



The Chambers of Paul Mendelle QC
and George Carter-Stephenson QC

R v O'Brien – a civil contempt

6th October 2014

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R v O'Brien [2014] UKSC 23

Introduction

The UKSC ruled on 2nd April 2014 on the legality of the extradition and punishment for contempt in the case of Brian O'Brien.

In short, the UKSC decided that a person extradited (from the USA) for a trial on a criminal charge ("boiler room" fraud), and who prior to his extradition was guilty of contempt of court by disobeying a court order (a Restraint Order imposed under POCA 2002), is liable to punishment for his contempt, even though it was not the basis of his extradition.

Background

Boiler room fraud

Monday 23rd April 2012 Brian O'Brien received a term of 8 years imprisonment, at Southwark Crown Court for the substantive boiler room fraud trial conviction.¹

¹ Count 1 Conspiracy to Defraud (share sales). Count 2 Fraudulent trading (of the shares). Counts 3-6 section FSMA unregulated trading through various unlicensed companies. Count 7 Attempted Obtaining Money transfer by Deception. Count 8 Hampering an Investigation s.2 (16) CJA 1987 (destruction of documents).

Contempt timeline

24.9.09 CCC - HHJ Barker QC granted, on a private ex-parte application by the SFO, a Restraint Order (RST 17/2009), under section 41 Proceeds of Crime Act 2002, against Brian O'Brien and West Addison Property Management Limited, prohibiting disposal of assets and for the provision of financial information. The restraint order, *inter alia*, required (para.8) Brian O'Brien within 21 days both (a) to make disclosure of all his financial assets by serving a witness statement of all his assets (para. 8) and (b) to repatriate all his moveable assets held outside England and Wales, in particular, the sum of £457,312.40 held in a bank account in Cyprus (para.16).

The background was a SFO investigation into a boiler room fraud. £4.1 million, being the sum of money that was taken from investors from two companies Golden Dynasty (£1.6 million) and Claimtracker (£2.5 million), as indicted, with £450,000 of investors' money going to GD and £600,000 to CT.

15.11.09 in breach of the Restraint Order, Brian O'Brien transferred £475,311.40 from Armada Land Trading Limited Cyprus account to his personal Bank of America account. Further there was a 15,000 Euro transfer ALTL to Brian O'Brien's personal account in Ireland.

18.12.09 CCC - HHJ Barker QC found the matter of Contempt against Brian O'Brien proved in his absence, he having left the jurisdiction. No financial witness statement was ever served, nor money ever repatriated.

HHJ Barker QC issued a bench warrant for Brian O'Brien's arrest for Contempt.

6.10.10 A federal arrest warrant was issued for Brian O'Brien in the US District Court in respect of the (underlying) fraud matters.

8.10.10 Brian O'Brien arrest and detention in USA.

14.10.10 United States District Court, Illinois order of commitment re. extradition of Brian O'Brien.

30.10.10 CCC - the SFO referred the Contempt back to the Central Criminal Court for the bench warrant to be withdrawn, to allow Brian O'Brien to be extradited back to the United Kingdom.

2.12.10 Brian O'Brien extradited back to UK, in custody, and taken to City of Westminster Magistrates' Court - fraud allegation was sent to Southwark Crown Court (2.12.10 PCMH).

20.5.11 CCC – Contempt Sentence by HHJ Barker: 15 months imprisonment imposed under the Contempt of Court Act 1981 (as set out below).

Section 14(1) of the Contempt of Court Act 1981 (“the 1981 Act”) provides:

“In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court...”

The appeal proceeded to the Supreme Court as to whether the contempt was a civil or a criminal matter, or an extradition offence to which the Rule of Specialty applied. The court ruled that in sentencing O’Brien for contempt this was not dealing with him for an extradition offence.

Appeal jurisdiction

A person committed for contempt, such as the Appellant, may appeal to the Court of Appeal (Criminal Division) by virtue of section 13(2)(bb) of the Administration of Justice Act 1960 (“the 1960 Act”).

An appeal from a decision of the Court of Appeal under section 13 lies to the Supreme Court by virtue of section 13(2)(c) of the 1960 Act, as amended (secondary judgment 2, Appendix, tab 2, paragraph 13). It is understood that there is no challenge to the correctness of the secondary judgment.

Brian O’Brien appealed to the Supreme Court, against a decision of the Court of Appeal Criminal Division [2012] 1 WLR 3170, upholding an order of the Common Serjeant (HHJ Barker QC) committing him to prison for 15 months for contempt of court in disobeying a Restraint Order made against him, under section 41 of the Proceeds of Crime Act 2002.

Mr. O’Brien had failed to make disclosure of his assets, had removed assets from the jurisdiction and had failed to repatriate assets from abroad.

The appellant argued that his committal was unlawful by reason of the specialty provisions of Part 3 of the Extradition Act 2003. After committing

the contempt the appellant fled to the USA, from where he was extradited on substantive allegations of boiler room fraud. The appellant argued that it was not thereafter open to the Crown Court to punish him for his earlier contempt, for which he had not been extradited.

The Court of Appeal Criminal Division decided that the contempt was civil in nature – as summarised in paragraphs 43-48 of the judgment:

43. (7) *Pulling the threads together:* We are persuaded that the contempt constituted by breach of a restraint order made under POCA is a civil not a criminal contempt. While no single factor is decisive, we are satisfied that this is the better view in the light of all the various matters to which we have had regard. In the paragraphs which follow, we pull the threads together.

44. First, this conclusion is supported by and consistent with the general discussion on the classification of contempt in English law. To reiterate, the fact of a custodial punishment is neutral; what matters is the nature of the contempt (breach of an existing order of the Court) and the purpose of the punishment (coercive as well as punitive).

45. Secondly, the restraint order in the context of confiscation proceedings is closely analogous to the freezing injunction in civil proceedings. We can see no proper justification for concluding that a contempt constituted by breach of such orders is a criminal contempt in the case of restraint orders but a civil contempt in the case of freezing injunctions (and search orders).

46. Thirdly, nothing in the predecessor regimes to POCA supports the contention that contempt constituted by a breach of a restraint order is a criminal rather than a civil contempt. To the contrary, authorities decided under those regimes speak with one voice, namely, that such contempt is to be characterised as civil contempt.

47. Fourthly, as to the POCA regime itself:

a. The conclusion that restraint proceedings are to be treated as civil proceedings and that the contempt constituted by breach of a restraint order is a civil contempt flows from a consideration of the predecessor regimes - unless POCA produced a radical departure from the position prevailing under those regimes. While it is true that under POCA, jurisdiction to make restraint orders has been transferred from the High Court to the Crown Court, we view the basis of this change as administrative – rather than in any way reflecting a radical change in the classification of restraint proceedings from civil to criminal. Overall, we see POCA as reflecting if not precisely replicating the predecessor regimes: *Jennings v CPS (supra)*, at [16]. We are unable to accept the test proposed by Mr. Jones; despite its taut formulation, we cannot agree that the Courts in which the proceedings have taken place determine whether the contempt was civil or criminal. That would be to place an undue premium on the listing and administrative arrangements current at any particular time; such arrangements do not outweigh the other considerations to which we have had regard.

b. The conclusion to which we are attracted is fortified by the terms of POCA, s.46; for our part, its real significance lies in the specific provision for the application of sections 2 - 4 of the Civil Evidence Act to restraint proceedings. It is noteworthy that those sections of the 1995 Act are made

applicable to restraint proceedings under POCA, whereas they do not apply to confiscation proceedings which are to be regarded as criminal in nature: see *R v Vincent Clipston* [2011] EWCA Crim 446; [2011] 2 Cr App R(S) 101, esp. at [50]. While we acknowledge the somewhat ambiguous nature of the wording in s.46(2) (“as those sections apply in relation to civil proceedings”), we do not think that this wording suggests that restraint proceedings are not civil proceedings; instead, we view this wording as confirmatory of the characterisation of restraint proceedings as civil proceedings. Had the legislature’s intention been to produce a radical change in the nature and characterisation of restraint proceedings from that which had hitherto prevailed, we are confident that very different wording would have been used.

- c. Furthermore, this conclusion is consistent with and supported by *R v M (supra)*, where this Court plainly proceeded on the basis that a contempt constituted by breach of a restraint order made under POCA, s.41, was a civil not criminal contempt.

48. It follows that we answer Issue (I) by holding that the contempt here in question was a civil not criminal contempt.”

The Court of Appeal certified the following points of law of general public importance:

- (1) Whether a contempt of Court constituted by breach of a restraint order made under section 41 of the Proceeds of Crime Act 2002 constitutes a civil or criminal contempt.
- (2) If the answer to (1) is a civil contempt, whether Section 151A of the Extradition Act 2003 and/or article 18 of the United Kingdom - United States Extradition Treaty 2003 precludes a court from dealing with a person for such a contempt, when that person has been extradited to the United Kingdom in respect of criminal offences but not the contempt in question.

The Supreme Court dismissed the appeal. Lord Toulson gave the lead judgment.

Reasons for judgment

Ground 1:

On the first issue the Supreme Court held that section 151A of the Extradition Act 2003 does not apply directly to this case. In any event, the sections relied upon by the Appellant cannot be read in isolation, and reading the Act as a whole it is clear that conduct constituting an extradition

offence must be a criminal offence under the law of the requesting state (here the UK) see paragraph 36 of the judgment.

Each of Parts 1-3 of the EA 2003 contain a similar definition of extradition offence, in each case referring to “*conduct punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment*”, with a common structure across the definitions.

Part 1 of the EA 2003, an EU framework decision, makes it a prerequisite of a valid arrest warrant that the conduct of the person is accused or has been convicted constitutes a criminal offence under the law of the requesting state. In relation to Part 1 (dealing with extradition from the UK to other Member States), the definition of “extradition offence” accordingly requires that an offence either be listed extraditable offence or an offence under UK law.

Part 2 of the EA 2003 provides a similar scheme in relation to extradition from the UK to those non-EU countries with which the UK has extradition arrangements (see sections 137-138 EA).

Part 3 of the EA 2003 deals with extradition to the UK. Section 148 (within Part 3) has no direct application to this case, since the UK judiciary is not involved in the process of obtaining Mr. O’Brien’s extradition. Nonetheless s.151A should be understood in the light of the wider scheme of the 2003 Act. Nothing can constitute an extradition offence unless it is a criminal

offence under the relevant state, here the UK (see paragraph 36 of the judgment).

Ground 2:

A Restraint Order under POCA 2002 is an interim remedy, aiming to prevent the disposal of realisable assets during a criminal investigation. The Crown Court has an inherent jurisdiction to treat breach of such orders as contempt of court. There is a well-recognised distinction between “criminal contempt”, covering conduct itself a crime, and “civil contempt”, covering conduct which is not itself a crime but it is punishable by the court in order that the court’s orders be observed. A civil contemnor does not receive a criminal record.

If a victim of Mr. O’Brien’s fraud had obtained a freezing order against him similar to the POCA Restraint Order and he has disobeyed the order, the victim would have been able to bring contempt proceedings following his extradition. There is no relevant difference with a POCA order. The key is the nature and purpose of the order, not the court in which the order was made.

Mr. O’Brien’s contempt was civil, and his committal is not barred by the specialty principle.

One of the appeal arguments advanced on behalf of Brian O'Brien

There were potentially other criminal offences which might have been laid against the Appellant instead of the charge of contempt, alleging conduct for which he would clearly have been extraditable, and upon which, unlike contempt, he would have had the right to trial by jury on return. One is perverting the course of justice, as discussed in *R v Kenny (Mark)* [2013] 3 W.L.R. 59, considered below; the second is an offence of money-laundering committed by, for example, concealing or transferring the proceeds of criminal conduct, contrary to section 327 of the 2002 Act. But the Respondent has not alleged such crimes or conduct, each of which has its own *mens rea* requirements, and is much more severely punishable than contempt.

Contempt of court for breach of a POCA Restraint Order can amount to the criminal offence of perverting the course of justice.

An example of where a contempt of court for breach of a POCA Restraint Order was dealt with as a criminal offence – of perverting the course of justice – can be found in *R. v Kenny (Mark)* Court of Appeal (Criminal Division) 30 January 2013 [2013] EWCA Crim 1; [2013] 3 W.L.R. 59; [2013] 3 All E.R. 85; [2013] 1 Cr. App. R. 23.

Summary: A breach of a restraint order made under the Proceeds of Crime Act 2002 was capable, without any more illegality beyond the breach

of the order itself, of constituting the offence of perverting the course of justice, rather than merely contempt of court.

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