THE HIGH COURT

[2023] IEHC 600

RECORD NO.: 2023/6 CA

RECORD NO.: 2023/38 CA

BETWEEN:

TIPPERARY COUNTY COUNCIL

PLAINTIFF/RESPONDENT

AND

MICHAEL REILL Y, STATIA REILLY, JOHN REILLY, HELEN REILLY, CHRISTINA REILLY, THOMAS REILLY, BERNADETTE REILLY, CHRISTINE REILLY, NORA REILLY, ANGELA REILLY, PATRICK REILLY, PATRICK HITCHINSON, ELLEN HITCHINSON, NED REILLY AND BRIDGET REILLY, MICAHEL REILLY, JAMES REILLY, MICHAEL REILLY AND THERESA REILLY

DEFENDANTS/APPELLANTS

AND

RAYMOND BEER, BRIDGET BEER, THOMAS REILLY AND JOSEPHINE REILLY

NOTICE PARTIES

JUDGMENT OF Ms. Justice Siobhán Phelan, delivered on the 3rd day of November, 2023

INTRODUCTION

1. This matter comes before me by way of two separate appeals against an Order made by the Circuit Court (Her Honour Judge Doyle) in January, 2023 (hereinafter "the 2023 Order") giving liberty to the Plaintiff (a local authority with responsibility for housing and planning in the County Tipperary area) [hereinafter "the Authority"] to pursue enforcement of orders previously made by that Court (His Honour Judge Fulham) on the 5th of July, 2013 [hereinafter "the 2013 Order"], almost ten years earlier. The 2013 Order was directed to the occupation, management, maintenance, and condition of lands owned by the Authority and established by it for use for group housing by members of the Traveller Community on foot of local authority tenancy agreements.

BACKGROUND

2. The lands at the centre of these proceedings comprise a triangular site at Powerstown, Clonmel in the County of Tipperary. The land is located between the railway track to the north (which serves to separate the site from an extensive housing development on the other side of the track) and a dual carriage-way (the N4 Clonmel bypass) to the south. The Authority built 3x three-bedroomed cottages on the land in the 1990s. In addition to the three houses constructed by the Authority on the site, there is also a longstanding unauthorised temporary dwelling adjacent to the main site. This unauthorised temporary dwelling has been home to the same family, now comprised of two adults and their four children, for approximately nineteen years. There are several other unauthorised temporary dwellings within the vicinity of the three houses, including the dwellings of two extended family members (adult children and their spouse and children) who have established themselves on the site in more recent years and were joined to the proceedings for the purpose of the application for leave to execute the 2013 Order.

3. A tenancy agreement was entered into with a number of tenants in the 1990s in respect of each of the three houses. The original tenants included the Third and Fourth Named Defendants. The tenancy agreement provided, *inter alia*, that the tenants will keep the dwelling in a clean and proper manner and will not permit the accumulation of rubbish (Clause 16), will not cause nuisance, annoyance or disturbance to neighbours (Clause 17) and will not keep any poultry, pigeons, greyhounds or other animals (save domestic pets which are not likely to cause a nuisance or become a source of annoyance) on the premises (Clause 18). The original tenant of 1 Railway Cottages was deceased when these proceedings commenced in 2012 but the Authority contends that the terms and conditions which applied to the letting continue to apply

to the current occupants, albeit there is no evidence that a further tenancy agreement was executed.

4. The proceedings commenced by Equity Civil Bill issuing on the 27th of March, 2012. In the proceedings the Plaintiff sought injunctive and declaratory relief in respect of the Defendants' unlawful occupation of the land. Proceedings were commenced against approximately twenty named Defendants, all of whom were members of the Traveller Community in occupation of the site. Several families were resident on the site without the benefit of permission from the Authority.

5. On the 5th of July, 2013, the Circuit Court (His Honour Judge Fulham) made the 2013 Order in the following terms:

i. An Order providing that the Plaintiff its servants or agents are entitled to enter the site including numbers 1, 2 and 3 Railway Cottages and the environs covered by the map to carry out such works as may be required to the toilet and sanitary facilities at the site pursuant to the Public Health (Ireland) Act 1878;
ii. An Order restraining the Defendants from interfering with the Plaintiff, its servants or agents in carrying out the works set out at paragraph 1;
iii. An Order requiring the Defendants to remove all unauthorised structures (save residential mobile homes and caravans as provided for under paragraph 6 below) and all hoses, dogs and other animals including fowl from the site by 30th of September 2013;
iv. If the Defendants fail to carry out the removal works set out at paragraph 3 by the said date, the Plaintiff may enter the site and carry out the said removal works;
v. An Order restraining the Defendants from interfering with the Plaintiff, its servants or agents carrying out the works set out at paragraph 4;
vi. An Order requiring the Defendants to vacate all mobile homes and caravans at the site by 31st December 2013 subject only to the availability of housing for the occupants of same;
vii. An Order effective from 30th September 2014 restraining the Defendants and any other persons having notice of the making of such Order from the keeping

of animals on the site and entitling the Plaintiff to enter upon the site and to remove any such animals as may be kept thereon form time in breach of such Order, without further Order from this Honorable Court;

viii. An Order restraining the Defendants and any other persons having notice of the making of such Order from beginning onto the site or erecting thereon any structures of any kind without the express written permission of the Plaintiff and further entitling the Plaintiff to enter upon the site and remove any such structures as may be brought onto or erected thereon in breach of such Order, without further Order from this Honourable Court;

ix. The Court doth note the undertaking of the 12th and 13th Defendants, Patrick and Ellen Hutchinson, that they will note return to the site;

6. The 2013 Order was made based on affidavit evidence before the Court. Evidence relied upon included the installation of several improvised toilets in the yards of the cottages without permission and the presence of a pipe through which sewage and foul water flowed down an embankment and across a public footpath onto the N24 public road. There was evidence of a significant vermin problem and the abandonment of animal carcasses at and around the site. The evidence before the Circuit Court confirmed that animals were irregularly fed and suffered neglect. It was averred that there were then 31 sheds, huts and other structures for the accommodation of animals at and around the site, all of which were erected or installed without authority and were inadequate or inappropriate for their then use. It was deposed that conditions on site gave rise to a public health risk.

7. Notably, no evidence was offered by any of the Defendants who did not file affidavits at that time and did not contest the evidence offered on behalf of the Authority. The 2013 Order was expressed as being binding on the Defendants and each and every person having notice of same. There was no appeal against the 2013 Order.

8. Following the making of the 2013 Order extensive clean up works were carried out on site. By November, 2013 unauthorised structures (not occupied by human inhabitants) were removed and animals were seized. Thousands of tonnes of waste had been removed. Intermittently, further clean-up operations occurred in 2017, 2018 and 2019 and works were finally carried out by the Plaintiff in 2019 to address a long-standing problem of raw sewage flowing from the unauthorised accommodation on the hill (occupied by the Fourteenth and

Fifteenth Named Defendants and their family) onto the public road. Accordingly, the position of the Fourteenth and Fifteenth Named Defendants who occupy a mobile home on the site (without permission from the Authority) has been ameliorated since 2013 by the installation by the Authority of a septic tank and water supply, addressing one of the major issues identified in grounding the application for the 2013 Order.

9. Over the years following the making of the 2013 Order, some of the parties originally named as Defendants moved away from the site (specifically, the First, Second, Fifth, Sixth, Seventh, Ninth, Tenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth and Twentieth Defendants) but others (notably the Notice Parties joined to the proceedings in 2021) have taken up occupation.

10. By May 2021, the site was occupied by the Third and Fourth Named Defendants at 2 Railway Cottages (on foot of a tenancy agreement entered into in October, 1997), the Eighth and Eleventh Named Defendant, who are brother and sister, at 1 Railway Cottage, the Twelfth and Thirteenth Named Defendants (and their ten children) who had previously been accommodated in an unauthorised temporary dwelling on the site at the time of commencement of the proceedings but now occupy 3 Railway Cottages following the re-housing by the Authority of the previous tenants, the Fourteenth and Fifteenth Named Defendants (with their four children) who continue in occupation of a temporary, unauthorised dwelling at the site for then approximately 17 years, together with two new families from the extended family group of previous occupants, specifically Thomas and Josephine Reilly and child (occupying a caravan outside the gate of 1 Railway Cottages) and Raymond and Bridget Beer and child, occupying a caravan in the yard of 2 Railway Cottages.

11. By Notice of Motion dated the 21st of May, 2021, the Authority applied for leave to execute the 2013 Order in circumstances where it was contended that certain breaches of the Order made subsist at site as follows:

> *"(a) Three unauthorised units, two occupied and one unoccupied, remain parked at No. 1, Railway Cottages, in breach of paragraphs 3 and 6 of the Order;*
> *(b) An unauthorised unit, currently occupied, remains parked at No. 2 Railway Cottages, in breach of paragraphs 3 of the Order;*

(c) An unauthorised unit, currently occupied, remains parked at No. 3 Railway Cottages, in breach of paragraphs 3 and 6 of the Order;

(d) An authorised unit, currently occupied, remains parked on the triangular site on the hill adjacent to and to the east of the Railway Cottages, in breach of paragraphs 3 and 6 of the Orders;

(e) A further two units have been installed on the triangular site on the hill adjacent to and to the east of the Railway Cottages, in breach of paragraph 8 of the Orders;

(f) Some 10 to 12 dogs, 2 horses, and numerous domestic fowl are being maintained in chicken coops, kennels, and sheds at and around No. 1 Railway Cottages, in breach of paragraphs 7 and 8 of the Order;

(g) Some 8 to 10 dogs, 2 horses, and numerous domestic fowl are being maintained in chicken coops, kennels, and stable at and around No. 2 Railway Cottages, in breach of paragraphs 7 and 8 of the Order;

(h) Some 6 to 8 dogs, 2 horses and numerous domestic fowl are being maintained in a chicken coop, kennels, stable at and around No. 3 Railway Cottages, in breach of paragraphs 7 and 8 of the Order;

(i) Some 10 dogs, 2 horses are being maintained in kennels, stable and shed at and around the unauthorised unit on the hill adjacent to the east of Railway Cottages, in breach of paragraphs 7 and 8 of the Order;

(j) Some 20 to 30 chickens are being maintained in chicken coops along the boundary with the railway line towards the eastern end of the site, in breach of paragraphs 7 and 8 of the Orders."

12. It was estimated on behalf of the Authority in the Affidavit evidence filed seeking leave to execute on foot of the 2013 Order that there were then between 6 and 10 horses at and around the site and as many as 30 dogs.

13. By Order made on the 24th of June, 2021 (by His Honour Judge Meghen) the two families which had taken up occupation on site since the making of the 2013 Order were joined as Notice Parties to the proceedings. In seeking leave to execute on foot of the 2013 Order as against these newcomers to the site, the Authority maintained that Thomas and Josephine Reilly had been offered social housing but had declined it on the basis that they required accommodation to which they could bring their horses, dogs, and chickens. It was further claimed that Raymond and Bridget Beer had surrendered property previously allocated to them.

14. By Order dated the 18th of January, 2023, the Circuit Court (Her Honour Judge Doyle) gave liberty to the Authority to pursue enforcement of the 2013 Order subject to a stay of 42 days. Thereafter, an application for a stay on the 2023 Order was refused by the Circuit Court (by Order dated the 20th of January 2023). Appeals were then brought on behalf of two groupings of Defendants by Notices of Appeal dated the 23rd and 26th of January 2023. Each of the two groups retained separate legal representation (the Eighth, Ninth, Eleventh, Twelfth and Thirteenth named defendants were named as appellants in a Notice of Appeal filed by David Morris, Solicitor and the Third, Fourth, Fourteenth and Fifteenth Named Defendants were named in a separate Notice of Appeal filed by Eamonn Hayes, Solicitor). Other named parties have not pursued an appeal and were not represented before me and some no longer live on the site.

15. A stay of execution was granted by the High Court (Meenan J.) on the 20th of February 2023 for a period of one month with liberty to the Authority to bring an application "*in respect of why the stay should not be extended*". An application to set aside the stay granted by the High Court has not been pursued because of an early hearing date fixed for this appeal. The 2023 Order stands stayed on consent pending the determination by me of this present application.

EVIDENCE

16. The Authority's application for leave to execute on foot of the 2013 Order falls to be considered in the light of a considerable body of affidavit evidence (some twenty-two substantive affidavits in the book of pleadings filed for the hearing of the appeal), some of it filed in respect of the original application for injunctive relief, some of it filed in support of and response to the Circuit Court application seeking leave to execute on foot of the 2013 Order determined in January, 2023 and some of it filed in support of and response to the application for a stay on that order and resisting the extension of that stay. A further affidavit was directed by me for the purpose of exhibiting a report from a housing body, CENA, understood to have been created in 2021 and discussed in correspondence exhibited in the proceedings and handed in to the Circuit Court judge in advance of the making of the 2023 Order. CENA (the word means '*home'* in the language of the Traveller community) is an Approved Housing Body working to address critical Traveller accommodation needs.

17. Despite the very significant volume of affidavit evidence, which I will not rehearse in full in this judgment, there is little factual dispute in this case. It is common case that there have been significant changes "*on the ground*" since the 2013 Order was made. This is clear even from a comparison of the photographs taken in 2013 with those taken in 2021 and 2022. In the case of one of the cottages the original tenants in occupation in 2013 have been rehoused and the Twelfth and Thirteenth Defendants and their family, who previously occupied an unauthorised temporary dwelling on the site, have taken up occupation of the vacated cottage, seemingly with the permission of the Authority.

18. Medical evidence placed before the Court confirms difficulties of an adolescent child (high-level ADHD) of the Fourteenth and Fifteenth Named Defendants. Medical evidence has also been produced in respect of the difficulties of the Twelfth and Thirteenth Named Defendants and their family of 10 children, one of whom is wheelchair bound, three others of whom are described by their father as suffering from depression and a further child is described by him as having special needs. In correspondence from their doctor exhibited on affidavit it is further expanded that four of the children suffer from a complex kidney condition and four have intellectual difficulties. For their part the Third and Fourth Named Defendants, who are considered elderly within their family and community, have documented medical issues, exhibiting documentation in this regard, and are reliant on family members for support.

19. The maintenance of animals as part of their culture is identified by most of the families as something which is integral to their identity as members of the Traveller Community. One family describes the importance of their animals to the mental health and emotional regulation of this special needs child of the family. Only one family (joined as Notice Parties to these proceedings) confirm that they do not keep animals at the site. This family confirm that they will vacate the site when allocated suitable local authority housing in a rural location within approximately 5 miles of Clonmel. They have not appealed against the 2023 Order but have asked the Authority to provide them with a mobile home at the site pending a suitable allocation. This family were previously accommodated off site but returned to the site in 2020 when this allocation of accommodation failed. The circumstances in which this occurred have not been expanded upon save that reference has been made by the Notice Party to the discriminatory behaviour of neighbours, making continuing to reside there impossible. The

Authority did not respond to this averment and has not committed to allowing the family to stay pending the allocation of acceptable housing.

20. Despite improvements arising at least in part from ameliorating works carried out by the Authority and the efforts of the Defendants over the intervening years, it is common case that the site remains chronically over-crowded through the occupation of the site containing three small cottages, intended for three families, by some 30 people. Offers of accommodation have been made during the period since 2013. In particular, persons who were children in 2013 but are now adults have been provided with accommodation elsewhere and have moved from the site. Where the families remaining on the site have refused offers, there is little information on affidavit addressed to the suitability of the accommodation offered. Similarly, in the case where an allocation has broken down, there is little information on affidavit as to the cause of same.

21. Of note, no offer of accommodation had been made to Thomas and Josephine Reilly, (Notice Parties joined in the proceedings when the application was brought in 2021), despite their occupation of the site from July, 2018. They had indicated that they required a house to which they could bring their horses, dogs and chickens and would not consider standard housing in an estate. The first offer of accommodation made to this family on the affidavit evidence before me appears only to have been made in January, 2022, after the application for leave to execute was brought. The offer made was of a Council house in Carrick-on-Suir which was refused. No further particulars are provided. There is no suggestion, however, that this property was one which could have accommodated animals.

22. Furthermore, there is no evidence of an offer of any alternative accommodation to the Fourteenth and Fifteenth Named Defendants, who have been in unauthorised occupation for more than nineteen years, from 2014 until offers made in March and May, 2022 (after the application for leave to execute had been initiated) of a tenancy of a property in Clonmel. No further information is available in respect of these offers and they were not accepted. The said Fourteenth and Fifteenth Named Defendants admit to owning two horses and eight dogs in the vicinity of their mobile home. They appear willing to move to alternative accommodation if their traveller lifestyle, which includes animals, could be maintained.

23. In response to the housing need prayed in aid on behalf of the Defendants, the Authority relies on allocations made under the current Traveller Accommodation Programme 2019-2024

confirming that approximately 74 allocations of residential accommodation have been made under the Programme including allocations of standard housing, group housing and single rural dwellings. No breakdown is provided as to how many of the allocations allow for the maintenance of animals and how many of the houses allocated had space to accommodate the parking of a touring caravan, despite these being recognised features of the traveller specific accommodation needs of travellers as a distinct cultural, social and ethnic group. It is unclear what, if any, provision has been made for these distinct accommodation needs under the current programme or the other programme adopted since the 2013 Order was made and the Authority have not provided any evidence in this regard.

24. While the Authority has carried out works on site and removed animals and structures following the making of the 2013 Order, there is no evidence of any family being removed by the Authority pursuant to the terms of the 2013 Order or, for that matter, in exercise of its statutory powers under s. 10 of the Housing (Miscellaneous Provisions) Act, 1992 (as amended). Structures and animals were removed on foot of the 2013 Order shortly after it was made but it is undeniable (and not denied) that new structures have been introduced and there are again a significant number of animals on site, contrary to the terms of the 2013 Order.

25. Animal welfare issues clearly prompted the application for the 2013 Order but the affidavit grounding the application for leave to execute refers to the number of animals present on site in breach of the 2013 Order alone and does not expand in any real or specific way on any current animal welfare concern.

26. Unlike the position when the 2013 Order was made, many of the Defendants have sworn affidavits resisting the application before me. Affidavit evidence has been adduced on behalf of the Fourteenth and Fifteenth Named Defendants to establish that the animals they own (some 2 horses, 8 dogs and 12 poultry) are well cared for and this is confirmed in writing by a veterinarian surgeon who stated that the health and welfare of all animals inspected were of *"a high standard"*. Similarly, a letter from a veterinary surgeon adduced in evidence on behalf of Eighth Named Defendant reported positively on the condition of 12 dogs housed in clean kennels, albeit in cramped conditions. He found no fault with the health and welfare of the animals presented to him. A further letter from the same veterinary surgeon confirmed no

issues with the care and welfare of animals examined by him belonging to the Twelfth and Thirteenth Named Defendants.

27. Although the Authority rely on animal welfare in bringing an application for leave to execute on foot of the 2013 Order, it seems to me that their focus is on the number of animals on site rather than specific welfare concerns based on the condition or care of the animals. They refer to the accumulation of animal waste and complaints received in relation to the animals including persistent barking, noise from cockerels and manure type smells but no details are given. While other general complaints are referred to include littering, burning of rubbish, anti-social behaviour (unspecified) and the fact that the fire brigade was required to attend on at least 4 occasions in 2022, no detail of the type required to assess the complaints relied upon by the Authority in moving their application for leave to execute has been provided.

28. In sum, the Affidavit evidence discloses that concerns for the families living on site include issues of social deprivation, educational disadvantage, and physical and mental health difficulties. Reliance is place on the high incidence of suicide, depression and unemployment, adult and juvenile illiteracy together with lack of homework facilities affecting the Defendants and their extended family members. The evidence further confirms, however, that the families are not all similarly positioned as regards their future accommodation needs.

29. Despite differences between the families, it seems that most of the families would prefer accommodation elsewhere than the site on condition that their animals can be properly accommodated with them. Many of the families complain that traveller specific accommodation catering for traveller needs and way of life have never been provided. This evidence raises a question as to the proper discharge by the Authority of their duties as a housing authority particularly since 2013 when an Order was obtained in respect of this site. The CENA proposal for these families following consultation with the Defendants is to develop Government funded traveller specific accommodation on a site owned by the Authority (one such site has been specifically identified) which has space to adequately accommodate the number of people together with space for animals, touring caravans and cultural activities.

30. The Authority has not engaged on affidavit or in submissions with the CENA documentation furnished to them on behalf of the Defendants beyond stating that proposals

based on this documentation are concerned with longer-term projects and with policy, and *"do not offer answers to the ongoing breaches the subject of this application"*(in third affidavit of J. O'Brien sworn on the 17th of January, 2023 at para. 13)

IDENTIFICATION OF THE GUIDING LEGAL PRINCIPLES

31. The 2023 Order made pursuant to O.36, r.9 of the Circuit Court Rules granting leave to execute the 2013 Order is challenged on this appeal. Order 36 rule 9 provides:

> *"9. Every decree of the Court, and every judgment in default of appearance or defence, shall be in full force and effect for a period of twelve years from the date thereof, and an execution order based on any such decree or judgment may be issued in the Office within the said period, but not after the expiration of six years from the date of such decree or judgment without leave of the Court. An application for such leave shall be made by motion on notice to the party sought to be made liable."*

32. It is common case that the power to grant leave to execute is a discretionary power and although neither party prepared written submissions, I was referred by both parties in oral submissions to a series of decisions in which the principles applied to guide the exercise of discretion were identified including *Smyth v. Tunney* [2004] 1 I.R. 512; *Hayde v. H & T Contractors* [2021] IEHC 103; *KBC Bank Plc v. Beades* [2021] IECA 41; *Ulster Bank Ireland Limited v. Quirke* [2022] IECA 283; *Start Mortgages DAC v. Hanley* [2023] IEHC 387 and *ACC Bank PLC v. Sweeney* [2023] IEHC 356.

33. Some general principles emerge from this case-law.

a. Firstly, there must be some explanation or grounds for an application for leave to issue execution of an order made more than six years after the date of such order. It is not, however, necessary to give unusual, exceptional or special reasons. The threshold, while not high, is not meaningless (Geoghegan J. in *Smyth v. Tunney*, Simons J. in *Hayde v. H & T Contractors*). The rule is intended to be facilitative.

b. Secondly, where an explanation or basis for making the application following a delay is given, the Court must consider any allegations of prejudice (*Smyth v. Tunney*).

34. While these principles are undoubtedly clearly established in the case-law cited and it was the Appellants' contention that the test established in these cases was not met, it was also pointed out that these cases all concerned applications for leave to execute on foot of money judgments. It was therefore contended that an issue arises as to whether the principles to be applied on an application for leave to execute are any different in a case of this nature. Counsel appearing for one group of Defendants submitted that where the relief is equitable in nature, this has a bearing on the grant of discretionary relief under Order 36. Reliance was further placed on the changed legal landscape since the 2013 Order was made, most particularly the decision of the Supreme Court in *Clare County Council v. McDonagh & Anor* [2022] IESC 2 delivered in January 2022 [hereinafter "*McDonagh*"] and the recognition of traveller ethnicity by the Government in March, 2017. In *McDonagh* the Supreme Court denied the grant of mandatory injunctive relief in summary disposal of proceedings and found that a court making mandatory injunctive orders must conduct a proportionality exercise. For his part, a solicitor appearing for other defendants argued that the order sought should not be granted having regard to the failure on the part of the Authority to provide culturally appropriate accommodation which recognises the cultural identity of the Defendants as members of the Traveller Community which failure has in turn led to the existence of conditions complained of at the site.

35. None of the cases cited concerned an application for leave to execute in respect of equitable relief by way of injunction. Furthermore, the cases cited are purely private law cases. The proposition that the onus on the party seeking to execute is "*light*" relied upon in recent jurisprudence seems to be one which has developed in the particular context of judgment debt. It seems to me that the view that the test is light and requires only some explanation for delay and consideration of issues of prejudice in a manner which is predisposed to the grant of an order giving leave to execute more than six years after the order was originally obtained must be approached with some caution in a very different legal context.

36. The context in which the 2013 Order was made is not a purely private law context (notwithstanding that relief was granted in respect of trespass and nuisance) but also comes within the public law realm which is subject to the statutory regime governing the provision of traveller accommodation pursuant to public law powers. The application before me is therefore for discretionary relief pursuant to the rules of court in a mixed area of both public and private

law. The provision of accommodation to the Defendants by the Authority or the decision to seek the eviction of the Defendants involves the discharge of statutory functions pursuant to an extensive statutory regime. I now propose to further consider this relevant legal context with a view to deciding whether the test for the grant of leave to execute an order which is more than six years old in a case of a public authority seeking to secure eviction of persons to whom it owes statutory duties is more nuanced than in the purely private law context.

37. Even prior to the enactment of the Housing Act, 1988 when there was no distinction between the provision of public accommodation to travellers and members of the settled community it was found that before a local authority might seek to evict Travellers from an unauthorised site, it must consider their accommodation needs (*McDonald v. Feely and Ors.* (Unreported, Supreme Court, O'Higgins CJ., 23rd of July, 1980). The effect of the decision in *McDonald v. Feely* was summed up by Carroll J. in her judgment in *Dublin Corporation v. McGrath* [2004] IEHC 45, [2004] 1 I.R. 216 at 222 as follows (cited in *McDonagh* at para.101):

> *"While this case is authority for the proposition that a local authority which fails to consider the housing needs of a person within their jurisdiction is not acting in accordance with its duty and cannot eject a trespasser, it is also authority for the corollary that if there has been reasonable discharge of this duty by considering the housing needs, an authority will not be restrained from moving on a trespasser."*

38. It was later found in cases such as *University of Limerick v. Ryan,* (Unreported, High Court, Barron J., 21st of February, 1991) that the duty to provide social housing and in particular the obligation imposed on housing authorities by s. 13 of the Housing Act 1988 to address the needs of Travellers, extended to providing halting sites, and not only dwellings or houses.

39. Despite these earlier pronouncements on the duties of local authorities, there was no solution to the accommodation plight of many travellers in the years that followed *McDonald v. Feely* and *University of Limerick v. Ryan*. In an apparent attempt to redress the State's failure to respond to the difficulties encountered by members of the Traveller community, steps were taken by the Legislature in the late 1990s and early 2000s to promote change at local level. Acknowledging the particular accommodation problem facing the traveller community, the Housing (Traveller Accommodation) Act 1998 amended the 1988 Act to copper-fasten the

rights of members of the traveller community to accommodation which recognises Travellers as belonging to a group who pursue a nomadic way of life (s. 29 of the 1998 Act). The 1998 Act introduced a new provision which places a mandatory obligation on housing authorities such as the Authority to carry out assessments of the accommodation needs of Travellers in their functional areas, to publish accommodation programmes every five years detailing the provision of accommodation required to address those needs, and to take *"reasonable steps"* to ensure the said programmes are implemented (ss. 6, 13 and 25 of the 1998 Act).

40. The nature of the duty on housing authorities pursuant to the 1998 Act was considered in *O'Reilly v. Limerick County Council* [2007] 1 IR 593 where the Court (MacMenamin J.) was not satisfied that the housing authority was meeting its statutory obligation to supply Traveller-specific accommodation in the form of halting sites. The case arose against the backdrop where s. 160 proceedings had previously been advanced and were threatened again. This precipitated the applicants to institute proceedings challenging the local authority's failure to provide halting site accommodation. In finding that he was not satisfied that the housing authority was meeting its statutory duty to supply sufficient Traveller-specific accommodation MacMenamin J. indicated an obligation to provide the Traveller family in that case with halting site accommodation.

41. It is clear from the judgment in *O'Reilly* that the 1998 Act does not simply place broad and overarching obligations to examine what Traveller's accommodation needs are but also to plan the specific steps to be taken to meet those needs and to work towards implementation. Obligations are placed on local authorities in respect of the particular members of the Traveller community within their functional area.

42. In tandem with changes introduced under the 1998 Act, the Legislature also provided for the protection of Travellers within the ambit of the Equal Status Act, 2000 [hereinafter "the 2000 Act"]. According to s. 2 of the 2000 Act being a member of the "*Traveller community*" means being a member of the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland. Section 6 of the 2000 Act prohibits discrimination in the provision of accommodation but under s. 6(6) provides that different treatment of a person because of membership of the Traveller community is not discriminatory, recognising that the housing needs of members of the

traveller community are not the same. Through the provisions of the 1998 and 2000 Acts it can therefore be seen that the Legislature in its laws seeks to achieve equal treatment for members of the Traveller Community through proper provision for accommodation which respects the traveller way of life. In addition to special provision made for the provision of accommodation to members of the Traveller Community, the Authority is bound to exercise its functions as a housing body in accordance with the Housing Scheme as a whole which includes provision in relation to letting priorities and closer regulation of housing allocation through measures such as the Social Housing Allocation Regulations, 2011 (S.I. 198/2011) which is addressed to what constitutes a "*reasonable*" offer. Under the Social Housing Allocation Regulations, 2011 (S.I. 198/2011) a person only loses their place on the housing list if they refuse two "*reasonable*" offers of accommodation in a continuous one-year period. This is in recognition of the fact that there may be valid reasons for refusing a particular offer.

43. Furthermore, a recognised part of the statutory framework guiding the exercise of the Authority's public law powers is the European Convention on Human Rights Act, 2003. Under s. 3 of that 2003 Act the Authority is obliged to exercise its powers in a manner which respects rights safeguarded under the European Convention of Human Rights (hereinafter "the Convention"). The Convention has been found by the European Court of Human Rights [hereinafter the "ECtHR"] to impose positive obligations on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life *(see Chapman v. United Kingdom* no. 27238/95, 18th of January, 2001, para. 96).

44. Similarly, s. 42 of the Irish Human Rights and Equality Commission Act, 2014 places a positive duty (the "*public sector duty*") on housing authorities as public bodies to perform their functions having regard to the need to eliminate discrimination, promote equality of opportunity and treatment of persons to whom it provides services and to protect the human rights of those persons. The public sector duty is a duty of process and not outcome which requires demonstration of due consideration in the affected decision-making process. Obviously, the public sector duty has no relevance to the original decision to seek injunctive relief in 2012 but it is relevant to the decision made in 2021 to seek to execute on foot of the 2013 Order notwithstanding the passage of time and changed circumstances.

45. Finally, it would be remiss in reviewing the relevant statutory context to ignore public law powers available to the Authority to seek to terminate tenancies or to address unauthorised

tenancies which give rise to public health concerns. The statutory regime governing public housing allocation makes provision for the termination of tenancies in circumstances where there are breaches of tenancy agreement pursuant to the provisions of the Housing (Miscellaneous Provisions) Act, 2014. This legislation contains procedural safeguards designed to guard against summary eviction and was introduced following a decision by the Supreme Court that a previous power to terminate a tenancy under the Housing Act, 1966 was incompatible with the European Convention on Human Rights in *Donegan v. Dublin City Council* [2012] 2 ILRM 233, [2012] IESC 18. Further, where unauthorised dwellings are considered unfit for human habitation or likely to obstruct or interfere with the use of public or private amenities or facilities or likely to constitute or constitutes a significant risk to personal health, public health, or safety, statutory provision is made for their removal under s. 10 of the Housing (Miscellaneous Provisions) Act, 1992 (as amended by section 21 of the Housing (Miscellaneous Provisions) Act, 2002. Importantly, however, s. 10 of the 1992 Act (as amended) only provides for the removal of an unauthorised temporary dwelling where accommodation is available on an approved halting site. The requirement to provide alternative halting site accommodation before exercising the s. 10 power is an important safeguard as a home cannot be interfered with unless a halting site place has been identified to receive the unauthorised temporary dwelling.

46. Most recently, in the decision of the Supreme Court in *McDonagh*, it was found with reference to the Article 8 jurisprudence of the ECHR that the courts must make their own independent judgment as to whether the making of an order which had the effect of requiring a party to vacate a place where they were living would be proportionate in nature. The Supreme Court placed emphasis on the underprivileged status of the traveller community in question in *McDonagh* quoting from *Winterstein* where this was considered "*a weighty factor in considering approaches to dealing with their unlawful settlement and, if their removal is necessary, in deciding on its timing, modalities and, if possible, arrangements for alternative shelter.*" The Court also said that it was "*a critical consideration*" that the application in question was brought by a Council in its role *qua* landowner and planning authority, yet the Council was also a housing authority which had specific statutory duties *vis-a-vis* the appellants. The Supreme Court found that it was arguable that the Council had failed in its duty *qua* housing authority to offer suitable accommodation to the appellants. The Supreme Court also re-iterated the centrality of constitutional protections in any proposed interference with

protected fundamental constitutional rights including personal rights in one's home protected under Articles 40.5 and 40.3 of the Constitution.

47. In my view the foregoing has implications for the test to be applied on an application for leave to execute on foot of the 2013 Order. While the 2013 Order was never subject to appeal and is not open to review by me, I am now being asked to make a fresh order in exercise of a discretion under the Rules which could have the effect of rendering families homeless after many years occupation of the site. It is long established that before a local authority may seek to evict Travellers from an unauthorised site, it must consider their accommodation needs. As I am now being asked to make a fresh order, I am satisfied from the decision of the Supreme Court in *McDonagh* that I am bound, when exercising my discretion under the Rules of Court to do so, so far as possible, in a manner which respects and vindicates the constitutional rights of the parties before the Court with due regard to the public interest and safety issues identified in the evidence and the Authority's duties as a public body charged with a range of statutory responsibilities including accommodation provision for the Defendants. There is a constitutional imperative on me in exercising powers under the Rules of Court to do so, to the extent possible, in a manner which ensures proper respect for affected constitutional rights by exercising my discretionary powers under the Rules in a manner designed to ensure only proportionate interference with those rights.

48. It seems to me therefore that the test I must apply in a case which involves an application for leave to execute an eviction order secured some ten years ago by a housing authority with ongoing duties to provide accommodation to the persons against whom the order is sought to be enforced is, firstly, whether there is an explanation for the delay in executing the order and secondly, whether any prejudice arises which warrants the refusal to exercise my discretion under the rules. Prejudice in this context includes a real risk of disproportionate interference with rights having regard to rights protected under the Constitution (most notably Articles 40.3 and/or 40.5), the statutory duties on the Authority including their duties under the Housing (Traveller Accommodation) Act, 1998 (as amended), s. 3 of the European Convention on Human Rights Act, 2003 and the "*public sector duty*" under s. 42 of the Irish Human Rights and Equality Commission Act, 2014.

APPLICATION OF THE TEST

Explanation for Late Application

49. The Affidavit evidence filed on behalf of the Authority outlines the steps taken on foot of the 2013 Order at the time it was obtained and shortly thereafter and documents the history on site since but without seeking to explain delay with reference to the events described. It is clear that certain steps were taken to improve conditions on site on foot of the 2013 Order. Unauthorised structures and animals were removed shortly after the 2013 Order was made. A major clean-up operation was undertaken. Further steps were taken to alleviate overcrowding in the years that followed through the making of alternative accommodation available. Although the 2013 Order permitted the removal on unauthorised temporary human habitation if alternative housing had been offered, no steps have ever been taken to remove a family in reliance on the 2013 Order. It is not stated but may be inferred that this was either because the Authority had not made an acceptable or reasonable offer of accommodation to those still in occupation of unauthorised temporary dwellings or the Authority was happy with the improvements on site. The Authority does not expand on which if either of these factors explain further inaction.

50. It is unclear at what point in time the numbers of animals on site increased to the numbers documented in 2021 or when the animal structures complained of as now being in breach of the provisions of the 2013 Order were erected. No explanation has been given for the failure to prevent this happening by action on foot of the 2013 Order once animals were brought back on site and unauthorised structures were erected, if these occurred within six years.

51. It seems from the evidence that prior to 2018 there had been a net reduction in the number of people occupying the site. The establishment of two additional families, one with animals, is a factor which might explain the decision to apply for leave to execute on foot of the 2013 Order in 2021, even though more than six years had expired. It is not, however, expressed as such on affidavit on behalf of the Authority.

52. The requirement to explain a late application to execute on foot of the 2013 Order under the Rules is light but it is nonetheless a threshold test. I should not have to deduce or assume an explanation from the circumstances outlined on affidavit on behalf of the Authority without

the Authority explaining whether these circumstances contributed to or explain delay. The evidence in this regard is weak but it is clear that the situation on site has not been static throughout the ten year period since the 2013 Order was made. Given that animals have clearly been brought onto the site in breach of the 2013 Order and new families have arrived in recent years, on balance and with some reluctance, I am satisfied that the threshold test which requires some explanation for delay is met on the evidence advanced in this case, albeit that it would have been better for the question of delay to be directly addressed on affidavit.

Prejudice including Risk of Disproportionate Interference with Rights

53. The essence of the submission made on behalf of the Appellants is that the factual and legal landscape has changed since the 2013 Order was made such that it would be prejudicial at this remove to give leave to execute an order which arguably would not now be made by a court. No mention was made by or on behalf of the Authority of duties under the 2003 Act or, for that matter, the Constitution, in the application presented to me notwithstanding the Defendants clear reliance on the decision of the Supreme Court in *McDonagh,* albeit it was submitted in argument that the 2013 Order was itself proportionate in its terms and no prejudice arose from an order giving leave to execute on foot of it. Similarly, no reference was made to s. 42 of the 2014 Act by or on behalf of the Authority in presenting their application in this case (nor for that matter on behalf of the Defendants in resisting it despite their general reliance on changes in the legal landscape since the 2013 Order was made) or to the assessment of the Defendants' needs as part of the Traveller Accommodation Programmes periodically adopted by the Authority since 2013.

54. In submissions on behalf of the Authority counsel contends that the effect of the decision in *McDonagh* is widely misunderstood. It is the Authority's position in response to the Defendants reliance on the decision in *McDonagh* that the *ratio* in that judgment does not operate to insulate from enforcement where there has been non-compliance with Orders previously made.

55. As set out above, I have concluded that in the housing context the test for leave to execute on foot of an order authorising the removal of a home from a site more than six years after the order was made must include due consideration of the risk of disproportionate interference with rights and the discretion should be exercised to refuse the application where

a real risk of disproportionate interference with rights is established. While the Authority rejected any requirement for a proportionality test at this stage of the process relying squarely on the fact that the 2013 Order was never appealed, the Authority further maintained that even though the 2013 Order long predated the decision of the Supreme Court in *McDonagh*, that Order in its terms provides for a proportionate interference with the Defendants' rights in their homes by providing that the Order cannot be utilised to remove a person unless alternative accommodation is available. I cannot accept the Authority's argument in this regard. This is because the manner in which the Order is drafted means that the Defendants could be required to leave the site where any offer of accommodation, no matter how unsuitable, is available. The difficulty for members of the Traveller Community on the housing list in accepting an unsuitable offer of accommodation in that their housing need is then treated as having been met even though the accommodation is not traveller specific or culturally appropriate with longer term consequences for the future provision for their housing need.

56. Where there is no evidence that traveller appropriate accommodation has been offered or that any steps have been taken to make provision of traveller appropriate accommodation to those living on the site who stand to be affected by execution of the 2013 Order, I cannot be satisfied that a protection against removal from site unless accommodation has been offered as provided under the terms of the 2013 Order sufficiently protects against the risk of a disproportionate interference with rights of those who risk being required to leave their long-term homes. I consider the risk of disproportionate interference with fundamental rights is real in circumstances where the decision to evict has been found to be subject to a proportionality test which in turn is dependent on the prevailing facts and circumstances at the time the decision is made. These facts and circumstances are affected by the passage of time and the considerations which might inform a decision to grant an injunction of the type granted in this case in 2013 are now very different. Even if a proportionality test was applied in making the 2013 Order, which is questionable given the need for clarification of the law in *McDonagh*, the passage of time and change of circumstances means that the relevant considerations which inform an assessment on an application of a proportionality test are different now than in 2013.

57. By way of example, one family living in an unauthorised temporary home on site is still living on the site some ten years after the 2013 Order was made. Their circumstances have clearly changed in that not only have the family been living there for ten years longer than

when the order was first made but, very materially in my view, given the public health issues cited at the time the 2013 Order was made, the sanitation issues relied upon in making the 2013 Order in respect of this temporary accommodation have since been addressed by works carried out by the Authority. The factual circumstances concerning the needs of the children of this family and animal welfare are also very different. When the application for leave to execute was initiated in 2021, no offer of accommodation had been made to this family since 2014 notwithstanding evidence of a special needs child in the household and other issues. The Authority has not addressed how the accommodation needs of this family were assessed in each of the Traveller Accommodation Programmes adopted since 2013. The family have now been living for some 19 years on the site, albeit without authorisation from the Authority, such that a Court called upon now to make the Order made in 2013 would be required to engage in a careful consideration of whether there has been a failure on the part of the Authority to discharge its statutory duties to this family over a very protracted time-frame. Furthermore, were the Authority to seek to remove this family under their statutory powers, it could only do so within the four corners of those powers. Were leave to execute on foot of an order which is now some ten years old given, any statutory constraints which might provide safeguards against the exercise of power in a manner which results in a disproportionate interference with rights are avoided.

58. The personal rights and interests of the Defendants/Appellants which fall to be weighed in a proportionality assessment are not static and are liable to be influenced by length of time living in a location and issues such as health and emotional dependency. On the evidence adduced in this case it is clear that there have been significant changes since 2013. It seems to me that the circumstances which would impact on a proportionality assessment have changed so much since 2013 that a balance of competing rights and interests now might be weighed quite differently, even assuming that such a weighing occurred at all in 2013 in the pre-*McDonagh* era on the state of the jurisprudence at that time. The terms of the order are such as to suggest that the Defendants occupying unauthorised structures (in the case of one family for upwards of 19 years) might be amenable to being required to leave the site in circumstances where they refuse any offer of accommodation made to them, no matter how unsuitable.

59. In my view there is insufficient detail given on affidavit directed to what alternative accommodation has been offered to those in unauthorised occupation of the site to enable an assessment of the offers to be made. Given the lack of detail provided in respect of these offers,

it is unclear whether there has been a discharge by the Authority of its statutory duties to those many Defendants seeking accommodation suited to their identities as members of the traveller community. In consequence, it is impossible to determine that making the order sought giving leave to execute on foot of the 2013 Order would not disproportionately interfere with protected fundamental rights in the home. It is recalled again that in the case of two families offers of accommodation were made after the application for leave to execute were presented to the Circuit Court, without any offer having been made over several years previously. It being the case that offers (whether suitable or not) have been made, there would be no impediment to the Authority requiring these families to leave the site were leave to execute granted in circumstances where it is far from clear that the Authority has discharged its statutory duties to the said families, both with dependent children and both seeking accommodation which is suited to the traveller way of life.

60. Given the ongoing nature of public law duties, the length of time families have been residing on the site, changes in circumstances as regards conditions on site, the personal circumstances of those living on site including the particular health needs of adults and children on site, the failure to make suitable accommodation available over a protracted period and statutory requirements pertaining to the provision of traveller accommodation specifically the requirement to adopt and implement periodic traveller accommodation plans under the Housing (Traveller Accommodation) Act 1998, I have come to the conclusion that a risk of a disproportionate interference with rights has been established in this case such that I should not exercise a discretion under O.36, r.9 giving leave to execute on foot of the 2013 Order where to do so could have the effect of permitting the removal of a family from site without a current lawful determination of the Authority's entitlement to such an order in accordance with the requirements of constitutional justice including the doctrine of proportionality. By reason of the Authority's failure to adequately address the issue of competing rights and interests and in particular the steps taken to provide traveller specific accommodation for the families living on site in discharge of statutory functions and in accordance with law, I am not in a position to determine that giving leave to execute on foot of Clause 6 of the 2013 Order at this remove would not result in a disproportionate interference with the Defendants' rights.

61. As for the balance of the 2013 Order, I accept the case made that animal husbandry is intrinsic to traveller culture and identity. I also accept the evidence that the animals on-site are well-cared for as attested by veterinarian evidence proffered and not seriously disputed on

behalf of the Authority. Despite this it is undeniable that serious concerns persist arising from the very significant and undisputed number of animals present on a confined site between a dual-carriageway and railway tracks and in close proximity to densely populated urban areas. While the authorities establish a need to engage in a proportionality exercise where there is interference with the "*home*" such as would occur where unauthorised structures used for human habitation were removed from site, the same protection does not extend to the keeping of animals at an inappropriate location, even where the animal husbandry is a key component of one's cultural identity.

62. Even though there is no evidence of incidents since 2013 involving the escape of animals from the site onto the N24 or the railway track before me, it seems to me that enforcing those elements of the 2013 Order which required the removal of animals and animal structures at this remove would not result in prejudice from a disproportionate interference with the Defendants' rights or interests given the unsuitability of the site for the accommodation of a large number of animals and the fact that most of the animals appear to have been introduced to the site in breach of the 2013 Order. Similarly, I would not consider permitting the Authority to enter onto the site which they own for the purpose of carrying out sanitary works, even at this remove, to be such as could result in a disproportionate interference with rights, albeit that no evidential basis for requiring entry for this purpose has been laid on affidavit in support of the current application.

CONCLUSION

63. There is a light onus on the moving party in an application for leave to execute on foot of an order which is more than 6 years old to explain why the order was not enforced earlier. This onus was discharged in this case through the account given of changes on site in the intervening period which meant that animals and animal-related structures were introduced to the site in the face of a court order. Furthermore, new families took up residence on the site.

64. In considering the question of prejudice on an application for leave to execute an order in a context of the exercise of public law accommodation functions, it is necessary to consider the risk of a disproportionate interference with rights if the leave sought is granted. As the application of a proportionality test is fact specific and dependant on where the balance between competing interests lies, a risk of disproportionate interference is made out where

changed facts and circumstances are established such that there is a real risk that the balance might be struck differently were the Court invited to make the order sought to be enforced on the date of the application for leave to execute.

65. Ten years have passed since the 2013 Order was made with no real attempt made to set out in evidence in support of the application the steps taken to provide traveller specific accommodation which vindicates a right to respect for the distinct traveller identity and culture. Furthermore, the personal circumstances of those living on site have changed in material ways in the intervening period. In consequence, I cannot be satisfied that there is no real risk of disproportionate interference with the Defendants' rights were leave given to execute an order removing them from the site. Nor can I with the Authority's submission that the 2013 Order at Clause 6 is crafted in a manner which ensures only proportionate interference with the Defendants' rights in their home were it to be enforced in 2023 as it does not safeguard against removal from the site where a patently unsuitable offer of accommodation has been made.

66. On the other hand, I would not consider it unduly prejudicial to give leave to execute orders permitting the removal of animals and animal related structures from site in circumstances where these animals were introduced to the site in the face of the 2013 Order. Further, were there an evidential basis for a necessity for an order giving the Plaintiff permission to enter onto the site for the purpose of carrying out sanitary works, this is not the type of order which I would consider gives rise to a real risk of prejudice by reason of disproportionate interference with rights, certainly without evidence as to why this would be so in a given case.

67. For the reasons given I refuse the application for leave to execute on foot of the 2013 Order insofar as doing so would require the Defendants or any of them to vacate mobile homes and caravans on site. I will hear the parties in respect of any consequential matters including as to whether I can or should grant leave to execute in respect of parts only of the 2013 Order.