

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION**

**IN THE MATTER OF MARK NIAL MCKINNEY, BEVERLEY SUZANNE  
MCKINNEY, MMK INTERNATIONAL TRANSPORT LTD AND TONY  
JAMES MCNEILL**

**IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002**

**IN THE MATTER OF THE CONTEMPT OF COURT ACT 1981**

**MORGAN J**

[1] This is an application by the Interim Receiver for an order that Tony James McNeill (the respondent) be committed to prison for his contempt in obstructing the receiver in the carrying out of her duties under and pursuant to her appointment by an Interim Receiving Order dated 24 February 2006. The receiver also seeks an order compelling the respondent to attend with her for further interview and to co-operate with her at interview by providing full, informed and proper answers to questions.

[2] The applicant submits that this is a civil contempt application whereas the respondent contends that this is a criminal proceeding. The respondent also submits that it is an abuse of process for the receiver to bring this application which he says should be brought by the Director of the Assets Recovery Agency if it is to be brought at all. Accordingly the respondent invites me to dismiss the application or to direct the receiver not to proceed further with it. I have agreed at the invitation of the parties to deal with these matters as preliminary issues and I have been asked to give general guidance as to the procedure which should be followed in such applications.

*Background*

[3] By Order of Coghlin J dated 24 February 2006 the applicant was appointed Interim Receiver of certain property of the respondent and the other named parties set out in schedule 2 to the Order. The property

comprised in the Order was amended by further Order of Coghlin J dated 8 September 2006. The Order provided the applicant with certain powers including:

"(1) Power to obtain information from the Defendants or any other person or to require the Defendants or any other person to answer any questions as provided for in Schedule 6 Paragraph 2 of the Proceeds of Crime Act 2002.

(2) Power to require any person given reasonable notice to attend at a specific time and specific location to answer any question. Where this power is exercised the Receiver may audio record such questions and answers."

[4] On 3 March 2006 the applicant interviewed the respondent in the presence of his solicitors. The applicant says that the respondent did not have or produce any documentation about his subcontracting transport business with Mr McKinney which he stated was a cash business. The applicant asked him about three lorries which were used in this transport business but the respondent was unable to provide their registration details. He maintained that he no longer had the lorries which he believed were operated in the Republic of Ireland when he was in business. He was unable to indicate where they were stored or where they were being driven. He said that he did not wish to identify the drivers of the lorries other than to name one of the drivers as Pat. He said that the reason for this was that he did not wish to brand these individuals because of the publicity surrounding the case and alleged links to loyalist paramilitaries and drug smuggling. He maintained that the information he had on the drivers was sketchy and he did not wish to say anything which was untrue or misleading and in any event he assumed that all the work was done properly as there had been no complaints from MMK International Transport Ltd who had paid for the work. The applicant further relies upon the failure at that interview to disclose three insurance policies which the respondent says are not in fact assets. In correspondence on 22 and 23 August 2006 the applicant asked the respondent to explain payments to him by MMK International Transport Ltd of approximately £1,474,555.00 and a note in their invoice book stating "you MMK owe me Tony McNeill 343,950 would you please forward this money ASAP Yours Tony Mc Neill". The respondent says that he told the applicant that he was paid between £10,000 and £12,000 per month by MMK for operating the lorries but had no documentary records in relation to any such payments. It will be for the full hearing to determine whether the receiver has made out her case.

*Civil or criminal contempt*

[5] The entitlement to exercise the jurisdiction to commit for contempt is set out in Order of 52 Rule 1 of the Rules of the Supreme Court (Northern Ireland) 1980.

*"1. - (1) The power of the High Court or Court of Appeal to punish for contempt of court may be exercised by an order of committal.*  
*(2) Where contempt of court-*  
*(a) is committed in connection with-*  
*(i) any proceedings in the High Court, or*  
*(ii) criminal proceedings, except where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court, or*  
*(iii) proceedings in an inferior court, or*  
*(b) is committed otherwise than in connection with any proceedings,*  
*then, subject to paragraph (3) and rule 5, an order of committal may be made only by a court of the High Court consisting of two or more judges, and in this Order the word "Court" shall be construed accordingly save where the context or paragraph (4) otherwise requires.*  
*(3) Where civil contempt of court is committed in connection with any proceedings in the High Court, an order of committal may be made by a single judge.*  
*(4) Where contempt of court is committed in relation to the Court of Appeal or in connection with any proceedings therein, an order of committal may be made by that Court as well as by the Court under paragraph (2).*  
*(5) Every order of committal may be directed to any police officer or to such other person as the Court may order.*  
*(6) A court of two or more judges exercising jurisdiction pursuant to this rule shall be called a Divisional Court."*

As appears from the Rule where, as here, the contempt is allegedly committed in connection with proceedings in the High Court it can be dealt with by a single judge if it is a civil contempt but otherwise an order of committal may only be made by a court consisting of two or more are judges. It is, therefore, critical to determine this jurisdictional issue before proceeding further.

[6] It is clear that the use of the term "civil contempt" in Order 52 Rule 1(3) of the RSC(NI) 1980 is intended to distinguish between the traditional classification of contempts as civil or criminal. The leading case in this jurisdiction on that issue is Lord Saville of Newdigate v Harnden [2003] NICA

6. In that case the appellant was the chairman of the Bloody Sunday Inquiry. The respondent was a journalist who was summoned to the tribunal to give evidence about the identity of two soldiers who had given him information about some of the events in 1972. The tribunal was anxious to trace these individuals. The respondent declined to give evidence on the grounds that he was obliged to protect sources who had given him information in confidence. The tribunal initiated contempt proceedings under the Tribunal of Inquiries (Evidence) Act 1921.

[7] On an application for discovery by the respondent an issue arose as to whether the proceedings were in respect of civil or criminal contempt. The lower court held that the proceedings should be regarded as criminal. On appeal the court approved the general approach set out at para 3-1 of Arlidge, Eady and Smith (3rd edition 2005).

“... a criminal contempt is an act which so threatens the administration of justice that it requires punishment from the public point of view; whereas, by contrast, a civil contempt involves disobedience of a court order or undertaking by a person involved in litigation. In these cases, the purpose of the imposition of the contempt sanction has been seen as primarily coercive or ‘remedial’.”

The court noted that breach of court orders and injunctions are generally ranked as civil contempts (see *Scott v Scott* [1913] AC 417) whereas a refusal to answer a question at a trial if ordered to do so by a judge would constitute a contempt committed in the face of the court and thus a criminal contempt (see *Secretary Of State for Defence v Guardian Newspapers* [1985] AC 339). The court further approved the distinction between the two categories set out at para 3-5 and 3-6 of Arlidge, Eady and Smith.

“3-5 Although the distinction between civil and criminal contempt continues to be made, and has to be considered carefully, the two categories have rather more in common than their traditional separation would imply. The considerations of public policy underlying the contempt jurisdiction generally are the protection of the administration of justice and the maintenance of the court’s authority. There lies at the heart of both civil and criminal contempt the need for society both to protect its citizens’ rights and to maintain the rule of law.

3-6 Thus, although 'civil contempt' is concerned with breaches of court orders or undertakings in civil litigation, for the benefit of parties, the court may wish primarily in such cases to coerce parties into compliance with its orders; or alternatively, even in this context, it may be primarily concerned to punish disobedience (for example, where the time for compliance has passed). In such circumstances as these, deterrence clearly has a role to play. It is therefore possible, in many examples of civil contempt, to discern these two considerations in operation alongside one another."

[8] In that case the court concluded that the contempt was criminal by analogy with contempt in the face of the court. In this case, by contrast, the alleged contempt consists of a failure to comply with a court order. As appears from the summons one of the objects of the application is to require the respondent to comply with the court order. I consider that the purpose of the proceedings is primarily coercive or remedial. Accordingly I am satisfied that these are civil contempt proceedings.

[9] In considering whether the proceedings were for civil or criminal contempt the court in Harnden went on to look at the requirements of article 6 of the ECHR. In *Engel v Netherlands (No 1)* (1976) 1 EHRR 647 at para 82 the European Court of Human Rights set out three criteria to inform the decision as to whether the proceedings constituted the determination of a criminal charge. The first was the domestic classification, the second was the nature of the offence and the third was the severity of the potential penalty which the person concerned risked incurring. I have found, without reference to the Human Rights Act 1998, that the proceedings are civil contempt proceedings. The purpose of the proceedings is in my view primarily coercive but there is a substantial punitive element for the respondent if he is found to be in breach of the order. By virtue of section 14 of the Contempt of Court Act 1981 he faces a possible penalty of up to two years imprisonment. In *R (on the Application of McCann) v Crown Court at Manchester* [2002] UKHL 39 Lord Steyn noted that although these factors should be considered cumulatively the third factor was likely to be the most important. I am satisfied, therefore, that the criminal charge provisions of article 6 of the ECHR are engaged in this case.

[10] This finding does not affect the conclusion that the proceedings are civil proceedings for the purpose of Order 52 of the RSC (NI) 1980. There is nothing in Harnden to lead to the conclusion that because the criminal charge provisions of article 6 are engaged the proceedings thereby become criminal

contempt proceedings. There is strong persuasive authority to the contrary in *Daltel Europe Ltd v Makki* [2006] EWCA Civ 94. That was a case in which the contempt proceedings related to a failure to disclose or deliver records and the making of dishonest statements in verifying a defence. The court concluded that the proceedings were civil proceedings for the purpose of the Civil Evidence Act 1995 so that hearsay evidence could be admitted. The court had no difficulty, however, in concluding that the whole of article 6 applied to the proceedings. I am satisfied that the position is the same in this case. In these civil proceedings the respondent will be entitled to rely upon the entirety of the procedural protections available to him under article 6 of the ECHR.

### *The institution of proceedings*

[11] Each of the parties has expressed concern about the procedure for the institution of these proceedings. The Interim Receiver is not comfortable with the role of prosecuting a summons for contempt because she perceives her position to be independent of the parties. She suggests that the court of its own motion or the ARA as the enforcement authority should prosecute the proceedings. The ARA submits that there is a need to protect the independence of the receiver who is carrying out her investigations on behalf of the court. Accordingly it should be for the court to initiate the proceedings of its own motion. The respondent submits that there is a risk of the appearance of bias if the receiver acts of her own motion to prosecute an alleged contempt and submits that it should be for the ARA to institute proceedings as the enforcement authority after the receiver has reported to the court.

[12] In order to determine this question it is necessary to examine the statutory framework. An application for an Interim Receiving Order and the appointment of an Interim Receiver is made by the enforcement authority pursuant to section 246 of the Proceeds of Crime Act 2002. In its application the enforcement authority is required by section 246(7) to nominate a suitably qualified person for appointment as receiver but the nominee may not be a member of staff of the Agency. The functions of the Interim Receiver are set out in section 247.

#### *" 247 Functions of interim receiver*

*(1) An interim receiving order may authorise or require the interim receiver –*

*(a) to exercise any of the powers mentioned in Schedule 6,*

*(b) to take any other steps the court thinks appropriate,*

*for the purpose of securing the detention, custody or preservation of the property to which the order applies or of taking any steps under subsection (2).*

*(2) An interim receiving order must require the interim receiver to take any steps which the court thinks necessary to establish –*

*(a) whether or not the property to which the order applies is recoverable property or associated property,*

*(b) whether or not any other property is recoverable property (in relation to the same unlawful conduct) and, if it is, who holds it."*

Judicial scrutiny of the actions of the Interim Receiver is effected by section 251.

*"251 Supervision of interim receiver and variation of order*

*(1) The interim receiver, any party to the proceedings and any person affected by any action taken by the interim receiver, or who may be affected by any action proposed to be taken by him, may at any time apply to the court for directions as to the exercise of the interim receiver's functions.*

*(2) Before giving any directions under subsection (1), the court must (as well as giving the parties to the proceedings an opportunity to be heard) give such an opportunity to the interim receiver and to any person who may be interested in the application.*

*(3) The court may at any time vary or set aside an interim receiving order.*

*(4) Before exercising any power under this Chapter to vary or set aside an interim receiving order, the court must (as well as giving the parties to the proceedings an opportunity to be heard) give such an opportunity to the interim receiver and to any person who may be affected by the court's decision."*

The Interim Receiver is subject to reporting obligations throughout the period of the receivership are set out in section 255.

*"255 Reporting*

*(1) An interim receiving order must require the interim receiver to inform the enforcement authority and the court as soon as reasonably practicable if he thinks that –*

*(a) any property to which the order applies by virtue of a claim that it is recoverable property is not recoverable property,*

*(b) any property to which the order applies by virtue of a claim that it is associated property is not associated property,*

*(c) any property to which the order does not apply is recoverable property (in relation to the same unlawful conduct) or associated property, or*

*(d) any property to which the order applies is held by a person who is different from the person it is claimed holds it,*

*or if he thinks that there has been any other material change of circumstances.*

*(2) An interim receiving order must require the interim receiver –*

*(a) to report his findings to the court,*

*(b) to serve copies of his report on the enforcement authority and on any person who holds any property to which the order applies or who may otherwise be affected by the report."*

[13] It is clear that section 246(7) is designed to protect the independence of the receiver particularly from the ARA. Section 247 imposes an investigative function on the receiver which goes far beyond the powers and duties of a receiver in any other field. In this case the Interim Receiving Order specifically imposes the following duties on the receiver.

"6. The Receiver shall consider such information and documents as are obtained by her in pursuance of this Order to establish whether or not Schedule 2 property is recoverable property or associated property and if the latter, to what extent the property comprises associated property.

7. The Receiver shall take all reasonably necessary steps to establish whether or not any other property is recoverable property and, if it is, who holds it."

[14] The role of the receiver in this legislation has been likened to that of an investigating judge. Section 247(2) imposes the obligation on the court to determine the steps the court thinks necessary in order to pursue the investigation and this, together with the supervisory role of the court under section 251, has resulted in the contention that this is a judge led investigation. I consider that one should be cautious about the use of this



term since it is apt to mislead. When appointing a receiver the court is, of course, anxious to ensure that the person appointed is independent but is also concerned to ensure that the person has the skills and experience necessary to enable them to carry out the task of securing the property and investigating the extent of recoverable property in relation to the alleged unlawful conduct. The court itself has neither the resources nor the skills to carry out those matters independently. It will normally satisfy that obligation in the form set out above and give the receiver powers pursuant to section 247(1) to enable the investigation to be carried out. Section 251 is the mechanism by which the court can supervise the availability of powers or their exercise in a particular case. It can be initiated by the receiver, a party or a person affected but that mechanism can only be engaged when an opportunity for a hearing has been offered to the parties or any person interested.

[15] The scheme of the legislation, therefore, is that there should be a judicially supervised investigation but that the legal duty to pursue the investigation is placed by section 247(2) on the receiver and the powers necessary to carry out that investigation are provided by section 247(1). The conduct of the investigation by the receiver is not, therefore, on behalf of the ARA or indeed the court but is an obligation imposed on the receiver by the court which itself is required to do so by the terms of section 247 (2).

[16] In this case the receiver complains that a party has refused to provide information or give answers to questions. The information and answers are sought by her to enable her to complete her investigation. The receiver has made the independent decision to pursue a contempt application. The court has had no role in the institution of the proceedings. The application will be determined by the court after hearing evidence and adversarial argument. The court will give reasons for its decision. Although the receiver was appointed by the court she was nominated by the ARA as a suitably qualified person and there is no challenge to or criticism of her appointment. I do not consider that there is any appearance of bias in these circumstances.

[17] Where the alleged contempt consists of the refusal to provide information or answer questions in connection with an investigation the receiver will know to what extent the information may be available from other sources and the significance of the refusal in the context of the investigation as a whole. Most importantly the receiver will be in a position to make a judgement as to the extent to which the refusal may inhibit her from fulfilling her responsibility to establish the extent of the recoverable property connected to the unlawful conduct and whether contempt proceedings are reasonably necessary for the purpose of carrying out the legal duty imposed on her by the court under section 247(2). These factors would tend to point to the receiver being the appropriate person to pursue civil contempt proceedings designed, inter alia, to secure compliance.

[18] Once the receiver is appointed the investigation by the Agency into whether property is recoverable property is, by section 341(3) of the 2002 Act, no longer a civil recovery investigation. The Director thereby loses all of his statutory investigative powers. The Agency, like the court, will not have access to the day to day papers of the receiver but will depend upon reports under s.255 and any directions applications under s.251 for information on the investigation. Although the Agency and the court will have a clear understanding of the broad parameters of the investigation neither will have the perspective on the whole investigation available to the receiver. Neither the Agency nor the court has a specific legal duty in respect of the investigation where the alleged breach arises in the manner alleged here. All of these factors point away from either the Agency or the court being the appropriate person to commence contempt proceedings in the circumstances alleged here.

[19] Of course there may be circumstances arising in proceedings of this kind where the ARA quite properly may take an independent view in order to protect some interest which may not be apparent to the receiver or which may be relevant to some other stage of the proceedings. In relation to any such alleged breach the Agency could properly claim to be the person aggrieved.

[20] There is no doubt that the court has power to make order of committal of its own motion when the contempt is committed in the face of the court (see *Balough v St Albans Crown Court* [1975] 1 QB 73). I accept as persuasive the decision of the English Court Of Appeal in *Re M (Contact Order : Committal)* [1999] 1 FLR 810 in which Ward LJ reviewed the authorities and concluded that the court also had power of its own motion to institute civil contempt proceedings. That is a reflection of the fact that civil contempt proceedings have a dual character protecting on one hand a litigant from a party in default and on the other punishing those who would bring the system of the administration of justice into disrepute. Ward LJ suggested 4 important features for the court to bear in mind in the case of civil contempt and I am happy to adopt them.

“(1) The extent to which knowledge of the breach has become a matter of public concern amounting to scandal capable of diminishing the authority of the court such as might lead to an increased flouting of its orders.

(2) The extent to which some other interest than that of the litigant is in need of protection. ...

(3) The contempt must be clear as well as flagrant.

(4) Pursuing a committal ex mero motu is a highly exceptional course to follow...”

The receiver has indicated her intention to pursue these proceedings and in those circumstances I do not need to consider further whether the court should act of its own motion.

*Conclusion*

[21] For the reasons given I consider that the receiver is the appropriate person to institute these civil contempt proceedings. The Phillimore Committee recommended that the practical distinctions between civil and criminal contempt should be amended by legislation. A number of distinguished commentators have added their support to that call. The case for that approach may now be stronger in light of the implications of article 6 of the ECHR for civil contempt. The point that I wish to make is somewhat narrower. Order 52 Rule 1 of the RSC (NI) 1980 draws a distinction between the procedure applicable to civil contempt and that applicable to criminal contempt. That difference in procedure has not been part of the Rules of the Supreme Court in England and Wales for many years primarily because of legislative intervention which provides for appeals in both cases to proceed to the Court of Appeal rather than the House of Lords. I consider that this case and Harnden demonstrate that the procedural distinction has no sensible basis in principle and merely constitutes a trap for the unwary. It is in the public interest that procedure should be simplified and modernised and the procedure surrounding contempt of court applications may be worthy of review.