Neutral Citation [2015] IEHC 781

THE HIGH COURT

2015 2012 SS

In the matter of an enquiry under Article 40.4.2° of the Constitution of Ireland

BETWEEN/

Mr B

Applicant

and

The Governor of the Midlands Prison

Respondent

and

Ms C

Notice Party

JUDGMENT of Mr Justice Max Barrett delivered on 10th December, 2015.

Part 1: Introduction.

1. Children are a blessing, but they come at a price. In the case of Mr B's child, that price has been quantified in the form of a maintenance order to which he is subject. Had Mr B but complied with that order, matters would not have come to where they are now. The court would respectfully encourage Mr B to seek both to comply with his maintenance obligations in the future and to discharge such arrears as have arisen in the past, not least given the special circumstances that he knows to arise in respect of his child. However, all that is by way of aside. What is at issue in the within application is whether or not Mr B's detention in prison for contempt of court, arising ultimately from non-payment of maintenance, is lawful.

2. As this application derives from family law proceedings that are concerned, at their heart, with the care of a minor, the court has elected to anonymise the names of the Applicant (Mr B) and the Notice Party (Ms C) in this judgment.

Part 2: Background Facts.

3. Mr B is detained in the Midlands Prison on foot of an order made by Griffin J. at a sitting of the Circuit Court on 3rd December. The relevant text of the order is set out later below. In essence, it commits Mr B to prison for a period of 3 months or until he has purged his contempt by paying the sum of €50k by way of part-payment of maintenance arrears.

4. There appear to have been lengthy previous family law proceedings between Mr B and the mother of his child (Ms C). It is not necessary to recount all the detail of those proceedings. Suffice it to note that in February 2014, Ms C issued a motion seeking, *inter alia*, judgment in respect of maintenance arrears. When the matter first came before the Circuit Court in July 2014, Mr B gave an undertaking to hold the sum of €50k from the proceeds of sale of certain lands, pending the full hearing of the motion. On 9th June, 2015, the matter came on for hearing. At the end of that hearing, Griffin J. granted Ms C judgment in respect of maintenance arrears to the amount of €62.9k. He also made an order requiring that Mr B pay €50k to Ms C within 14 days.

5. On 25th November last, Mr B was served with a motion seeking his attachment and committal for failure to comply with the orders of 9th June. In essence, Ms C contended that, on 9th June, Mr B had given an undertaking to withhold €50k from the sale of certain lands and to pay them to Ms C within 14 days, which undertaking had not been complied with.

6. The matter came on for hearing before Griffin J. on 3rd December. At that time, Mr B's solicitor submitted that no such undertaken had been given by Mr B on 9th June or at all. (Mr B had, of course, given an undertaking to the court in July 2014 to hold the sum of €50k from the proceeds of sale of certain lands, but only pending full hearing. That undertaking was spent either when the full hearing of the February 2014 motion came on last June or when the hearing completed, but in any event before judgment was given. The court notes in passing that it appears from the affidavit evidence of Mr B's solicitor that the lapse of the undertaking was at least implicitly accepted by the learned Circuit Court judge. Thus Mr B's solicitor avers: *"I submitted to the Court that this undertaking was spent on the determination of the relevant motions. The court indicated that it continued to rely on this undertaking nonetheless[i.e.* despite its being spent]").

7. In any event, after hearing argument, Griffin J. sentenced Mr B to 3 months' imprisonment for contempt of court but indicated that he could purge his contempt at any time by paying the €50k. As this order cannot be for breach of a spent undertaking, the only possible alternative is that it arises from non-payment of a portion of the judgment debt of last June.

Part 3: The Text of the Committal Order.

8. So far as relevant to the within application, the committal order of 3rd December provides as follows:

> *"WARRANT OF IMPRISONMENT FOR CONTEMPT OF COURT*
> *…THE COURT DOTH FIND the Respondent…in Contempt of Court for his failure to honour his sworn Undertaking to the Court to withhold €50,000.00 from the proceeds of sale of his land and that he pay the sum of €50,000.00 to the Applicant…within fourteen days of the 9th day of June, 2015 in part satisfaction of the arrears of Maintenance due.* **[1]**
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> *THE COURT DOTH ORDER:*
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> *That the Respondent…be imprisoned in Midlands Prison…for a period of Three Months from this day for such Contempt and the Court Directed that Mr [B]... can purge his contempt at any time by payment of the monies he was ordered to pay…"* **[2]**
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> **[1]** As mentioned above, this undertaking appears to the court, and it seems that it also appeared to Griffin J., to have been spent, albeit that the learned Circuit Court judge sought to place continuing reliance on same.
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> **[2]** As identified later below, there is a difficulty with this limb of the Circuit Court order.

Part 4: The Circuit Court Rules, 2001, as amended (the "Rules").

9. If one assumes that the committal order relates to the non-payment of the judgment debt, the learned Circuit Court judge had no jurisdiction under the Rules to make the above-mentioned form of order.

10. Order 37, rule 1 of the Rules provides as follows:

> *"If the person bound by any order of the court,* ***other than a judgment for the payment of money*** *fails to comply with its terms, the party entitled to the benefit of such order may serve a notice requiring the person so bound to attend the court on a day and at an hour to be named in such notice to show cause why he should not be committed for his contempt in neglecting to obey such order."* [Emphasis added].

11. In a similar vein, O.36, r.4 of the Rules provides as follows:

> "A judgment requiring any person to do any act **other than the payment of money**, or to abstain from doing anything may be enforced by an execution order by way of attachment or committal."[Emphasis added].

12. As the committal order cannot be for breach of a spent undertaking, albeit that it purports to be, the only alternative conclusion is that it is for non-payment of a portion of the judgment debt arising since last June. But as the above-quoted rules show, such a committal for non-payment of money is not allowed under the Circuit Court Rules. This does not mean that Ms C is without remedy. All it means is that, in the circumstances arising, the form of remedy afforded her by the learned Circuit Court judge is not permitted under the Circuit Court Rules.

Part 5: The decision in Hanrahan.

13. The court has been referred by counsel to the decision of the Supreme Court in *Laois County Council v. Hanrahan* [2014] IESC 36. In that case, Mr Hanrahan appealed against a High Court order committing him to prison for contempt of court in failing to obey a High Court order requiring him to remove large volumes of polluting waster from his parents' family farm in County Laois. The operative part of the order of the High Court stated as follows:

> "*The Court doth adjudge that the* [appellant] *is guilty of contempt of this Court by reason of such default and that he be committed for such contempt to Mountjoy Prison to be detained therein for a period of six months or such further period as this Court shall direct UNLESS the provisions laid down in the Schedule hereinafter impliedly to in full and in accordance with the time limits therein specified."*

14. This form of order was found by the Supreme Court to be invalid because it contained an impermissible combination of punitive and coercive elements. Two judgments were delivered in the Supreme Court. A judgment was delivered by Fennelly J. for the Court. McKechnie J. also delivered what is in effect a concurring judgment. Both judgments contain text of relevance to the within application.

15. Following a survey of relevant authorities, Fennelly J., at paras.59–62 of his judgment, identifies various principles affecting the exercise of the jurisdiction to punish in cases of civil contempt (such as that which the learned Circuit Court judge has found Mr B to have manifested) and made certain related comments:

> *"59…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.*
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> *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.*
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> *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.*
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> *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.*
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> *v) Any imprisonment must be for a fixed term.*
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> *60. It is true that, even in cases of purely coercive orders, there is an element of punishment. It is by committing the…*[contemnor] *to prison that the court secures the observation of its orders. However, when a term of imprisonment is imposed by way of punishment, the above principles apply.*
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> *61. It is inescapable that the punishment was imposed in this case for the purpose of coercion. Both the terms of the order and the explanation of it in the judgment show that the appellant was committed to prison for a fixed term of six months until he complies with the terms of the order. The actual terms are that he is committed* 'for a period of six months or such further period as this Court shall direct UNLESS the provisions laid down in the Schedule hereinafter impliedly to in full and in accordance with the time limits therein specified.' *The appellant is, firstly, committed to prison for six months, unless he complies with the order. Moreover, the court retains the power to impose further periods of imprisonment on the same terms. The learned judge explained: 'the key to the jail is in the hands of the' appellant. This is not a permissible type of order. It unacceptably blurs the line between civil and criminal contempt.*
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> *62. For that reason the order should be discharged and set aside. I do not, however, accept the submission made on behalf of the appellant that the order should simply be discharged. I would remit the matter to the High Court for further consideration. It would then be a matter for that Court to decide whether, in the light of the principles outlined above, the conduct of the appellant has amounted to such serious defiance of the order of the court as to merit the imposition of six months or any other term of imprisonment by way of punishment."*

16. In a similar vein, McKechnie J. states as follows, at paras.76–79 of his judgment:

> *"76.It seems clear, at least in some respects, what the judge had in mind: he wanted the works done within a timeframe; if that was accomplished the order would have no effect; if default was made however, imprisonment would follow. What is unclear is whether the appellant was to serve six months only, or a longer period if subsequently directed. The perfected order certainly gives that impression, whereas, the note of the judgment, at least by inference, seems intended to have the six months as the outer limit, but with release possible before then if the work plan is implemented.*

77. Whichever of these interpretations is to be regarded as accurate, neither in my view can be sustained as a matter of law. If the intention of the High Court judge was purely coercive, which is likely, the detention should have been indefinite in duration, subject only to the judge's power of suspension, to be exercised at sentencing, which in any event does not appear ever to have been contemplated. If on the other hand the intention was punitive, that is, with the object of punishing Mr Hanrahan for disobeying the s.58 order, the sentence had to be one for a term certain and could only be in respect of past events. Further, the serving of such term could not be influenced by the appellant's future conduct.

78. It seems to me that the trial judge inadvertently conflated his coercive and punitive powers and in effect merged or rolled both into one. This, the law does not permit: accordingly, I am therefore satisfied that the appeal must be allowed on that basis.

79. This conclusion does not however dispose of the committal application. My view on the validity of the order does not disturb the underlying finding that the third named respondent was guilty of contempt. In fact, by open admission he pleads to it. Equally so it does not disturb the view of the trial judge…that the contempt in question is serious in nature and must be regarded as such. That being the situation, I propose to remit the matter back to the High Court to further consider what the appropriate order should be."

Part 6: Application of the Hanrahan principles to the present case.

17. There is a clear analogy to be drawn between the circumstances in *Hanrahan* and those presenting here. To borrow from the wording of Fennelly J., when it comes to the facts underpinning the within application (as with the facts underpinning the appeal in *Hanrahan*) *"It is inescapable that the punishment was imposed…for the purpose of coercion….*[T]*he appellant* [here Mr B] *was committed to prison for a fixed term…until he complies with the terms of the order."* It is clear from a reading of the order at issue in the within proceedings that when it comes to Mr B (as was stated by the trial judge in *Hanrahan* to be the case in respect of Mr Hanrahan) *'the key to the jail is in the hands of the* [contemnor]'. And it is equally clear that, as Fennelly J. makes clear in *Hanrahan, "This is not a permissible type of order. It unacceptably blurs the line between civil and criminal contempt."*

18. The judgment of McKechnie J. gives a clear sense of how the learned Circuit Court judge ought to have proceeded in the within matter. Indeed, his words are as good a fit to the facts of this case as they were in *Hanrahan*. There, as here, *"If the intention of the…judge was purely coercive, which is likely, the detention should have been indefinite in duration, subject only to the judge's power of suspension….If on the other hand the intention was punitive, that is, with the object of punishing* [the contemnor]*…for disobeying* [a court order]*…the sentence had to be one for a term certain and could only be in respect of past events. Further, the serving of such term could not be influenced by the appellant's future conduct."*

19. This Court is bound by the decision in *Hanrahan* and thus it is bound to find that the order at issue in the within application is not a permissible type of order. This is because it unacceptably blurs the line between civil and criminal contempt. Thus it must be discharged and set aside.

Part 7: The decision in Ryan.

20. Counsel for the State suggested in the course of the hearing of this application that it(the application) is more properly a matter for judicial review. In this regard, the court is mindful of the distillation of principle undertaken by Denham C.J. in the Supreme Court's decision last year in *Ryan v. Governor of the Midlands Prison* [2014] IESC 54.In that case, the Chief Justice, following a survey of applicable case-law, observed as follows:

> *"18…[T]he general principle of law is that if an order of a Court does not show an invalidity on its face, in particular if it is an order in relation to post conviction detention, then the route of the constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In such circumstances the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw."*

21. Here the order of Griffin J. patently shows the same conflation of the punitive and the coercive which the Supreme Court rejected as impermissible in *Hanrahan*, making this a case which, to borrow from the Chief Justice's wording in *Ryan*, is one appropriate for *"the constitutional and immediate remedy of habeas corpus."* In passing, the court notes that because it is such a case, it follows that the Governor of the Midlands Prison, being – to borrow from Art.40.4.2° of the Constitution – *"the person in whose custody* [Mr B]*…is detained*" is necessarily a party to the within proceedings and is not, as was contended at the hearing of the within application, a 'stranger' to the proceedings.

Part 8: Conclusions.

22. For the reasons stated above, the court concludes as follows:

> (1) The undertaking of July 2014 was spent either when the full hearing of the February 2014 motion came on last June or when the hearing completed, but in any event before judgment was given. This lapse of the undertaking appears from the affidavit evidence before the court to have been, at least implicitly, accepted by the learned Circuit Court judge.
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> (2) If the court is correct as to (1) (and it considers that it is), it follows that the committal order of 3rd December is fundamentally flawed on its face in that it is grounded on the breach of what was a spent undertaking.
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> (3) If the court is correct as to (1) (and it considers that it is) the only alternative reading of the committal order is that it is for non-payment of a portion of the judgment debt arising since last June. But such a committal for non-payment of money is not allowed under the Circuit Court Rules.
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> (4) Regardless of all the foregoing, the court finds, indeed must find, by reference to the decision of the Supreme Court in *Hanrahan* that the committal order at issue in the within application is in any event not a permissible form of order because it unacceptably blurs the line between civil and criminal contempt.

23. Having regard to all of the above, the court is not satisfied that Mr B is being detained at this time in accordance with the law and thus the court is coerced by Article 40.4.2° of the Constitution into ordering his release now from detention.

24. The court notes that its views on the validity of the committal order do not disturb the underlying finding by the learned Circuit

Court judge that Mr B is guilty of contempt. Equally, the court's finding does not disturb the clear view of the trial judge that the contempt in question is serious in nature and must be regarded as such. That being so, the court proposes to remit the matter back to the Circuit Court for it to further consider what the appropriate order should be.

25. Finally, the court ends where it began. Children are a blessing, but they come at a price. Mr B cannot reasonably expect Ms C to bear the full cost of rearing a child of which he is father, not least in light of the special circumstances that he knows to present in respect of his child. The court would respectfully encourage him to recognise more fully his paternal responsibilities by seeking now to meet his maintenance obligations.