

THE HIGH COURT

[2022] IEHC 348

[2021/3794 P]

BETWEEN

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

VINCENT KAVANAGH AND MADELEINE (MADELINE) KAVANAGH

DEFENDANTS

JUDGMENT of Ms. Justice Egan delivered ex tempore on 2nd day of June, 2022

Introduction

1. This is the court's *ex tempore* judgment in respect of an application made to the court on 31st May, 2022 seeking an order pursuant to O.44 of the Rules of the Superior Courts for the attachment and committal of the first named defendant and three other individuals, Mr. Dylan Kavanagh, Mr. Brian McCarthy and Mr. Francis Murphy, for their alleged failure to comply with an order of the High Court (Allen J.) made on 3rd March, 2022.

Order of 3rd March, 2022

2. On 3rd March, 2022, the defendants, their servants or agents and any other person acting in consort with them or having knowledge of the order were restrained pending the trial of the action from:
 1. Trespassing upon or otherwise entering the property comprised in Folio 9004F County Carlow known as 36 Beechwood Park, Carlow, County Carlow ("the property");
 2. Filming or recording by any means the employees, servants or agents of the plaintiff or the County Registrar for Carlow or his servants or agents at or near the property and from posting such footage or images on the internet or otherwise sharing such films, videos or images by way of social media.
3. Execution on foot of the above order was stayed until 12 noon on Friday 4th March, 2022.
4. In brief, the background to the order of 3rd March, 2022 is as follows: On 14th March, 2016 the Circuit Court (Her Honour Judge Fergus) made an order for possession of the property. The High Court (Noonan J.) subsequently dismissed an appeal by the defendants against that order. On 17th February, 2022, the order for possession was executed and possession was delivered to the plaintiff. Later that day, the first and second named defendants broke into the property and, despite demand, the first named defendant has since that date refused to leave.
5. In a reserved judgment of 3rd March, 2022, Allen J. stated that the first and second named defendants were trespassers and that the plaintiff was clearly entitled to the interlocutory order which it sought. Allen J. noted that the defendants had sought to resist the application on a number of grounds but that there was no substance to any of their

arguments. Allen J. noted that in truth the case was a perfectly simple one and that the defendants had defied the process of the law.

6. No appeal was pursued by the defendants against the order of Allen J. of 3rd March, 2022. For completeness, it should be noted that the second named defendant has since left the property and that the present application did not concern her in any way.

Non-compliance with Order of 3rd March, 2022

7. The circumstances in which the order of 3rd March, 2022 came to be before this court are set out in an affidavit of the plaintiff's solicitor sworn on 19th May, 2022. Initially, the plaintiff tried to come to a resolution of the matter and by letter of 9th March, 2022 requested the defendants' proposals. The consistent attitude of the first named defendant, as evident from his correspondence with the plaintiff's solicitor, has been to refuse to acknowledge the validity of the order of 3rd March, 2022. The plaintiff's solicitor was therefore instructed to serve the order of 3rd March, 2022, with a penal endorsement, upon the first name defendant and any other occupants of the property. The plaintiff's solicitor engaged the services of Blackwater Bailiff and Asset Management Services Ltd to effect service of the penally endorsed order. Service was attempted on 28th March, 2022 and on four subsequent occasions thereafter. On each such occasion the summons server detected activity from inside the property, knocked on the door but received no answer. The summons server was therefore instructed to return to the property and attach an envelope to the door of the property containing the order bearing the penal endorsement, which he did on 12th April, 2022. When the summons server returned the following day, the envelope had been removed.
8. It is clear that the first named defendant received a copy of the penally endorsed order as, in correspondence to the plaintiff's solicitor of 13th April, 2022, he acknowledged receipt of the order but stated that it was a "*false*" penal endorsement and that same was "*an ultra vires instrument*". The first named defendant further stated that leaving the order at the property constituted a trespass.
9. As a result of the forgoing, the plaintiff concluded that the first named defendant was recalcitrant and determined not to leave the property; and that a number of other individuals were either residing in the property or were present on the property.
10. Accordingly, the plaintiff issued the motion for attachment and committal which came before the High Court (Owens J.) on 20th May, 2022, on which date the plaintiff was granted liberty for short service of a motion for attachment and committal.
11. The plaintiff's solicitor avers that service of the notice of motion and other documents for attachment and committal ("the application papers") was effected upon the first named defendant and the occupants of the property by certified post. Service was further effected to the email address from which the first named defendant had previously corresponded. In addition to this service by certified post and by email, a summons server from Blackwater Bailiff and Asset Management made three unsuccessful attempts to personally serve the application papers on 21st and 23rd May. On each occasion, the

door was not answered despite the fact that the summons server could detect activity inside. Following the third unsuccessful attempt at service, the summons server attached an envelope containing the application papers to the front door of the property. When the summons server returned to the property the following day, he observed that the envelope had been removed from the door.

12. It is clear that the first named defendant received the application papers served as he sent an email acknowledging receipt thereof and making further allegations in relation to the invalidity of the order of 3rd March, 2022, referring to it as a "*purported High Court order*". The first named defendant also indicated in this correspondence that he would not be in attendance before the High Court on 25th May, 2022.
13. The matter was returnable before O'Moore J. on 25th May, 2022. On that date, it appearing to the Court that the first named defendants and any person in occupation of the property had acted in breach of the order of 3rd March 2022, the court issued an order of attachment directed to the Commissioner and members of An Garda Síochána against the first named defendant and any person or persons in occupation of the property, directing that they be brought before the court at 11 am on 31st May, 2022 or the first opportunity thereafter, to answer the contempt of court alleged against each of them in failing to comply with the order of 3rd March, 2022 and to show cause why each of them should not be committed to prison for such contempt. The order of attachment on foot of this court order issued to An Garda Síochána on 27th May 2022. An original copy of the order was produced before the court.

Application for attachment and committal on 31st May, 2022

14. Pursuant to the order of attachment, An Garda Síochána attended at the property and attached four people who were brought to the court. Initially, none of these four people would identify themselves to the court. In due course, the first named defendant identified himself to the court, as did his son, Mr. Dylan Kavanagh.
15. The other two individuals would not identify themselves or otherwise confirm their identity. The plaintiff's solicitor gave sworn testimony identifying one of these individuals as Brian McCarthy. Mr McCarthy acted as the first named defendant's McKenzie friend during the course of the injunction application before Allen J. The other individual was identified by the sworn testimony of Garda Michael McGrath as Francis Murphy.
16. At the commencement and throughout the course of the hearing before this court on 31st May 2022, Mr. McCarthy and Mr. Murphy, made it clear that they did not accept the authority of the court. By their actions, both individuals disrupted the court proceedings. Both Mr. McCarthy and Mr. Murphy repeatedly stated that they did not know why they had been arrested and brought before the court. However, any attempt by the court to answer or address the question implied in this statement, was simply shouted down by Mr. McCarthy and Mr. Murphy. Mr. McCarthy refused, despite repeated requests, to stop talking over the court in order that the court proceedings could continue in an orderly manner. Mr. Murphy adopted a similar attitude. As a result, it was necessary to request that Mr. McCarthy and Mr. Murphy be removed from the court. The first named defendant

and his son, Mr. Dylan Kavanagh remained in court and were respectful of the court throughout the proceedings.

17. The court inquired of the first named defendant and Mr. Dylan Kavanagh as to whether they wished to make any submissions to the court. The court also informed the first named defendant and Mr. Dylan Kavanagh of the very serious nature and consequences of the proceedings they were facing and inquired as to whether they wished to obtain independent legal advice. The court also made it abundantly clear to those before the court that their fate rested in their own hands and that the sole purpose of the plaintiff's application was to seek compliance with the order of Allen J. of 3rd March, 2022.
18. In response, the first named defendant repeated some of the points which he had evidently made to Allen J. during the course of the injunction application leading to the order of 3rd March, 2022. His position was further that he did not accept the validity of the order of 3rd March, 2022 and did not propose to comply therewith. The first named defendant was afforded a full opportunity to purge his contempt, but declined to offer the court any undertaking not to trespass upon the property or otherwise breach the order of 3rd March, 2022 pending the trial of the action.
19. Mr. Dylan Kavanagh indicated that he was prepared to furnish an undertaking not to trespass on the property pending the trial of the action. Noting that he had not received independent legal advice, I offered Mr. Dylan Kavanagh the opportunity to give such an undertaking to continue only until this morning, 2nd June 2022, so that he could seek legal advice and return before the court with the benefit of same. Mr. Dylan Kavanagh did not wish to avail of this suggestion. He therefore furnished an undertaking on oath not to trespass upon the property, or otherwise breach the order of 3rd March 2022, pending the trial of the action. This court accepted Mr. Dylan Kavanagh's said undertaking.
20. As the court proceedings continued, I inquired as to whether Mr. McCarthy or Mr. Murphy would agree to re-enter the court in a peaceable manner to enable the proceedings to continue in their presence. Mr. McCarthy was not prepared to do this. However, Mr. Murphy did agree to re-enter the court without disrupting the proceedings. The court then inquired of Mr. Murphy whether he would be willing to give an undertaking not to trespass upon the property or otherwise breach the order of 3rd March, 2022, pending the trial of the action. Mr. Murphy made it clear that no such undertaking would be forthcoming. The same was evidently the position in relation to Mr. McCarthy.

Decision

21. The punishment of contempt of court by way of committal should only be engaged in as a last resort and in circumstances where it is necessary to vindicate the authority of the court and to procure obedience with an order of the court. However, the deliberate disobedience of a court order is a matter of utmost gravity and, in an appropriate case, where that element of deliberateness or culpability is present, the court must not hesitate to exercise its undoubted jurisdiction to imprison a contemtor, either for a specified period, or until such time as the contempt is appropriately purged. (*Adebayo v. Commissioner of An Garda Síochána* [2004] IEHC 359, Peart J.).

22. Where it is sought to imprison someone for failure to abide by a court order, it must be proved beyond a reasonable doubt that their behaviour represents a deliberate breach of the relevant order. Further, as the main purpose of civil contempt is coercive and its object is to compel the person concerned to comply with the order that has been breached, a person should be given a reasonable opportunity to comply with, or to undertake to comply with, the order in question before being committed to prison for contempt.
23. In this case I find that, in continuing to trespass upon the property, the first named defendant wilfully disobeyed the order of 3rd March, 2022. Further, I am satisfied, beyond a reasonable doubt, that the first named defendant was fully aware of the order and of the consequences of breaching it. I am further satisfied that the first named defendant has been afforded abundant opportunity to comply with the order of 3rd March, 2022, up to and including immediately before I delivered judgment, but has repeatedly and steadfastly refused to do so. I am therefore satisfied beyond reasonable doubt that the first named defendant is in breach of paragraph 1 of the order of Allen J. of 3rd March, 2022 and in contempt of court by trespassing upon or otherwise entering the property.
24. Messrs. McCarthy and Murphy were present on the property when the Gardaí attended to attach and commit persons in occupation of the property pursuant to the order of O'Moore J. of 25th May, 2022. As occupants of the property, Messrs. McCarthy and Murphy fell within the scope of the order for attachment and were appropriately attached and brought before the court.
25. I am satisfied beyond a reasonable doubt that Mr. McCarthy, who acted as McKenzie friend to the first name defendant throughout the proceedings before Allen J., was fully aware of the existence and implications of the order of 3rd March, 2022. I also conclude, beyond a reasonable doubt, that in entering upon and remaining in the property, Mr. McCarthy acted in deliberate breach of that order and in contempt of court. Mr. McCarthy declined to engage in any manner with the proceedings before this court on 31st May, 2022. He stated that the court had no authority over him. He continually disrupted the court proceedings and declined to undertake not to re-enter or trespass upon the property or otherwise breach the order of 3rd March 2022. This disruption of the process of the court and refusal to undertake to abide by the order of 3rd March, 2022 continued unabated throughout the lengthy hearing before this court.
26. I cannot be satisfied, beyond a reasonable doubt, that Mr. Murphy was aware of the existence and implications of the order of 3rd March, 2022, prior to entering the property or that he entered the property by reason of a conscious decision to disobey that order. However, if there was any doubt as to whether Mr. Murphy was fully aware of the terms and consequences of the order of 3rd March, 2022, prior to his entry to the property, there can be no doubt in this regard after he was attached and brought before the court.
27. When Mr Murphy agreed to re-enter the court in a peaceable manner, the court fully explained to Mr. Murphy the nature of the court order of 3rd March, 2022 and the consequences of breaching same. The court informed Mr Murphy that his actions in

entering upon and remaining in the property were in breach of that order. The court also enquired as to whether Mr. Murphy had, or wished to obtain, independent legal advice. In addition, the court repeatedly enquired as to whether Mr. Murphy would undertake not to re-enter or trespass upon the property or otherwise breach the order of 3rd March, 2022. Mr. Murphy responded to the court's enquiry by saying "Good Evening" and then turning his back to the court. Mr. Murphy therefore declined to furnish any undertaking at all times, up to and including immediately before I delivered judgment.

28. In short, I am satisfied beyond a reasonable doubt that both Mr. McCarthy and Mr. Murphy were aware of the implications of the order of 3rd March, 2022, and of the consequences of not complying therewith. I am further satisfied that Mr. McCarthy and Mr. Murphy, even when fully aware that their actions had been in breach of the order of 3rd March, 2022, knowingly declined to furnish undertakings to cease and desist from further such conduct in contempt of court. Like the first name defendant, Mr. McCarthy and Mr. Murphy were afforded a reasonable opportunity to undertake to comply with the order and chose not to do so.
29. I am satisfied that in the within application the contempt of court on the part of all three individuals before the court is manifestly clear from their actions and their conduct, both in and outside court. This conduct amounts to a flagrant and deliberate breach of the order of 3rd March, 2022 by trespassing upon and entering the property, or in the alternative, by declining to undertake to the court not to re-enter the property.
30. In the circumstances, I had proposed to make an order of committal of all three individuals until such time as they purged their contempt. As matters transpired, on today's date, Mr. Murphy agreed to furnish an undertaking not to breach the order of 3rd March, 2022 and the court accepted this undertaking.
31. However, the first named defendant and Mr. McCarthy are presently subject to this court's order of committal for indefinite detention until such time as they purge their contempt. I propose to review the matter in due course and I have therefore adjourned the proceedings for a fixed period to be relisted again before me on Wednesday 15th June, 2022 at 11am.
32. Finally, lest there be any ambiguity on these matters, it is at all times open to the first named defendant and to Mr. McCarthy to come back before the court to purge their contempt and to undertake not to trespass upon or enter upon the property, or otherwise breach the order of 3rd March, 2022.