

THE HIGH COURT

[2022] IEHC 595

Record Number: 2018/484 CA

BETWEEN

ROSARIE O'MAHONY

PLAINTIFF

AND

START MORTGAGES DESIGNATED ACTIVITY COMPANY

DEFENDANT

Record Number: 2018 510 CA

BETWEEN

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

ROSARIE O'MAHONY

DEFENDANT

Record Number: 2020/10 CA

BETWEEN

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

ROSARIE O'MAHONY

DEFENDANT

EX TEMPORE RULING of Mr. Justice Mark Heslin delivered on the day of 18th October, 2022

1. An email was sent by the defendant Ms O'Mahony to a member of staff of the courts service, a Mr Eoin Manning, yesterday. That email was sent at 19 minutes to 3pm and it stated the following:

"Hi Eoin

Hope you are well. I have a bit of an urgent situation in that these cases are being heard tomorrow with out proper notice to me. I was only notified by email on the evening of 12th Oct of the call over on 13th Oct last, Apparently they were take out of Adjourned Generally last December even though the Circuit Court case still has not been heard.

I have a letter for the Judge for tomorrow, which I will send by email and registered post but I don't know who the judge will be. I'm also sending to the Chief Justice as Eversheds are trying to ambush me again in court.

Maybe you can direct me please and give me name of the Judge for tomorrow.

--

Kind regards

Rosarie O'Mahony"

2. At 3.34pm yesterday, Ms Lisa Scott, a non-jury Registrar, sent a response to the defendant in the following terms:

"Dear Rosarie,

You should attend Court tomorrow morning to explain your position to Judge Heslin, who will be taking this hearing in Court 5.

You must also contact the other party to advise them of your position.

Kind regards,

Lisa Scott,

Non Jury/Judicial Review Registrar

High Court"

3. At about one minute to 11, just before I sat, I was handed a copy of a 3-page document which also has, by way of an appendix, a copy of a 28th of February 2022 letter sent by Eversheds to the defendant Ms O'Mahony. That 3-page document is headed "*Notice to Seek Adjournment Until Circuit Court Case is Complete*" and it is addressed to me. The defendant identifies herself as a litigant in person. She goes on to say that she has been the only woman in court every day, who has, as she puts it, gone through the facts of the case. She suggests that counsel has changed a number of times and the suggestion is made that certain legal representatives have gotten their facts wrong. She refers to the 2nd of October 2018 order and asserts that no order for possession was granted on that day.
4. Now I pause at this juncture, to say that, although I only had a brief period of time with the papers, last evening, they do contain a Circuit Court order, dated the 2nd October 2018, which was made by His Honour Judge O'Donohoe, issued by the Circuit Court, signed on behalf of the County Registrar, and the operative part of the order states:
"THE COURT DOTH ORDER:-
 1. *Grant Order for Possession of ALL THAT AND THOSE the hereditaments premises and appurtenances comprised in Folio 101214F of the Register of Freeholders County of Cork*
 2. *Grant stay of 9 months on execution of possession"*
5. On the face of it that is a Circuit Court Order for possession and it also recites, *inter alia*, that: "*Whereupon and reading the pleadings and documents filed herein and on hearing what was offered by solicitor for the plaintiff and the defendant appearing in person, and it appearing to the Court that the plaintiff is entitled to possession of the premises as claimed in the Civil bill*" and then the operative part proceeds.
6. So, on the face of it, there is an order from the Circuit Court which undermines entirely the suggestion made in this letter that there was no order for possession granted.
7. The letter goes on to say that matters have gone on to become very confusing through no fault of Ms O'Mahony's and it is appropriate, given that Ms O' Mahony has not shown up today, to quote the following *verbatim*:

"To be perfectly honest Judge, wild horses wouldn't drag me to Dublin tomorrow. I cannot and will not be a willing participant in another trial by ambush. When you read the below I think you will agree with me.

I only received notification of this case last Wednesday 12th October 2022 by email letter from Eversheds informing me of call over list the 13th October in morning, I had absolutely no way of being in front of a computer that morning and informed them so by letter email late on Wednesday 12th October. I'm supposed to have got a letter from them 9th December 2021 informing me of these dates which I have not received."

- 8.** The letter proceeds to set out a narrative which includes accusations that the defendant has been "ambushed" on prior occasions and, as she puts it, has been "tricked" into attending court. She sets out what she describes as a brief summary of the facts. It begins by stating "Back in 2012 PTSB brought a case against me in the Cork Circuit Court for possession". She goes on to say that the case was discontinued in 2015. She then says "PTSB brought a new case in 2017 which leads us to present day proceedings. Which has now split into 2 legs, one for costs of the original discontinuance and the other for possession, 6 motions in all."
- 9.** The end of the document, is in the following terms:

"Q1. Why would I file an appeal against the costs amount in discontinued matter 2012/03669, for an application that was never heard?

Q2. Pursuant to rules, matter 2017/00847 cannot commence until cost have been settled and PAID in matter 2012/03669;

Q3. Whether this cost application was heard or not – was the circuit court in breach of its own rules in hearing the new matter 2017/00847, prior to the costs outcome in the old matter 2012/03669?

In any event justice has not been done, nor has been seen to be done; I could write you 20 pages of all the shenanigans of the past 10 years but I think I've said enough for now.

I am absolutely sure none of what I have detailed herein was mentioned by counsel for Start in the call over of 13th October 2022 – as yet again they attempt to coerce trial by ambush No. 4

I ask that you adjourn this matter until further notice"

- 10.** It is fair to say that the basic proposition advanced by the defendant as a basis for seeking an adjournment, is that in the past she has been "tricked" into attending court and in the past she has been "ambushed" and she regards today as a further attempt at same and she complains of lack of notice. But it is entirely appropriate to say that the defendant, even on her own case, has known that these cases were in callover for the 13th. She has known that since last Wednesday the 12th.
- 11.** I simply lack any evidence from which I could hold what the defendant advances, namely, that she has ever been "tricked" into attending court or ever "ambushed" and it is also appropriate to say that there is no suggestion in this letter that the defendant is ill or that anything has prevented her from attending court today. Rather, she has made a conscious and very deliberate choice, saying that "wild horses wouldn't drag" her to Dublin and she is unwilling to come.
- 12.** With regard to the question of service - and this will of course help the Court which is coming to the matter 'cold' to better understand why we are here - Ms Alanna O'Byrne of Eversheds Sutherland LLP, solicitors for the plaintiff, swore affidavits on the 17th of October and on the 18th of October. For the record, it seems to me important that the contents of Ms O'Byrne's 18th of October affidavit are referred to.

13. At paragraph 1 she avers that she is an employee of Eversheds and makes the affidavit from facts within her knowledge. I propose to read the affidavit now, for the purposes of the DAR, given that the defendant has chosen not to attend. From paragraph 2 the following is averred:

"2. I say that by letter dated the 25 May 2020, addressed to the Defendant at [address given] and sent by ordinary post, Eversheds Sutherland LLP as solicitors for the Plaintiff (hereinafter "Eversheds") did inform the Defendant that the motions in respect of High Court Record Numbers 2018/484 CA and 2018/510 CA which had been listed for mention in the High Court Non-Jury list on the 26 May 202 now stood adjourned generally.

3. I say that by letter dated the 31 August 2021, addressed to the Defendant at [address given] and sent by ordinary post, Eversheds did inform the Defendant that the matter bearing High Court Record Number 2020/10 CA had also been adjourned generally with liberty to re-enter. Eversheds further advised the Defendant that a request had been made to the Registrar to have all the aforesaid matters that stood adjourned generally, re-entered and re-listed for hearing and that the Registrar had indicated that they could be listed for mention on 21 October 2021. I say that the letter sought confirmation from the Defendant that the suggested date was suitable to her.

4. I say that by letter dated the 29 September 2021, addressed to the Defendant at [address given] and sent by certified post, Eversheds did inform the Defendant there were no matters outstanding in the Circuit Court that prevented the High Court applications from proceeding. I say Eversheds further advised the Defendant that it intended notifying the Court of same at the for mention date of the 21 October 2021

5. I say that Eversheds further wrote to the Defendant by letter dated 18 October 2021 informing the Defendant that the motions had been listed for mention on the 20 October before Judge MacGrath, that the hearing would be held remotely and set out in the letter the relevant High Court email address to contact to obtain log in details. I say that the said letter dated 18 October 2021 was sent by certified post, to the Defendant at her address [address given].

6. I say that by letter dated the 26 November 2021 addressed to the Defendant at [address given] and sent by ordinary post, Eversheds did inform the Defendant of their intention to apply to the Court on the 9 December 2021 to reinstate the motions and seek a hearing date. I further say that the letter dated 26 November 2021 again provided the Defendant with the appropriate contact in the High Court office to obtain the necessary link and log in details for the hearing on 9 December 2021.

7. I say that by letter dated the 9 December 2021 addressed to the Defendant at [address given] and sent by ordinary post, Eversheds did inform the Defendant that on the 9 December 2021 the outstanding matters were re-entered and listed for hearing collectively for two days on the 18 October 2022. I say the letter further advised the Defendant that she should attend Court on that date if she had any representations to make.

8. I say that by letter dated 11 October 2022 sent by certified post to the Defendant at her address [address given] Eversheds did inform the Defendant that matters which were listed for hearing on the 18 October 2022 were listed in a remote callover on the 13 October and that the Plaintiffs instructions were to apply to call the matter on for physical hearing. I further say that Eversheds provided the Defendant with the necessary High Court email address to obtain log in details for the callover. I say that a copy of the letter dated the 11 October 2022 was also sent to the Defendant under cover email dated 12 October 2022

9. I say that by letter dated 14 October 2022 sent by certified addressed to the Defendant at [address given] Eversheds and by email dated 14 October 2022 to [defendant's email address given], Eversheds did inform the Defendant that at the callover on the 13 October 2022 the matters were called on for a physical hearing in the High Court Non-Jury list Four Courts Dublin for 2 days commencing 18 October 2022. I further say that a copy of the Booklets of Pleadings which had been filed with the courts office in advance of the 18 October 2022 hearing date was also sent to the Defendant under cover of the email of 14 October 2022."

14. And she refers to the relevant correspondence.

15. It is appropriate to quote *verbatim* from both the 11th October 2022 and then the 14th October 2022 letters.

16. On the 11th October - and I am quoting directly from the letter which was on its face sent by certified post in the manner averred to the defendant - it says:

"Dear Madam

We refer to our letter to you of the 9 December 2021.

As confirmed to you in that letter, the 7 outstanding applications/matters were re-entered and listed for hearing (collectively for 2 days) on 18 October 2022. The applications/matters in question are:

- *High Court Record No. 2018/484CA*
- *High Court Record No. 2018/510CA*
- *High Court Record No. 2020/10CA*

The above matters will appear in callover in the High Court Non-Jury list this Thursday the 13th October 2022 at 10am

The callover list on Thursday 13 October 2022 will be heard remotely. You should arrange to log in to the callover. You will need to contact the High Court at [email address given] to obtain a link to access the remote callover."

17. The letter concludes *"Please note that we are instructed to advise the court at the callover that the hearing of the above matters should be heard by way of physical court hearing"*. The certificate of postage, dated the 12th of October, is also attached, as issued by An Post. There follows, by way of exhibits, the email to the defendant's email address, which is dated the 10th of October, sent at 10.08am, and it says:

"Dear Ms O'Mahony,

Please find attached letter for your attention.

A hardcopy was also sent to you by post yesterday."

18. As to the letter also exhibited, also sent by certified post, and dated the 14th October, it reads as follows:

"HIGH COURT RECORD NUMBER:2018/484CA & 2018/510CA & 2020/10 CA

Dear Madam,

We refer to the above matters and previous correspondence.

In our letter to you of the 9 December 2021 we confirmed that the above matters were listed for hearing (collectively for 2 days) on 18 October 2022.

By letter dated 11 October 2022 and email of the 12 October 2022 we advised you that the matters were listed in a callover in the High Court Non-Jury list on 13 October 2022 at 10 a.m. and that we intended calling them on for a physical hearing.

We further advised that the callover was to be heard remotely and provided you with the email address of the relevant High Court contact to obtain log in details to gain access to the callover.

Take notice that at the callover the applications/matters in question were called on for a physical hearing in the High Court Non-Jury List, Four Courts Dublin for 2 days commencing the 18 October 2022.

For your ease and we are sending you in advance by email a soft copy of the 4 Booklets of documents that we will be providing to the Court at the hearing on the 18 October 2022.

These booklets contain the pleadings for the following matters:

1. Circuit Court Record No 2017/00847
2. High Court Record No 2018/484 CA
3. High Court Record No 2018/510 CA
4. High Court Record No 2020/10 CA

You will note that you are already in possession of all of the documents contained within the Booklets, we have merely collated them into booklets to assist the Court at the hearing.

We will provide you with a hard copy of each booklet at the hearing of the action"

19. Behind that exhibited letter is the certificate of postage with respect to same. It is dated the 14th October.
20. That is followed, in terms of the exhibits, by an email sent to the defendant's email address on the 14th of October at 14.52, which reads:

"Dear Madam,

Please see booklets 1-4 attached.

Kind regards"

21. I am entirely satisfied that the defendant has been properly served and is, and at all material times has been, fully aware of these matters and their status. But it also seems to me that, taken at its height, this adjournment is based on a premise, which is unsupported by evidence, to the effect that this is an attempt to "ambush" the defendant.
22. The evidence by way of sworn affidavit and the exhibits demonstrate the contrary. They demonstrate that the plaintiff has gone to very significant lengths, which in my view are entirely satisfactory and reasonable, to notify Ms O'Mahony of precisely the status of the proceedings, what is at issue, and what will be listed for hearing, and she had every reasonable opportunity, it seems to me, to attend.
23. In his submission, counsel for Start Mortgages DAC, the plaintiff, pointed out that matters were originally listed in October 2019, some 3 years ago, but they were adjourned on that date in the absence of sufficient evidence as to service. As I have just said, I am entirely satisfied as to service.
24. The submission was also made that, 3 years later, no payments have been made. I don't doubt for a moment the accuracy of the instructions given by counsel, my point is simply that we haven't yet looked at the evidence underpinning that. However, this would not seem to be a proposition in dispute. It is certainly not disputed by the defendant who has chosen not to show up and, from my brief look at the papers last night, I did see averments made to that effect.
25. It seems that what we are here to deal with, in summary, comprises an appeal concerning the 2nd of October 2018 order for possession and, in the manner I explained earlier, there plainly is an order from the Circuit Court which is before this court, quite apart from the contention in a letter I received at 11am that no such order was made. It also appears that,

among the issues to be dealt with today, concerns an extension of time granted by way of an order made by the Master, which the plaintiff appealed. Also at issue appears to be an application brought by Ms O'Mahony, which, it is said by the plaintiff, was in respect of an order which was never made; with a certain other application challenging, it appears, the substitution of a particular party for another.

- 26.** To draw this ruling to a conclusion, it seems to me that all of the following factors are relevant and all of the following factors weigh against the granting of an adjournment
- 27.** First, it seems to me that, as a matter for first principles, parties to litigation have a responsibility to advise themselves of the status of litigation which they are a party to. And it seems to me to be equally uncontroversial to say that parties to litigation have an obligation to keep themselves updated on the status of same.
- 28.** Second, whatever dispute there may have been or may be, in relation to the state of knowledge on the defendant's part and in saying that I am not satisfied that there was any doubt and that is because of the positive averments made and the correspondence exhibited by Ms O'Byrne. But even if one were to accept, *per* what the defendant has written in her letter, that there was doubt *prior* to the 11th October, it is common case that the defendant was squarely on notice as of the 12th of October, that is last Wednesday, that these cases were to be in a callover the following day, that is last Thursday the 13th of October. Therefore, she had the opportunity to participate in the callover and had the opportunity, should she so wish, to make such submissions at the callover as she wished. She did not take that opportunity.
- 29.** Third, it is a fact that the cases appeared in the callover and were called-on for a two day hearing, i.e. today the 18th and tomorrow the 19th. No 11th hour application for an adjournment was made then i.e. on the 13th last Thursday.
- 30.** Fourth, this application for an adjournment is brought long *after* the 11th hour. We are now on the morning of the hearing and the cases are due to start. An adjournment would result in wasted costs, in particular and very obviously for the plaintiff, who has come here ready and willing to proceed.
- 31.** Fifth, the resources of this court are scarce and there would be a very obvious cost to the public and to the public interest if a case which had been called-on for 2 days were to be adjourned the very moment it was due to commence. That cost would include lost judicial time, the lost time of the Registrar sitting with me, and the fact that this courtroom and its facilities have been set aside to devote 2 days to these matters or applications and to no other proceedings. And the very obvious corollary or 'flipside' is that another 2-day case did not have devoted to it these scarce court resources. And an alternative 2-day case cannot simply be 'conjured up' in a matter of seconds so that it could be heard as an alternative
- 32.** Sixth, this is not a case involving witnesses or oral evidence. Therefore there is no question of witnesses needing time to refamiliarise themselves with any issues, or with any documents.
- 33.** Seventh, the case is set out in the pleadings and there are books of pleadings before the court and the evidence puts beyond doubt that books of pleadings have already been made available to both parties and, therefore, there is no question of the defendant not having access to all papers.
- 34.** Eighth, it seems to me that neither side has chosen to put in written legal submissions. Therefore, there is no question, for example, of the plaintiff having filed written legal submissions in recent days which the defendant has not had an opportunity to consider or to respond to in writing. There are simply no submissions and, therefore, that issue does not arise.
- 35.** Ninth, and this flows from my brief review of the papers, this brief review suggests that these matters come to this court by way of appeals. In other words, there has already been a first-instance hearing in another forum of the issues and, therefore, the defendant, just as the plaintiff, has on previous occasions had the opportunity to hear the other's position.
- 36.** The final reason, and the most important of them all, is there is no evidence whatsoever before the court today which would allow me take the view there is a risk of injustice by proceeding with the hearing. Matters net down, I am afraid, to a situation where the

defendant has chosen not to attend a hearing of which she was fully on notice and in respect of which she received, not only advance warning, but copies of all the papers.

- 37.** For these reasons, I am satisfied that the justice of the situation is met by declining the adjournment request made in the letter handed to me at 11am this morning.

Note: The matters proceeded and the Court reserved judgment, which will be delivered electronically once available.