

THE HIGH COURT

[2007 No. 7212 P]

BETWEEN

DENIS GIFFORD AND SHEILA GIFFORD

PLAINTIFFS

AND
DUBLIN CITY COUNCIL

DEFENDANTS

Judgment of Mr. Justice T.C. Smyth delivered on the 20th day of November, 2007

1. The Plaintiff seeks an interlocutory injunction restraining the Defendant, its servants or agents from taking any steps to enforce the warrant for possession of 36 Sean O'Casey Avenue in Summerhill, Dublin of the Dublin District Court on the 28th June 2007.

2. The facts giving rise to this litigation may be briefly stated:

a) The Defendant ('the Council') let the dwelling house at 36 Sean O'Casey Avenue, Summerhill in the City of Dublin ('the premises') to the Plaintiffs under a Tenancy Agreement of 7th May 1986; the tenancy granted was a joint tenancy from week to week.

b) The Plaintiff's tenancy was terminated by a Notice to Quit and demand for possession dated 30th January 2007 which took effect on 12th March 2007. The Plaintiffs failed to comply with the Council's demand for possession.

c) On 20th March 2007 the Council issued a summons pursuant to Section 62 of the Housing Act 1966 as amended by Section 13 of the Housing Act 1970 (hereinafter referred to as Section 62) in the District Court to recover possession of the premises. On 28th June 2007 the District Court granted the Council a warrant for possession of the dwelling and imposed a stay of execution thereon for a period of three months, which period has now expired.

3. Before considering the application for injunctive relief the following points may be noted:-

1. The Plaintiff did not appeal the order of the District Court of 28th June 2007.

2. The Plaintiffs have not challenged the legality of the Council's decision to terminate their tenancy in the dwelling house (premises) by way of application for judicial review.

4. The proceedings as formulated essentially seek declaratory relief [but until the hearing to determine such, seek an interlocutory injunction] that:-

I. Section 62 of the Housing Act 1966 (as amended) is incompatible with the obligations of the State under Articles 6, 8, 13 and 14 of the European Convention on Human Rights.

II. The Defendant ('the Council') has failed to perform its functions in a manner compatible with the State's obligations under Articles 6, 8, 13 and 14 of the European Convention of Human Rights.

5. It was common case the principles applicable to the instant application are those set out in *Campus Oil v. Minister for Industry and Energy* (No. 2) [1983] IR 88 to wit:-

(a) The existence of a serious question to be tried.

(b) The inadequacy of damages, and;

(c) That the balance of convenience lies in favour of the grant of the injunction.

6. In *Foley v. Sunday Newspapers* [2005] 1 IR 88 it was held that in addition to the foregoing, other special factors may have to be taken into consideration depending on the particular circumstances of the case with the result that, even if the issues identified by the *Campus Oil* case are resolved in favour of the Plaintiff - there may be a good reason for the Court to decline the grant of an interlocutory injunction.

7. In the instant case notwithstanding its formulation, it is ex relatione seeking relief by way of judicial review. If so, the Plaintiffs are in serious difficulties for the Defendant relying on the decision of Costello J. as he then was in *O'Donnell v. Dun Laoghaire Corporation* [1991 ILRM 301 submitted as follows:

"The Plaintiffs became aware of the Council's decision to terminate their tenancy on 30th January 2007. The Council obtained a warrant for possession of the premises from the District Court on 28th June 2007 and three months later on the expiry of the stay of execution on that Order the plaintiffs moved to seek interim relief for the purpose of restraining the Council from executing a valid and enforceable order obtained from the Court. No explanation is given by the Plaintiffs for the delay in bringing the proceedings nor do they offer any reasons to explain or excuse the delay."

8. While there was and is no bar to the form in which the proceedings come before the court, yet Costello J. did consider at page 315 of the cited case that the rules and principles contained in O.84 r.21 of the Rules of the Superior Courts 1986 should be applied. The paramount consideration under O.84 r.21 is that an application must be brought promptly. What the Plaintiffs have to show to have the discretionary power of the Court exercised in their favour, to extend the time for allowing an application, is that there are good reasons for extending the time. To do so there must be reasons which both explain the delay and afford a justifiable excuse for the delay; neither have been tendered to the Court and on this ground alone the Plaintiff's case fails. However, I would not wish to rely solely on this time bar issue to determine the Plaintiff's case.

9. The jurisdiction of the Court to grant a declaration of incompatibility is contained in S.5 of the European Convention of Human Rights Act 2003 (the Act of 2003) which provides that the Court may, having regard to S.2 of the Act on its own motion or on application and where no other legal remedy is adequate and available make a declaration of incompatibility that a statutory provision or rule of law is incompatible with the State's obligation under the Convention provisions. Even if in the instant case the Plaintiffs

were successful in obtaining a declaration of incompatibility their entitlement is to a payment of compensation (see subsections (4) and (5) of S.5).

10. The constitutionality of S.62 of the Housing Act, 1966 (as amended) has been tested and considered in *The State (O'Rourke) v. Kelly* [1983] IR 58 and *Dublin Corporation v. Hamilton* [1999] 2 IR 486. To the extent that the Act of 2003 may have effect on the implementation of the Housing Act, the Supreme Court in *Dublin City Council v. Fennell* [2005] 1 IR 604 in the course of a judgment of Kearns J. at p.614 (with which the other members of the Court concurred) said:

"It goes without saying therefore that the position of the tenant of a housing authority compares unfavourably with that of a private law tenant under contract or under the Landlord and Tenants Acts, the Rent Restrictions Act or a variety of other statutes. It may also be seen that the summary method whereby possession of such dwellings may be recovered, notably where the tenant is regarded as having through misbehaviour brought about the termination of his own tenancy and thus forfeited the right to any alternative accommodation may arguably infringe certain articles of the Convention and in particular articles 6, 8 and 13 thereof and also article 1 of protocol 1 (protection of property) of the Convention." (My emphasis)

11. Altogether from the obiter nature of this passage relied upon by the Defendants and even assuming at trial a declaration of incompatibility were pronounced such separately or in combination do not provide a basis for granting the interlocutory relief now sought. Indeed when invited to consider treating the motion as the hearing of the action the Plaintiffs withheld consent on the basis of some unspecified need for discovery. There is an abundance of case law adverse to granting injunctive relief which determines the issues properly determinable at trial. I find no warrant in the passage cited from Fennell's case to grant the interlocutory relief sought.

12. I accept as correct the submissions of the Defendants so cogently put by Mr. Connolly that even if the Plaintiffs were ultimately successful in obtaining a declaration that S.62 is incompatible with the State's obligations under the Convention provisions, the declaration will not affect the validity, continuing operation or enforcement of S.62 or the validity and enforcement of the warrant for possession obtained by the Council. In the circumstances the granting of the interlocutory relief sought by the Court would be futile.

13. In my judgment if the Plaintiff believed that the Council had acted unreasonably, unfairly or from an improper motive or in breach of its obligations under Section 3 of the Act of 2003 they should have applied to the High Court for judicial review. The availability of that remedy, coupled with the fact that the Council cannot recover possession of the dwelling without a court order is sufficient to supply the necessary and appropriate degree of respect for the Plaintiff's rights under Article 6, 8, 13 and 14 of the Convention.

14. If there is a serious issue to be tried it should have been raised timeously in judicial review proceedings (although proceedings in plenary form are permissible). The Act of 2003 even in the case of a declaration of incompatibility gives rise (in an appropriate case) to an award of compensation therefore damages are the adequate and appropriate remedy. The balance in the instant case lies in favour of declining the relief sought, accordingly I refuse the application for interlocutory relief.