

BETWEEN

KIERAN WALLACE

PLAINTIFF

AND

SEAN HEALY

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered on 2nd day of April, 2019

1. Before the Court now is the motion by the plaintiff receiver ("*the receiver*"), pursuant to notice of motion issued on 30th January, 2018, for the attachment and committal of the defendant and others for their alleged failure to comply with the order of Gilligan J. made on 3rd April, 2017, restraining the defendant, his servants or agents, or any other person having notice of the order from interfering with and/or attempting to frustrate the activities of the receiver of certain properties, pending the trial of the action, ("*Gilligan order*").

2. The primary objective when exercising the committal jurisdiction of the court in this type of application is coercive. Reasonable opportunity should be given to a person who is the subject of such an application to comply with the order. However, that does not detract from the obligation of the applicant for such an order to establish beyond a reasonable doubt that the person allegedly in breach of an order is and continues to be in breach of the relevant order.

3. It is emphasised that the only person before this Court now is actually the defendant. Following observations which I made when this motion came before me last December, the receiver now is only pursuing the defendant on foot of the notice of motion, without in any way detracting from his right, and any duty which he has to those for whom he acts as agent to pursue the current occupiers of various properties for trespass or otherwise. I will revert to this aspect because it is time for everyone, including the Court, to take stock about the amount of time which has been spent on attempting to gain possession of the various dwellings which are the subject of the Gilligan order.

Directions and orders after the Gilligan order prior to the hearing of this motion

4. It is indeed unfortunate that the Court has had so many motions and applications. The following is a short summary before I proceed to engage with the application:-

31.07.2017 This Court made an order for substituted service of the Gilligan order with a penal endorsement on the defendant and occupiers of the dwellings spread between counties, Tipperary, Cork and Limerick ("*the properties*").

12.02.2018 Barniville J. made an order for substituted service by ordinary prepaid post on the defendant and by pinning copies in a weather protected manner on the front doors of the properties.

08.03.2018 Costello J. made an order for future service of notices and documents on the defendant and occupiers of the properties by ordinary prepaid post.

04.05.2018 Ní Raifeartaigh J. ordered the defendant to file an affidavit within three weeks detailing the factual position about the occupiers of the properties with ancillary orders and the motion adjourned to Friday, 1st June, 2018, and then later adjourned. In passing, the Court notes that no stay was placed on that order. While the defendant has appealed that order it is not the subject of the motion presently before the Court for the attachment and committal of the defendant.

07.06.2018 Costello J. made an order extending her earlier order about service on the defendant and occupiers of the properties to be effected by ordinary prepaid post.

This Motion

5. On 3rd October, 2018, this motion and the defendant's motion to set aside the Gilligan order came before this Court. In my ruling on that afternoon I said "*to be clear, the adjournment of the committal motion depends on the result of the defendant's motion to set aside the Gilligan order*".

6. The defendant's motion to set aside was heard on 4th October, 2018, and I delivered judgment on 5th October, 2018. Due to the constraints on this Court's availability, the defendant was asked and reluctantly gave an undertaking on oath that he would comply with the Gilligan order until 5th December, 2018, when the Court indicated that it would allocate a separate date for the continuation of the current contempt motion. That undertaking was given without any admission by the defendant that he had disobeyed the Gilligan order.

7. On 5th October, 2018, I gave various directions with a view to advancing the hearing of the committal motion in an orderly and efficient manner as best as the Court could provide. This, like all previous orders and directions were encapsulated in perfected orders. Included in those directions at para. 3, was the request for the receiver to apprise the Court on 21st December, 2018, about the efforts made to identify the names and descriptions of occupants. The Court facilitated the defendant by directing that his attendance was not required on that day and counsel for the receiver apprised the court on 21st December in relation to the occupants and inability to identify names.

8. On 11th January, 2019, this Court gave detailed and further directions for the advancement of the committal motion and the plenary proceedings. Relevant to today, were the directions at para. 1, 2 and 5, for this committal motion. In effect, this Court wanted to get an up to date position from the witnesses relied upon by the receiver about the occupants of the properties and what evidence was going to be relied upon in the committal motion which was then, according to the receiver, to be directed against the defendant only.

9. This Court had expressed concern about making an order for An Garda Síochána to bring all occupiers of the properties to Dublin in view of the evidence then available. All was arranged to be resumed on 12th February, 2019, but due to the shortage of courtrooms, a new listing was given for last Friday, 29th March, 2019, and the hearing continued into today, Tuesday, 2nd April, 2019.

Friday, 29th March, 2019

10. The above summary may not do justice to the saga and inconvenience caused but it is important to put the delay in determining this contempt motion in some context. Both the receiver's legal team and the defendant submitted written legal submissions for this motion. Various rulings were made on an *ex tempore* basis on points made by the defendant last Friday which ended after 4pm. Suffice to say that after all of the tangents pursued the evidence now available to the Court in the motion for the committal of the defendant, because of the clarifications given by counsel for the receiver earlier this morning and of this Court's actual understanding of how the motion would proceed, is as follows:-

Affidavit of Dick Holmes

11. An affidavit of Dick Holmes of Coldwell Banker in Cork, sworn on 28th September, 2018, which referred to his visits to the properties on either or both of the 18th and 24th July, 2018. The affidavit is replete with references to information given by third parties who have not sworn affidavits. The receiver relies on Order 40, rule 4 of the Rules of the Superior Courts ("RSC") for adducing hearsay evidence in interlocutory matters. This committal application relied on the hearsay evidence given by Mr. Holmes in that affidavit.

12. I am not going to give an excursus on hearsay evidence in committal applications because it is apparent from the uncontradicted evidence given by the defendant in his affidavit sworn on 21st November, 2018, and his further elaboration as I will mention later, that some of the information relied upon by Mr. Holmes was incorrect.

13. The defendant commented in his submission last Friday that "*if he wasn't blessed by the fact that he was out of the country, he would be used as a pawn in their inability to do their duty*". In short, he would have been in a predicament according to his version of events. He was actually away from 16th-23rd July, 2018, as supported by his flight confirmation correspondence from Ryanair. Otherwise, the defendant says he would have been faced with his word being assessed against the information referred to in the affidavit of Mr. Holmes.

14. The extent to which this Court comments on the defendant's submission that Mr. Holmes' makes scandalous allegations is that the receiver, in this and future applications for committal should cause more thorough investigations to be undertaken when pursuing an application to deprive a citizen of his liberty under the civil jurisdiction to coerce compliance with court orders.

15. Counsel for the receiver this morning submitted that it is not sufficient in a civil contempt motion for a respondent or defendant to infer a "*presumption of innocence wrapped up in a misconceived right to silence*". He submitted that such an approach is disrespectful of the court process and the rule of law. The Court acknowledges that there can be a lack of clarity about the civil contempt process. However, comparing the process in applications for contempt to the adversarial process used in a criminal prosecution is not accurate.

16. The defendant referred the Court last week to proposed legislation for contempt proceedings but that is not law at the moment. Counsel for the receiver is indeed correct to the extent that a respondent in a civil contempt motion cannot just sit back and merely challenge the evidence before the court by seeking to have it excluded on the grounds that it constitutes hearsay evidence.

17. The already mentioned undertaking given by the defendant on oath last December and the hesitant but actual indication given on 20th March, 2019, by the defendant that he has no contractual or other arrangement with the occupiers of the houses in question is sufficient in the present circumstances to refute the allegation that he was or is in contempt of the Gilligan order.

Affidavit of Sean Cahill

18. The second piece of evidence is the affidavit of Sean Cahill, sworn on 15th January, 2019. Mr. Cahill was present last Friday, for cross-examination by the defendant. Mr. Cahill referred to the following properties:-

- (i) 19 Whitepoint Moorings, Cobh, Co. Cork
- (ii) 47 Lockmills, Corbally, Co. Limerick
- (iii) 3 The Lodges, Ballykisteon, Co. Tipperary

when alleging that the defendant remained a landlord, according to unidentified sources of information given to him, ("*the now relevant properties*").

19. The defendant's cross-examination of Mr. Cahill as confined by this Court was effective to the extent that it raised reasonable doubts about whether the defendant or his agent collected rents or continues to allow people occupy the now relevant properties whether for rent or other reasons.

20. Mr. Cahill respected his duty to tell the truth and the whole truth when he acknowledged "*slum landlord activity*" in areas involving vacant properties over which a receiver has been appointed. In other words, opportunists, whether criminals or those associated with civil disobedience gangs take possession of houses unlawfully from receivers to rent or use for their own purposes.

21. Mr. Cahill confirmed that he did not seek any written evidence of contracts, rent books or receipts from the occupiers of the now relevant properties. He also accepted that those who gave him the hearsay information could have had ulterior motives whether to remain in the properties or blame others like the defendant for their trespass in the now relevant properties.

22. Counsel's linking of a Dominic (and I will not use his second name because he is not here in court to answer the allegations made against him) to the defendant is tenuous. Counsel referred to an affidavit not produced which alleges that this Dominic inspected relevant documentation on behalf of the defendant earlier in these proceedings. It is not for the Court to advise on proofs; all that I will say is that linking the said Dominic by reference to an earlier affidavit of a Ms. Walsh, solicitor with the firm on record for the receiver, is not acceptable.

23. The motion with implications for an individual who is not before the Court causes the Court to pause and give an opportunity to

that person, if he is going to be named in that way.

Conclusion

24. The defendant, while protesting that he should not have to give confirmation of his compliance with the Gilligan order in the context of this application for committal, has on two occasions as mentioned, told the Court that he has obeyed and will continue to obey the Gilligan. In those circumstances, I refuse the application to commit the defendant to prison for the alleged civil contempt of the Gilligan order.

25. Even if I found that there was un rebutted evidence of non-compliance by the defendant with the Gilligan order, the point made by the defendant about strict compliance with O. 41, r. 8 of the RSC Courts which requires specific wording, has not been answered by the refrain that the defendant knew at all times what he faced when coming to Court in relation to this application. The penal endorsement on the order states: "*If you the within named Sean Healy neglect to obey this order by the time herein limited, you will be liable to the process of execution for the purpose of compelling you to obey the said order.*"

26. Both Peart J. in *O'G v. The Governor of Cork Prison* [2007] 2 I.R. 203; [2006] IEHC 236, paras. 38-39, and Laffoy J. in *Airscape Ltd v. Powertech Logistics Ltd & Ors* [2008] 4 I.R. 438; [2007] IEHC 43, para. 11, make it clear that the words "including imprisonment" must be included in a penal endorsement, as per O. 41, r. 8.

27. The sanction sought by the receiver is severe and there are strict rules to be followed.

28. Given the amount of time expended by everyone, including this Court, on this aspect of the litigation and in respect of which I have already given directions to bring to a plenary hearing by the end of this legal year, if at all possible, I make the following comments in an effort to assist an understanding of this Court's view today.

29. Reasonably serious efforts should be made to identify the names of the occupants of properties who are trespassing and disobeying the Gilligan order. General Data Protection Regulation (GDPR) and other privacy concerns when seeking information from the providers of utilities or services to the properties and their occupiers can be overcome if lawful means are adopted.

30. It is not the Court's function to advise receivers, landlords or anyone. The defendant's insistence that the Court should remain aloof has limited merit but this aloofness does not:-

(i) prevent the Court from inquiring in a committal application about means of investigations, sources of information and attempts to obtain the help of local Courts and An Garda Síochána to assist in securing information for the purpose of securing compliance with orders of the Court such as the Gilligan order; and

(ii) prevent the Court from making arrangements to conduct hearings in an efficient and effective manner.

Therefore, the receiver is urged to review his system and work methods in seeking occupation of the properties and other similar properties.

31. This application demonstrated an absence of local knowledge and the High Court preferably should not be used if a local Circuit Court or District Court can be used to gain possession from trespassers whether through court order or other orders involving utilities. The defendant has had to travel to Dublin on a few occasions for this motion where the receiver and his legal team are based.

32. The occupiers of the dwellings for which the plaintiff has been appointed receiver reside in Munster. That is the extent to which the Court will now go in the application affecting those served with notice of the Gilligan order and in this unsuccessful application on behalf of the receiver for the committal of the defendant. This judgment and the consequential order does not preclude a future similar application grounded on evidence which could satisfy the Court beyond a reasonable doubt that the defendant or occupier is not complying with an order of the Court duly served with a penal endorsement as required by the rules of the superior courts.