

**THE HIGH COURT**

[2022] IEHC 79  
[2020 No. 6319 P.]

**BETWEEN**

**START MORTGAGES DAC**

**PLAINTIFF**

**AND**

**NOEL ROGERS AND UNA ROGERS**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Butler delivered on the 8th day of February, 2022**

1. This is the court's ruling on issues consequential to my judgment of 2nd November, 2021 [2021] IEHC 691 including the form of the orders to be made, applications for costs and whether the second defendant should be granted a stay. The parties have provided detailed written submissions on these issues save that the second defendant has not addressed the form of the order. I will deal with each of the issues in turn.

**Form of Order**

2. The plaintiff, as mortgagee-in-possession of the defendants' former family home, issued proceedings against both defendants alleging that subsequent to their eviction, they unlawfully returned to and took up occupation of the property as trespassers. The application the subject of my judgement was the plaintiff's application for an interlocutory injunction requiring the defendants to vacate the property. When the matter came on for hearing, the second defendant was represented by solicitor and counsel. The first defendant did not appear and was not represented. Prior to the hearing, he contacted the registrar, indicated that he would not be in a position to deal with the matter and provided a medical certificate saying that he was unwell. He did not seek an adjournment. At the hearing, the court was informed that the defendants had separated and that only the second defendant and the children of the marriage were residing in the property. Counsel on behalf of the second defendant was unable to tell the court when the first defendant had left the property, presumably because the second defendant would not provide instructions on this issue.
3. The plaintiff requests that notwithstanding the first defendant's non-participation at the hearing, orders should be made against both defendants. The basis for this request is threefold. Firstly, the plaintiff has a real concern that if no order is made against him, the first defendant will re-enter the property even if the second defendant leaves it. This is a very genuine concern in light of the fact that the first defendant has already broken into the property subsequent to his eviction. Secondly, the evidence was very vague as regards the state of the defendants' marriage which appears to have fluctuated over time and the second defendant was unable (or perhaps unwilling) to confirm to the court when the first defendant had left the property. Therefore, there was little reassurance to be gained from the second defendant's statement that the defendants were separated at the time of the hearing. Thirdly, if in fact the first defendant is not currently residing in the property, then no prejudice will be caused to him by making the orders sought. Put simply, the plaintiff argues that the first defendant cannot be prejudiced by being required to vacate a property of which he is not in occupation. The second defendant has

not addressed this issue. In fairness, if the parties are currently still separated, it would not be appropriate for her to do so.

4. Naturally, I have a concern in respect of the making of any order against a party who is not present in or represented before the court. The first defendant was properly served with these proceedings and advised of the hearing date and did not attend. In this case, there is an added difficulty because the first defendant has health issues. I understand these to be of a fairly longstanding and ongoing nature such that, in circumstances where he has not instructed legal representatives, it is unclear that the first defendant would ever regard himself as being in a position to deal personally with the case against him. That said, the plaintiff's entitlement to seek relief cannot be postponed indefinitely. I accept, in particular, the genuineness of the concerns being expressed by the plaintiff in circumstances where the first defendant has already illegally re-entered the property following eviction.
5. In all of the circumstances, what I propose to do is to grant the plaintiff the relief sought in the notice of motion against both defendants. I do so for two reasons. Firstly, I accept the plaintiff's concern that in light of the events which have already occurred there is a genuine risk that the first defendant will seek to return to the property if orders are not made against him. Secondly, I note that the orders originally sought by the plaintiff include at paragraphs 3 and 4 orders which would restrain not just the defendants but all persons having notice of the making of the order from impeding the plaintiff in taking possession of the property and from trespassing or otherwise interfering with the property. Thus, even if the first defendant were not to be the direct subject of an order he would in any event be encompassed within the scope of the orders I intend making under paragraphs 3 and 4 of the Notice of Motion. There is not or should not be a material difference in the restraint to which the first defendant will then be subject. Consequently, I will direct that the plaintiff serve the first defendant with the order I propose making and I will grant the first defendant liberty to apply, on notice to the plaintiff, within one month of the date of the perfection of the order. In that context, I will also grant liberty to him to bring an application to have the orders made against him set aside. In the balance of this judgment when I refer to "the defendants" being in occupation of the property I intend to refer either to the second defendant or to both of the defendants as may be appropriate.

#### **Costs**

6. The plaintiff applies for its costs as the successful party on all of the issues in the application before the court in accordance with s. 169 of the Legal Services Regulation Act, 2015. The second defendant does not appear to dispute this *prima facie* entitlement but requests the court to exercise its discretion not to make an order for costs against her. The second defendant's written submissions on this point suggest that the authors of *Delany and McGrath on Civil Procedure* (4th Ed., 2018) at para. 24.32) are of the view that the words "*unless the court orders otherwise*" in s. 169(1) of the 2015 Act may serve to lower the threshold that was expressed in O. 99, r. 1(4) which used the phrase "*unless otherwise ordered*" when referring to the "costs follow the event" principle. O.99 was

revised in 2019 (i.e. after the 2018 edition of Delaney and McGrath) to take into account the coming into force of the 2015 Act. The current text of O.99 does not expressly refer to the costs follow the event principle, as a result of which the particular text discussed by the authors at para 24.32 is no longer operative. Instead, the principle is imported from the statute through O.99, r.3(1) which requires the court to have regard to the matters set out in s.169(1). In any event, I confess to having struggled with this submission as I could not see any meaningful difference between the two phrases, particularly when it is acknowledged that the only entity which could have made the order which was referred to in O. 99, r. 1(4) was a court. Having checked the passage in *Delany and McGrath*, I am satisfied that this is not in fact what the authors stated. Rather, they opine that the coincidence in wording between the legislation and the then-extant rules of court "*would suggest that no change to the burden is intended*". They do go on to say that the overall scheme of Part 11 of the 2015 Act is geared towards the more routine exercise of the discretion and that it is arguable that a court may depart from the rule where it considers it appropriate rather than requiring special or unusual circumstances.

7. In any event even if there is no requirement on the second defendant to show special or unusual circumstances, I am not satisfied that it would be appropriate to depart from the usual rule in this case. No particular grounds are advanced by the second defendant as to why it would be appropriate not to make an order for costs against her. A discrete argument is advanced to the effect that any costs ordered should be reserved until the final determination of the matter either at trial or on appeal from the interlocutory order to the Court of Appeal. In circumstances where there is little practical reality to the plaintiff being able to enforce an order for costs against the second defendant at this time, I will make an order for the costs of this application against the second defendant and I will reserve those costs until the final determination of this matter by the court of trial.
8. There is a further application for costs by the second defendant in a motion issued on her behalf seeking an extension of time under O. 122 within which to file a replying affidavit. The plaintiff's injunction application was originally listed for hearing on 10th November, 2020 and, on 5th October, 2020, Reynolds J. gave a direction which included a stipulation that the defendants were to file any replying affidavit within three weeks. Unfortunately, the second defendant became ill with Covid-19 which meant, apart from the fact of her illness, that the public health measures then in force precluded her from attending at her solicitor's office to swear an affidavit. On receiving that news, her solicitor sought consent from the plaintiff's solicitor to an extension of time for the filing of a replying affidavit by a further three weeks. The plaintiff's solicitor did not reply to this request despite sending other correspondence to the second defendant's solicitor during the relevant period. Obviously, a further extension of three weeks would have been problematic given the scheduled trial date on 10th November. However, the trial did not proceed on that date. I am not aware whether the adjournment was a consequence of the second defendant's illness or resulted from limitations on court hearings due to public health restrictions.

9. The court was not informed whether the requested consent was subsequently forthcoming when the matter was adjourned, whether further directions were given or whether the second defendant simply filed a replying affidavit, as she did on 8th December, 2020 (and on two subsequent occasions), once the immediate urgency of a trial date had receded. Although the second defendant's motions were listed with the plaintiff's application when the matter came before me on 3rd June, 2021, the motions were moot at that stage and had been so for some time. They were not moved and I neither considered them nor made any finding in relation to them. I presume that they were listed solely for the purpose of this costs application.
10. The plaintiff takes the view that the second defendant's motions were unnecessary and that, as they were never decided, no order for costs should be made. The second defendant argues, in circumstances where directions had been given imposing a time limit for the filing of a replying affidavit in light of an imminent hearing date with which the second defendant could not comply for reasons beyond her control and the plaintiff not only declined to consent to the late filing of an affidavit but did not even reply to her solicitor's correspondence, that the costs of the motion should be allowed. I am inclined to agree with this submission. It is inconceivable in circumstances where the second defendant could not swear an affidavit both because she was ill and because she was in isolation in compliance with public health guidelines, that she would not have been allowed an extension of time to file an affidavit. Nonetheless, where a special time has been fixed by the court for the filing of an affidavit, O.40, r.4 provides that no affidavit filed after that time may be used save with leave of the court. Given the circumstances, the plaintiff's solicitor's silence and the imminence of the trial date, it was not unreasonable for the second defendant's solicitor to have issued a motion at the time when he did so. If the plaintiff's solicitor had consented to the late filing of the affidavit, then it would have been unnecessary to issue a motion to formally seek the leave of the court which would be routinely granted in the absence of opposition. Where such consent was not forthcoming, it would have left the second defendant in a very vulnerable position to allow the matter proceed to a hearing without being certain that her affidavit would be admitted and considered by the court. Consequently, I will allow the second defendant the costs of one of the two motions currently before the court. Those costs should not carry with them any trial costs for the day on which the matter was at hearing before me since the motions were moot by the time of the trial, were not moved and no submission was made in respect of them on that occasion. The costs may include a portion of the post-trial written submissions made on behalf of the second defendant.

**Stay**

11. Given that I propose to make orders against the defendants in the terms of paras. 1 to 5 of the plaintiff's notice of motion, the second defendant seeks a stay on that order. Two separate applications for a stay are made. The first is for a stay on the interlocutory orders pending the trial of the action and the second is an alternative request for a stay on the interlocutory orders pending the determination of an appeal from the interlocutory judgment to the Court of Appeal. The bulk of the second defendant's written submissions are directed to this issue.

12. I can dispose of the first application in short order. It would make a nonsense of the plaintiff having succeeded in obtaining interlocutory relief in advance of the full trial of an action if that relief were then to be denied to it through the grant a stay until the trial has taken place. The court has already conducted a balancing exercise for the purpose of determining where the balance of justice (or, to put it another way, the least risk of injustice) pending trial might lie before making the decision to grant interlocutory relief to the plaintiff. Although the second defendant's written submissions effectively invite the court to reconsider its assessment by arguing that there is a risk of irredeemable damage to the second defendant if she is wrongly ordered to leave her home, I do not consider it appropriate to embark upon such a reconsideration. The balancing exercise already carried out was necessarily conducted in a context where the court could not know what the outcome of the action will ultimately be. Consequently, the consideration given to where the balance of justice might lie was framed by an awareness of the potential risk of injustice to both parties if the injunction were to be granted or, alternatively, refused and the outcome of the trial were to favour the party that had lost on the interlocutory application.
13. The application for a stay pending an appeal of the interlocutory order is somewhat different as the outcome in issue here is not that of the trial itself but, rather, a determination as to whether the court was correct to have granted the interlocutory injunction. The second defendant contends, firstly, that the appeal raises a substantive point of legal interpretation. Thus, the initial element of the test posited by Clarke C.J. in *Okunade v. Minister for Justice* [2012] 3 IR 152 that there be an arguable case (in these circumstances, an arguable ground of appeal) has been met. The second defendant points out that, notwithstanding that this arguable ground has been determined against her in the High Court, it may yet be decided in her favour on appeal. This is of course correct in the sense that the outcome of the appeal is necessarily unknown at this time. Secondly, the second defendant contends that she faces what she terms a real risk of injustice, a grave injustice should "*the plaintiff move to execute an order with haste*" and irredeemable damage. Finally, the second defendant contends that the court took a view that the evidence given by her on affidavit was not credible in circumstances where the trial had not yet taken place, and the various witnesses had not yet given evidence nor been subjected to cross-examination.
14. In general terms, significant reliance is placed by the second defendant on the judgment of Clarke J. in *Okunade v. Minister for Justice* (above). Obviously, I take no issue with this seminal judgment but note that the principles summarised by Clarke C.J. are expressly stated by him to be those applicable in the context of judicial review applications and appeals. Many of the considerations identified by him are particularly apposite where the substantive legal proceedings concern a challenge to the validity or application of a public decision or measure. It seems to me that a consideration of where the greatest risk of injustice would lie in proceedings between two private entities as opposed to proceedings between a private individual and the State will bring additional and somewhat different considerations into play. This is particularly so as regards the use of litigation to delay the enforcement of legal entitlements benefitting the opposing party which have already been

determined in other litigation between the parties. There is some overlap in this case between public and private law considerations because the plaintiff's case is predicated on it having obtained court orders against the defendants which culminated in their eviction and the defendants' subsequent acts of trespass flying in the face of those court orders. Thus, whilst the dispute between the parties has its origins in the private law remedy to enforce security for a debt, the public interest in respect for and enforcement of court orders is also at issue. However, unlike the situation in *Okunade* the interest in question is not purely a public interest, as the plaintiff has a specific private interest in being able to rely on and to obtain the benefit of the orders already secured.

15. The plaintiff opposes the grant of any stay, pointing out that the court has already conducted an analysis as to where the risk of least injustice lies. The plaintiff also emphasises the finding made at para. 61 of my judgment that the second defendant's current occupation of the property does not represent the *status quo* and that allowing the defendants to remain in occupation of the property as trespassers would amount to the inversion of the *status quo*.
16. I have considered all of the arguments made by the second defendant. I am not convinced that the *Okunade* judgment is of significant assistance to her position. *Okunade* concerned a direct challenge to a ministerial decision which the State sought to enforce. Much of the court's analysis considers the relative weighting of the risk of potential harm to a child if they were to be deported from the jurisdiction in which they had always lived pending the determination of an appeal from the unsuccessful judicial review of that decision and the public interest in ensuring that *prima facie* valid measures be respected and enforced. The circumstances here, although undoubtedly serious from the second defendant's perspective, are more routine and concern the enforcement of court orders made in favour of the plaintiff over an extended period of time. The second defendant has not challenged any of these orders. The undisputed evidence is that the defendants are indebted to the plaintiff for a sum in excess of €700,000; that their indebtedness is secured on certain property; that the plaintiff obtained judgment and an order for possession in respect of that property in 2008; that only €5,000 has been paid by the defendants to reduce their indebtedness to the plaintiff since 2012; that an eviction was carried out on behalf of the plaintiff on 10th March, 2020 on foot of an order of possession dated 19th July, 2019 and finally that the defendants returned to the property on the same date and re-entered and re-occupied the property from which they had been evicted. No formal challenge has been made by the second defendant to the eviction. The legal issue raised by her has been raised in response to the plaintiff's application to require the defendants to vacate the property on which they are *prima facie* trespassers.
17. I acknowledge that the second defendant has raised a legal argument in response to the plaintiff's application which puts in issue the legal status of the order of possession of 19th July, 2019. For the sake of clarity and in light of the characterisation of my judgment in the second defendant's written submissions, I should point out that my judgment did not turn on and certainly did not turn solely on my finding that the order made by Barniville J. under O. 42, r. 24 of the Rules of the Superior Courts on 12th November,

2018 was not an execution order under s. 2 of the Enforcement of Court Orders Act, 1926. Rather, I held that even if Barniville J.'s order was to be regarded as an execution order (a proposition with which I did not agree), the order of possession granted on 12th November, 2018 made pursuant to an application on foot of that order was undoubtedly itself an execution order with a one-year lifespan under O. 42, r. 20. The second defendant did not point to any authority to suggest that the lifespan of such an order was limited to the unexpired residue of the order under O. 42, r. 24 pursuant to which it had been made. Therefore, to succeed on appeal, the second defendant will have to establish not only that the order of 12th November, 2018 was an execution order but also, in consequence of that, that the order of possession of 19th July, 2019 expired at the expiration of a period of one year from the making of the order of 12th November, 2018.

18. Accepting that the point may give rise to an arguable ground of appeal, the court must then apply a balance of justice/least risk of injustice analysis to the respective positions of the parties in the event that a stay is granted or refused. As is acknowledged by Clarke C.J. in *Okunade*, the applicable principles are largely similar in the case of a stay pending appeal and in the case of an interlocutory injunction. I have already carried out an analysis of where the least risk of injustice lies for the purposes of the interlocutory injunction. The second defendant has not pointed to anything materially different or specific which would alter that analysis for the purposes of a stay pending appeal. The position remains that the plaintiff, as mortgagee-in-possession, is the person *prima facie* entitled to possession of the property and the second defendant is a trespasser on the property. The second defendant is heavily indebted to the plaintiff, has not taken any meaningful steps to reduce that indebtedness for nearly a decade and will not be in position to meet any damages that might be sustained by the plaintiff if a stay is granted. The plaintiff, on the other hand, is a financial institution which will be in a position to meet any damages sustained by the defendants if a stay is refused and the second defendant is successful on appeal or if the defendants successfully defends the substantive proceedings.
19. Whilst the second defendant's written submissions couch the arguments in terms of the second defendant being left in or required to leave her home, the court cannot ignore the legal reality which is that the plaintiff is in possession of the property and the defendants are in unlawful occupation as trespassers. Insofar as the second defendant refers to the plaintiff moving to execute the order with haste, it should be noted that the eviction in this case was carried out nearly two years ago and the defendants have been in what is *prima facie* unlawful occupation of the property since then. The eviction post-dated the making of an order for possession by more than a decade. That order required the defendants to deliver up possession of the property to the plaintiff, which of course they failed to do. I also note that, in ease of the defendants, the plaintiff did not take action to remove them from the premises during the period when lockdown measures were in operation for public health reasons. Finally, my substantive judgment in this case was delivered nearly three months ago which of itself has afforded the second defendant an extended period of time to leave the premises. I do not think that the plaintiff can be unfairly accused of moving with undue haste in all of these circumstances.

20. The second defendant cites a large number of authorities dealing with the assessment of the credibility of witnesses in asylum cases. I struggle to understand the relevance of those cases to the circumstances of this case. Assessment of credibility in asylum applications is a very specific and difficult task given, at very least, that there will likely be significant linguistic and cultural differences between the applicant and the decision-maker. In addition, a genuine asylum seeker may be traumatised as a result of events in their country of origin which, in turn, may have an impact on their ability to remember the details of those events accurately or to recount them in a coherent fashion. Corroborative evidence from the applicant's country of origin is unlikely to be readily available. The second defendant in this case is not operating under any such impediments. She has filed three affidavits and has had a full opportunity to put all potentially relevant evidence before the court including evidence from persons other than herself. She was not cross-examined which meant that, save where her evidence was inherently not credible, it was taken by the court at its height.
21. Insofar as the second defendant is suggesting that the findings on credibility in this case were not based on cogent reasons, it may be useful to summarise the reasons given in my judgment for doubting the accuracy of much of the evidence given by her. Firstly, she gave a materially different account of events on the day of the eviction to her solicitor (as reflected in his correspondence) than given in her replying affidavit. Whilst nothing material might turn on whether she was upstairs or downstairs when the eviction party arrived, it is still incumbent on the second defendant to give an accurate account of these events. Further, the suggestion in the initial correspondence that she was having a cup of tea in the kitchen with her husband is potentially relevant in light of her assertion on affidavit and at the hearing that the parties had been separated for some years.
22. Secondly, her evidence was vague and incomplete on key issues, particularly concerning the extent to which she was actually separated from the first defendant at material times. I regard it as telling that she was unable, or perhaps unwilling, to give her counsel instructions as to the date on which the first defendant had left the property prior to the hearing. Thirdly, the second defendant's account of being unaware of the fact that her mortgage was in arrears and of the subsequent legal proceedings was not credible in circumstances where the plaintiff adduced evidence of personal service upon her of legal documentation relating to these matters on three occasions and her signing receipts for registered post addressed individually to her on two further occasions. The second defendant seemed to acknowledge receipt of all of those documents save for one item delivered by registered post (for which the plaintiff had exhibited a signed receipt). She asserted that notwithstanding the receipt of the documents by her she had not opened the envelopes nor read their contents. I regarded this explanation as implausible but found that if it were true it meant that the second defendant had deliberately ignored important correspondence served personally on her.
23. Fourthly, insofar as I found the account of the defendants' return to the property and the first defendant finding a broken lock on the driveway not to be credible, I specifically acknowledged that this may well be the account the first defendant had given to the

second defendant. However the account was not, of itself, credible even if the second defendant's evidence that this is what she was told was correct. Fifthly, I noted that the second defendant's evidence regarding the key conversation between her husband and an official of Blackwater Asset Management was hearsay and her husband, the first defendant, had not sworn an affidavit to confirm the contents of this conversation. However, I went on to find that, even if I accepted that this is what the first defendant told the second defendant, the statement attributed to that official did not, in my view, constitute a reasonable basis for the claimed belief that, notwithstanding their eviction, the defendants were being permitted by the plaintiff, its servants or agents, to re-enter and re-occupy the property.

24. As it happens, the key legal argument made on behalf of the second defendant does not depend on any of her evidence on these issues being accepted by the court. It is a purely legal argument as to the status of various court orders and the extent to which an eviction could be validly carried out on foot of them.
25. The defendants have now been in what is *prima facie* unlawful occupation of this property for a period of over two years. The plaintiff obtained judgment against the defendants and went through the various steps required in order to execute that judgment. The defendants did not appeal the judgment, nor have they brought any legal challenge to the steps taken by the plaintiff on foot of that judgment. Consequently the status quo is that the plaintiff is a mortgagee-in-possession legally entitled to possession of the property and the defendants are trespassers. Any order made by the court which would sanction the defendants' continued presence in the property, even on a temporary basis, would invert rather than maintain the status quo. The defendants are manifestly not in a position to compensate the plaintiff in damages if it were to transpire that the status quo had been wrongly inverted. For all of these reasons, I do not propose to grant a stay on the interlocutory orders which I have made.