THE HIGH COURT

[2015/2044 SS]

IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION

BETWEEN

CLAIRE KNOWLES

APPLICANT

AND

GOVERNOR OF LIMERICK PRISON

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th day of January, 2016

1. By loan offer dated 21st February, 2006, ICS Building Society agreed to lend moneys to the applicant and a co-owner, secured by a first legal mortgage over her family home in Glanmire, County Cork. The borrowers defaulted on payments and full repayment was demanded by letter dated 27th October, 2009.

2. The Building Society brought proceedings against the borrowers in Cork Circuit Court on 6th October, 2011. At the hearing of those proceedings, the applicant was ordered to surrender possession of her family home by order dated 20th January, 2014. The order for possession was appealed to the High Court. That appeal was dismissed by Kearns P. on 14th July, 2014.

3. On 23rd September, 2014, Whitney Moore Solicitors came on record for the plaintiff building society in the Circuit Court proceedings. The notice of change of solicitor contained an error in the title, and a new notice was later issued with the correct title, but backdated as of the date of the original.

4. On 8th October, 2015, an order was made substituting the Bank of Ireland as a plaintiff in those proceedings.

5. On 16th October, 2015, the bank make an *ex parte* application to Cork Circuit Court for liberty to issue a motion for attachment and committal against the applicant for failure to comply with the order for possession. That motion came before His Honour Judge McDonagh on 27th October, 2015, who adjourned it to 8th December, 2015.

6. By order made on 8th December, 2015, His Honour Judge Ó Donnabháin directed the attachment and committal of the applicant by reason of her failure to comply with the possession order, until such time as she purged her contempt.

7. On 9th December, 2015, Mr. Ben Gilroy, a litigant in person on behalf of the applicant, applied to Binchy J. for an order under Article 40.4 of the Constitution and under the Habeas Corpus Act 1781 (that short title having been conferred by the Short Titles Act 1962) for an inquiry into the legality of her detention. The application was transferred to Barrett J. who made an order for an inquiry, which was made returnable for the 10th December, 2015, and ultimately was further transferred to me on that date.

8. In the meantime, following the application for attachment and committal, the applicant appears to have had the idea of seeking an enlargement of time to appeal the original possession order for a second time. She brought a motion dated 22nd October, 2015 in this regard, and the order was, surprisingly, granted by the Master on 10th November, 2015. Further apparently inconclusive proceedings in relation to it appear to have taken place in the High Court on 7th December, 2015 when the order was not set aside. I have not been given detailed information as to the basis for the latter development. However it can legitimately be observed as far as the Master's order is concerned that the procedure of appealing a Circuit Court order to the High Court for a second time, after the final determination by the High Court of the first appeal, is not known to the law. There are truly exceptional circumstances where a final order can be set aside, for example, where a grave breach of natural justice has unwittingly occurred (see *O'Neill v. Governor of Castlerea Prison* [2004] I.R. 298), but even if such rare and exceptional circumstances arise, such an application must be specially made to the court that made the ultimate order and not by way of a second appeal *ab initio*. The Master's order is clearly a nullity. It is an impermissible order in the light of the final order of Kearns P. Even if it were an order made within jurisdiction, which it is not, it provides no basis for the applicant to continue to fail to comply with the possession order.

9. Following the hearing of the present application, I indicated that I would circulate a written judgment setting out my reasons, and this is that judgment. I again wish to take the opportunity to commend the applicant for the succinct and organised manner in which she presented her case before me.

10. In the course of determining the present application I was required to decide a number of preliminary issues which I propose to record in the present judgment.

Can an applicant be represented by a lay person in *habeas corpus*?

11. The first issue before me was whether Mr. Gilroy could represent the applicant following the return to the order for an inquiry under Article 40.4. On 10th December, 2015, I ruled that he could not, and I now set out formal written reasons for that decision.

12. It is a fundamental principle of the operation of the legal system that, in general, an individual natural person has the right to represent themselves in legal proceedings. A person representing themselves is subject to the same procedural rules that apply to other litigants. See for example *Burke v. O'Halloran* [2009] 3 I.R. 809 at pp. 818-819.

13. It is possible to envisage circumstances where that right may be subject to limitations, but no such circumstances arise here. For example, a person accused of an offence does not have an unqualified right to directly cross-examine the injured party, and it could be appropriate to require such cross-examination to be carried out through the court itself or a lawyer appointed by it, where a direct

cross-examination of the victim by the defendant, especially in a sexual crime or other offence against the person, would be oppressive and would amount to legalised victimisation of the injured party.

14. However, where a person is not representing themselves, it is a fundamental postulate of the legal system that they must be represented by a qualified legal professional, who in turn owes professional duties to the court. This is also true where the entity being represented is a legal rather than a natural person, and therefore by definition cannot appear directly itself (see my decision in *Pablo Star Media Ltd. v. E.W. Scripps Co.* [2015] IEHC 828).

15. This fundamental principle has been reaffirmed on numerous occasions, including in the *habeas corpus* context: see for example *The State (Burke) v. Lennon* [1940] I.R. 136 (where it was said that Article 40 was not to be taken as allowing an applicant to be represented by a third party where he was able to make the application himself), and *Application of Woods* [1970] I.R. 154, where the Supreme Court specifically and unanimously rejected the argument that another prisoner could, on behalf of the applicant, make substantive submissions following the return to a *habeas corpus* order. However the Supreme Court in that case did allow the prisoner in question to address it on the issue of his entitlement to represent the applicant, as I did in this case. (See also *The State (Egan) v. Central Mental Hospital* (Unreported, High Court, Kenny J., 27th January, 1972).

16. The principle has also been reaffirmed in cases such as *Battle v. Irish Art Promotions Ltd* [1968] I.R. 252 and *Re Coffey* [2013] IESC 11. At para. 37 of *Coffey*, Fennelly J. said that the general principle was subject only to "*rare exceptions*" where the general rule would cause "*particular injustice*". Such rare exceptions include *Coffey v. Tara Mines* [2008] 1 I.R. 436, where Ó Néill J. allowed a wife to represent a husband, where the latter would otherwise not be able to make his case due to disabilities rendering it impossible to conduct the proceedings. The Legal Aid Board refused to assist and the plaintiff's wife was unable to obtain a solicitor despite her best efforts. That was truly an exceptional case and furnishes no support for the argument advanced by Mr. Gilroy.

17. Representation by a family member is in a different category in any event as such representation is permitted more generally in the District Court under O. 6, r. 2 of the District Court Rules 1997 in cases of "*infirmity or other unavoidable cause*", and so does not infringe any fundamental principle of the legal system.

18. My attention has been drawn to orders in a recent *habeas corpus* application, *Corrigan v. Governor of Mountjoy Prison* (Court of Appeal, 2015/72 SS, 17th February, 2015) ordering an inquiry on appeal from a decision of Cregan J., and a subsequent order on the return to that inquiry (High Court, (O'Malley J.), 2015/226 SS, 20th February, 2015), in which the orders of the courts concerned refer to Mr. Beades being heard by the court on behalf of the applicant. The order of the Court of Appeal is obviously consistent with the Supreme Court jurisprudence I have referred to in that Mr. Beades was heard only as to the initial application for the inquiry which includes an appeal from a refusal of an inquiry. As regards the indulgence afforded by O'Malley J. of hearing him on the return however, I can only assume, in the light of the Supreme Court jurisprudence on the issue to which I have referred, either that the court concerned considered the particular circumstances to be one of the "*rare exceptions*" envisaged by *Re Coffey*, for reasons which obviously do not appear on the face of the order, or alternatively heard Mr. Beades on a *de bene esse* basis without its attention being drawn to the caselaw on this issue. Either way, it is abundantly clear from that caselaw that there is no category of exception for Article 40 applications which would allow lay persons to represent applicants as a matter of generality, or at all, except in exceptional circumstances. *O'Shea v. Governor of Mountjoy Prison* [2015] IECA 101 is an *ex tempore* judgment of Ryan P. for the Court of Appeal in which while it was noted that Mr. Beades had made submissions on behalf of the applicant in that case, essentially as a concession, although no caselaw is referred to, the court specifically stated at para. 15 that "*the Court does not want to set a precedent"* in this regard. It would appear that it is at least possible that some persons may have misinterpreted limited concessions afforded in particular cases as giving rise to a misconception that there is a general acceptance by the courts that there is no difficulty with the general principle of lay "*representation*" in Article 40 cases, thereby giving rise to unrealistically heightened expectations in that regard in subsequent cases such as the present one. To that extent, it may be that for the courts to afford such an audience in a substantive hearing (as opposed to the initial application for the inquiry) as a concession could be to create (or reinforce) more problems than it might solve, even apart from the fact that such a concession could only arise in exceptional circumstances having regard to the Supreme Court decisions referred to.

19. Mr. Gilroy argued that there were appropriate exceptional circumstances in the present case. He referred to the applicant's right to equality of arms, fairness and justice, and under Article 6 of the European Convention on Human Rights (and could perhaps more immediately have referred to Article 5(4)). However these considerations could apply to any Article 40 application and do not constitute exceptional circumstances.

20. He also submitted that Ms. Knowles was upset by her incarceration in Limerick Prison, and was in no state to "*defend herself*". First of all the notion of defending oneself is not relevant to an Article 40 application. The onus is on the State to justify the detention. If it fails to do so, the applicant must be released. However I made clear to the applicant that if she needed time to compose herself, this would be afforded to her, or alternatively if she wished to retain a solicitor, time would be made available to allow her to do this also.

21. Mr. Gilroy also, naturally, relied on *Coffey v. Tara Mines*, but as I have set out above that was itself an exceptional case and did not lay down a general rule. The general position is clear from a broader survey of the case law. He also relied on other cases where judges have allowed lay persons to represent applicants, and the same position arises there.

22. He suggested that *Woods* could be distinguished because in that case there was such proximity between two prisoners being in the same institution that there must have been a meeting of minds and thus no particular benefit to the applicant by allowing one prisoner to be represented by another. Imaginative though this argument is, I do not think that *Woods* can be distinguished on that basis. It lays down a general rule in relation to the impermissibility of representation by lay persons in Article 40 applications, and is not limited to cases involving prisoners.

23. Mr. Gilroy also argued that this was his application, in the sense that he made the *ex parte* application to Barrett J. He suggested that Ms. Knowles was not in a position to prosecute it for that reason. This is a misunderstanding of the nature of an Article 40 inquiry. The application must be made in the name of the detained person. If that person is of full age and capacity, it can only be progressed with their consent. This is not Mr. Gilroy's application.

24. Having regard to the foregoing, the general rule applies, and I decided that there were no exceptional circumstances to depart from it. Mr. Gilroy (and Mr. Jerry Beades who took up the cudgels when the former was unavailable) was not permitted to address me on the substance of the Article 40 inquiry. However I did allow the applicant the opportunity to take time to seek legal advice, which she did not avail of, and I also permitted Mr. Gilroy (and in his absence Mr. Beades) to act as a McKenzie friend.

25. I should emphasise that, while it would not, in the absence of exceptional circumstances, be appropriate for a lay person to

represent an applicant under Article 40 at the substantive hearing, this is not intended to take away from the possibility that a lay person could make the *ex parte* application on behalf of an unrepresented person in custody. However, I emphasise that to do so, the person moving the *ex parte* application must normally have the advance consent of the detained person, or failing that very substantial reasons for believing that they will consent to the application being made. In the present case, Mr. Gilroy indicated that he had previously assisted the applicant, and indeed on the return to the inquiry, Ms. Knowles expressly confirmed that she agreed with the application having been made and adopted it. Normally, however, the third party applicant must be expected to have secured the prior consent of the detainee either personally or through someone in direct contact with him or her.

26. It is not the case that any person can simply meddle in the affairs of another, who happens to be in custody. In the absence of either consent or substantial objective reasons demonstrating that is likely that the applicant will consent to the application being made, an *ex parte* application under Article 40.4 by an unrelated party should be refused.

Is the State, or the other party concerned, responsible for justifying committal for civil contempt?
27. Mr. Remy Farrell, S.C., who addressed me (as did Ms. Gráinne O'Neill, B.L.) on behalf of the respondent governor, submitted to me that in a case such as this where the imprisonment arises by virtue of an application for attachment and committal by a bank, it was not appropriate to require the State to defend the imprisonment. He submitted that either the application should be dismissed or the Bank of Ireland joined as a notice party for the purposes of justifying the detention.

28. I gave a ruling on 10th December, 2015, rejecting that argument and I now set out the reasons for it.

29. In my judgment in *Grant v. Governor of Cloverhill Prison* [2015] IEHC 768, I discussed the relevant caselaw and set out, at para. 99(vi), the principle that the person detaining the applicant is responsible for justifying the legality of the detention. In that judgment I dealt with the argument that other parties should be joined as notice parties and stated for reasons set out in that judgment that the decision of the Supreme Court in *McSorley v. Governor of Mountjoy Prison* [1997] 2 I.R. 258 is not a current statement of the law in this respect. Mr. Farrell relied heavily on the decision in *Ryan v. Governor of Midlands Prison* [2014] IESC 54, but that decision is also addressed in Grant and, in any event, does not provide a basis for the submission he makes.

30. He submits that the Governor has no relationship, legal or otherwise, with the Bank of Ireland. This is irrelevant. The detention of the applicant is attributable to the State. She is detained in a State facility under the control of the respondent, on foot of an order made by a judge of the Circuit Court. As it happens, Bank of Ireland, the applicant for that order, is also a statutory body, although that makes no difference to the liability of the State to justify the detention.

31. Mr. Farrell submitted that the governor is not in a position to compel witnesses or the production of documentation and that the underlying order could have been made at a geographically remote location from the prison. These are unsustainable objections. The court is required to provide fair procedures to respondents as well as to applicants and is available to lend its aid in compelling the attendance of necessary witnesses or the production of appropriate documentation. The court should not, on the return to an Article 40 application, railroad a respondent into an immediate justification of the detention if the information required to justify the detention is not reasonably to hand. In the present case, to come to a conclusion about the alleged infirmity before the Circuit Court it was necessary to have either evidence from someone who was there or access to the digital audio recording (DAR) or both. Therefore, in this case, I directed that the DAR be made available to the respondent. In a case such as this, where it is not possible or appropriate for the respondent to advance an immediate full justification for the detention without access to particular persons or documents, it would not be in the interests of justice to ramrod the inquiry to a conclusion in the absence of a reasonable opportunity for the respondent to have access to that material, subject of course to keeping in mind the overall urgency of an Article 40 application and in addition bearing in mind the possibility that in a particular case, an infirmity might appear to be so glaring as to require an immediate final order by the court on the return date.

32. In *Grant*, I took the view that the person detaining the applicant is the appropriate respondent to an Article 40 application and is responsible for justifying the legality of the detention, including any steps that have occurred prior to the current detention and upon which its legality depends. It is not necessary or appropriate to put on notice any other party, including an emanation of the State that made any underlying decision (para. 99(vi), citing the approach taken e.g., in *McDonagh v. Governor of Cloverhill Prison* [2005] 1 I.R. 394).

33. The governor of a prison is therefore required to go behind the face of the order under which a person is detained and justify the substantive legality of that order. Mr. Farrell submits that the Governor does not want to do that and that this is "*proxy litigation*" and "*a challenge to civil proceedings*". However, that is what Article 40 requires. The person detaining a citizen is obliged to go behind the semantic surface of any order or warrant, and provide, if necessary, a substantive justification for the detention and a substantive answer to any alleged infirmity in the process leading to the order or warrant concerned.

34. The very wording of Article 40.4.2° itself makes it clear that it is the person in whose custody the applicant is that must be the respondent to a *habeas corpus* application.

35. The fact that it is a bank that may be in a position to provide information to defend the legality of the detention is absolutely not a basis for refusal of relief under Article 40, joining the bank as a notice party, or conversion of the proceedings into some other type of litigation, which is also impermissible.

36. The notion that the bank should be joined as a notice party to justify the detention would mean that the obligation to defend the legality of the detention of the citizen by the State would be shifted onto the shoulders of a private party, again leaving aside the status of this particular bank as a statutory entity under the Bank of Ireland Act 1781 (interestingly the very next statute after the Habeas Corpus Act 1781 on which a short title is conferred by the Short Titles Act 1962). I completely reject the notion that this is an appropriate conception of the proper implementation of Article 40.4, the Habeas Corpus Act 1781, or indeed Article 5(4) of the ECHR.

37. It is true that in a judicial review application, it would be for the other party to the underlying litigation and not the State, to stand over an order of a judge which was challenged under O. 84 (see my decision in *Hall v. Stepstone Mortgage Funding Limited* [2015] IEHC 737). But this is not a judicial review application, nor is there any analogy with judicial review. Article 40 carries its own specific procedural features, one of which is that the State must take on the burden of justifying the detention, through the medium of the individual State official who has custody of the applicant. It is not necessary or appropriate to join either other State agencies or private parties that may be involved in underlying litigation in order to enable this to be done. The court can, and should, ensure that fair procedures are observed by requiring any necessary witnesses and documents to be put before the court, including by directing the production of the DAR and by affording time in this regard where appropriate. The application to join the Bank of Ireland as a notice party was therefore refused, as was the application to dismiss the proceedings at that stage.

Bail
38. The court has an inherent jurisdiction to admit an applicant to bail in the Article 40 inquiry itself. Any such bail order is normally only intended to last until the Article 40 application is determined.

39. As referred to in *Grant*, the court does not have jurisdiction to issue a stay on release. However, in the case of a person incapable of protecting themselves, the court may structure the final order in such a way as to control the release for that person's protection (Grant para. 99(v), citing *FX v. Clinical Director of the Central Mental Hospital* [2014] IESC 01 and *N. v. H.S.E.* [2006] 4 I.R. 374).

40. However the court is not precluded from putting a stay on the order for the re-arrest of the applicant who has been granted bail, in the event of refusal of relief under Article 40.4, if such a stay is in the interests of justice.

41. It is also important to note that the granting of bail within the context of an Article 40 inquiry does not render that inquiry moot, simply because the person is then no longer in detention. Such an interpretation of Article 40 would be absurd and self-defeating, because not only would the bail order subvert the inquiry itself, but also by doing so it would immediately nullify itself by ending that inquiry and thus ending the bail.

42. Ms. O'Neill expressly accepted this proposition on behalf of the State.

43. In the present case, I granted the applicant bail on her own bond of €100, on a number of conditions including the following:-

> (i) Not to come within 100 yards of her former address at The Pines, Castle Jane Woods, Glanmire, Co. Cork.
>
> (ii) To attend the resumed inquiry on 14th December, 2015, and from time to time thereafter.
>
> (iii) To surrender to Limerick Prison at a time to be specified by the court, if unsuccessful in her Article 40 application.
>
> (iv) To reside at a specified address at Church Hill, Glanmire, Co. Cork, and to give notice to Glanmire Garda Station within 24 hours of any change of address.

Can the court require a respondent to put further material on affidavit in the course of the inquiry?
44. As can be seen from the chronology set out in this judgment, a number of orders above and beyond the committal warrant exhibited in the State's certificate justifying the detention are of relevance to the legality of this detention. In the course of the inquiry, I requested the respondent to make arrangements to put the relevant orders on affidavit. Mr. Farrell initially objected to this course on the grounds that Article 40.4 itself provided a procedure for justifying a detention, namely a certificate, and the court should not, as he put it, "*create a new procedure not envisaged by the Constitution*", namely the supplementing of that certificate by an affidavit.

45. I think that this objection takes altogether too narrow a view of the process, for three reasons;-

> (i) It is already established that a respondent can supplement the documentation originally furnished by either supplying further information or substituting a correct order for an incorrect one (see authorities discussed in *Grant* para. 100(v) citing *O'Farrell v. Governor of Portlaoise Prison* [2014] IEHC 416 (Hogan J.), *Moore v. Governor of Wheatfield Prison* [2015] IEHC 147 (Kearns P.), *O'Neill v. Governor of Wheatfield Prison* [2015] IEHC 168 (Kearns P.), *Miller v. Governor of Midlands Prison* [2014] IEHC 176 (Baker J.), *Joyce v. Governor of Dóchas Centre* [2012] 2 I.R. 666 (Hogan J.)). For the court to request or even require such further documentation to be put formally before it is consistent with the approach taken in this caselaw.
>
> (ii) Furthermore, the Article 40 process remains an *inquiry*, and the court retains an entitlement to direct that certain matters be formally put in evidence.
>
> (iii) Finally, ensuring that documents handed to the court are also formally proved, if needs be by way of affidavit, facilitates further examination of the issues should that be required in any other forum and removes the potential for procedural confusion as to what was or was not properly before the court of first instance.

46. For these reasons, I requested Mr. Farrell to reconsider his objection to putting in such an affidavit, which he then very sensibly agreed to do. I have now had the benefit of a detailed affidavit in this regard sworn by Mr. Brendan Moriarty, solicitor, which exhibits the papers in relation to the proceedings before the Circuit Court.

47. I now turn to the specific legal grounds of challenge raised by the applicant in this case.

Alleged failure to afford the applicant the chance to seek legal representation
48. The applicant complains that she was not afforded the opportunity to obtain legal representation. However this complaint must be judged in context, in particular having regard to the following:

> (i) At no stage during the long course of the possession proceedings does she seem to have been formally represented.
>
> (ii) The applicant was on notice of an application for attachment and committal since late October, 2015.
>
> (iii) She was therefore aware, since that date, long before the impugned order of 8th December, 2015, that her liberty was at stake.
>
> (iv) At no stage prior to 8th December, 2015 did she seek to be represented in relation to the committal motion.
>
> (v) She was strongly advised to get legal advice by the learned Circuit Court Judge.
>
> (vi) The learned judge also afforded her numerous other opportunities to consult solicitors or have the matter adjourned on an undertaking to comply with the court's order.

(vii) At no stage subsequent to the events of 8th December, 2015 did she seek legal representation.

(viii) In the course of the inquiry, I offered the opportunity of an adjournment to seek legal advice, which was not taken up (which omission, I hasten to add, was perfectly within her rights).

49. Despite some desultory interactions with solicitors in court on the day, her interventions in relation to this issue on 8th December, 2015, as referred to in the transcript, are somewhat elliptical and do not amount to a direct request for an adjournment to seek legal advice. The references of particular note are:

(i) Firstly that she asked whether legal aid would be available *if* she sought legal advice.

(ii) Secondly there is a request for an adjournment, without a specific reason being given, still less that the reason was to get legal representation.

(iii) Furthermore, in the afternoon, she expressly told the learned Circuit Court Judge that she was not taking up his offer made that morning, which must be construed as a reference to the totality of the suggestions and advice made by the learned judge, including that she obtain a solicitor.

50. Having regard to the totality of the evidence, I draw the inference that the applicant never formed a definite intention to seek to be legally represented.

51. Furthermore, she was already on notice of the risk to her liberty. A person is not entitled to indefinite and repeated warnings as to their liability to imprisonment. The very nature of the motion for attachment and committal speaks for itself. Clearly, Ms. Knowles did not see fit to meet that application appropriately since late October either by way of an undertaking, by making submissions herself on legally recognised grounds as to why she should not be committed, or by obtaining legal representation.

52. The only reasonable interpretation of the applicant's manner of dealing with the application was that she was prepared to deal with it herself, without legal representation: see *The State (Sharkey) v. District Justice McArdle* (Unreported, Supreme Court, Henchy J., 4th June, 1981) at p. 7.

53. I note in this context that the terms of the Legal Aid Custody Issues Scheme do not appear to cover applications for attachment and committal. Leaving aside the question of whether such legal aid is a constitutional or ECHR requirement, it would seem to me that it would be desirable even as a practical matter to expand the scheme to facilitate the legal representation of persons facing committal in any court. The availability of the scheme might do much to facilitate the making available of representation and to avoid problems such as occurred in this case in future.

54. The learned Circuit Court Judge, it would seem partly as a result of the applicant's own submissions, was minded to make it a condition of any adjournment that the applicant agreed to vacate the property. This "condition" (if such it was) being attached to any adjournment to seek legal advice must be read in context; the context being that the applicant had not put forward any sustainable basis why she should not be committed. While I appreciate the effort she made to ventilate certain issues of concern to her, these did not constitute legal grounds to challenge the possession order at this stage. In another case it might be inappropriate to seek to attach conditions (relative to the substantive defence of the proceedings) to any adjournment to obtain legal advice. In the present case the point is academic because I do not consider that the applicant had any real intention to seek legal representation, was already on notice of the risk of imprisonment, and failed to put forward any stateable reason why she should not be committed.

Allegation that applicant was interrupted in making a submission

55. The applicant alleges that she was interrupted in making a submission on the afternoon of 8th December, 2015. The only interruption recorded on the DAR is at the very end of the hearing after the order was made. It is not evident that there was any other interruption. Furthermore there is no protest from Ms. Knowles that she had been interrupted in making any submission, prior to the making of the order for attachment and committal. In any event, the submission that Ms. Knowles was attempting to make appeared to amount to an allegation that the original possession order, the appeal against which was dismissed by Kearns P., was void. This is an untenable and irrelevant argument in the context of attachment and committal proceedings of this nature, given the fact that not only was the order not challenged on judicial review but it was unsuccessfully appealed to a higher court. An interruption of a manifestly irrelevant submission does not give rise to grounds to vitiate the lawfulness of the decision ultimately made. While in the criminal context, a defendant is entitled, "*however laughable his defence*", to have it fairly presented to the jury (R. v. Marr (1989) 90 Cr. App. R. 154 at p. 156 *per* Lord Lane C.J.), there is not an unlimited right to make submissions without interruption to a judge sitting alone, and certainly not in a civil case (see *Talbot v. Hermitage Golf Club* [2014] IESC 57: "*Courts are entitled, and indeed are required, to foster their resources*" *per* Charleton J. at para. 47). An application for attachment and committal for coercive rather than punitive purposes, arising from civil contempt, remains a civil matter for these purposes. Having said that, the requirement that justice be seen to be done must be vindicated, not merely that it actually be done, but in the present case I conclude that this requirement was not infringed.

Errors in the documentation

56. The applicant pointed to a number of clerical errors in the Circuit Court paperwork, including the "backdated" notice of change of solicitors, which I would agree was incorrectly backdated (in that the amended notice should have been dated as of the date of the amendment rather than of the original) and the error in the heading to the committal warrant in this case (referring to the incorrect name of the plaintiff in the possession proceedings). Following the latter error being brought to the respondent's attention, a new committal warrant was obtained and included in the State's certificate dated 10th December, 2015. Of course, it was the original, incorrectly titled, warrant that was actually executed at the time the applicant was lodged in the respondent's prison. The endorsement appears on the back of that incorrect warrant.

57. The error relating to the notice of change of solicitors does not go to jurisdiction. The error in the heading of the committal warrant is in principle capable of constituting a ground for an application for release under Article 40. However the practice of allowing the papers justifying the detention to be supplemented or corrected has been approved in numerous cases as referred to above. Having regard to the fact that the error has been corrected, and indeed already stood corrected at the time of the governor's certificate, release under Article 40.4 is not appropriate in this case (see *Grant,* para. 100(i)).

Conclusion

58. As discussed in *Grant*, caselaw clearly establishes a specific threshold to be overcome in an Article 40 application, particularly one arising from an order made by a court. Any error on the face of the record must be jurisdictional or must be such that release is a

proportionate response, and any infirmity not appearing on the face of the record must be an absence of jurisdiction or a fundamental flaw. In the present case, the only relevant error on the face of the record was corrected prior to the governor's certificate (thanks, it must be said, to an intervention on behalf of the bank, by Mr. Brendan Moriarty, solicitor with Whitney Moore Solicitors, who learned of the error from Mr. Gilroy's application for an inquiry and immediately put matters in train whereby the problem was enabled to be corrected by the time of the governor's certificate). As regards matters not on the face of the record, I am of the view that the learned Circuit Court Judge did not fall into error in the manner in which he handled the application to attach and commit, but if I am wrong about that, it seems to me that given the particular approach taken to that application by this particular applicant, any such error does not reach the level of fundamental flaw that is the threshold for release under Article 40 in these circumstances.

59. I am therefore obliged to find that the applicant is being detained in accordance with law in the sense in which that expression is used in Article 40.4.2° of the Constitution, and I therefore declined to order her release. I directed nonetheless that her bail continue until 7pm on 16th December, 2015, in order to permit her to make an application to Cork Circuit Court to purge her contempt of the possession order. The reason I specified that time was to allow her until 4 pm to purge her contempt in Cork Circuit Court, failing which she would have 3 hours of travel time in order to be able to present herself to Limerick Prison by 7 pm. There is to be no order as to costs in the circumstances, particularly having regard to the fact that the applicant, although unsuccessful, was correct in identifying errors in the paperwork to which I have referred.