

THE HIGH COURT

Record Number: 2005 No. 2143P

BETWEEN

CORK CITY COUNCIL

PLAINTIFF

AND

LIAM BURKE AND MARIAN BURKE

DEFENDANTS

Judgment of Mr Justice Michael Peart delivered on the 15th day of August 2005

1. The plaintiffs are the owners of a substantial and old dwelling house known as Ringmahon House, situated in Mahon, Cork. There are substantial grounds also at these premises as well as a garage and outhouses.

2. The first named defendant has been in the employment of the plaintiff since 1974 in the Parks Department, and has been in occupation of what is referred to as "the West Wing" of Ringmahon House since about July 1976 under and by virtue of a Caretaker's Agreement dated 29th July 1976. The second named defendant is the wife of the first named defendant. I shall for convenience refer to them simply as "the defendant" since there is no distinction between the two defendants as far as the claims made herein are concerned. The defendant is a salaried employee of the plaintiff in addition to the benefit of his use of the premises referred to, and his duties are not and have never been confined to looking after the house and grounds at Ringmahon House. He has other work in various parks in the area.

3. By that agreement the defendant acknowledged that he was in possession of the West Wing and the grounds as a caretaker only, and under no contract of tenancy. He also undertook to vacate the premises "whenever required to do so" by the plaintiff, and he further acknowledged his duty to maintain the grounds attached to the house to the satisfaction of the plaintiff, to maintain the public grounds and open spaces as required, and the plaintiff's permission to him to use the walled-in garden for the growing of vegetables for his own use only.

4. The first named defendant and his wife have dwelt in the West Wing now for twenty nine years, but are now required to vacate the premises by the plaintiff because the plaintiff wishes to carry out very major redevelopment of the premises and the grounds attached so that some sheltered accommodation for elderly people can be provided urgently.

5. The plaintiff maintains that over the past couple of years the defendant has been well aware of the plaintiff's intentions and plans because there has been a protracted negotiations process taking place over that time in order to reach an agreement with the defendant whereby the defendant would vacate and the plaintiff would provide him with a package of assistance to enable him to accommodate himself elsewhere. These negotiations have not yielded fruit according to the plaintiff, and it has now decided to exercise its legal rights so that it can achieve vacant possession of the premises so that the necessary and urgent works can be carried out. To this end the plaintiff served a 7 day notice by letter dated 17th June 2005 requiring possession in the event that the defendant did not accept any one of four alternative offers regarding alternative accommodation set forth in that letter.

6. The defendant is not happy to accept any of the said proposals, and says that he would require more detail in relation to these. The plaintiff maintains that it has put forward a variety of very reasonable proposals which acknowledge the long time that the defendant has had enjoyment of the premises under the Caretaker's Agreement, and his service with the plaintiff as an employee. On the other hand, the defendant submits that he is not obliged to accept any of these proposals, and that if the plaintiff wishes to obtain possession on foot of the Agreement by obtaining a Court Order, it must do so lawfully. In that regard the defendant submits that given his occupation of the premises as his family home for twenty nine years, a seven day notice as contained in the said letter dated 17th June 2005 is wholly inadequate to meet the situation and is unreasonable to the extent that the plaintiff should not be entitled to succeed in these proceedings.

7. The plaintiff on the other hand submits that the notice period given to the defendant must be seen in the light of the fact that over a number of years, during which discussions have taken place with the defendant, the defendant has been aware of the wish of the plaintiff to regain possession of the premises for the purpose of carrying out the proposed development, and that this period must be included in, or deemed to be part of, the reasonable notice which it has in effect given to the defendant.

8. I do not propose to set out in detail all that is contained in the various affidavits as to the nature of discussions which have taken place over that time. Suffice to say that the plaintiff has made offers which could enable the defendant to purchase or otherwise acquire an alternative premises on what the plaintiff considers to be favourable terms and with its assistance. The defendant does not see things that simply however. The plaintiff at the same time does not accept that it has any obligations to assist the defendant in these ways to re-accommodate himself and his wife, yet it preferred to do so because of the wish that after so many years in occupation of the premises, that situation would be recognised in a reasonable way and that the plaintiff should be seen to act reasonably in that regard. Nevertheless the plaintiff submits that whatever about its wish on a voluntary basis to assist the defendant in finding alternative accommodation, at the end of the day if it cannot reach an agreement with the defendant, it is entitled to rely on its legal rights and obtain possession of the premises without compensation to the defendant.

9. The defendant maintains that the actions of the plaintiff, particularly by sending a firm of contractors to commence work without notice to the defendant, was an act of intimidation and was high handed in the extreme. There are other ways set forth in the affidavits in which the defendant complains about the manner in which the plaintiff has conducted itself in the task of attempting to get possession, but again I do not propose to go into all of that in detail.

10. This application is for an order pursuant to paragraph (a) of the Notice of Motion dated 22nd July 2005 as follows:

"(a) to restrain the defendants and each of them, theirs and each of their respective servants of agents, licensees or invitees, from trespassing upon or occupying the west wing of Ringmahon House, and the double garage and sheds associated therewith at Mahon in the City of Cork, until further or other order."

11. In effect the plaintiff seeks possession on an interlocutory application, even though the relief is couched in prohibitory terms, so that in the meantime until the trial of this action the works can be allowed to proceed.

12. Very extensive submissions have been made by both parties. Much of those submissions and the case-law referred to, while very interesting and helpful and carefully prepared and presented will be of great assistance to whatever judge hears the ultimate trial of

this case as to whether the plaintiff is entitled to possession on foot of the notice which was served requiring possession to be yielded up. However my function is quite limited as is always the case where an interlocutory injunction is sought. In order to obtain an interlocutory injunction, this Court must first be satisfied that a fair or serious issue has been raised by the plaintiff. In this case the question at issue is whether or not the plaintiff is entitled to claim possession of the premises on foot of the Caretaker's Agreement and in that regard whether the notice given to the defendant is the appropriate notice. This will be very much a matter of law, and while the defendant, through Seamus Woulfe SC has referred to significant caselaw to the effect that seven days notice to vacate after a period such as 29 years occupation can never be adequate or reasonable notice, the question will remain to be determined whether the period which preceded that seven day notice and during which efforts were made by the plaintiff to resolve matters amicably without resorting to relying on strict legal rights, can be had regard to.

13. The defendant also raises a defence by way of proprietary estoppel. The plaintiff submits that it is an unstatable defence. Time will tell.

14. David Holland SC on behalf of the plaintiff has submitted that the defendants are now trespassing and that this is a clear case in which the plaintiff ought to be entitled to an interlocutory order, and that the defendants can have no Defence since the title of the plaintiff to the premises cannot be disputed. However, even though the title of the plaintiff is not the issue in dispute there is certainly a dispute and it will be determined as a matter of law to a large extent rather than a matter of fact, as to whether reasonable notice is required which is longer than the seven days given, and also whether the pre-notice period of negotiation and discussion can be taken into account in considering the reasonableness of notice given. That in my view amounts to a fair issue for the purpose of this interlocutory application. The plaintiff cannot in my view say that there is no possible Defence to the plaintiff's claim. It is a matter capable of argument to the point where it requires a full determination. For my part, given the inequality between the parties, I would favour the view that the question of reasonable notice must be addressed as of the date upon which legal rights are being invoked, rather than by reference to some indefinite period in which it will not have been clear to the defendant that time was running against him. However that is a view which must not in any way influence the trial judge, who will be far better placed, after full argument and perhaps some evidence, to determine the question in a substantive way.

15. The Court must therefore address the question of the adequacy of damages, and then also pass to the question of the balance of convenience.

16. The question of whether damages would be an adequate remedy for the plaintiff, it is really an irrelevance in this case. Their claim for damages is based on the fact that if they cannot have vacant possession, or at least such possession as enables it to carry out the works which are necessary for the attainment of their plans of development, they will incur weekly losses of in the region of €7000 including VAT, by way of payment to a contractor. It will also be impeded in the provision of sheltered housing for the elderly, and great emphasis is placed on this fact as causing irreparable harm. There is no way in which the defendant could meet any award of damages in view of the modest salary he enjoys for his employment by the plaintiff. So damages could not be an adequate remedy.

17. However, the fact that the defendant could not meet an award of damages is not by itself determinative of the matter. If it were, then it would be the case that in all cases brought against an impecunious defendant, a plaintiff could always restrain activity pending the hearing, and the balance of convenience consideration would be redundant.

18. An important factor in the present case is the nature of the claim, as well as of the premises in question, namely the defendant's family home where he and his wife have resided for twenty nine years. Another important factor is the relationship of employment which exists between the parties, and the fact that the plaintiff is a public authority rather than a private commercial enterprise. The inconvenience to the plaintiff is that a proposed development of some accommodation for elderly people is held up until the plaintiff can either reach an amicable arrangement with the defendant, or until these proceedings can be finally determined and vacant possession achieved. A weekly financial cost has been averred to, as already referred to. The plaintiff's plans have been in existence for quite a number of years at this stage, but having failed to reach agreement with the defendant they want to exercise whatever legal remedies might be available to them.

19. For the defendant the inconvenience if enjoined in the manner sought is that this couple will have to leave at very short notice the house which has been their family home for twenty nine years, and which they have maintained over that time. They have stated through their Counsel that they wish to adopt a reasonable stance with the plaintiff in their discussions, but they are of the view that the plaintiff is not being reasonable in the matter of notice of their departure from the house. In the event that they are successful in their Defence of these proceedings either on the question of whether reasonable notice has been given, or proprietary estoppel or whatever, it seems to follow that they would be entitled to resume their previous occupation of the west wing, yet by that time all manner of development might have taken place in relation to the plaintiff's plans for development, although presumably the plaintiff could undertake not to disturb the West wing premises or do anything which would interfere with the possibility of the defendant resuming possession if successful in the proceedings. Following any such victory in the proceedings, the plaintiff would thereupon presumably serve another notice on the plaintiff of a length commensurate with the determination of the trial judge on the notice already given, and the defendant would be entitled to reside there until the expiration of that notice period.

20. It seems to me at this stage that the balance of convenience lies in the plaintiff being required to delay its plans until these proceedings are determined, so that the defendant is not required to peremptorily uproot and find alternative accommodation, perhaps on a temporary basis, only to perhaps resume possession of the premises at issue herein. The inconvenience of that to the defendant outweighs the inconvenience of the plaintiff, who have already had to wait for some time and will now be required to wait a bit longer. The plaintiff will be in a position to expedite as much as possible the hearing of this case so that the matters at issue can be determined in everybody's interests as quickly as possible. The present impasse is not desirable in my view and has the capacity to escalate if the plaintiff seeks to progress its development even in relation to the out-houses which the plaintiff has been using for some time.

21. I am therefore refusing the relief sought in the Notice of Motion, and I will make such directions as may be appropriate so as to progress the matter as speedily as possible to a full hearing, unless some amicable compromise can be reached.