regularly failed to reply to correspondence and makes service of documents difficult. He has failed to attend court on a number of occasions and when a reason for his non-attendance is provided, it is submitted that it is often a scarcely credible one and is provided at the last minute.

It is submitted that the respondent repeatedly fails to adhere to agreed timelines or those set out by the Court in relation to the exchange of affidavits or documents. Similarly, the administration of the estate was further delayed for a lengthy period by the respondent's repeated failure to furnish a bill of costs in respect of the €35,000 he claimed, despite being directed by the Court to do so.

Counsel submits that the respondent's conduct is particularly egregious given that he is an officer of the court. It is submitted that the intent and meaning of the various court orders, including that made on 18th May, has been perfectly clear and that the respondent has not issued any appeal or sought a stay. Rather, he has simply ignored the Court's orders and acted in flagrant breach of them. It is submitted that there is no suggestion in the present proceedings of any inability to pay as the respondent furnished a statement of account indicating that he still holds the funds.

In relation to the requirements to be satisfied before an order for the attachment and/or committal of a person can be made, counsel submits that the respondent was served with the 18th May order by email, for which a 'read receipt' was received, by standard post, and by a letter delivered to his office. It has not been claimed by the applicant that he is unable to comply with the order and no appeal has been taken against it and no application for a stay sought.

Counsel for the applicant submits that there is scope for both a punitive and coercive order in the present case. Any punitive order imposed would be required to be of a fixed duration, while the applicant submits that in circumstances where the primary concern is bringing about compliance with the 18th May order, a coercive order for an indefinite period until the respondent purges his contempt is more appropriate.

The applicant submits that the respondent had every opportunity to bring any intention to appeal the order of 18th May to the attention of the applicant or indeed before the Court. However, he instead ignored a number of the letters sent by the applicant's solicitors following the making of the order until he sent an e-mail on a Friday night after papers were refused on the last day by the Court of Appeal office. In those circumstances the applicant is not willing to consent to any time within which to bring an appeal.

SUBMISSIONS OF THE RESPONDENT

The respondent solicitor strenuously denies that he has used his knowledge and experience of the law to frustrate the applicant and the proceedings before this Court. He submits that he is primarily a tax lawyer and is not an experienced courtroom lawyer. It is submitted that the various aspects of this case involve a huge volume of papers and documentation which were required to be

considered as the matter progressed. Furthermore, many of the adjournments in this case were sought by the applicant.

It is submitted that monies connected to the estates were held by the respondent due to outstanding undertakings and that various persons have misled the Court by asserting that the monies were held without authority or that undertakings were not given.

The respondent submits that the money has not been paid over to date because he was considering whether or not to appeal the order, which he ultimately decided to do. He submits that papers and a notice of appeal were lodged in the Court of Appeal office on the last day allowable within the time limits. However, the papers were not accepted as a copy of the court order was required. The respondent submits that a letter was sent to the applicant's solicitors seeking their consent to a short extension of time within which to bring an appeal. However, this letter had not been replied to by the time the attachment and committal application came before the Court. It is accepted that no application for a stay was made and no application was brought before this Court seeking an extension of time.

DISCUSSION

The governing authority in relation to orders for attachment and committal is the decision of the Supreme Court in *Laois County Council v. Hanrahan* [2014] 3 JIC 1406. The decisions of Fennelly and McKechnie JJ. make clear that there is a need to distinguish between criminal and civil contempt and that it must be clear whether or not an order is punitive or coercive, although in some instances of contempt the court may exercise both coercive and punitive powers. Fennelly J. stated (at para 59) as follows:-

"I am satisfied that the principles affecting the exercise of the jurisdiction to punish in cases of civil contempt are as follows:

- i) It will normally be a matter for the court to decide of its own motion whether the case is one which justifies the imposition of punishment, which may be a fine or a term of imprisonment, although there may be cases involving matters of purely private interest where the court may be invited to exercise the jurisdiction,*
- ii) The circumstances justifying the imposition of punishment will almost always include an element relating to the public interest, including the vindication of the authority of the court. The object is punishment, not coercion.*
- iii) A court should impose committal by way of punishment as a last resort. The contempt must amount to serious misconduct involving flagrant and deliberate breach of a court order. Mere inability to comply will not amount to serious misconduct.*
- iv) Committal by way of punishment inherently relates to conduct which has already taken place, not to future conduct. A person cannot be punished for his future conduct: that would involve preventive detention.*
- v) Any imprisonment must be for a fixed term."*

At paragraphs 59-67 of his decision in *Hanrahan*, McKechnie J. considered civil contempt and the nature of orders for attachment and committal made in such cases:-

"59. Civil contempt on the other hand essentially arises where a person is in breach of a court order, whether its terms be mandatory or prohibitory. Such an order may be enforced by attachment or committal (O. 42, r. 7 of the Rules of the Superior Court). Judgments for the payment of money are separately dealt with by r. 4 of O. 42. No distinction exists between interim, interlocutory and final orders of which injunctions are the most obvious examples.

60. In the vast majority of such cases the court will be engaged by the recipient of the order, whose only real focus and interest however is likely to be in having its terms enforced. This will be particularly so where the litigation is between private parties. Unlike criminal contempt, what the court seeks to do in such circumstances is to bring about compliance on the part of the defaulter by invoking its persuasive powers: if such should involve a prison sentence, the term thereof will be indefinite which is entirely consistent with and designed to further this coercive objective. Once the default has been remedied or is no longer in issue, which may result from due compliance or by a withdrawal of the application, the committal order ceases to have effect. That situation may also come about in other circumstances, such as a person's death, or permanent incapacity, or where for example the subject matter of an unlawful picket no longer exists, or in the case of a ship, which has departed from this jurisdiction.

61. It is sometimes said that the court does not have a personal or an individual interest in enforcing this type of order, or at least not to the same extent as it has in the case of criminal contempt.

*62. For entirely understandable reasons – mostly at a functional level – there may be some truth in this. However at the level of principle it must be noted that every judicial order which issues, has been made with the authority of the court behind it: as such it seems to me that the court will always have an intrinsic interest in securing due compliance with its orders. Lord Woolf M.R., in *Nicholls v. Nicholls* [1997] 1 W.L.R. 314 at p. 326, described such interest as being "very substantial". Although spoken in a more specific context, this is very much within the justification offered by Keane C.J. for his conclusion in *Flood* that when called upon to enforce orders of the Tribunal, the High Court's power is more than merely coercive. The judgments of Finnegan P. in *Shell* and Fennelly J. in *Quinn* entirely support this proposition. Accordingly, whilst the court may not always display of its own motion an overt interest in having each of its orders secured, nonetheless such an interest is there and will be acted upon where necessary.*

63. In practice the court will generally leave to the parties the enforcement of its orders, particularly if the rights in issue are of an exclusively private nature. However, there may also exist circumstances, where the nature, effect or consequences of a breach is such, that the court feels compelled to intervene or further intervene so as to mark its disapproval of conduct, which it views as being quite offensive. This will occur more readily where there are significant public interest matters at issue, where the behaviour in question, is threatening to the court itself or otherwise constitutes a serious or significant challenge to it. Where such occurs I have no doubt but that the court has jurisdiction to act and its powers in this regard may be both coercive and punitive.

64. *When intervention in this way becomes necessary as part of civil contempt, the court must be conscious that its jurisdiction has these two elements to it. Both may arise out of the same set of circumstances but when that occurs, it is of vital importance for the court, to distinguish sharply between its coercive intent and its punitive, or as it is sometimes put, its disciplinary intent. The reason is because the punishment is intended to reflect past conduct, i.e. conduct which has taken place up to the hearing date. Once therefore the imposed punishment has been met, the conduct which gave rise to it will have been legally dealt with. If further misbehaviour of a similar nature should reoccur, that likewise can be dealt with in the same way.*

65. *There is a second reason why the court must deal separately with these matters, which is that as with criminal contempt, any punitive element involving incarceration must be for a term certain. There is no scope for imposing an indefinite sentence in this context.*

66. *The type and nature of conduct which might give rise to the court's decision to penalise on a civil contempt motion may take many forms. Generally however only conduct which can properly be termed as "serious" or "outrageous" or "wilful" or "deliberate" or as constituting a "gross affront" to the integrity of the court will justify intervention in this way.*

67. *Even where such conduct is found to exist and is punished accordingly, that nevertheless may not be an end to the matter: the coercive power may still be required to be exercised if the anterior order should remain uncomplied with."*

In the present case, this Court made an order on 18th May, 2015 directing the respondent to pay over the sum of €23,000 within seven days of the making of the order *i.e.* by 25th May. This order has not yet been complied with by the respondent. Since the making of the order, and indeed since the attachment and committal proceedings were commenced, the matter has been adjourned on a number of occasions and the respondent has been afforded every opportunity to comply with it.

Having regard to all of the circumstances of this case and the respondent's contempt of the order of this Court, I am satisfied that the committal of the respondent is warranted. The Court directs that the respondent should be committed to prison unless or until such time as he elects to purge his contempt by complying with the terms of the order of 18th May, 2015 by paying over the sum of €23,000 as directed.

While the Court marks its disapproval of the attitude the respondent has adopted throughout the course of these proceedings and accepts the submission of counsel for the applicant that there is a public interest in ensuring that Court orders are respected and complied with, as required by the Supreme Court decision in *Hanrahan*, it should be made clear that the order of attachment and committal in this case is a coercive one. The respondent will be committed to prison unless or until such time as he elects to purge his contempt by complying with the terms of the order made on 18th May, 2015.