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Supreme Court of Ireland Decisions

Judgment

Title:	Moore -v- Dun Laoghaire Rathdown County Council
Neutral Citation:	[2016] IESC 70
Supreme Court Record Number:	07/2011
High Court Record Number:	2010 1040JR
Date of Delivery:	13/12/2016
Court:	Supreme Court
Composition of Court:	Clarke J., Laffoy J., O'Malley J.
Judgment by:	Clarke J., Laffoy J., O'Malley J.
Status:	Approved
Result:	Appeal allowed & set aside

THE SUPREME COURT

[Appeal No: 7/2011]

Clarke J.
Laffoy J.
O'Malley J.

Between/

Christopher Moore

Applicant

and

Ann Moore

Applicant/Appellant

and

Dun Laoghaire Rathdown County Council

Respondent

Joint Judgment of Clarke J., Laffoy J. and O'Malley J. delivered the 13th December, 2016.

1. Introduction

1.1 This case raises the important issue as to the circumstances in which it might be appropriate for the High Court to decline to grant any relief in favour of a party who has been evicted from their home on foot of an invalid warrant for possession. Each of the members of the Court contributed to the writing of this judgment.

1.2 In these proceedings both the applicant and the applicant/appellant ("collectively the Moores") sought judicial review arising out of their eviction from what was their family home. By the time the proceedings came on appeal to this Court the case was only being pursued by the second named applicant who is the sole appellant ("Ms. Moore"). However, nothing turns on the fact that Ms. Moore is the only remaining claimant.

1.3 Furthermore, it does require to be noted that a range of issues were originally relied on by the Moores for suggesting that their eviction from their family home was unlawful. However, by the time of the hearing of the appeal before this Court, only one issue was pursued. In circumstances which it will be necessary to outline in due course the trial judge (Peart J.) accepted that there was no lawful basis for the warrant of possession on foot of which the Sheriff executed an order for possession of the District Court made in proceedings brought by the respondents ("Dun Laoghaire Rathdown") against the Moores. The reason for the finding of unlawfulness was quite simple. The District Court (Ejectment) Rules 1999 (S.I. No. 218/1999) amended the District Court Rules in a manner which was operative at the time of the relevant proceedings in the District Court. Those rules amended O.47, r.14 of the District Court Rules and introduced a new O.47, r.15. The net effect of those amendments was that a warrant for possession could be issued at any time within six months of the making of an order for possession but, importantly, after six months such a warrant could only be issued after an application to the Court by the plaintiff on notice to the defendant.

1.4 While it will be necessary to address the precise circumstances in which a warrant for possession came to be issued in this case, it is now accepted that the warrant on foot of which the Moores were evicted did issue well outside the six month period referred to in the rules and, importantly, issued without any application on notice as required by O.47, r.15. It was in those circumstances that the trial judge, quite correctly, accepted that the warrant was unlawful. No cross appeal was, again quite properly, brought by Dun Laoghaire Rathdown against that finding. The uncontested backdrop to this appeal is, therefore, that the Moores, and in particular Ms. Moore, were subjected to an eviction on foot of an unlawful warrant.

1.5 For reasons addressed in his judgment, *(Moore & anor v Dun Laoghaire Rathdown County Council* [2010] IEHC 466 (Unreported, High Court, Peart J., 29th November, 2010)) the trial judge came to the view that it was, nonetheless, appropriate, in the exercise of what he considered to be his discretion, not to grant any relief by way of judicial review. It is as against that finding that Ms. Moore appeals to this Court. Only some of the background facts to this case are truly relevant to the narrow issue which now requires to be resolved and the Court, therefore, turns to the relevant facts.

1.6 However, before so doing it should also be noted that the legislative context within which the events of this case occurred has been radically altered by the enactment of the Housing (Miscellaneous Provisions) Act 2014 ("the 2014 Act"). The old procedure for obtaining an order for possession, under s. 62(3) of the Housing Act 1966 ("the 1966 Act"), required only proof of a duly served notice to quit and demand for possession.

Part II of the 2014 Act sets out procedures which confer far greater rights on tenants who wish to contest allegations made against them and creates a far more extensive decision-making role for the District Court. If a possession order is now made, it must specify both a commencement date for the period of time during which the housing authority may recover possession and the length of that period (which must be at least two months but not longer than nine months).

2. The Relevant Facts

2.1 The Moores were tenants of Dun Laoghaire Rathdown of a property at 4 Glennatan, Loughlinstown. They had been tenants since 1993. It is fair to say that there was a history of significant rent arrears leading to a series of proceedings in the District Court over the years.

2.2 However, on the 18th December, 2008, Dun Laoghaire Rathdown sought and obtained an order for possession from the District Court sitting in Dun Laoghaire. Subsequently, there was a degree of engagement between the parties and it was not until the earlier part of 2010 that it was sought to obtain a warrant for possession directed to the Sheriff to give effect to the original order for possession of the District Court. As noted earlier, the relevant provisions of the District Court Rules required, in the event that a warrant for possession was sought more than six months after the original order for possession, that there be an application on notice to the tenants concerned. It is accepted that no such application was ever brought.

2.3 As a result of inquiries made by this Court in the course of the hearing of this appeal some further documentation was provided by Dun Laoghaire Rathdown from which it is now possible to infer the sequence of events which led to the ultimate eviction which lies at the heart of these proceedings. It would seem that no written version of the original order for possession was in fact drawn up at the time that order was made. It should be pointed out that this was not at all unusual in that the volume of orders made by the District Court is such that written orders are frequently not made up unless one or other of the parties requires the order or some other purpose leads to the necessity to have a formal written order.

2.4 In any event it would appear that a letter was sent in the name of Edward C. Hughes, the county law agent of Dun Laoghaire Rathdown, to the relevant District Court clerk on the 1st March, 2010. The letter is in very simple terms. It says:-

> *"Enclosed please find Order and Warrant in above case.*
>
> *Please note that the first date that this case appeared in the District Court was the 6th November, 2008.*
>
> *Kindly place the Order and Warrant before the District Court Judge for signature and let this office know when same is ready for collection."*

It would appear that what accompanied that letter were two documents in draft form. The first was a draft of an order whose operative part provided as follows:-

> *"An Order was made on the 18th day of December, 2008 by one of the Judges for the time being assigned to the said District against the said defendant (sic) to the following effect:-*
>
> *Order for possession with a Stay of Three Months."*

In addition there was a draft warrant which was in a standard form directed to the Sheriff for the county of Dublin authorising him "to enter upon and give possession of

the said premises…"

2.5 It would seem that these documents came to be signed by a District Judge on the 29th April, 2010 and were returned to Dun Laoghaire Rathdown. In due course the warrant was sent to the Sheriff who executed it in the ordinary way on the 14th May, 2010. It should be pointed out that no criticism of any sort can be directed towards the Sheriff for the events leading to the issues in this case. The Sheriff was presented with what was, on its face, a valid warrant and executed that warrant in the ordinary way.

2.6 It should also be noted that a letter had been sent from Dun Laoghaire Rathdown to the Moores on the 4th March, 2010 which suggested that a warrant for possession had been obtained on the 18th December, 2008. This was, of course, inaccurate. What had been obtained on that date was an order for possession. A warrant for possession had not been obtained. Indeed, the height of what had occurred in respect of a warrant for possession by the 4th March was that the letter of the 1st March to the District Court clerk requesting same had been sent but no warrant had actually been obtained. The flawed warrant ultimately obtained was not signed by the relevant District Judge until the 29th April.

2.7 While dealing with the timeline it is also relevant to note that the Moores commenced these proceedings in late July, 2010. The grounding affidavit of Ms. Moore was sworn on the 26th July, 2010, an *ex parte* docket designed to facilitate the application for leave was also made out on the same day together with a statement of grounds and the order granting leave was made on the 30th July, 2010.

2.8 In that context it should also be noted that the evidence before the High Court suggested that the Moores had received a letter from the Sheriff in early May, 2010 which advised that a warrant for possession had been issued. However, the evidence was also to the effect that Ms. Moore had phoned the Sheriff who was unable, on that occasion, to give her a precise time when it was likely that he would seek to execute the warrant. As noted earlier, the warrant was actually executed on the 14th May.

2.9 The first move which the Moores then made, in an attempt to deal with the legal situation which had arisen, was to seek to have the District Court order for possession set aside. That application was heard in the District Court on the 24th June, 2010 but was refused. It was thereafter that advice was taken which led to the commencement of these proceedings.

2.10 It also seems to be the case that a procedure for seeking a warrant for possession in the manner earlier noted would have been entirely unobjectionable had the application for the issuing of the warrant concerned been made within six months of the original order for possession. As already noted O.47, r.14 in its amended form permits such a warrant for possession to be issued at any time not exceeding six months after the date of the order. There could, in such circumstances, be nothing wrong in a local authority presenting a draft form of order and a draft warrant to be signed by a District Judge provided that such a process was intended to lead to the issuing of the warrant within six months of the date of the original order for possession.

2.11 However, what happened here is that the application for a warrant was made over 16 months after the order for possession without, it would appear, anyone paying attention to the requirements of the amended rules which had, after all, been in force by the time in question for over ten years. Those amended rules clearly required an application in court on notice to the tenant.

2.12 No satisfactory explanation as to how this occurred seems to have been given in the High Court. The replying affidavit sworn in the High Court on behalf of Dun Laoghaire Rathdown does not deal at all with the manner in which the warrant was

obtained. The written submissions on behalf of Dun Laoghaire Rathdown, both in the High Court and in this Court, refer simply to a "perceived failure" to make a proper application, without further elaboration. It was not until the hearing of the appeal that the letter to the District Court clerk of the 1st March, 2010 was produced. Furthermore, when questioned at the hearing of this appeal, counsel for Dun Laoghaire Rathdown was unable to indicate whether what happened was a one off error or whether, for whatever reason, Dun Laoghaire Rathdown had not adverted generally to the need to bring an application on notice once six months had expired and was, thus, following its normal, if erroneous, practice in the circumstances of this case. No issue, therefore, arises as to whether the nature of the illegality of the warrant and the circumstances in which it was obtained might allow Dun Laoghaire Rathdown to argue that they be excused from the consequences of the invalidity of the warrant.

2.13 On one view a further aspect of the facts may at least be of some relevance. Evidence was given before the High Court that during 2010 at least some realistic efforts had been made by Ms. Moore to regularise the position about arrears of rent. At that time she was in employment and, in addition to paying rent as it fell due, she was paying an additional sum to at least make some inroads into the arrears. Furthermore, at a slightly later stage in 2010 but before the proceedings in the High Court, it became clear that there was a charitable benefactor who was offering to make substantial payments designed to clear the arrears in their entirety. While it is unnecessary to go into those facts in any great detail it can at least be said that Ms. Moore would have been in a position to make a case at or around that time to the effect that there was some reality in the prospect of her being able to address the undoubtedly substantial arrears of rent. In the same context, and in fairness to Dun Laoghaire Rathdown, it does also need to be recorded that the local authority had a concern that the pattern in the past had been that there were arrears built up which were only regularised at the last minute after the legal process designed to lead to possession had been initiated.

2.14 Against the background of those facts it is next necessary to turn to the law relating to local authority possession proceedings before the District Court.

3. Local Authority Possession Proceedings in the District Court

3.1 There was some debate at the hearing of this appeal which concerned the question of the extent to which a District Judge hearing such possession proceedings or an application to allow for the issuing of a warrant for possession outside six months could or should have regard to what might be described as the merits of the situation including having regard to any rights which might be available to a relevant tenant under Article 8 of the European Convention on Human Rights ("ECHR"). There has been much case law both in this jurisdiction and in the United Kingdom arising out of issues concerning the balancing of the broad obligations of local authorities in their provision of local authority housing and Article 8 rights. (see for example *Donegan v Dublin City Council & anor* and *Dublin City Council v Gallagher* [2012] 3 IR 600, *Manchester City Council v Pinnock* (2010) 3 WLR 1441, *Hounslow London Borough Council v Powell* [2011] AC 186,)

3.2 It is also of some relevance to cite what was said by McKechnie J. at para. 131 of his judgment in *Donegan* and *Gallagher* McKechnie J. agreed with the position identified by Laffoy J. in the High Court in *Donegan* that the issue and execution of a warrant for possession under s.62 of the Act of 1966 amounted to an interference with Article 8 rights and required justification within the terms of that provision. McKechnie J. did, however, ultimately conclude that it was unnecessary to reach a final determination on the question of the entitlement to raise Article 8 type issues before the District Court for the purposes of resolving the case before him. For reasons which we hope will become apparent we have also concluded that it is unnecessary to determine, for the purposes of resolving this appeal, like questions as to the extent to which it would have been

open to a District Judge, under the law then currently in force, to have considered Article 8 type issues in the context of an application to allow for the issuing of a warrant for possession outside the six month period to which reference has already been made.

3.3 In any event McKechnie J. went on to hold that, if the procedural safeguards available were inadequate having regard to the substantive merits of the case, judicial review would not in itself be a sufficient remedy and there could be a violation of Article 8. On the facts of one of the two cases under consideration in the judgment, the Court found that the only available remedy was a declaration that s.62(3) of the 1966 Act (the provision requiring the District Judge to make an order if satisfied that the housing authority had duly made demand for the house) was incompatible with the State's obligations under the Convention.

3.4 It is important to recall that the District Court Rules make it clear that a warrant for possession which is sought more than six months after an order for possession can only be made after notice has been given to the relevant tenant. As pointed out in *Shell E & P Ireland Limited and ors v McGrath and ors* [2013] 1 IR 247, rules of court are a form of delegated or secondary legislation and thus form part of the law. It follows that the requirement that a tenant be put on notice for an application for a warrant for possession which is sought outside the six month period is a legal requirement which is binding.

3.5 It cannot be assumed or accepted that it was intended that no useful purpose could be served by that legally mandated procedure. Previously, in accordance with cases such as *The State (O'Rourke) v. Kelly* [1983] IR 58, *Dublin Corporation v. Hamilton* [1999] 2 IR 486 and *Dublin City Council v. Fennell* [2005] 1 IR 604, it had been confirmed that, under the provisions of s.62 of the 1966 Act, a District Judge was confined to an examination of the procedural requirements of the section and could not consider any issue touching on the merits of the situation. Order 47 r.15 introduced a new entitlement on the part of a tenant - to be heard in opposition to the grant of a warrant outside the six-month period. It follows that it must be the case that there could be circumstances where it would be appropriate for a District Judge to decline to make the order sought. If it were otherwise what would be the point in the procedure in the first place? There was a debate between counsel at the hearing of this appeal as to whether the District Judge, in hearing an application for the late issuance of a warrant under O.47, r.15, involved the District Judge concerned in a broad consideration of whether, on the merits, and possibly involving an assessment of Article 8 rights, it was appropriate or proportionate to make the order concerned. Counsel for Ms. Moore argued for such a broad approach. On the other hand counsel for Dun Laoghaire Rathdown suggested that the proper approach of the District Judge was confined to assessing whether the relevant local authority had provided an adequate explanation as to why a late warrant was being sought.

3.6 As a matter of first impression, it seems arguable that the point of the rule is the possibility that lapse of time may result in a relevant change of circumstances such that the District Judge might come to the conclusion that it had become inappropriate to issue a warrant.

3.7 But even if the proper role of the District Judge is confined in the manner contended for on behalf of Dun Laoghaire Rathdown, it clearly follows that there must be circumstances in which a tenant might successfully persuade the District Judge not to allow for the issuance of a late warrant. What then would happen? Clearly an order for possession, which could no longer lawfully progress to a warrant for possession, would be of little or no practical benefit. As a matter of reality the order for possession would, in those circumstances, become incapable of practical enforcement. It would follow that the local authority concerned would need to go back and demand possession again and

follow that by fresh proceedings. It is clear that, in such circumstances, having regard to the jurisprudence following the enactment of the European Convention on Human Rights Act in 2003 in cases such *Fennell* and *Donegan*, a local authority would be required to consider afresh the Article 8 rights of the tenant and would be required to do so in the light of the circumstances then prevailing. Thus, even if the role of a District Judge in considering whether to allow for the issuing of a late warrant is confined in the manner contended for on behalf of Dun Laoghaire Rathdown, it must be acknowledged that it is possible that a District Judge might properly fail to be persuaded to allow for late issuance and that this would inevitably lead to an obligation on the relevant local authority to reassess whether it was then appropriate to seek possession in all the circumstances of the case. The Court would wish to emphasise that nothing in this judgment should be taken as implying that any jurisdiction to make such an assessment (whether, on a proper construction of the law, vested in a court or in a local authority), would require that the broad, statutory obligations of local authorities to make suitable housing available to those on housing lists be excluded from any relevant assessment. This judgment should not be taken, in any way, to depart from the established jurisprudence which requires weight to be attached to such considerations.

3.8 However, the analysis just conducted is designed to demonstrate that, at a minimum, the hearing on notice which is required as a matter of law by O.47, r.15 contains within it the possibility that there may require to be a fresh assessment of the proportionality of possession being sought by a local authority in the light both of those general considerations attaching to the local authority's obligations and of the rights of the tenant. Whether that assessment would be required to be carried out by the District Judge hearing the application is not material to that overall conclusion. Even if the District Judge is not required to carry out that assessment it must be the case that there is a possibility that the District Judge might properly refuse to allow for the issuing of a late warrant and thus trigger a mechanism which would require the local authority to carry out a fresh assessment. Either way, the court is given a role in protecting the rights of tenants which may not be bypassed by the expedient of obtaining a warrant for possession without a court application on notice.

3.9 It follows, therefore, that the result of an application under O.47, r.15 has the potential to have a significant impact on the rights of tenants for it creates at least the possibility that the tenant may become entitled to a fresh assessment on the merits. It follows in turn that depriving a tenant of the opportunity which an application on notice gives them amounts to depriving a tenant of a significant entitlement which the law confers. That entitlement should be seen in the context of the protection of tenants' Constitutional and Convention rights in respect of their homes.

3.10 The decision of the trial judge confirms that Ms. Moore was deprived of that entitlement. It is against the background of that analysis of the importance of the entitlement concerned that it is necessary to turn to the question of whether it was appropriate for the trial judge to come to the view that no order should be made.

4. The Exercise of the Trial Judge's Discretion

4.1 The ultimate conclusion of the trial judge is to be found in the final paragraph of his judgment where it is stated that having regard to "*the circumstances generally both before and since the making of the order for possession, and the conduct of both parties to these proceedings… refusing to grant the reliefs sought is not disproportionate, and that the discretion vested in the Court should be exercised by refusing the reliefs being sought…*"

4.2 In coming to that conclusion it is clear from the preceding paragraphs that the trial judge took into account what he felt was the spent nature of the warrant. In that regard the trial judge placed reliance on *The King (M'Swiggan) v. Justices of County*

Londonderry [1905] 2 I.R. 318 where a warrant which was a nullity was not quashed in the exercise of the Court's discretion. In addition the trial judge had regard to the fact that he found there to have been no conscious or deliberate breach of the Moores' rights.

4.3 The trial judge also considered that the Moores did not take any steps, between being made aware of the fact that there was a warrant for possession and the time of their actual eviction, to seek to challenge the warrant on the basis now contended for. It was against that background that the trial judge assessed what he described as "any prejudice to the applicants arising from the fact that they had no opportunity to make submissions to the District Court". It is, in that regard, however, also important to note the relatively short period of time between when the Moores became aware that they were liable to eviction and the time when that eviction took place together with the steps, to which reference has already been made, which they promptly took to challenge the legal basis of their eviction.

4.4 Counsel for Ms. Moore argued on the appeal that the approach of the trial judge in adopting a broad overall assessment of proportionality and the merits was inappropriate in circumstances where there was an established illegality which led to the eviction of persons from their family home. The Court accepts that counsel was correct in that contention.

4.5 While not necessarily decisive, the starting point has to be to observe that a family home enjoys protection both under the Constitution and under the European Convention on Human Rights. Persons may, of course, lose the right to occupy a family home in accordance with law. It might be said that the Moores lost the formal right to occupy their family home when a valid notice to quit was served. However, there are two relevant considerations that qualify the effect of that statement. One is that the house remained their home, whether they were legally entitled to be there or not, until such time as they were evicted in due course of law. In *The People (Director of Public Prosecutions) v. Lynch* [2010] 1 IR 543 the Court of Criminal Appeal held that a squatter was entitled to the protection conferred by Article 40.5 against entry by gardaí in possession of an invalid warrant, on the basis that a place is the "dwelling" of a person if they live in it. The issue is thus a question of fact. Similarly, the European Court of Human Rights held in *Prokopovich v. Russia* (Case 58255/00) [2004] ECHR 642 that:-

> *"… the concept of "home" within the meaning of Article 8 is not limited to those which are lawfully occupied or which have been lawfully established. "Home" is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular habitation constitutes a "home" which attracts the protection of Article 8.1 will depend on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place".*

4.6 The second consideration is that the practical mechanism for giving effect to the loss of the right to occupy a family home where the family concerned does not consent is the procedure to which reference has already been made. As McKechnie J. noted in *Donegan*, Article 8 rights are interfered with when a warrant for possession is obtained. It is true, as was also noted in the same judgment, that a warrant which is issued in accordance with the 1966 Act is issued in accordance with law and thus that aspect of the preconditions for interfering with Article 8 rights is met. However, that analysis presupposes that the warrant for possession concerned is properly issued in accordance not only with the provisions of the 1966 Act but also any other legally binding measures.

4.7 The ultimate deprivation of the occupation of the family home in this case came about when a warrant for possession, which was obtained in a fundamentally defective

manner, was executed. It does not seem to the Court that it is possible to describe, therefore, the deprivation of possession of the family home in this case as having been conducted in a manner consistent with Article 8.2 of the ECHR which prohibits interference by a public authority with the family home "except such as is in accordance with law". The fundamental value at stake in these proceedings is the rule of law. For good reason local authorities are given wide power to manage the housing stock available to them. There are many who would very much like to be able to avail of local authority housing and, in the current climate as all are unfortunately only too well aware, the available stock for most if not all local authorities falls a long way short of the level of units required. The jurisprudence generally, therefore, supports reasonable decisions of local authorities as to how to manage that stock while paying appropriate regard to the rights and interests of tenants. But it is not that balancing exercise which is at issue in this case. Rather it seems to the Court that what is at stake is the rule of law.

4.8 It must be emphasised that the problem with the warrant in this case is not a technicality such as a minor misdescription or an absence of authority on the face of a warrant arising in circumstances where it can be demonstrated that the judge issuing the warrant had all of the necessary evidence to enable the warrant to be issued. Rather this is a case where there was a complete failure to invoke the proper jurisdiction of the District Court resulting in a fundamental denial of fair process in the issuing of the warrant. The law required that, in the circumstances of this case, the Moores be put on notice before a warrant could be issued. They were not put on notice. The fact that they were thus deprived of the opportunity of seeking to persuade the District Court not to allow for the late issuing of the warrant is not, in the Court's view, simply a factor to be taken into account in the balance. It is an issue which renders the warrant unlawful in a most fundamental way.

4.9 Whether the District Judge might have been persuaded to decline to allow for the late issuing of a warrant or the probability of the result of any relevant hearing in that regard is not, in the view of the Court, a factor of any significant materiality. Would it be an answer to a challenge to the conviction in his absence of an accused of a summary offence in the District Court, where he or she had not been notified of the hearing, to suggest that the evidence was so overwhelming that the accused would have had no prospect of acquittal? Of course not.

4.10 On the facts of this case we consider it to be of the highest importance to acknowledge that an order, which significantly affected the Moores' rights, was made without putting them on notice of the intention to seek that order as the law required. This is not a case where there were attempts to notify which perhaps fell short of proper notice but were deemed good and sufficient by a court. This is a case where, for reasons which remain unexplained, no attempt to notify at all was made. This is not a case where the reasons put forward for suggesting that the warrant was invalid are technical but rather where the reasons put forward are of significant substance being that the party most likely to be affected by the making of the order was denied an opportunity to be heard because they were not served with notice as the law required. In the view of the Court the circumstances display a significant illegality in the manner in which possession was actually obtained. It follows from that fact that it would require a very significant countervailing factor before it could be appropriate to decline to grant some relief to the Moores. This is not a case where it is simply a question of balancing factors on one side or the other. This is a case where the rule of law requires that a party should not be able to retain the benefit of a warrant for possession, obtained in a fundamentally unlawful way, in the absence of significant countervailing factors going beyond the general considerations pertaining to the statutory role of a housing authority.

4.11 While it might not be appropriate to push the analogy too far it is illustrative to note the distinction made in respect of a so-called "irregular judgment" and a "regular judgment" in circumstances where a party to civil proceedings obtains a judgment in default of appearance. As is pointed out between paras. 3-48 and 3-*51 Delaney & McGrath, Civil Procedure in the Superior Courts,* 3rd Edition (Dub, 2012) very different considerations are applied by the Court in an application to set aside depending on whether the judgment was regularly obtained or irregularly obtained. It is clear from the authorities cited that a principal element of the reasoning behind that distinction is that a party which has suffered from an irregular judgment, i.e. one where the party concerned was not properly served at all, should not be placed in a worse position by reason of the fact that a judgment was irregularly obtained than it would have been had no judgment been secured in the first place. On the other hand a party against whom a regular judgment has been obtained, who seeks some leeway from the Court in having that judgment set aside so that they might defend the proceedings, is in a more difficult position and needs to meet certain criteria, such as, for example, establishing that they have an arguable defence, before the Court will set aside the judgment. The underlying principle behind that distinction is that a party who obtains an irregular judgment should not benefit by it and a party who has an irregular judgment entered against it should not be disadvantaged.

4.12 It seems to the Court that there is at least a broad similarity with the circumstances which arise here. However, in the circumstances of this case the Court also has to take into account the special protection conferred by Article 40.5 of the Constitution, which prohibits the forcible entry of the home save in accordance with law. In the absence of a significant countervailing factor a local authority, which obtains a warrant for possession in a fundamentally irregular way, should not be able to retain the benefit of it and a party against whom such a warrant for possession is granted should not be disadvantaged.

4.13 In the view of this Court there are no factors which would go close to providing a justification for the Court not granting relief in the circumstances of this case. There is no undue delay or inappropriate litigation action on the part of Ms. Moore. The history of rent arrears would undoubtedly be a factor which could properly be taken into account in assessing any balancing exercise which was required to be undertaken between the entitlement of the local authority to manage its housing stock and Ms. Moore's rights. But the fact that it is a factor to be taken into account in such circumstances could never justify an adverse measure being taken without giving notice and affording the opportunity to be heard which the law mandates.

4.14 In those circumstances the Court is not satisfied that declining to make any order was within the range of permissible courses of action which were open to the High Court in all the circumstances of this case. In so saying the Court would emphasise that it should not be seen, in any way, to be departing from the well established jurisprudence which suggests that this Court should not interfere with an order made by the High Court which does lie within the range of permissible orders even if it might be that this Court, were it considering the matter afresh, might have chosen a different approach.

4.15 Having concluded that some relief should have been given to the Moores it is finally necessary to turn to the question of what relief ought now be provided.

5. The Relief

5.1 A lot of water has passed under the bridge since this matter was before the High Court. In all the circumstances of the case counsel for Ms. Moore, on the hearing of this appeal, accepted that it would not be appropriate at this stage to seek any form of order designed to place Ms. Moore back into her former home. However, counsel urged that there should be a declaration that the warrant for possession was unlawful and a

determination that Ms. Moore should be entitled to damages.

5.2 Whether or not it would have been appropriate, in all the circumstances pertaining at the time when this matter was determined by the High Court, to make an order which would have had the effect of putting Ms. Moore back into possession is difficult to assess. It would have been necessary to take into account all of the circumstances including what had happened to the property concerned subsequent to the eviction of the Moores. In saying that the Court would not rule out that, in an appropriate case, orders of that type might well be required. The fact that it might be possible or even likely that a local authority might seek to come again and restart the process and the fact that there was a realistic prospect that, should the local authority come again, a valid order for possession followed by a valid warrant for possession might follow, would not, in the Court's view, justify, in an appropriate case, declining to make orders designed to put a tenant who had been the subject of an unlawful warrant for possession back into possession.

5.3 However, the circumstances of this case have moved on to such an extent that, as counsel for Ms. Moore accepted, such orders would no longer be appropriate. Apart from the question of whether she would or would not currently be eligible for local authority housing, there is the potential for interference with the rights of any third party now in occupation. However, it remains the case that, at a minimum, Ms. Moore was wrongfully evicted on foot of a warrant which was obtained in significant breach of the legal process which required to be followed. In those circumstances it seems to the Court that it is appropriate that Ms. Moore be awarded damages to reflect that fact. Declaratory relief is also appropriate.

5.4 For understandable reasons there was little concentration at the oral hearing of this appeal on the question of the proper basis on which it would be appropriate to address the question of damages should same be awarded still less the question of whether it would be appropriate for this Court to attempt the exercise itself or rather remit the matter back to the High Court for the purposes of an assessment of damages.

5.5 In those circumstances we consider that the proper course of action to adopt is to make a declaration that the eviction of Ms. Moore, effected on the 14th May, 2010, was unlawful and to determine that Ms. Moore is entitled to damages at the level of principle.

5.6 The Court would propose hearing counsel on both sides as to how the question of damages should be progressed. In particular the Court would wish to receive submissions on whether it is possible or appropriate for this Court to assess damages itself or whether the question of damages should be remitted to the High Court. In either eventuality the Court would wish to hear counsel on the general principles which ought be applied to the assessment of damages in a case such as this whether that assessment is to be conducted by this Court or whether this Court is to give guidance to the High Court, (in the event that the matter is remitted back for assessment) on the proper approach to the calculation of damages. In addition, the Court would like to hear counsel on the question of whether, and if so in what way, the arrears of rent which were owing by the Moores to Dun Laoghaire Rathdown should be taken into account in the assessment of damages.

6. Conclusions

6.1 For the reasons analysed in this judgment the Court will, therefore, make a declaration to the effect that the eviction of Ms. Moore on the 14th May, 2010 was unlawful.

6.2 The Court will also determine that Ms. Moore is entitled to damages at the level of principle but will put the matter in for further submission on a future date to deal with the issues concerning damages just noted.