

Neutral Citation No: [2018] NIQB 56

Ref: DEE10698

*Ex tempore Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 28/06/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

IN THE MATTER OF MICHAEL FRANCIS DOHERTY

AND

THE PROCEEDS OF CRIME ACT 2002

AND

**IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF PUBLIC
PROSECUTIONS FOR NORTHERN IRELAND FOR AN ORDER OF
COMMITTAL AGAINST MICHAEL FRANCIS DOHERTY**

Before: Deeny LJ and Maguire J

DEENY LJ

[1] This is an application by the Director of Public Prosecutions for Northern Ireland (DPP) that Michael Francis Doherty be committed to prison for contempt of court on account of his failure to comply with the Order of this court dated 12 April 2017, the default being his failure to swear and serve an affidavit on the court and on the DPP informing the Director of all his assets whether inside or outside Northern Ireland. That Order was on foot an application brought to the court in 2017 to investigate the affairs of Michael Doherty, Sean Doherty and Michael Doherty Haulage Limited. Having heard the moving party Mr Justice Colton imposed an order requiring the three named defendants to not dispose of a list of assets including a number of properties, the monies in a number of financial accounts and a considerable number of vehicles. They are in business in haulage but also apparently in work related to forestry; that is the two Mr Dohertys and the firm.

[2] These orders are there to assist in the recovery of suspected criminal proceeds and in the investigation of crime. Mr Gregory Berry QC who appears with Mr Taggart for Michael Doherty points out that his client has not in fact been

charged with any offence but Mr Samuel Magee, who appears for the prosecution, informed the court that the papers with regard to any prosecution were still with the PPS; no decision had been taken.

[3] So the order was made; it is common case that following it there was some agreed extensions but the affidavit ought to have been served by 25 May 2017 and a warning was sent by the PPS that the defendants were in breach of that on 2 June but on that day two affidavits were received. That is from Mr Sean Doherty and one affidavit from this defendant, Michael Doherty, in his capacity as a director of Michael Doherty Haulage Limited. The third affidavit required from him personally was not served. There was some suggestion from his solicitors, Messrs Mills Selig, by letter of 9 June that they would seek to apply to vary the order of Mr Justice Colton to release him from the obligation to serve a personal affidavit in this matter. The order of the judge would have allowed a consensual variation certainly of an extension of time and possibly of that nature. The point is made on behalf of Mr Doherty that the PPS did not in fact reply to that letter and it is somewhat in his favour that in the course of the next 6 months no reminders were sent to him about the matter. The matter really only came back to life, it would seem, in one respect, by a letter from Doherty's solicitors of 15 December 2017 complaining that there had been no reply to their letter of 9 June, and saying they were left with no option but to proceed to issue the application to discharge or vary the order without some information which had been requested. They then asked that there would be no objection to the use of frozen funds for costs for that purpose.

[4] The Public Prosecution Service wrote back on 18 December to point out that as Mr Doherty had been interviewed a number of times by the police in the interval he should have been well aware of what issues and information was important in regard to the investigation and the Restraint Order. No waiver was offered on behalf of the PPS but rather there was a warning that Mr Doherty should serve the personal affidavit and the letter concluded:

“Please forward same forthwith and without further delay failing which we will have no alternative but to refer your client to the High Court for contempt of court.”

[5] The defendant, we are informed by counsel, did not remain inactive at that stage but again was considering the application to vary but was inhibited in doing so by the provisions of Section 190, and I imagine Section 189, of the Proceeds of Crime Act 2002 which prohibit the use of frozen funds by statute for some purposes connected with the alleged criminal offences which are being investigated. In any event the DPP then proceeded on 7 March 2018 to serve the present proceedings, the nature of which I have outlined. The service of the proceedings was efficacious so far as the prosecution was concerned in as much as an affidavit was then served on 4 April on the PPS by Mr Doherty. It set out his personal assets and accounts.

[6] Now what is implicit in that and what has been candidly admitted by counsel on his behalf is that that affidavit disclosed that over and above the accounts known to the authorities at the time of the original application for a Restraint Order was brought Mr Doherty was a client of Danske Bank in Northern Ireland and indeed another financial institution but he was particularly concerned about Danske Bank because he had the opportunity to do work which he was anxious to do in Co Fermanagh with a company there linked to Coilte, the public forestry authority in the Republic of Ireland but it required the use of expensive machinery. He required finance to buy this valuable equipment. He hoped to obtain the finance for that from Danske Bank, but he was apprehensive that if he disclosed that he was a client of theirs then the Order in all likelihood would be amended and served on them and that might damage his applications for credit. As Mr Magee justifiably said he took a calculated decision to defy the order of the court in order to obtain credit and that is the position here.

[7] It seems to us the position is clear that the applicant is entitled to succeed on the principal point, namely that this court is satisfied that Michael Francis Doherty is in contempt of court for failing to serve in writing an affidavit on the court and on the Director of Public Prosecutions. Mr Berry sensibly, implicitly in his skeleton and explicitly before the court conceded that and we take that concession into account. The question therefore that has largely occupied the time of the court today is what should follow from that. The prosecution draw the courts attention to the power of the court to impose a custodial sentence of imprisonment for this contempt. It is a civil contempt it is agreed, but it is important that the orders of the High Court are obeyed and the available means of ensuring compliance with the orders of the court include the imposition of a custodial sentence. To do so has been regarded in some of the cases as a punishment for a past breach but it may also be regarded as a deterrent to others against thinking that they can evade orders of the court or simply not comply with them with impunity and so it has been the duty of the court to consider that in this regard. We cannot accept the submission of Mr Berry that this civil contempt on this man's part is at the lowest end of the range of contempt; there could be people who delay in gathering the necessary documents to comply with the order of the court due to dilatoriness and are in breach for that reason or who have other personal reasons which cause them to be in default. That is not the case here. This man made a conscious decision for business purposes not to comply with the order of the court. The references to varying the order of the court must be taken with more than a grain of salt because any such application would have been an improper application unless it acknowledged the reason for it, ie that this man was involved with other financial institutions than the ones the prosecution were aware of.

[8] There is a considerable delay here which we take into account. On the other hand he did swear one of the affidavits the court told him to do and his solicitors were in touch with the PPS and he himself attended for interview with the police and at this stage before us there is no conclusion that he has committed any offence at all. Taking all these factors into account and the other matters adduced by

counsel and to be detected in the case law we have concluded that he does not pass the threshold for a custodial sentence today. That being the case the court has to consider the principle alternative remedy, namely the imposition of a fine. We have, as I say, had the benefit of citation of case law, the prosecution citing the *R v Harris & Hawthorne* [2018] NIQB 38, *R v Baird* [2011] EWCA Crim 459, *R v Patel* [2017] EWCA Crim 820 while Mr Berry and Mr Taggart relied on *Allason v Random House UK Ltd No:2* [2002] EWHC 1030 and *R v Lloyds TSB Plc* [2008] EWHC 2393.

[9] We feel obliged to address one of those cases in particular as it might seem that we are diverging from it and that is the case of *R v Harris & Hawthorne* [2018] NIQB 38. In that case a differently constituted divisional Court had to consider an application for contempt against Philip John Harris and Tracy Hawthorne in relation to the disposal of a camper van in breach of an order of the court, again Mr Justice Colton and on the part of the female defendant, Tracey Hawthorne, of failure to file an affidavit. Mr Berry relies on that case to urge leniency on this court. The learned judge in his judgment referred at paragraph 8 to *R v O'Brien* [2014] UKSC 23 and notes that the court has a power to impose punishment. As My Lord, Mr Justice Maguire, pointed out in the course of this hearing the judgment does not seem to address the issue of deterrence. It seems that from the judgment the defendant Harris had been given “a significant prison sentence for his offending, he having pleaded guilty on 4 September 2017. His earliest release date is October 2019.” Despite that he was the recipient of a sentence of a further 3 months’ imprisonment without remission from the court. The court took a different view in regard to Ms Hawthorne. It was not satisfied that she could be blamed for the disposal of the camper van in breach of the order of the court and so she was sentenced only for the failure to file the affidavit. They noted that the affidavit had now been filed so in that regard she is akin to Mr Doherty but they noted further that she has a number of young children and they noted the contents of the pre-sentence report and they imposed a fine of only £500. That may have been a perfectly proper fine to impose on the mother of young children and particularly in the light of the circumstances in the pre-sentence report of which we are unaware but we do not think it is a proper sentence in this case in the case of this businessman who failed to comply with the order of the court. We are aware that he will have been put to further costs in relation to defending this matter either now or at some date in the future and we are aware further that there is an issue of costs in this application on which we will hear counsel but balancing the factors for and against him we have concluded that the appropriate fine is one of £7,500.

[Costs of PPS to be paid by respondent and to be taxed in default of agreement.]