| Neutral Citation No: [2017] NIMag 1<br><br>*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Ref:* **2017NIMAG1**<br><br>*Delivered: 01/09/2017* |
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**IN THE PETTY SESSIONS DISTRICT OF EAST TYRONE**

**County Court Division of Fermanagh and Tyrone**

_____

**H**

**-V-**

**W**

**AND BY CROSS-SUMMONS**

**W**

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**H**

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**MEEHAN J**

[1] On 8th August 2017 this matter was listed at Dungannon Domestic Proceedings Court. It was a husband's Application for full Non-Molestation and Occupation Orders against his wife. An interim ex parte Order which combined both Non-Molestation and Occupation orders had already been granted on 7th July.

[2] I was invited at the outset by counsel for the Applicant to read the papers; he felt this might shorten matters. I retired to consider the papers and later returned to the Court to state that I was dismissing the Application. I gave reasons for my decision at that time, but I take this opportunity to set those out in somewhat greater detail.

[3] The Applicant's supporting Statement is to be found in the Appendix hereto. That was part of his Form F1 written Application. These being all the papers put before me on the Applicant's behalf, I proceeded then as now on the basis that the learned Deputy District Judge who granted the interim Order took no notes, nor added any memorandum in the course of the leave application and subsequent ex parte Hearing on 7th July. It is to be expected in such circumstances that all the evidence upon which the Judge's decisions was based is to be found in the papers filed.

[4] My own practice when dealing with an application for leave to proceed ex parte is not to admit the Applicant to chambers while I consider the merits from the papers alone. If, as is usually the case, I cannot find a basis for granting leave, I invite the Applicant's Solicitor to come in and respond to my reasoning. Sometimes the Solicitor will indicate that the Applicant would then wish to amplify upon the written Statement and ask that I permit oral evidence to be taken. My response is to suggest instead an amendment to the paperwork. More usually, the Solicitor accepts the ruling, sometimes even adding that (s)he was simply "following instructions". These applications for what is properly understood to be truly exceptional relief are quite common nowadays.

[5] In Wallace v Kennedy [2003] NICA 25 a Resident Magistrate had granted an ex parte Non-Molestation Order and made provision that it should last for a year. In respect of the decision to grant an ex parte Order at all, the Northern Ireland Court of Appeal had this to say;

> [6 …. We have no information about the circumstances of the case which influenced the court to make an ex parte order rather than direct a hearing on notice, and cannot express an opinion on the correctness of its decision to do so. We would only observe that Article 23(2) spells out a number of circumstances to which the court should have regard in determining whether to make an order ex parte, in terms which appear to envisage that the court should be satisfied that there is an urgent need for an order to be made without notice to the respondent.
>
> [7] …
>
> Hoffmann LJ in a non-molestation case in Loseby v Newman [1995] 2 FLR 754 at 758 described the proper practice in generalised terms:
>
> "An ex parte order should be made only when either there is no time to give the defendant notice to appear, or when there is reason to believe that the defendant, if given notice, would take action which would defeat the purpose of the order."

In the context of family cases, that will generally be limited to emergency cases when the interests of justice or the protection of the applicant or a child clearly demand immediate intervention by the court: Ansah v Ansah [1977] F 138 at 143, per Ormrod LJ.

[6] The statutory authority to make such orders in Northern Ireland without a full Hearing between the parties is set out in Article 23 of The Family Homes and Domestic Violence (Northern Ireland) Order 1998, as amended ("the 1998 Order");

> Ex parte orders
> 23.—(1) The court may, in any case where it considers that it is just and convenient to do so, make an occupation order or a non-molestation order even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of court.
>
> (2) In determining whether to exercise its powers under paragraph (1), the court shall have regard to all the circumstances including—
> (a) any risk of *significant harm* to the applicant or a relevant child, attributable to conduct of the respondent, if the order is not made immediately,
> (b) whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately, and
> (c) whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and that the applicant or a relevant child will be seriously prejudiced by the delay involved—
> (i) where the court is a court of summary jurisdiction, in effecting service of proceedings, or
> (ii) in any other case, in effecting substituted service.
>
> (3) If the court makes an order by virtue of paragraph (1), it shall afford the respondent an opportunity to make representations relating to the order as soon as just and convenient at a full hearing.
>
> (4) …
> (5) …
>
> (*my emphasis*)

[7] The interim Order in the instant case was in two distinct parts. The first page comprised an interim Non-Molestation Order, whereby

- The Respondent was forbidden to use or threaten violence against the Applicant and was not to instruct, encourage or in any way suggest that any other person should do so; and

- She was also forbidden to intimidate, harass or pester the Applicant and likewise was not to instruct, encourage or in any way suggest that any other person should do so.

  It was then declared that this order was to take effect forthwith, upon being served, and would remain in force until 8th August 2017.

[8[ The power to grant a Non-Molestation Order is contained in Article 20 of the 1998 Order;

> Non-molestation orders
> 20.—(1) In this Order a "non-molestation order" means an order containing either or both of the following provisions—
> (a) provision prohibiting a person ("the respondent") from molesting another person who is associated with the respondent;
> (b) provision prohibiting the respondent from molesting a relevant child.
>
> (2) The court may make a non-molestation order—
> (a) if an application for the order has been made (whether in other family proceedings or without any other family proceedings being instituted) by a person who is associated with the respondent; or
> (b) if in any family proceedings to which the respondent is a party the court considers that the order should be made for the benefit of any other party to the proceedings or any relevant child even though no such application has been made.
>
> (3) …
> (4) …..
>
> (5) In deciding whether to exercise its powers under this Article and, if so, in what manner, the court shall have regard to all the circumstances including the need to secure the *health, safety and well-being*—
> (a)of the applicant or, in a case falling within paragraph (2)(b), the person for whose benefit the order would be made; and
> (b) of any relevant child.
>
> (6) A non-molestation order may be expressed so as to refer to molestation in general, to particular acts of molestation, or to both.
>
> (7) A non-molestation order may be made for a specified period or until further order.

(8) A non-molestation order which is made in other family proceedings ceases to have effect if those proceedings are withdrawn or dismissed.

(*my emphasis*)

[9] The second part of the Order, on the next page, constituted an interim Occupation Order, whereby

- The Court declares that the Respondent is entitled to occupy [the matrimonial home] as his home and accordingly
- The Respondent was to allow her husband to occupy those premises;
- She was not to obstruct, harass or interfere with the Respondent's peaceful occupation of the premises;
- She was not to occupy the premises;
- She was to leave the premises "forthwith upon service on her of this order"; and
- Having left the house, she was forbidden to return to, enter or attempt to enter it again.

It was again declared that this order was to take effect forthwith upon service and was to remain in force until 8th August.

[10] Service was to be effected by the Police. The third page included a footnote, in bold typeface, as follows;

NOTICE: This Order gives you instructions which you must follow. You should read it all carefully. If you do not understand anything in this Order you should go to a Solicitor, or an Advice Centre or Citizen's Advice Bureau. You have a right to ask the Court to change or cancel the Order, but you must obey it unless the Court does change or cancel it.

You must obey the instructions contained in this Order. If you do not, you may be guilty of an offence, and you may be sent to prison and/or fined.

[11] The application for an ex parte Order had come before the Court on a Friday, some days after the monthly sittings of the Domestic Proceedings Court at Dungannon, which deals with this kind of case. The next sittings of that Court were not to be until 8th August. It therefore appears that the learned Deputy District Judge, having decided to grant leave to proceed on an ex-parte basis and, further, to grant the relief sought on an interim basis, fixed the return date for a full Hearing between the parties as the next monthly sittings of the Domestic Proceedings Court.

[12] In Wallace v Kennedy [2003] NICA 25, Carswell, LCJ also gave guidance as to how long such an ex parte Order should last, before the matter is fully considered at an inter partes Hearing;

> **[8]** When it is appropriate to make an *ex parte* order, it is clear from the authorities that it should be made to subsist only for a very limited duration. In *Ansah v Ansah* Ormrod LJ went on to say:
>
> "If an order is to be made ex parte, it must be strictly limited in time if the risk of causing injustice is to be avoided. The time is to be measured in days, ie the shortest period which must elapse before a preliminary hearing inter partes can be arranged, and the order must specify the date on which it expires."
>
> This principle has been regularly followed, and in G v G (Ouster) [1990] 1 FLR 395 Lord Donaldson of Lymington MR expressed the view that a period of seven weeks was "completely unjustifiable".
>
> [15] We would therefore offer the following guidance to magistrates' courts which are asked to make ex parte non-molestation orders:
>
> (d) The court should consider with some care whether the circumstances of the case justify the making of an order ex parte rather than directing that the matter be heard inter partes on short notice.
>
> (b) At the time of making the order the court should preferably fix a return date for the full hearing, specify that date in the order and limit the duration of the order to the date of the full hearing. The period of duration should be as short as reasonably possible, in order to comply with Article 23(3) of the 1998 Order.
>
> (c) Alternatively, it could issue a summons directed to the respondent to attend a full hearing and limit the duration of the order to the date of that hearing.
>
> (d) If neither of these steps is taken at the time of making of the order, the court should subsequently proceed to arrange a full hearing, provided it can be done within a time which qualifies as being "as soon as just and convenient."
>
> (e) It would be open to a respondent, if the court has not taken steps to arrange a full hearing, to make a request for one to be held, and in such case the court should make the necessary arrangements.

(f) The respondent may apply under Article 24 for variation or discharge of a non-molestation order, whether it has been made ex parte or inter partes or confirmed after a full hearing. The onus will be on him on such an application to make out his case for variation or discharge. The court should be careful, however, to ensure that a respondent is not required to undertake that onus if he should really have sought a full hearing under Article 23(3), and in such a case it should treat the application as a full hearing under that provision.

(g) If a respondent commits an act prohibited by the order before a full hearing is held, and is then prosecuted for breach, it will be open to him to rely upon the defence that a full hearing should have been held before the time when he committed the act alleged. It will be for the court hearing the prosecution to determine whether the act was committed before the time at which a full hearing should have been held (whether or not one was ultimately held). If it was, that defence will fail; but if it was not, then the summons should be dismissed.

[13] On the facts, Wallace v Kennedy concerned a Non-Molestation Order. The need to set an early date for a Hearing on notice after making an ex parte Order is all the more acute in respect of an Occupation Order, where, as here, the absent party is being ejected from her home. The greater the interference with the absent party's liberty or basic rights, the greater the obligation must be on the Court to have the case re-listed at the earliest feasible date.

[14] The ex parte Order of 7th July recites that the Applicant is entitled to occupy the dwelling-house in question. It is not apparent quite how that conclusion was reached, beyond an inference drawn from the opening passages in the Applicant's grounding Statement. None of the information sought in Form F1, which is designed to identify the nature of the Applicant's interest in the premises, had been answered.

[15] The only attention given by the Applicant to Section 6, is at question 6(B)( i.e., who is living in the house); there he did state:

> It is currently occupied by the Applicant, it is the matrimonial home and the Respondent has left.

[16] That was a misstatement of fact. On the other hand, the Respondent's address was given as the same family home and she was served there with the Order by the Police that same evening.

[17] Of papers which include a request to have the application heard ex parte in the first instance, Stephens, J made this observation in RH & Ors v IH [2009] NIFam 19;

> [28] … on any ex parte application the applicant must proceed "with the highest good faith", see Schmitten v Faulkes [1893] W.N. 64 per Chitty J. The fact that the court is asked to grant relief without the person against whom the relief is sought having the opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of all material facts otherwise the order may be set aside without regard to the merits, see Boyce v Gill (1891) 64 L.T. 824 and Baly & another v Barrett & others [1988] NI 368 at page 417 letters D to H.

[18] In any event, it would appear from the terms of the Order that the learned Deputy District Judge was proceeding on foot of the provisions contained in Article 11 of The Family Homes and Domestic Violence (Northern Ireland) Order 1998 in respect of the Occupation Order element. There one finds two core provisions - two routes to an Order.

[19] The first is via Article 11(6), which reads as follows;

> (6) In deciding whether to exercise its powers under paragraph (3) and (if so) in what manner, the court shall have regard to all the circumstances including-
> (a) the housing needs and housing resources of each of the parties and of any relevant child;
> (b) the financial resources of each of the parties;
> (c) the likely effect of any order, or of any decision by the court not to exercise its powers under paragraph (3), on *the health, safety or well-being* of the parties and of any relevant child; and
> (d) the conduct of the parties in relation to each other and otherwise.
>
> (*my emphasis*)

[20] The second route is via the next paragraph, 11(7);

> (7) If it appears to the court that the applicant or any relevant child is likely to suffer *significant harm* attributable to conduct of the respondent if an order under this Article containing one or more of the provisions mentioned in paragraph (3) is not made, the court *shall* make the order unless it appears to it that-
> (a) the respondent or any relevant child is likely to suffer *significant harm* if the order is made; and
> (b) the harm likely to be suffered by the respondent or child in that event is as great as, or greater than, the harm attributable to conduct of the

> respondent which is likely to be suffered by the applicant or child if the order is not made.
>
> (*my emphasis*)

[21] In Chalmers v Johns [1999] 1 FLR, Thorpe LJ set out the court's approach to the exercise of its function in relation to Occupation Orders under the equivalent English legislation;

> [T]he court has first to consider whether the evidence establishes that the applicant or relevant child is likely to suffer significant harm attributable to the conduct of the respondent if an order is not made. If the court answers that question in the affirmative, then it knows that it must make the [occupation] order unless balancing one harm against the other, the harm to the respondent or the child is likely to be as great. If, however, the court answers the question in the negative, then it enters the discretionary regime provided by s 33(6) and must exercise a broad discretion having regard to all the circumstances of the case, particularly those factors set out in the statutory checklist within s 33(6)(a)–(d) inclusive.

[22] For the purposes of an ex parte Occupation Order, though, the only proper route is via Article 11(7) and a finding of significant harm attributable to the conduct of the Respondent. Only then does one have the basis for granting an ex parte order, given the terms of Article 23, with requires the Court likewise to be satisfied on "significant harm".

[23] Article 11 and the provisions which follow in the 1998 Order to cover other kinds of interest in the dwelling house (and of relationship between the parties) constitute a resource available in all three tiers of court – Magistrates', County Court and High Court. Prior to the 1998 Order, personal protection orders could be obtained only in the Magistrates' Courts. Under Articles 18 to 20 of the Domestic Proceedings (Northern Ireland) Order 1980 one had to establish that physical violence had occurred. Those provisions were repealed by the 1998 Order. Nonetheless, Article 11(7) of that Order might be seen as the trace of the 1980 provisions; a finding of significant harm dictating a remedy, without having to go through the more extensive checklist now contained in Article 11(6).

[24] In Section 8 of the Form F1 in the instant case, the Applicant also reveals that the property is mortgaged, not rented. One does not know whether the Applicant or the Respondent is the mortgagor, or perhaps both; perhaps neither.

[25] No details of the mortgage have been provided in the grounding Statement. Rule 10B of the Magistrates' Courts (Domestic Proceedings) Rules (Northern Ireland) 1996, as amended, provides as follows;

> 10B.—(1) A copy of an application for an occupation order under Article 11, 13 or 14 of the Order of 1998 shall be served by the applicant by first-class post on the mortgagee or, as the case may be, the landlord of the dwelling-house in question together with a notice in Form F3 informing him of his right to make representations in writing or at any hearing.
>
> (2) Rule 10A(4) above shall apply, with the necessary modifications, to service under this rule.

[26] No attention was paid this this requirement, in advance of the full Hearing on 8th August.

[27] There is nothing in Article 23(2) which excuses the Applicant from presenting all relevant facts in the grounding Statement. If leave be granted and an interim Order be made, the same grounding Statement will serve as notice of the evidence upon which the Applicant intends to reply at the full Hearing, except of course in respect of matters which are alleged to have arisen in the meantime. What facts are relevant will reflect what considerations the Court is required by law to take into account. The grounding Statement has to make the case for the full Order. Should there be an application for an ex parte order, yet more information will have to be included in the Statement.

[28] In RH & Ors v IH, Stephens, J emphasised the requirement for a properly reasoned case on the additional issue, where the Applicant also seeks an ex parte order pending the full Hearing;

> [31] In this case the only reference in the statement of RH as to the need for an ex parte order was as follows:-
>
> "I am making this application ex parte because the children and I require immediate protection. I am also fearful of the response of the Respondent should a Summons be served upon him with the protection of an Interim Order" (sic)
>
> Generalised assertions such as this without any details or particulars are insufficient to justify bringing applications on an ex parte basis. In this case the statement should have set out the reasons to believe that IH would take action which would defeat the purpose of the order rather than merely asserting a fear that he would do so. The applications should not have been made on an ex parte basis.

[29] The Applicant's grounding Statement did not intimate any wish to have an ex parte order. Granted, there is a tick entered against the relevant paragraph in Section 3

of the Form F1, indicating a wish to have the matter heard ex parte, but even there the Form's printed text states immediately that "The reason relied on for an application being heard without notice must be stated in the statement in support". On the authority of RH & Ors v IH alone, ex parte relief ought not to have been sought or treated without, at the least, an amendment to that Statement.

[30] Having deduced that the learned District Judge must have relied upon Article 11(7) of the 1998 Order, this means that the assertions made in the grounding Statement led her to conclude that the risk of significant harm to the Applicant and attributable to the conduct of the Respondent was so acute that it was necessary to have the latter evicted immediately.

[31] The reader is free to appraise the grounding Statement in the Appendix to this judgment. In essence, the Applicant asserts that he has been hen-pecked for years. He claims, implicitly at least, that the consequential stress became intolerable that same morning. He claims to have "constant" chest pains and that his psoriasis has flared up. He has "confided" in his GP, but does not assert that these alleged ailments have required medication. He asks the reader to believe that he has endured all this verbal abuse demurely and has never retaliated in any way. It is not easy to reconcile this with his disclosure that his children do not sympathise with him and that two of them are "reluctant" to speak to him. He highlights that one of the more unbearable threats made to him on 16th June 2017 was to tell "our family" what he really thought of them and that they would see him for what he really was.

[32] On this issue about having no time to give the Respondent notice, one might usefully recall the words of Munby, J in the case of X Council v B (EPO) [2005] 1 FLR 341 on the point. That case concerned the grant of an Emergency Protection Order to a local authority on an ex parte basis, but the point applies even more to ex parte applications for personal protection orders;

> [53] An ex parte application will normally be appropriate only if the case is genuinely one of emergency or other great urgency - and even then it should normally be possible to give some kind of albeit informal notice - or if there are compelling reasons to believe that the child's welfare will be compromised if the parents are alerted in advance to what is going on.

[33] The grounding Statement recounts how, on 7th July, the Applicant had risen, had a shower and gone to drive off in his car, whereupon the Respondent got in his way for a period. One deduces that, in consequence of her behaviour while he had been having his shower earlier and in light of her behaviour on the driveway, he then decided to divert to his Solicitors and have these papers prepared, before proceeding to the courthouse. His last recorded sighting of his wife was as she waved him goodbye.

[34] The Applicant's Solicitor should have been required to make effort to contact the Respondent to inform her of her husband's intentions and thereby to afford her the opportunity to attend. If the Respondent were told that her husband was about to obtain a court order, evicting her from her home with immediate effect, I would have thought that she would have wanted to present herself, hopefully along with a legal representative, to object strenuously. I should think it highly likely that any representations by the Respondent directly would have persuaded the learned Deputy District Judge that the matter could safely and properly be left to a full Hearing at the next Domestic Proceedings Court.

[35] Within the terms of X Council v B, the learned Deputy District Judge would otherwise have had to have taken the view that to alert the Respondent to the fact of the intended Application would have defeated its purpose. On the papers filed, that purpose would have been to stop the Respondent criticising or verbally abusing her husband when she joined him at the courthouse. That does not remotely come within the range of "significant harm". By the same token, the idea of not giving the Respondent informal notice of the Application could hardly have been based on a concern that she would have so oppressed her husband by her remarks or threats at the courthouse that he would have lost his nerve and abandoned the case.

[36] These parties have evidently been unable to achieve agreement on a dispute over who stays in the matrimonial home, or as to how their respective interests in it are to be liquidated and distributed. The Respondent discloses that he is in gainful employment. He also mentions that, as well as the mortgaged house, there is also a farm which he tends. One can infer that he feels entitled to retain possession of the property as against the Respondent and has endured all this misery accordingly. There is nothing revealed about her situation. If she is not in gainful employment and if she has not been assured sufficient financial support by the Respondent, she may well have felt unable, all these years, to move into alternative accommodation. It is especially unfortunate that upon being made the subject of a combined Non-Molestation and Occupation Order, she would most likely be deemed to have rendered herself voluntarily homeless for the purposes of any application for social housing.

[37] This is a classic case of attempting to use the powers of a Magistrates' Court under the domestic violence legislation in order to resolve, or pre-empt any enquiry into wider issues about title to the property and financial consequences of the breakdown in the relationship.

[38] In Bassett v Bassett [1975] Fam. 76, 87; Cumming-Bruce, J had this to say about addressing the balance of hardship between the parties, where one sought the ejectment of the other from the family home;

> I extract from the cases the principle that the court will consider with care the accommodation available to both spouses, and the hardship to which each will be exposed if an order is granted or refused, and then to consider whether it is really sensible to expect [the applicant] and child to endure the pressures which the continued presence of the other spouse will place on them. Obviously inconvenience is not enough. *Equally obviously, the court must be alive to the risk that a spouse may be using the instrument of an injunction as a tactical weapon in the matrimonial conflict* … Where there are children, whom [the applicant] is looking after, a major consideration must be to relieve them of the psychological stresses and strains imposed by the friction between their parents, as the long term effect upon a child is liable to be of the utmost gravity.
>
> (*my emphasis*)

[39] The situation at home, as described by the Applicant in his grounding Statement, was not one as warranted the eviction of his spouse, never mind on an ex parte basis. It was, if anything, a situation which fell to be determined under Article 11(6) – the careful and informed balancing of respective hardship, although it would have required a good deal more information about the needs and resources of the respective parties to be set out in the papers.

[40] In the case of Y(Children) [2000] 2 FCR 470 a County Court had ruled that the wife should leave the home, after consideration of the criteria under what we also have as Article 11(7) of our 1998 Order (significant harm). No-one was to be put on the street in consequence of that ruling, though; leave to appeal was granted by the Recorder and the Order suspended in the meantime. The notion of an ex-parte order never arose.

[41] It is instructive to compare the facts in that case, as found after a proper Hearing, with the uncontested assertions of the Applicant in the instant case;

> 21. It is plain from the structure of his judgment that the recorder appears to have founded his decision under section 33(7). That is clear to me because of his references to the balance of harm being greater in the one case than in the other. That approach has come under attack by Mr Murray on the mother's behalf. He very fairly and frankly acknowledged that he has probably given us greater assistance than he gave the learned recorder, for he has subjected the Act and the facts of this case to penetrating analysis. In order for section 33(7) to be satisfied, the court has to find that either the applicant or any relevant child is likely to suffer significant harm. "Harm" is defined as being, in the applicant husband's case, "ill-treatment or impairment of health" and, in the case of the child, "ill-treatment or impairment of health or development". Mr Murray is content to assume that J was suffering significant harm. I am not entirely sure that he needed to go that far, but I am

content to proceed on that basis. There is no finding that the father was suffering significant harm. Although his health is precarious owing to diabetes, his illness is controlled by insulin. He has lost sight in one eye but does not seem to suffer any greater disability arising from the domestic circumstances. He has his television in his room and seems to be perfectly able to manage there. I should add that, in remarks made by the judge after his judgment had been delivered, he was at pains to add that "the reason why the balance went father's way was his health and disability".
22. Assuming, therefore, that the hurdle of significant harm can be overcome (about which I have my doubts) Mr Murray, correctly in my judgment, pointed out that the second question for the court to resolve is whether that significant harm was "attributable to the conduct of the respondent". The conduct of the mother of which complaint was made was of some violence in the marriage. I have read the recorder's findings as to the mother's involvement, her joining in the fighting between R and the father in professed self-defence of the daughter. In not being sure "where one draws the line between self defence and siding with", the judge was in my view making no finding that the mother had engaged in violence for which she is culpable — if, indeed, there was much violence between husband and wife at all: the complaint in the affidavit arose from one occasion when there was a fairly ferocious fight between father and daughter and the mother intervened. On analysis of the written evidence, the father's accounts of that incident differ between themselves and hardly appear to me to be credible.
23. What the judge asked himself was whether it was clear that harm was likely to be caused if both parties continued to live in the house. He did not address the questions to whom will harm be caused, and by whom will it be caused. His only clear finding of violence is that the husband, as he admitted, struck the wife some years previously. There is, therefore, no finding that the wife was guilty of violence, certainly not of inexcusable violence, towards the father. There is no hint or suggestion that she has been violent towards J. The case against the wife is really that she has failed to control R in her hostility towards her father; but by the same token, the husband has done nothing to contain his relationship with his daughter and to prevent it from erupting into unseemly violence between them. The conclusion is, therefore, that the mother is at least no worse than the father in this respect. There is no finding that any harm was attributable to the conduct of the mother. Consequently, it seems to me that the recorder has fallen into error. He was wrong in my judgment to find section 33(7) applicable to this case.

[42] Those passages are taken from the Judgment of Ward, LJ. Sedley, LJ was, if anything, more robust;

32. I agree. The recorder's judgment, with great respect, is shot through with errors both of approach and of substance.
33. The purpose of an occupation order, however large its grounds may potentially be, is not to break matrimonial deadlocks by evicting one of the parties, much less to do so at the expense of a dependent, and in this case a heavily pregnant, child. Nor is it to use publicly-funded emergency housing as a solution for domestic strife — see Warwick v Warwick [1982] 3 FLR 393.
34. There is no finding, and no evidential basis for any finding, that J was likely to suffer significant harm attributable to his mother's conduct. For this reason alone, section 33(7) could never come into play. If it were to do so, it is clear that the consequent harm to R, who is a relevant child just like J, would be at least as great as to J. There is now, of course, a yet further relevant child, R's new baby. As to the harm which will result if no order is made, I agree with all Lord Justice Ward has said of the significance of the father's health and the absence of any evidence that the mother will be a source of harm if she stays.
35. The more general power under section 33(6) is not at large, especially where the court is asked to deploy it to the Draconian end sought here. It is there to afford necessary protection which can be afforded in no better way. Here, as the judge noted at the start of the judgment, cross-undertakings had succeeded in preserving the peace. He said on the very first page of his judgment:
36.
"… in the course of the proceedings cross-undertakings were given by husband and wife to behave properly towards one another. Those undertakings seem to have been effective, in that no further trouble between them has apparently arisen."

37. In my judgment the case should have ended there and then.

[43] The situation within the home in the instant case, even on the Applicant's account, did not approach the fact situation with which the Court was concerned in Y (Children). Nonetheless, a decision was made to hear the matter without affording the Respondent an opportunity to answer. That decision was Draconian in character and devastating in consequence.

[44] A cross-Application by the Respondent to discharge the ex parte Order was served at the courthouse on the morning of the full hearing (8th August), a full month later. Such a cross-Application at that stage was otiose, of course, because the ex parte Order was to expire that day anyway. The Respondent's better course would have been to have made immediate application to discharge the ex parte Order, or perhaps even seek Judicial Review of the Court's actions. There are many reasons why an individual Respondent may experience difficulties in mounting an immediate challenge, but the

delay here was most unfortunate. It must be recognised nonetheless that it was the Court which provided that the ex parte Order should last a full month, absent the Respondent's own initiative.

[45] The reasons for the Respondent's cross-application were set out at Section 3 of her Form F8;

> I wish the Court to consider discharging this ex parte non molestation and occupation Order. The Order was granted on 7th July 2017 …at Dungannon Courthouse. I cannot understand the grounds upon which it succeeded. I would vehemently deny that I am in any way abusive towards the Applicant and certainly there were no incidents that would warrant an Order being made on an emergency basis. The application should have been heard on an inter partes basis. I would agree that the living arrangements are intolerable but I would submit that it was [H] who harasses me and intimidates me on an ongoing basis. I intend to strenuously contest the Order. I request that the Court discharges the Order and submit that the matter should proceed to hearing without Order. My whole life has been affected including a decline in my mental health. My Housing rights have also been affected.
>
> The Form F8 is dated 3rd August, but, as previously mentioned, the papers were not filed in Court until 8th August.

[46] The immediate consequences arising from the grant of the ex-parte Order on 7th July are recorded in an email to the Court Office from a Constable Todd of Dungannon PSNI. It was transmitted at 5.13 am the following morning, confirming service of the Court's Order at 7.40 pm the previous evening and reads;

> Good Morning
>
> I refer to the above Order.
> Our ref CC2017070700824
> This Order has now been served.

NMO served in person to [W] at home address … . [W] was extremely emotional at the time of service. I read the particulars of the order to [W]. Myself and Con Madine stayed with [W] until the arrival of her friends [X] & [F] arrived (sic). [F] spoke to [W]'s brother [G] and he was on his way to the property also to support [W] and help her gather her belongings together …

Dated this 1st September 2017

Judge John I Meehan
District Judge (MC)(NI)
Dungannon

APPENDIX

I, [H] of ... do make this following statement in support of my application for a Non-Molestation and Occupation Order under the Family Homes and Domestic Violence (Northern Ireland) Order 1998.

I reside at the above address with my wife. We have been married for $26^{1}/_{2}$ years and we both live together at the matrimonial home. However, we separated in November 2013. We continue to live in the matrimonial home but live in separate rooms and sleep in separate bedrooms. There are 3 children of the marriage, [A] aged [over 18], [B] aged [over 18] and [C] aged 20. All 3 boys are financially independent and no longer reside at home.

Since the date of the separation, I have found it very difficult and stressful as the Respondent and I continue to live in the matrimonial home. We hadn't been getting on for quite some time and as such we decided to officially separate in 2013. Since the date of the separation there has (sic) been a lot of arguments between us. The Respondent does suffer from mental health problems and in the past has been admitted to hospital although more recently she has been stable. She continually cuts me down and puts pressure on me to upset the relationship between me and our children. At the moment both [A] and [C] are very reluctant to speak to me and they have turned against me. The Respondent has also encouraged her friends and members of her family not to speak to me anymore. She keeps referring to me as being the laughing stock of the community and says that the neighbours are laughing at me and says I am the talk of the community.

Non-stop she has told me that I am rubbish, that I wasn't a good father and never helped around the house. She continually calls me lazy and says that I do not know what work is, yet I always worked full-time in […], look after the farm and continue to pay all household bills. I would say that things have got really bad since 2015 as the verbal abuse has got worse. She generally runs me down and criticises me.

I have had cause to contact the PSNI on 3 occasions in the past 3 months. On the first occasion, it was when she said to me "hopefully one day the house will be burnt with you in it". I reported this to the Police but they advised that because of her wording it wasn't actually a threat that they could investigate. On the second occasion, I called in with Dungannon Police again just to speak to them about clarification as to why they felt they could not take any action in relation to the previous threat she had made to me. On Friday 16th June 2017 I contacted the Police again, the Respondent had asked for some weed killer which had been in the garage and I told her that I had removed it and that she wasn't getting it. She then went out to the garage and lifted straps and other items belonging to the strimmer and brought them into her bedroom and locked them in there. I went out to the garage and lifted a flower pot and put it in the boot of my car. The Respondent then opened the boot of my car and was attempting to remove the flower pot from it. I took the flower pot out, the Respondent was shouting verbal abuse at me and demanding the flower pot back. I refused to let her have it, at which stage she faced me and lifted her leg and threatened to kick me. I told her "to go ahead and do it". This left me very frightened and scared. She took her mobile phone and shoved it in my face, she threatened to tell our family about what I think of them and she threatened me that they would see me for what I really am. She had the mobile phone pressed against my face. I then sat the pot back down and I walked away. I was about to call the Police when a friend called me. During this telephone call she continued to be verbally abusive. She was calling me a cheat and a marriage wrecker. My friend [N] overheard her shouting. I then contacted the police and made a statement to police over the phone to a constable Wilson.

1 week- 10 days later I attended Dungannon Police station and made an official statement to police and was encouraged by them to obtain a Non-Molestation Order. Later that evening police spoke with the Respondent and warned her about her behaviour. This however has not stopped her continually verbally abusing me.

I go to bed at night and I lock my door, I often lie awake worrying and wondering what she may do next. It is affecting my concentration at work and I have had cause to speak to my manager in work on a few occasions as I am worried. I have also confided in my GP. More recently my psoriasis have flared up with worry and stress. My thought pattern is up the left, I'm afraid to speak to people and I have become withdrawn. On occasions I feel myself miles away not paying attention and I feel nervous.

I know that [W] will stop at nothing to continue to harass and annoy me. I am absolutely exhausted by her behaviour. Her abusive language towards me is demeaning and it is causing me distress. There is constant friction in the house and I am subject to her verbal abuse daily. I suffer constant chest pain, I have heart problems and the stress is making it worse. This morning whilst I was in the shower the Respondent entered my bedroom, I heard her and came out and asked her what she was doing. She was standing looking about her and started to be verbally abusive.

When I left to go out to the car this morning she followed me out, I got into the car and that she opened the boot of the car and started to fumble through my belongings. I attempted to lock the car and she came round to the back drivers (sic) side door and tried to open the door to get in. I started the engine and she then stood behind the car so that I could not reverse to get away. She eventually moved and she waved me off.

I respectfully ask that this court grant me a Non-Molestation Order and Occupation Order for the protection of myself. I fell I need protection from the Respondent as I am frightened of her and I feel I need the protection of the court to prevent any further actions of this sort against me.

I declare and believe this statement of 2 pages to be true and understand that it may be placed before this Honourable Court.

Signed – [H]

Dated - 7.7.17