Neutral Citation Number: [2010] IEHC 466

THE HIGH COURT

JUDICIAL REVIEW

2010 1041 JR

BETWEEN:

CHRISTOPHER MOORE AND ANN MOORE

APPLICANTS

AND

DUN LAOGHAIRE – RATHDOWN COUNTY COUNCIL

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 29th day of November 2010:

The applicants and family, being tenants of the respondent since December 1993, were evicted from their family home by the respondent on foot of a Warrant for Possession dated 29th April 2010, which issued following the granting of an Order for Possession by the District Court at Dun Laoghaire on the 18th December 2008. The premises in question are situated at 4, Gleanntan, Loughlinstown, Co. Dublin (hereinafter referred to as "the premises").

In these proceedings the applicants seek an order of *certiorari* quashing the said warrant for possession, a declaration that the eviction which was carried out by the Sheriff on the 14th May 2010 was unlawful, a mandatory injunction directing the respondent to restore the applicants to possession of the premises, as well as damages for breach of their constitutional right to the inviolability of their dwelling. The grounds for impugning the validity of the warrant for possession are stated to be that it is not in the form provided for in the District Court (Ejectment) Rules, 1999 ("the Rules") and in particular Form 47.9 thereof; it was not issued, as required, namely within six months from the date of the Order for Possession, namely, 18th December 2008, there being no order extending the time for issuing outside that period; and further that the warrant was executed within one month from the date of its issue contrary to the Rules, and was executed at a time of the day not authorised by section 62 of the Housing Act, 1966 and section 86 of Deasy's Act. I will address the parties' submissions in relation to these matters in due course.

Factual background:
There is of course a history of dealings and interactions between the applicants and the respondent which is relevant to the reliefs being sought and I will set that out. But essentially it is the case that for a considerable number of years the applicants failed to discharge the rent as it fell due, and in spite of efforts from time to time to reduce the arrears and pay the rent as due following discussions and agreements with the respondent in that regard, arrears continued to accrue, leading to steps being taken by the respondent by the institution of ejectment proceedings in order to recover possession, culminating in the Order for Possession and eventual eviction pursuant to the warrant for possession which is the subject of the within proceedings.

Two affidavits have been filed by the second named applicant, the second being in response to a replying affidavit sworn by Marie Cronin, an administrative officer in the respondent council. The second named applicant has sworn her affidavits on her own behalf as well as on behalf of the first named respondent.

From these affidavits the following seems to have occurred.

The applicants moved into the premises in December 1993 as tenants of the council having previously occupied a different premises in Sallynoggin since about 1985, also as tenants of the council. They have now three children aged 24, 22 and 17 respectively who resided in the premises up to the date of eviction. It would appear that apart from a brief period of separation when the first named applicant moved to England, the entire family have resided there since 1993. The rent payable under the tenancy agreement with the council was a differential rent, capable of adjustment depending on the number of persons in occupation at any particular time. When the tenancy commenced the rent was about £12 per week, but the applicants state that by the year 2000 that rent had increased to the sum of £40 per week. While the applicants state that they were able to pay the rent due from 1993 to the year 2000, Ms. Cronin has stated in her replying affidavit that over the years a total of four warrants for possession were obtained due to a failure to pay rent, the first of those warrants being one dated 16th May 1996. So, clearly the applicants are incorrect in stating that rent was paid as due up to the year 2000. In her second affidavit the second named applicant states that *"the first named applicant [her husband] would confirm that he did receive the previous warrants but not that of the 18th December 2008 nor was the receipt of any of the previous warrants communicated to me at any time by the first named applicant*".

In fact Ms Cronin states at paragraph 4 of her replying affidavit that *"the conduct of the applicants throughout their tenancy demonstrates a disturbing pattern of behaviour on their behalf of systematically failing to discharge the rent and engaging in brinkmanship as regards the taking of proceedings to recover possession"*.

It appears to be the case that each time a warrant for possession was obtained due to rent arrears the council came to some arrangement with applicants to discharge the arrears and pay current rent as it became due, rather than execute the warrants, but that while the applicants discharged the arrears which led to the issue of the first warrant in 1996, they never succeeded in keeping to agreements made in relation to later warrants in 2001 and 2004. Ms. Cronin states that the council have showed considerable forbearance over the years towards the applicants in this regard.

At any rate the applicants state that by the year 2000 they were experiencing financial difficulties resulting from a difficulty which the first name applicant had in finding continuous employment. By 2007 the rent had risen to £99 per week, but when the first named applicant became unemployed in February 2009 they sought assistance from the Department of Social Welfare. However, on account of a delay of ten weeks in receiving benefit, no rent was paid between February 2009 and June 2009, and that thereafter they paid a sum of €100 per week, and occasionally €110 per week in order to address the arrears. In addition, it is stated, a sum of €300 was

paid on 12th June 2009 and a further sum of €500 was paid on the 9th October 2009.

Ms. Cronin has stated that on the 9th June 2008 (three days before the said sum of €300 was paid) a Notice to Quit was served on the applicants. She goes on to state that by the time the tenancy was determined on the 12th July 2009 the amount of those arrears was the sum of €12,731.67, and submits that the size of these arrears demonstrates how little the applicants ever paid in respect of their rent over the years. She also states that numerous and unsuccessful efforts were made by the council to try and contact the applicants and discuss the situation prior to the matter coming before the District Court in November 2008 and leading to the obtaining of the Order for Possession. She has subsequently become aware, according to her affidavit, that throughout 2008 the first named applicant was in employment, and further that the second named applicant was employed as a care assistant.

In that regard, a letter dated 28th May 2010 from the council's law agent to solicitors acting for the applicants refers to many meetings and warnings to the applicants in relation to arrears of rent, and in particular a warning letter dated the 18th September 2007, and a final warning letter a month later dated 15th October 2007, and refers also to the Notice to Quit which was served on the 9th June 2008 and a demand for possession served on 28th August 2008 failing any resolution of the arrears.

Following the failure by the applicants to yield up possession of the premises on foot of the Notice to Quit and Demand for Possession, the council issued and served a summons returnable before Dun Laoghaire District Court on the 6th November 2008 wherein a warrant for possession was sought pursuant to the provisions of section 62 of the Housing Act, 1966. The applicants state that they never received that summons. They state also that they did not receive the later letter from the council dated 7th November 2008 notifying them that the case was adjourned until the 18th December 2008. However, Ms. Cronin in her affidavit states at paragraph 11 as follows:

> *"I say and am advised that on the 6th November 2008 in Dun Laoghaire District Court a man and a woman believed to be the applicants and identified themselves as such requested that the hearing of the application for an Order for Possession would be held expeditiously and on this basis the Court granted a hearing date on the 18th December 2008. I say that the respondent had a practice of not listing section 62 cases for hearing in the month of December unless specifically requested to do so by former tenants or the legal representatives and that the date for hearing in the instant case was obtained specifically to facilitate the applicants."*

She goes on to state in paragraph 13:

> *"... ... ... Council records indicate that a person identifying themselves as the second named applicant contacted the staff member in the Housing Rents Department of the respondent prior to the hearing, who contacted a staff member in the Legal Department stating that the second named applicant would not attend the hearing. "*

The applicant's second affidavit denies completely that they attended at Dun Laoghaire District Court and denies also that they received the letter dated 7th November 2008 advising them of the adjournment to the 18th December 2008.

At any rate on the 18th December 2008, the necessary proofs being in order, the Order for Possession was granted by the District Judge sitting that day. A stay of three months was placed on the order. The applicants have stated that they were not aware until September 2009 that this Order for Possession had been made on the 18th December 2008. The applicants in their first affidavit state that it was at a meeting in September 2009 that they first became aware that this order had been made, and that they were told that the council wanted the arrears discharged in one lump sum, and that the applicants proposed two lump sums of €500 each and an additional sum of €50 per week over and above the current rent of €99 per week. They state also that from that date they paid €100 per week, and from October 2009 a sum of €150 per week until their eviction occurred on the 14th May 2010. Ms. Cronin states, however, that the applicants failed to make any reasonable proposal to discharge the substantial arrears and that given the amount of the arrears it was reasonable to seek to have the arrears discharged in one sum at that stage. However, Ms. Cronin states that it was from the 18th December 2008 the applicants *'finally entered into discussions in relation to discharging the arrears of rent*", and that on foot of those discussions the council did not to seek to repossess the premises.

However, Ms. Cronin does not agree that the applicants only became aware that the order of the 18th December 2008 had been made. In her affidavit she states that it was from the 18th December 2008 the applicants "*finally entered into discussions in relation to discharging the arrears of rent"*, and that on foot of those discussions the council did not seek to repossess the premises.

By the 4th March 2010 the arrears remained to a large extent unresolved and the council sent a letter to each of the applicants by registered post referring to the Order for Possession dated 18th December 2008 and informing the applicants that "*the matter has been referred to the County Sheriff with a request that he fix a date for the immediate eviction from [the premises]*" and that they should make arrangements for alternative accommodation.

It is worth mentioning at this point in the narrative that in fact while the Order for Possession had clearly been made as of 18th December 2008, no warrant for possession had ever been issued on foot of same which act as an authority to the Sheriff to evict the applicants. To that extent the letter dated 4th March 2010 gives a false impression, as it was not until 29th April 2010 that the District Judge issued a warrant directed to the Sheriff authorising him to take possession of the premises. That warrant contains the following command to the Sheriff:

> *"This is to require and authorise you to whom this Warrant is addressed to enter upon and give possession of the said premises, within a certain period, to wit: one month from the date of this Warrant, to the said Complainant and Housing Authority its Agent or Receiver And for this the present Warrant shall be sufficient authority to all whom it may concern ".*

An issue arises, which I will come to, as to whether this direction means that the Sheriff had to wait for at least one month to pass before evicting the applicants, or if it does not mean that, whether the form is compliant with Form 47.9 of the Rules and in turn in compliance with the provisions of section 86 of Deasy's Act, as amended. Another issue is what flows from the fact that no application was made to the District Judge for an extension of time for issuing the warrant since more than six months had elapsed from the date on which the Order for Possession had been made on the 18th December 2008.1 will return to these issues in due course.

At any rate, the applicants have stated that they received a letter dated "May 2010" from the Sheriff stating that a warrant had issued for the delivery of possession of the premises, whereupon they immediately contacted the Sheriff's office but that he was not able to say on what date he was going to execute the warrant. The applicants go on to describe how on the 14th May 2010 at about 6.50am the Sheriff and his messengers and members of An Garda Siochána arrived at the premises for the purpose of executing the

warrant. The second named applicant was already at work at that time apparently, and her son telephoned her at about 7.05am to tell her what was happening, whereupon she left work immediately and returned to the premises at about 7.45am, by which time the Sheriff and the others had already entered the premises and had requested the family members to Leave the premises. When she got there she found her family outside the premises. The doors of the house had been removed and it had been boarded up. The second named applicant states that she was shocked by these events, and she wanted to gain access to the house in order to retrieve medication and a nebuliser which she requires for asthma from which she suffers. She was not permitted to re-enter the premises and was so distressed that she had to be taken to St. Columcille's Hospital where she was given oxygen.

Following this eviction the family was split up. She herself went to stay with relatives in Bray, her husband departed for England to stay with his relatives there and the children went to stay with friends in separate houses.

In the aftermath of these events, the applicants immediately sought advice from their solicitor who wrote a letter dated 18th May 2010 to the council's law agent, and who also on the 19th May 2010 issued and served a Notice of Motion returnable for the 3rd June 2010 seeking to have the Order for Possession trade on the 18th December 2008 set aside on the basis that they had not been served with the summons leading to the making of that order, or the notification of the adjournment of that summons from 6th November 2008 to the 18th December 2008. That application was determined on the 24th June 2010. The District Judge refused to set aside the order in question, not being satisfied that these documents had not been received.

The applicants and their family remain out of occupation of the premises.

The applicants have stated in their grounding affidavit that a charitable organisation has agreed to discharge the sum of €13,000 due for the arrears of rent. She states also that a charitable donor who wishes to remain anonymous has also indicated that he/she will pay a sum of €6000 towards the arrears, and that the second named applicant has herself paid a sum of €2000 to the same solicitors. She has exhibited a letter from those solicitors which confirms that a sum of €6000 is held by them, and the letter goes on to state that their client will advance an additional sum to discharge the arrears of rent up to a sum of €13,000 but "*upon a successful reinstatement of the applicants into the premises*". In other words this offer is conditional upon the council agreeing to the reinstatement of the applicants into the premises. The council are however not willing to readmit the applicants to the premises in spite of this offer in respect of the arrears, given the history of arrears outlined already. The applicants on the other hand state that they will in the future be able to discharge the rent as it falls due if allowed to return to the premises.

The applicants have stated in their grounding affidavit that if the council had brought an application to the District Court for an extension of time to issue a warrant for possession as, as they submit, is required under the legislation, they would have made submissions to the District Court and explained their circumstances and that they are thereby prejudiced since the District Judge would have had a discretion as to whether or not to permit the extension of time for the issue of the warrant on foot of the order dated 18th December 2008.

Submissions:
Arising from the factual background set forth above, Mark de Blacam SC for the applicants submits that there are three features of the procedures adopted by the council which render the warrant for possession bad in law, and which should lead to the warrant being quashed.

Firstly, it was issued more than six months after the making of the Order for Possession, without, as required as provided by Order 47, rules 15 of the Rules, an application being made to the District Court. In that regard, Order 47, rules 14 and 15 provide as follows:

> *"14. A warrant for possession pursuant to section 86 of the Landlord and Tenant Law Amendment Act, Ireland 1860 [Deasy's Act] shall be in accordance with Form 47.9, Schedule C. may be issued at any time not exceeding six months after the date of the order.*
>
> *15. After the expiration of six months from the date of the order a warrant may only be issued on application to the court by the plaintiff and on notice to the defendant. Notice of said application shall be served on the defendant by prepaid ordinary post not less than seven days before the date fixed for the hearing of the application. "*

Mr de Blacam points to the mandatory nature of these rules, and in circumstances where the warrant issued outside the period of six months from the date of the Order for Possession, and without the application under rule 15 being made, the warrant can have no validity.

Secondly, the warrant which issued from the District Court on foot of that Order for Possession is not in the form prescribed by the Rules at Form 47.9 in Schedule C thereof. When one looks at that prescribed form, one can see a number of respects in which the warrant actually signed by the District Judge departs from the text of the prescribed form. Some of those departures do not affect the substance of the form, but Mr de Blacam points to one in particular, namely the direction to the Sheriff in the penultimate paragraph thereof. The prescribed form contains the following direction: "*To enter upon and give possession of the said premises to the plaintiff or his/her agent in not less than one month from the date of this warrant*" (my emphasis). In other words the warrant is not to be executed until after one month has elapsed from the date of the warrant. The warrant actually signed contains the following direction in that regard: *"... to enter upon and give possession of the said premises, within a certain period, to wit. one month from the date of this Warrant, to the complainant and Housing Authority its Agent or Receiver ..."* (my emphasis). The Sheriff complied with this direction since he took possession on the 18th May 2010 i.e. within one month from the date of issue. Mr de Blacam submits that the applicants were thereby deprived of what he describes as "the cooling off period" of one month during which eviction may not take place. It is relevant to refer to the fact that the this one month `cooling off period' is one prescribed by section 86 of Deasy's Act which, as amended by section 13 of the Housing Act, 1970, provides that it shall be lawful to issue a warrant directed to the Sheriff "*requiring and authorizing him, within a period to be therein named, and not less than one month from the date of such warrant, to give the possession of the said premises to the said landlord .....* (my emphasis).

It is submitted that the warrant on foot of which execution was levied did not comply with this statutory requirement and the prescribed form which reflects the requirement, and that the eviction cannot therefore be a lawful one, since the authority given to the Sheriff was an unlawful one.

Those grounds are relied upon also in seeking a declaration that the eviction of the applicants was unlawful.

In addition, a third ground is relied upon in that regard, namely that the eviction took place at a time of the day outside the time permitted for such eviction to take place by the provisions of section 62 (4) of the Housing Act, 1966 (as amended by section 13 of the Housing Act, 1970) and by section 86 of Deasy's Act. In that regard, the applicants' evidence is that the Sheriff arrived at the

premises at about 6.50am on the day in question, and that by the time the second named applicant returned to the premises at 7.45am the Sheriff had already taken possession of the premises and boarded it up. Mr de Blacam has referred to the provisions of section 86 of Deasy's Act, as amended also by section 13 of the Housing Act, 1970 which provides that "*no entry shall be made under such warrant on any Sunday, Good Friday, or Christmas Day, or at any time except between the hours of eight in the morning and eight in the afternoon* " (my emphasis).

In urging upon the Court a strict interpretation of the Rules and the necessity for a strict adherence to the procedures and forms prescribed by statute and the Rules for the steps leading to the eviction of the applicants from their home, Mr de Blacam has relied upon the judgment of McCarthy J. in *McMahon v. Leahy* [1984] I.R. 525 at 547 where, although dealing with a warrant in the context of extradition proceedings and therefore one touching upon the liberty of the citizen, the learned judge stated the following in relation to the need for strict adherence to forms and procedure:

> *"One might seek to overlook patent errors in a printed document even when same forms part of sworn testimony - as in the misprint in Constable Lovell's first affidavit; for my part, where the liberty of any person, be he citizen of the State or otherwise, is concerned, where valid arrest is fundamental to the validity of the proceedings, where sweeping powers are given to the police forces of two adjoining jurisdictions, I am not prepared to overlook the careless approach and lack of attention to detail to which I have referred and which I have sought to illustrate ... ... Narrow though this approach may appear to be, the insistence on strict compliance with all the requirements of the exercise of statutory powers is a fundamental feature of our jurisprudence; it is the duty of the superior courts to exercise the vigilance necessary to ensure such compliance. "*

In addition to those submissions, Mr de Blacam submits that the failure by the council to comply with the requirement to make an application to the District Court for the issue of a warrant outside a period of six months from the making of the Order for Possession, in accordance with Order 47, rule 15 of the Rules denied to the applicants an opportunity to which they were entitled on such an application to make submissions to the District Judge which could have led to a refusal of the application on proportionality grounds, given the fact that they would have been in a position to inform the Court that they were, albeit through the generosity of a charitable donor, to discharge all the arrears of rent due, and explain their changed financial circumstances which could have satisfied the Court also that they were at that stage in a position to pay the rent on time into the future. It is submitted that proportionality is a matter which the Court would have been obliged to take into account when deciding whether or not to exercise a discretion whether or not to make the order for the issue of the warrant for possession. In that regard Mr de Blacam has referred to the provisions of section 4 of the European Convention on Human Rights Act, 2003 which requires that a court shall, when interpreting and applying Convention provisions, take due account of the principles laid down by, *inter alia*, the opinions and judgments of the European Court of Human Rights. In that regard, it is submitted that Article 8 of the Convention is engaged in a matter of this nature when it is being considered by a District Judge. It is submitted that a court can interfere with family rights but only provided that it is proportionate and therefore lawful to do so, and the denial of the opportunity to make submissions in that regard has rendered the order made by the District Court unlawful.

In support of this submission, Mr de Blacam has referred to the judgment of Hedigan J. in *Quinn v. Athlone Town Council and Others*, (Unreported, High Court, 8th July 2010) in which the learned judge cited with approval from the judgment of the European Court of Human Rights in *McCann v. United Kingdom* (Application No 19009/04, judgment delivered on 13th May 2008 at para. 50) as follows:

> *"The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end. "*

Also relied upon is a passage from *Quinn* where the learned High Court judge cited a passage from the decision of the European Court of Human Rights in *Cosic v. Croatia* (Application No 28261/06, 15th January 2009, para. 21) as follows:

> *" ... the guarantees of the Convention require that interference with an applicant's right to respect for her home be based not only on the law but also proportionate under paragraph 2 of Article 8 ... ".*

James Connolly SC for the respondent has submitted that when looking at the divergence from the particular form of the warrant which was issued by the District Judge on foot of the Order for Possession, and when considering the time at which the eviction took place, as well as the fact that no application was made for the issue of the warrant outside the six month period from the date of the Order for Possession, the Court should look also at all the surrounding circumstances, such as the history of non-payment of rent, the efforts made by the council prior to eviction to reach arrangements with the applicants to deal with the situation, and the fact that the applicants can point to no real prejudice resulting from any of these features of the case.

He submits that this Court can exercise a discretion to overlook these matters in the circumstances of this case. In that regard he refers to Order 12, rule 25 of the Rules which provides:

> *"Non-compliance with any of these Rules shall not render any proceedings void, but in cases of non-compliance the Judge may direct that the proceedings be treated as void or that they be set aside in part as irregular or that they be amended or otherwise dealt with in such a manner or upon such terms which the Judge thinks fit. "*

As far as the time at which eviction took place is concerned - just before 8am on the morning in question - he submits that in any event the Sheriff is an independent officer and that the time at which he acted was outside the control of the council itself.

Regarding the fact that the warrant issued after six months had elapsed from the date of the Order for Possession, it is submitted that even if this is so it does not render the warrant invalid, and that at best, from the applicants are concerned, it becomes voidable, and he refers to the fact that the applicants never sought to have the Order for Possession quashed and that it remains valid. He refers to the fact that once the applicants failed to give up possession on foot of the Notice to Quit their tenancy determined and they no longer had any right to remain in possession of the premises.

Regarding the fact that the warrant for possession was executed within one month from the date of its issue, Mr Connolly has submitted that this is in fact in accordance with the provisions of section 62 of the Housing Act, 1966 as amended by section 13(1) of the Housing Act, 1970 as set forth above. He puts forward a different interpretation for the relevant provision in section 86 of Deasy's Act, as amended. He submits that section 86 authorises the issue of a warrant to the Sheriff requiring him to execute same "*within a period to be named therein ...*" and that the amendment effected by section 13 of the Housing Act, 1970 means that the warrant requires the Sheriff to take possession within a period of one month, and that it is not the case that possession may not take

place until one month has passed. In other words, he submits that there is no provision for what the applicants have called `a cooling off period of one month'. Accordingly, it is submitted that the warrant which directed the Sheriff to execute the warrant "*within a certain period, to wit: one month from the date of this warrant*" is in accordance with the statutory provisions in this regard.

Mr Connolly has also directed his submissions towards a consideration of the rights of the parties herein, the applicants and the respondent council. He refers to the fact that the applicants' tenancy was lawfully terminated upon the expiry of the Notice to Quit, and that thereafter they have no right to occupy the premises, and that therefore their eviction on foot of a valid order for possession obtained in December 2008 must be seen as an inevitable consequence of their own actions in failing to pay the rent which they were obliged to pay under their tenancy agreement with the council. That order for possession remains unchallenged, and it is submitted that it is still of full force and effect.

Mr Connolly has referred to the judgment of Kearns J. (as he then was) in *Dublin City Council v. Fennell* [2005] 1 I.R. 604, and that of Hedigan J. in *Quinn v. Athlone Town Council*, (Unreported, High Court, 8th July 2010) to the effect, *inter alia*, that Article 8 rights are first engaged in cases of this kind at the point in time when the Notice to Quit is served. It is submitted not only that the applicants engaged with the council after that point in time and can be seen as having acquiesced in the procedures, but also that they should be refused any relief on the present application by reason of their delay, since in effect the applicants are trying to challenge the order for possession itself when they state that they were not aware of the return date and adjourned date for the application for possession, and the time for so doing has long expired. It is submitted that if the applicants had wished to challenge the order for possession on the grounds of lack of proper notice prior to it being made, they were in a position to do so within the prescribed time for making that challenge which is provided for in Order 84, rule 21 of the Rules of the Superior Courts, and that it is now too late.

It is submitted that the fact that thereafter the council forbore in seeking to enforce that order by eviction, in the interests of the applicants and pursuant to representations on their behalf in relation to discharging the arrears, should not prejudice the council now so long after that order for possession was made. It is urged upon the Court that this feature of the case should persuade the Court that any failure to seek an extension of time from the District Court before obtaining the warrant for possession should be overlooked, in view of the fact that during the period of six months after December 2008 the council and the applicants were seeking ways to deal with the situation without the need for eviction on foot of a warrant of possession.

It is submitted also that while the applicants have the benefit of family rights under Article 8 of the Convention and other Article 41 of the Constitution, these are not absolute rights, and must not be seen to be unlawfully interfered with simply because there may have been some error in the process by which the warrant issued on foot of a lawful order for possession was executed, particularly a technical error or errors that do not affect their rights in a fundamental way.

Mr Connolly urges the Court to have regard also to the responsibility which the council has to manage its public housing stock in an efficient and fair way in the interests not just of these applicants but in the interests of all members of the public within its functional area. Again, he points to the statutory scheme for repossessing a premises from tenants who will not pay their rent as required, and to the fact that in this case the Notice to Quit had the effect of bringing to an end the entitlement of these applicants to remain in the premises, and that the obtaining of the order for possession was a step lawfully taken, and remains unchallenged and of full effect. It is submitted therefore that the applicants have no standing to argue that this Court should make an order the effect of which would be to allow them get back into possession of a premises in respect of which their tenancy has been lawfully determined.

Even if the applicants are correct in pointing out some technical errors either in the form of warrant completed or as to the hour at which the Sheriff evicted the applicants, it is submitted that their remedy should not be one which would have the effect of enabling them to occupy the premises to which they have no longer any entitlement in law. Any remedy, if at all, should sound in nominal damages only, and that, absent any *mala fides*, or action by the council which could be seen as high-handed and egregious, there could be no question of damages having to be exemplary in nature.

Mr Connolly submits also that this Court should not act in vain by making an order quashing a warrant for possession which has already been executed, even if the Court was satisfied that it was invalid at the time of execution, having regard to the various matters advanced by the applicants, in particular perhaps the failure to seek an extension of time from the District Court for the issue of same, as opposed to the alleged want of proper form. To do so, it is submitted that the Court would be facilitating an unlawful occupation of the premises, in view of the fact that the applicants' tenancy has been lawfully determined by the Notice to Quit, and they have no right to be there any longer.

He urges in addition that there would be futility in any order that might result in the applicants regaining possession of the premises, since inevitably it would lead to an application being made by the council to the District Court for an extension of the time to issue a fresh warrant, leading inevitably to an execution of same, whereby the applicants would necessarily again be required to leave the premises. It is submitted that in these circumstances the Court should exercise its discretion in favour of the respondent council.

In support of these submissions, Mr Connolly has referred to the judgment of FitzGibbon LJ. in *The King (M'Swiggin) v. Justices of County Londonderry* [1905] 2 I.R. 318. That was a similar sort of case though on different facts of course. In that case the order for possession made at the Petty Sessions Court failed to state on the face of the order the amount of the rent payable, this being something necessary in order to show the jurisdiction of the Court to make the order. There was therefore a want of form in the sense that it was not apparent on the face of the order, as required, that the Court had jurisdiction. However, the High Court was satisfied that there had been evidence of the rent before the Petty Sessions Court and that it had jurisdiction to make the order actually made. Following the making of that order, and on foot of it, the landlord obtained possession of the premises. It was some three months later that the applicant sought to have the order for possession quashed by *certiorari*. FitzGibbon LJ was satisfied that the order was deficient on its face, but also that it was an order made within jurisdiction. Since the order was spent once possession was obtained on foot of same, FitzGibbon LJ. was satisfied that "*to bring it up to be quashed, under such circumstances, is not necessary for any purpose", since "if it is bad on its face, it is null and void and it is no bar to any action. It declares no right; it affects nothing; it authorises no continuing wrong, and no action has been or ever can be taken upon it, since August 5th last [the date of recovery of possession].* "

In the same case, Holmes LJ in his judgment stated at page 323:

> *"I accept the proposition that a person whose rights may be affected by an illegal or invalid order of an inferior court, or who may be otherwise prejudiced thereby, is entitled to have the order quashed, unless he is precluded by his conduct or by delay from making the application.*
>
> *The High Court, however, ought not to interfere by writ of certiorari where its interference is manifestly unnecessary and useless, as it would be in this case.*

> *The order was executed, and possession of the house taken early in August. The writ of certiorari was not applied for until nearly three months later. What benefit could Annie M'Swiggin then gain from it? It would not restore her to possession; and in as much as the ground of the application is that the order is invalid on its face, it could not affect her rights, whatever they my be. Courts of Justice ought not to countenance litigation that is manifestly unnecessary, and I am therefore of the opinion that the appeal must be disallowed. "*

Mr Connolly has also relied upon the judgments of the Supreme Court in *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381. In that case the prosecutor had failed to exercise a right of appeal against the decision of the respondent in favour of seeking a declaration and other reliefs by way of judicial review. Chief Justice O'Higgins was satisfied that the object and purpose of the prosecutor in those proceedings was "*to bypass the scrutiny of planning proposals provided by the Planning Acts and, thereby, to frustrate their operation in this instance*" (p. 395), and that in such circumstances the Court should exercise its discretion by refusing the reliefs sought "*having regard to the existence of an adequate appeal procedure, to the conduct and motives of [the prosecutor] and to all the circumstances of this particular case*".

In the same case, Henchy J. concluded at page 402 that "*the proper exercise of judicial discretion in the instant case requires that [the prosecutor] be denied certiorari, for its only purpose would be the pursuit of an unattainable object, i.e. a development permission by default.*"

The Court was also referred to what was stated by Walsh J. at p. 398 where, having concluded that an order of *certiorari* would be of no benefit to the prosecutor, he concluded that where such an order of *certiorari* would be of no benefit to the prosecutor, the Court should exercise its discretion to refuse to make the order sought "*where that would not confer any benefit to [the prosecutor]*".

Accordingly, Mr Connolly submits that no lawful purpose would be served for the applicants by the quashing of the warrant, since their right to possession was lawfully determined when they failed to give up possession upon the expiry of the Notice to Quit, following which they no longer have any right to be in the premises, and the Court should in the exercise of its discretion refuse the reliefs sought.

In response to these submissions, Mr de Blacam has referred also to the judgment of Henchy J. in *Abenglen*; and in particular to a passage at page 403 where having referred to *The State (Vozza) v. O'Floinn* [1957] I.R. 227 he stated:

> *"I respectfully agree with the unanimous decision of this Court that, in those circumstances, Vozza's conviction and sentence could not withstand an application for certiorari, regardless of any lack of candour or exaggeration on his part in the making of his application for a conditional order of certiorari. He was entitled ex debito justitiae to a quashing of the conviction."*

The Court has also been referred to a passage from the judgment of Walsh J. in *Abenglen* where at page 398 he considered the question of the availability of an alternative remedy by way of appeal which was not availed of, and stated:

> *"There is no doubt that the existence of alternative remedies is not a bar to the making of an order of certiorari. A court, in its discretion, may refuse to make such an order when the alternative remedy has been invoked and is pending. However, a court ought never to exercise its discretion by refusing to quash a bad order when its continued existence is capable of producing damaging legal effects. A court's discretion cannot in justice be exercised to produce or permit a punitive or damaging result to be visited upon an applicant as a mark of the court's disapproval or displeasure when such result flows from, or is dependent upon, an order which is bad in law - even when the applicant (by his conduct or otherwise) has contributed to the making of such an order. Such conduct can be dealt with in deciding the question of costs."*

Accordingly it is submitted that despite the fact that the applicants were seriously in arrears with their rent and failed to discharge them, and still have not done so, the Court should exercise its discretion in favour of the applicants who were evicted from their house on foot of a warrant that was not issued in accordance with law, who should be permitted to return to their home so that on any future application by the council for an extension of time to issue a fresh warrant they can make what submissions they can to the District Court, particularly in relation to the proportionality of such an order being granted, and to permit them to avail of the charitable donation which will enable all arrears to be discharged by the time that application may come again before the District Court.

Conclusions:

The form of the warrant: Form 47.9 of Schedule C of the Rules:

As set forth above, the warrant which issued in this case directed the Sheriff to deliver up possession of the premises "within a period of one month from the date of the warrant". The question raised in this regard is whether or not that timeframe is in accordance with the provisions of section 86 of Deasy's Act, as amended by section 13 of the Housing Act, 1970. Section 86 in its original form provided for the issue of a warrant requiring possession to be obtained within "*a period to be named therein, and not less than seven or more than fourteen clear days from the date of such warrant*". (my emphasis)

The warrant is issued by the District Judge pursuant to the provisions of section 62 (3) of the Housing Act, 1966. As originally enacted, section 62 (4) of the Act of 1966 provided, *inter alia*, that the provisions of section 86 of Deasy's Act shall apply. Prior to its amendment therefore, this provision required that possession could be obtained within the period specified but not within seven days or beyond fourteen days from the issue of the warrant. In other words there was a period of seven days within which the warrant could not be executed. That provision was amended by section 13 of the Housing Act, 1970 so that the words "a period to be named therein, and not less than seven or more than fourteen clear days from the date of such warrant" in section 86 of Deasy's Act were replaced in their entirety by the words "of one month", so that the relevant portion of section 86 in its amended form reads "*to issue a warrant .... requiring and authorizing him within one month to give the possession of the said premises to the landlord... ".*

It seems to me that the direction continue din the warrant which actually issued in this case on the 29th April 2010 is in accordance with the statutory provision, and that it is Form 47.9 of Schedule C of the District Court Rules which fails to conform to the amended statutory provision, since the latter contains a direction "To enter upon and give possession of the said premises to the plaintiff or

his/her agent in not less than one month from the date of this warrant" (my emphasis). This form appears to provide for a one month period from the date of the warrant within which possession may not be obtained i.e. a 'cooling off period' as contended for by the applicants, whereas the amendment to section 86 of Deasy's Act by means of the amendment to section 62 (4) of the Act of 1966 by section 13 of the Act of 1970 has removed the said 'cooling off period' and provided that possession shall be obtained "within one month" of the date of issue of the warrant.

It follows in my view that even though the form of warrant fails to conform in this respect to the form provided by the Rules, it complies with the statutory provision, and must be seen as being in accordance with law in that respect. Form 47.9 of Schedule C of the Rules is incorrect in this respect and consideration should be given by the District Court Rules Committee to amend same so that it is in accordance with the statutory provision so that confusion is avoided in future cases.

Time of execution:

The uncontroverted evidence is that the Sheriff obtained possession at about 7.45 am on the morning in question, having arrived for that purpose at about 6.45am. Possession was therefore obtained some fifteen minutes earlier than the earliest time permitted by section 86 of Deasy's Act, as amended by section 13 of the Act of 1970, though if the time at which the Sheriff arrived for that purpose is to be seen as the time at which he obtained possession, then he obtained possession one hour and fifteen minutes earlier than is permitted. Either way, however, I would consider that this error is not one which of itself would be sufficient to entitle the applicants to relief, and can be considered in all the circumstances to be a *de minimis* departure from the statute, and the Court has a discretion to refuse relief on that ground where no particular prejudice is stated by the applicants to have arisen thereby.

Warrant issued outside six months from the date of the order for possession:
Again, there is no disputing that the warrant was issued outside the period of six months from the date of the order for possession as provided for in Order 47, rule 14 of the Rules, and that the council made no application to the District Court for a warrant pursuant to the provisions of Order 47, rule 15 thereof. That rule provides that notice of such an application must be served on the defendant not less than seven days before the return date for the application. Clearly the defendant is to be afforded an opportunity on such an application to make submissions to the District Judge before the Judge exercises his/her discretion to make or refuse to make an order for the issue of the warrant outside the period of six months. Clearly in the present case, the applicants may have availed of that opportunity to urge upon the District Judge that the warrant should not issue, and that they may have informed the Court that their circumstances had improved by reason of the employment of the second named applicant referred to by her in her grounding affidavit, and by producing the evidence of the availability of a charitable donation sufficient to ensure that the then current arrears would be discharged if they were permitted to remain in possession of the premises. Submissions as to proportionality in the context of family rights under Article 8 of the Convention and under Article 40 of the Constitution may also have been made on their behalf.

Whether or not the District Judge would have acceded to such submissions is impossible to say. He/she would clearly have a discretion to exercise in that regard, and provided that he acted judicially in the exercise of that discretion, it is possible given all the circumstances that he/she would still have permitted the issue of a warrant. But the gravamen of the applicants' submission in this regard on the hearing of this application for relief is that they were denied that opportunity.

It cannot be disputed that the warrant on foot of which the applicants were evicted was not one which was issued in accordance with law. It was therefore not a sufficient or indeed any authority on foot of which the Sheriff could act. That is not to impute any *mala fides* on the part of the Sheriff. He was not aware that the warrant had not issued pursuant to an order made under Order 47, rule 15, and neither was there any onus upon him to make enquiries in that regard. But the council must be taken to be aware that the warrant was invalid. Again, no *mala fides* should be attached to the officers of the council who achieved the issue of the warrant without such an order. No doubt it was a simple error, and it can be remarked also in that regard that having obtained an order for possession, they engaged with the applicants in the hope that some appropriate arrangement could be made in respect of the arrears and current rent, and it was only after these engagements failed to achieve a result acceptable to the council that they decided to move in relation to a warrant and the obtaining of possession. But the fact remains that eviction was obtained without lawful authority in that regard.

It must be noted also that before the Sheriff arrived to take possession he had notified the applicants in advance of his intention to do so by letter dated "May 2010". 1 do not know on what date in May 2010 that letter was received, but the second named applicant has stated that she contacted the Sheriffs office to find out the date on which he would be attending for the purpose of executing the warrant but this information was not given to her by whoever she spoke to.

No other step was taken by the applicants at that point, such as getting in touch with their solicitor. Of course, they had no reason to believe that the warrant in possession of the Sheriff was defective. But had they sought legal advice, it is possible that their solicitor may have sought a copy of the warrant and may have ascertained from the District Court or from the council's legal representative that no application for the issue of the warrant had been made in the District Court as required. Had this occurred the applicants' solicitor could have advised them there was an opportunity to make an application to restrain the execution of the warrant on the grounds of its invalidity. Such an application may well have been granted. Nevertheless, what would have inevitably followed would have been an application to the District Court by the council for the issue of a fresh warrant under Order 47, rule 15 of the Rules. However, the fact is that it was not until immediately after their eviction that the applicants went to their solicitor and, thereafter, that an unsuccessful application was made to set aside the order for possession made on the 18th December 2008 on the grounds that they had not been served with the summons leading to the making of that order. It was not until July 2010 that it would appear that a charitable donor emerged to enable the applicants at the eleventh hour to discharge the arrears due at that time.

Futility/Proportionality:
It must be concluded that the warrant on foot of which possession was obtained was an invalid warrant. In a criminal context, a person arrested on foot of an invalid warrant would almost certainly have to be released, and I note the comments in relation to *Vozza's* case in the judgment of Henchy J. in *Abenglen* at page 403. The present case is not a criminal case, and it does not follow that because the applicants were evicted on foot of an invalid warrant, that they must be returned to the situation as it existed prior to their eviction. The Court's discretion is engaged, and the Court can have regard to the fact that quashing the warrant now on the grounds of its invalidity will achieve no useful purpose since it has already been executed, and to all the circumstances of the case, including that at the time that they were evicted and for a long time prior to that event, a considerable amount was due by them in respect of arrears of rent, and that they had failed to address that issue in any timely or satisfactory way. The Court can of course also weigh in the balance the fact, as it undoubtedly is, that the applicants were deprived of no more than a possibility that the District Court on an application for a warrant being made under Order 47, rule 15 of the Rules, the District Judge might, having heard the applicants' submissions, have exercised his discretion by refusing to issue the warrant. That is probably the high point of the

applicants' case in these proceedings.

The high point of the council's case is probably that, even if this Court is satisfied, as it is, that the warrant was invalid, no useful purpose as far as the applicants are concerned is served by the granting of an order quashing same, as it is spent, or by any declaration that the eviction was unlawful, and that in circumstances where the order for possession is not under challenge and the tenancy lawfully determined upon the expiry of the Notice to Quit, the applicants have no longer any legal right to be in occupation of the premises.

The provision by which a warrant may not issue outside a period of six months without an order from the District Court is an important protection provided to tenants. For example, it serves to protect a tenant against whom a landlord has obtained an order for possession, from a landlord who has dragged his/her heels thereafter for six months or more, and who may have tolerated or acquiesced in a continued occupation of the premises following the making of the order for possession and thereby led the tenant to believe that no action would be taken on foot of the order for possession. The protection provided is that no warrant can issue until an application, on notice to the tenant, is made to a District Judge. It prevents matters from proceeding by surprise after a lengthy period has passed, possibly leading to a false sense of security on the part of the tenant and his/her family.

In the present case, following the making of the order for possession, the applicants engaged with the council. I do not accept that they were unaware of the summons which led to the making of that order, or the letter informing them of the adjournment of that application to the 18th December 2008. I accept the evidence contained in the letter dated 28th May 2010 from the council to the applicants' solicitors, and the evidence in that regard in the affidavit of Marie Cronin, that during 2009 representations from the applicants were entertained by the council. They were written to again on the 3rd March 2010 to the effect that the matter was now being referred to the Sheriff. The fact that the warrant itself had not issued by that date, and did not as a matter of fact issue until 29th April 2010, does not dilute the fact that the applicants were at all times made aware of the council's intention to evict the applicants. In fact there is evidence from that letter dated 3rd March 2010 that at a meeting in the councils' offices on the 16th April 2010, the applicants were informed that the council was proceeding with the eviction, and were given other advices about contacting the homeless support services and other welfare services. That meeting took place only a couple of weeks before the applicants received a letter from the Sheriff that he would be seeking possession, albeit that a particular date for that action was not contained in the letter. The applicants appear to have taken no step in the short time between this information being given to them and the warrant being executed. They certainly cannot claim that they were taken by surprise, and that is relevant to the Court's consideration of whether the denial of the opportunity to make submissions to the District Judge on an application for a warrant under Order 47, rule 15 of the Rules is sufficient to amount to a denial of the protection intended to be provided for by the requirement that such an application must be made.

It is against that background that the Court should consider the futility of any order that could be made on the present application to quash the warrant or make any declaration, let alone grant any injunctive relief which could permit the applicants to resume their unlawful occupation of the premises now that the order for possession has been obtained, and whether that consideration should outweigh any prejudice to the applicants arising from the fact that they had no opportunity to make submissions to the District Court on an application in that regard.

Having considered the competing interests and the submissions made by each party I have reached the conclusion that even though the eviction took place on foot of an invalid warrant, the circumstances in which that occurred were not deliberate. The fact is that the applicants are no longer in occupation of the premises and the warrant, though not lawfully issued, is spent. It never had legal validity in fact. As with the warrant in *The King (M'Swiggan) v. Justices of Londonderry* (supra) the warrant in the present case is and always was a nullity, declared no right, and authorizes no continuing wrong, and to bring it up to be quashed would serve no useful purpose. No quashing of the warrant can restore the applicants to possession of the premises.

There was no conscious and deliberate breach of the applicants' rights, as is clearly demonstrated by the manner in which the council continued to deal with the applicants after the order for possession was made. There was no *mala fides* demonstrated in any way. If there were to be such a deliberate and conscious neglect to do things as they are required to be done under the District Court Rules, the Court has ample powers to address such an exceptional situation, but the present case is far from that.

Even though the applicants enjoy the protections afforded by, *inter alia*, Article 8 of the Convention, those rights are not absolute rights. Nevertheless the principle of proportionality is something which needs to be considered, particularly given the obligations upon this Court under section 2 and section 4 of the European Convention on Human Rights Act, 2003, and I have had regard to the jurisprudence of that Court to which I have been referred, and in particular the statement quoted already from the judgment of the European Court of Human Rights in *McCann v. United Kingdom* [supra] that "*any person at risk of an interference of this magnitude [loss of one's home] should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end*. "

But, I am satisfied that at this point in time, and given the circumstances generally both before and since the making of the order for possession, and the conduct of both parties to these proceedings, that refusing to grant the reliefs sought is not disproportionate, and that the discretion vested in the Court should be exercised by refusing the reliefs being sought by the applicants, and I so order.