THE COURT OF APPEAL

[2018 NO. 197]

[2018] IECA 179

Peart J.
Irvine J.
Hogan J.

BETWEEN:

PAUL MCCANN

PLAINTIFF/RESPONDENT

AND

AB, XY AND THE ANTI-EVICTION TASKFORCE

DEFENDANTS/RESPONDENTS

REDACTED JUDGMENT of Mr. Justice Michael Peart delivered on the 21st day of June 2018

1. The appellant, XY (Ms Y) is currently detained in the Dóchas Women's Prison on foot of a committal order made by the High Court (Baker J.) in May 2018, until such time as she purges her contempt of court and is released pursuant to a further order of the High Court. She seeks to appeal that order.

2. In May 2018, Ms. Y was found to be in contempt of an order of the High Court (Donnelly J.) made on in May 2015. Her appeal against that order was dismissed on all grounds by order of this Court made on the 9th February 2017.

3. By its order dated 15th May 2015, Ms. Y was ordered to vacate and deliver up possession of, inter alia, a specified property in Dublin. Other injunctive orders were made which are not relevant to the present appeal. Other orders were made in respect of other properties, but the plaintiff receiver has obtained vacant possession of those properties.

4. The present appeal concerns Ms. Y's continued occupation of the specified property and her assertion, despite the dismissal of her appeal by this Court in February 2017 against the order of the High Court of May 2015, that she has a lawful entitlement to continue to reside in and occupy that property. She is not willing to purge her contempt by simply giving an undertaking to vacate that property and never return to same, and to acknowledge that she is bound by the order of the High Court (Donnelly J.) dated May 2015. It is the existence of this alleged entitlement to occupy the specified property

which she relies upon for her submission that Baker J. erred in making the order for her committal.

5. Ms. Y has two teenage children who continue to reside in the property specified. While Ms. Y is in prison for her contempt, they are being looked after at these premises by a friend of the first named defendant, who is the former partner of Ms. Y and the father of the children. It is because of the ages of these children that the plaintiff receiver has not sought to recover possession on foot of the order of May 2015 while Ms. Y is in prison and therefore no longer residing in the property.

6. The plaintiff's application to attach and commit Ms. Y for her contempt of the High Court's order was grounded on several affidavits which outlined certain facts which satisfied Ms. Justice Baker of May 2018 that Ms. Y was in breach of that order, and was in contempt of court, specifically in relation to her failure to obey the order requiring her to vacate the specified property in Dublin. Since the breach relied upon at this stage of the proceedings is Ms. Y's continued failure to vacate, and deliver possession of the specified property, I will simply refer to an averment in the affidavit of Peter McKenna, solicitor for the plaintiff which was sworn by him on the 26th January 2018 in which he avers at para. 36 thereof that Ms. Y "continues to occupy and control the property specified and has shown no willingness whatsoever to vacate that property". I should add, of course, that she does not dispute that she is in occupation of that property. Rather, her strong submission on appeal is that the committal order should not have been made because she has an entitlement to be in occupation of the property by virtue of a settlement of family law issues between herself and Mr. AB, the first named defendant, and for that reason she is not in breach of the order. However, that was one of the issues that was decided against her by Ms. Justice Donnelly and which gave rise to her order made in May 2015, which was duly upheld by this Court on appeal.

7. Ms. Y has raised a number of grounds of appeal in addition to her claim of entitlement on foot of the family law settlement just referred to. I will address them individually.

Legal Aid

8. Ms. Y submits that she ought to have been granted legal aid in the High Court when facing the plaintiff's application to have her attached and committed for contempt of court, and that the order for her committal made without her having the benefit of legal representation is unlawful. In fact, this is not a ground of appeal set forth in her notice of appeal. However, even on this appeal the appellant is representing herself, despite the fact that this Court made a recommendation under the Legal Aid - Custody Issues Scheme for her legal expenses to be defrayed under the scheme so that she could be legally represented by solicitor and counsel for the purposes of an appeal. She has, however, said that from prison she cannot access a solicitor for this purpose. I fail to understand why she is unable to access legal services from prison. Indeed, it is worth noting that she is still, or was, a student of Kings Inns, and has demonstrated considerable skill as an advocate before this Court, not just on this appeal, but recently on an application made by her for release from detention pursuant to Article 40.4.2 of the

Constitution. In my view, she has put her case as well as it could be put, and has not, in truth, been disadvantaged before this Court at all by not having legal representation.

9. The question of her having legal aid in the High Court before Ms. Justice Baker did not arise because Ms. Y did not make any application in that regard. She should not now be heard to complain that the order made was bad because she was not given the benefit of legal aid in the High Court. I have little doubt that in the High Court, too, Ms. Y conducted her own case with ample skill and competence given what I have just said. But it should also be borne in mind that in the lead up to the hearing of the plaintiff's application for her attachment and committal, there was ample time for her to engage the services of a solicitor should she had wished to do so. Indeed, it is worth mentioning that from the expiration of the stay on the order of the 4th May 2015 (Donnelly J.), on a date in April 2017, which had been granted by this Court, she was at risk of enforcement of the High Court's order. The plaintiff's notice of motion in that regard was issued and served in November 2017, and yet it was not heard until the 4th May 2018. She swore and filed two comprehensive and well-drafted affidavits between the issue of the motion and its hearing. It is also clear from the transcript of the hearing before Ms. Justice Baker that Ms. Y argued her case against the plaintiff's application with clarity and determination. She is no legal neophyte. There is no indication from that transcript that she was in any way unfairly disadvantaged by not having legal representation in the sense so elegantly articulated by Henchy J. in *The State (Healy) v. Donoghue* [1976] IR 325. She knew well that she had a right to apply for legal aid, and equally could well have arranged to have been legally represented should she have wished to do so, and had ample time to make such arrangements. In my view, there is no reason to interfere with the order of May 2018 by reason of the fact that in the High Court Ms. Y was not legally represented. In these particular circumstances, it is unnecessary to consider the extent to which (if at all) the principle in Healy applies to defendants facing charges of civil contempt of court.

No civil contempt committal jurisdiction

10. The appellant also submits that there is no jurisdiction vested in the High Court to commit a person for a civil contempt of court. That submission ignores the jurisdiction which the courts have traditionally and for a long time enjoyed under the common law to enable it, when necessary, to enforce its own orders. Thus far, that common law power has not been put on a statutory footing by the Oireachtas. But the common law jurisdiction in relation to civil contempt still endures in this State. As the Supreme Court pointed out in *The State (Director of Public Prosecutions) v. Walsh* [1981] I.R. 412, the existence of that jurisdiction was part of embedded fabric of the common law prior to the coming into force of the Constitution on 29th December 1937.

11. Many examples could be given of where this common law power was actually exercised by the courts of the Irish Free State in the period between 1922 and 1937. It is perhaps sufficient for this purpose to refer to the judgment of the Divisional High Court in *Attorney General of the Irish Free State v. O'Kelly* [1928] I.R. 308, a case where the existence of the contempt jurisdiction was expressly acknowledged. In his judgment, Hanna J.

rejected the argument ([1928] I.R. 308, 331) that the High Court no longer had power "derived from the well of the common law", noting that this argument was inconsistent with the full original jurisdiction which the Constitution of the Saorstát Éireann had vested in the High Court. Hanna J. continued:

> "It is necessary that every Court, no matter how established, should have the power to commit for contempt. The Courts of Dáil Éireann established under the decree of the first Dáil (June 29th, 1920) claimed this power. In my view, whether we are the grantees of the powers of the former Courts in this country through the operation of the statutory powers referred to or are the descendants of the Dáil courts, or were wholly created from the deliberations of our own Legislature, we are fully armed with this most essential power."

12. Quite independently of any argument to the effect that the existence of a contempt jurisdiction is an essential and inherent attribute of the judicial system if the constitutional guarantees relating to the administration of justice (Article 34.1) and judicial independence (Article 35.2) are to be meaningful and effective, it is enough to say that the contempt jurisdiction was part of the body of law that was in force here immediately prior to the coming into operation of the Constitution in 1937 . It was, accordingly, carried over into our law by virtue of Art. 50.1 of the Constitution which provides:

> "Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas."

13. I would therefore reject this ground of appeal.

Served with order after the time for compliance had expired

14. The appellant says that she was served with a copy of the order dated May 2015 containing a penal endorsement as required by O. 41, r. 8 of the Rules of the Superior Courts only on the 22nd April 2016 (almost 1 year after the order was made). She relies on the fact that the plaintiff has stated that this order required her to surrender possession immediately – although "immediately" must be read in the context of the stay granted by this Court until the determination of the appellant's appeal against the order for possession made in May 2015. The appellant submits that she cannot be held to have been in breach of the order requiring her to deliver possession of the premises immediately, where she was not served with the order for almost one year after it was made.

15. Even accepting that the appellant was served for the first time with a copy of the order in question on the 22nd April 2016 (and in that regard I note that in an affidavit of service sworn by the plaintiff's solicitor on the 15th June 2016, he deposes that he personally served a copy of the said order with penal endorsement on Ms. Y on the 24th June 2015 – this is denied by Ms. Y), she must accept that she was present in court when the said order was made, and when her appeal against it was dismissed. She knew that the order

was in force immediately (subject to the stay pending appeal), and that it was in force once that appeal was decided against her in February 2017 and the further two-month stay thereafter until 2017 expired.

16. The mere fact that the order of May 2015 contained no particular date by which possession had to be delivered to the plaintiff does not invalidate it, and does not preclude an application for attachment and committal for its breach. It would arguably be different if the order actually directed her to vacate the property by, say, not later than two months from the date of the order, and where the order was not served upon her until after that date had passed. Each such case would have to be examined on its own facts of course. But here the situation is very different. The order is silent as to the date on which possession is to be given up. In such circumstances, subject to any operable stay on execution, the appellant was obliged to give up possession immediately, and at any time thereafter the plaintiff could seek to enforce it by way of execution order of possession under O. 47 of the Rules of the Superior Courts or otherwise. I would reject this ground of appeal also.

No attested copy of the order was served

17. The appellant states that the copy of the order with which she was served was not an attested copy of the order, and was a plain copy. In my view, this ground is unstateable since there is no requirement under the rules of court or otherwise that the copy of the order served be an attested copy. No such rule or requirement has been identified by the appellant.

The alleged entitlement to possession under family law settlement with Mr AB

18. I have already stated above that the appellant's appeal against the conclusions and order of Ms. Justice Donnelly of May 2015 was dismissed by this Court in February 2017, and that the issue sought to be raised against the plaintiff again on this appeal was dealt with conclusively in that judgment. It may not be raised and relied upon again on this appeal as a reason for impugning the order of May 2018 on foot of which the appellant is currently in prison. At para. 84 of her judgment. Ms. Justice Donnelly stated:

> "I am quite satisfied that the settlement and court order can in no way be interpreted as meaning that any interest of the first defendant in the specified property was purported to be transferred to the second defendant".
>
> Ms. Justice Donnelly reiterated her conclusion in this respect at a number of other passages in her judgment. That conclusion was upheld on appeal by this Court. It has been conclusively determined at this stage against Ms. Y. While she continues to believe in its merit as an argument and does not accept the judgment of Ms. Justice Donnelly, she must as a matter of law do so. It cannot be further relied upon by Ms. Y. I reject this ground of appeal also.

The failure of the Court to consider alternatives to committal

19. The appellant seeks to rely upon the judgment of O'Hanlon J. in *Ross & Co Ltd (in receivership) and Shortall v. Swan* [1981] ILRM 416 in order to submit that the trial judge ought to have considered some alternative to committal for contempt before so ordering,

given that the purpose of the jurisdiction to commit a person for breach of an order is in the first instance coercive, and not punitive. In Ross & Co (in receivership) O'Hanlon J. was dealing with the occupation of a factory premises in New Ross, Co. Wexford in furtherance of a trade dispute, and which was in deliberate contempt of a court order restraining such occupation. In that case O'Hanlon J. was of the view that the plaintiff had an alternative remedy under s. 3 of the Prohibition of Forceable Entry and Occupation Act, 1971 which made it a criminal offence to remain in forceable occupation of land "unless he is the owner of the land or so remains thereon in pursuance of a bona fide claim of right". O'Hanlon J., approving of, and applying, what Lord Denning held in *Danchevsky v. Danchevsky* [1974] 3 All ER 934 stated:

> "It appears to me that the principle enunciated by the English Court of Appeal is a correct and prudent one. It is undesirable that the High Court should commit to prison for an indefinite period a person who has no intention of obeying the order of the court, and who may even welcome the publicity he gains by the making of such an order as a means of furthering his own cause. If no other reasonable course is open, then the order may have to be made to vindicate the authority of the court. If some other reasonable course is open, then it is preferable that it should be adopted."

20. In that case it appeared to O'Hanlon J. that there was a suitable alternative course, namely that the trade union officials would be prosecuted for an offence under s. 3 of that 1971 Act for which a potential penalty was a sentence of six months imprisonment in the case of a summary conviction.

21. One could argue that in the present case the plaintiff could seek to enforce the order for possession of the premises by executing same through the City Sheriff's powers to execute for possession as an alternative to committing Ms. Y to prison. One could even contemplate a prosecution against her under the same provision as was referred to in Ross & Co. But the presence of her two children in the property is a significant factor in the present case. A prosecution against Ms. Y would not achieve vacant possession given the presence of her children there. Equally, it is understandable that the plaintiff would hesitate, on compassionate grounds, before seeking to have children forcibly evicted. The appellant has not identified some alternative action that could be taken that would have the effect of coercing her compliance with the High Court's order. None comes to my mind, particularly given the stubborn and determined refusal by the appellant to comply with its terms, and her reasons for doing so.

22. I would entirely agree that the committal jurisdiction of the Court in relation to civil contempt should be coercive in the first instance. A person should be given a reasonable opportunity to comply with the order in question before being committed to prison for contempt. But such is Ms. Y's unshakeable determination not to comply, and her continued reliance on an issue that has been finally and conclusively determined against her, that in my view, the High Court was entitled to make an order for her committal. It, of course, remains the case that at any time she may apply to the High Court to purge

her contempt by undertaking to vacate the premises (with her children also) and undertaking never to return, and to acknowledge herself bound by the High Court's order. This Court has urged her to do just that, and to face up to the reality of her situation as the law has determined it to be. But she has shown no willingness to deviate from the course on which she seems willing and determined to follow, despite the necessary separation from her teenage children which her continued imprisonment entails. This Court is concerned only with the entitlement of the High Court to make the order for her committal. If there is to be any alteration in the status quo, that can be achieved by Ms. Y herself by purging her contempt at any time, or by some other order of the High Court should the plaintiff choose to make some application in that regard.

23. Some other grounds of appeal were raised such as the fact that there was some difference in relation to the identification of properties to be vacated in the committal order. The curial part of the order referred to "properties described in paragraphs (a) and (b) in the First Schedule hereto" whereas in that Schedule the relevant properties were identified by roman numerals (i) and (ii). But this Court has already disposed of those issues when hearing the appellant's application for release under Article 40.4.2 of the Constitution, as well as some issues raised again in relation to the appellant's temporary detention at the Bridewell Garda Station in the immediate aftermath of the making of the committal order and it is unnecessary to express those conclusions again.

24. For all these reasons I would dismiss the appeal.