

THE HIGH COURT

[2019 No. 5104 P.]

BETWEEN

TIPPERARY COUNTY COUNCIL

PLAINTIFF

AND

WILLIAM MCCARTHY, ELIZABETH MCCARTHY, MARY ELLEN MCCARTHY, JIMMY MCCARTHY, JOHN MCCARTHY, WINNIE MCCARTHY, BELINDA O'REILLY AND NED O'REILLY

DEFENDANTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 3rd day of October, 2019

1. An unofficial halting site has existed at Cabragh Bridge, Cabragh, Thurles, County Tipperary for around 40 years. In 2002, North Tipperary County Council, the predecessor of the plaintiff, acquired land opposite the bridge to build six houses with a view to removing the unofficial site. An Bord Pleanála granted permission in March, 2013, the land having been acquired from a local land owner, Mr. George Clarke. Houses were constructed at a cost of €2 million. They are currently unoccupied and fenced off. The first and second-named defendants have been in residence at the unofficial halting site since May, 2015 and were joined by the fifth and sixth-named defendants in 2016. According to the Council's deponent, the defendants have not been assigned houses in the new development and all arrived late to the site. *"In each case this was an opportunistic move given that they were aware of the housing or the proposed housing at the time they moved into the site"*.
2. The Council wrote to the defendants on 30th May, 2019 requiring them to move. Matters then came to a head when the Council reached agreement with the other residents of the unofficial halting site at Cabragh Bridge on 5th June, 2019 as to how the housing development would proceed. That then gave rise to a necessity to address the issue of residents in the unofficial site that were not being alternatively accommodated at that location, and on 27th June, 2019 the present proceedings were instituted, seeking injunctive and declaratory relief.
3. On 5th July, 2019, when the proceedings were being served on the defendants, a senior social worker for the council was pushed in the back by the first-named defendant who then started shouting abuse. The latter then threw a plastic bat at the council's senior social worker and tried to shove the proceedings under his arm. The fifth-named defendant also tried to shove the proceedings down the back of the summons server and both of them continued to shout abuse.
4. Reynolds J. made an order requiring the defendants to move their caravans from Cabragh Bridge or its vicinity on 11th and again on 18th July, 2019. The latter order was to be effective from 5 pm on 22nd July, 2019. The council now applies for a notice of motion dated 25th July, 2019 for orders of attachment and committal as well as for further or other orders and costs. Reynolds J. made a further order on 31st July, 2019 providing for

service of the previous orders with a penal endorsement and allowing until 8th August, 2019 for compliance. On 21st August, 2019, Reynolds J. was dissatisfied with compliance with her directions on the plaintiff's side and decided not to retain seisin of the proceedings but gave the plaintiff liberty to re-enter the proceedings during the vacation. The orders have now been served with a penal endorsement, but even if they hadn't been, the defendants are clearly aware of them.

5. On 17th September, 2019 the council applied *ex parte* to re-enter the proceedings with a new return date, and Twomey J. made an order that the matter be re-entered on 25th September, 2019. On the latter date when the matter first came before me I warned those defendants who appeared at that stage that their liberty was in issue and that they should get legal advice, and I adjourned the matter to 3rd October, 2019 to enable them to do so if they wished.
6. I have now received helpful submissions from Mr. David Humphries B.L. for the council and from the second and sixth-named defendants in person. The first and fifth-named defendants are the spouses of the second and sixth-named defendants and while they did not appear when called they were in effect "represented" by their spouses. That is of course not strictly permitted although I propose to overlook that particular problem in the circumstances. Mr. Clarke, the landowner who sold the land to the council, also sought to intervene in person at the hearing but I explained to him that court procedures did not allow for such interventions. The council is not proceeding in the present motion against the third, fourth, seventh and eighth-named defendants. The gist of the submissions made by the (relevant) defendants was that they should be provided with appropriate houses and that the offers made by the council were not suitable. The defendants were offered alternative accommodation at Ballybeg, Thurles but do not wish to take that up. Insofar as the defendants' submission to me was concerned, unfortunately that was a matter to be considered at the time of making of the original injunctions and does not arise at the enforcement stage.
7. When it comes to enforcement, the court clearly has a range of options available. It may seem strange to return in this context to the theme of proportionality, which was the fulcrum of my somewhat unloved judgment in *Walsh v. Minister for Justice and Equality* [2016] IEHC 323 [2016] 6 JIC 1303 (Unreported, High Court, 13th June, 2016). But O'Donnell J. pointed out for the Supreme Court in *Walsh v. Minister for Justice and Equality* [2019] IESC 15 (Unreported, Supreme Court, 25th February, 2019) at para. 36 that the ultimate outcome in that case was influenced by the nature of the proceedings as an Article 40 application. There is of course no question of reopening any issue decided by the Supreme Court (albeit with the minor caveat that the Strasbourg jury has yet to phone in its vote). But I don't read the judgments either in the Court of Appeal or the Supreme Court as precluding a court before which a question of contempt presents itself from adopting what it sees as the most proportionate solution to any such question. The history of the law of contempt of court is illuminated by a number of examples where the court has overlooked behaviour that might otherwise warrant punishment as contempt of

court. There is certainly no element of the punitive in any order I propose to make today. The focus must simply be on enforcement of the existing High Court orders.

8. The legal system, and indeed more broadly the rule of law, depends on the conception that court orders should be complied with. All the same, giving all due weight to the principle of proportionality, it is not necessary to order the immediate attachment and committal of the relevant defendants notwithstanding that I am satisfied to the criminal standard that they are in contempt of court. The legitimate needs of the council and the public safety problem averred to on its behalf can be met by a more calibrated order. It does not particularly matter except maybe to theoreticians whether one sees the entitlement to make such an order as arising as part of the contempt jurisdiction or as part of the general equitable jurisdiction under s. 28(8) of the Supreme Court of Judicature Act (Ireland) 1877, as part of the claim for further or other order in para. 3 of the plaintiff's notice of motion. Either way, if I can send the relevant defendants to prison with immediate effect, I can certainly make an order that has a less dramatic effect on their liberty.

Order

9. Thus in the circumstances the appropriate order is as follows:
 - (i) that the court authorises and directs the Commissioner and members of An Garda Síochána to enter the caravans of the first, second, fifth and sixth named-defendants using reasonable force if necessary, to escort any occupants out of the caravans of the first, second, fifth and sixth-named defendants using reasonable force if necessary and to prevent such defendants or any other such occupants from either re-entering the said caravans or interfering with the plaintiff's removal of the said caravans under s. 69(2) of the Roads Act 1993 using reasonable force if necessary;
 - (ii) that if the first, second, fifth and/or sixth named defendants resist such entry, escorting and/or prevention or interfering with the Council's removal of the said caravans under s. 69(2) of the Roads Act 1993 the court authorises and directs the Commissioner and members of An Garda Síochána to arrest any one or more of the first, second, fifth and/or sixth-named defendants as so resists and bring them before the next convenient sitting of the High Court to answer for their contempt of court;
 - (iii) that there be a stay of this order until 14.00 on the 4th October, 2019;
 - (iv) that in the event that the first, second, fifth and/or sixth-named defendants prior to 14.00 on the 4th October, 2019 remove such caravans to a distance of more than a radius of 2 kilometres from Cabragh Bridge, Cabragh, Thurles, Co. Tipperary, the stay to continue for as long as such caravans are kept outside that radius; and

- (v) that the balance of the motion of the plaintiff be adjourned to such date if any as any such first, second, fifth and/or sixth-named defendants may be brought before the court under this order.