THE HIGH COURT

[2022] IEHC 436

RECORD NUMBER: 2022/55 CA

CA CIRCUIT COURT: 2022/00019

BETWEEN

SHAY MURTAGH LIMITED

PLAINTIFF/RESPONDENT

AND

TREVOR COOKE AND PERSONS UNKNOWN

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 15th day of July, 2022

INTRODUCTION

1. This matter comes before the Court by way of an appeal against interlocutory injunctions granted by the Circuit Court (Her Honour Judge Fergus) restraining trespass and ordering delivery up of possession to the Plaintiff/Respondent of Apartment 29, First Floor, Aisling Court, Killucan, Co. Westmeath [hereinafter "the dwelling"].

2. The Named Defendant/Appellant is in occupation of the dwelling. He maintains that relief should not be granted on an interlocutory basis in circumstances where he occupies on foot of a tenancy agreement entered into with the former owner of the dwelling and the Plaintiff/Respondent purchased the dwelling from the Receiver to the former owners on notice of its occupation by persons unknown.

FACTUAL BACKGROUND

3. The property is comprised in Folio 2440L of County Westmeath.

4. The evidence adduced on affidavit in support of the injunction application establishes that the Plaintiff/Respondent purchased the leasehold interest in the property, as created by lease dated the 28th of October, 2004 from Kinnegad Construction Limited to Mr. Coyle and Mrs. Coyle for a term of 999 years, from one Mr. Coulston in his capacity as receiver to Mr. Coyle and Mrs. Coyle.

5. A contract of sale was concluded on the 25th of November, 2021 and it recites on its face that the contract was entered into between Mrs. Coyle and Mr. Coyle acting by their receiver Mr. Coulston and one Ms. Murtagh. Ms. Murtagh is a director of the Plaintiff.

6. The document schedule to the contract of sale refers to a certified copy mortgage deed dated the 28th of October, 2004 between Mrs. and Mrs. Coyle and the Irish Life and Permanent PLC and a certified copy deed of appointment of the Receiver dated the 4th of August, 2020. This mortgage deed is not exhibited, nor is the deed of appointment of the Receiver.

7. As a special condition to the Contract of Sale headed "*7. Occupancy*", it is recorded:

> *"The property in sale is sold subject to and with an occupancy. The vendor does not hold a copy of any leases or any information relating to the occupiers in the property in sale. It shall be a matter solely after completion for the purchaser to deal with the occupiers. No documents will be provided by the Vendor and no objection, requisition or enquiry shall be raised by the Purchaser in this regard. The Purchaser shall not be entitled to vacant possession of the property in sale on completion of the Sale. General Condition 17 of the General Conditions of Sale is amended accordingly. For the avoidance of doubt, the Purchaser acquires the property in sale with full knowledge and notice of the terms, conditions and provisions of the occupation by the occupiers within the knowledge of the Vendor…The Receiver is not receiving rent in regards this property, therefore General Condition 23 is hereby varied to the effect that if any rent is outstanding to the Vendor for any period up to the date of Completion then the Purchaser shall provide to the Vendor at the cost of the Vendor, all assistance reasonably required to enable the Vendor to recover the said arrears."*

8. The Plaintiff/Respondent's ownership of the property was registered on the 7th of January, 2022 and registration is relied upon by the Plaintiff/Respondent as definitive evidence of title.

PROCEEDINGS

9. The Plaintiff/Respondent issued proceedings by way of Equity Civil Bill on the 9th of February, 2022 seeking*, inter alia*, an injunction restraining the Defendants from trespassing at the dwelling"], an injunction requiring the Defendants to forthwith vacate the dwelling and an order for possession of the said dwelling.

10. By *ex parte* application made on the 16th of February, 2022, the Circuit Court (Her Honour Judge Fergus) granted liberty to issue and serve an application for an interlocutory injunction. A Notice of Motion issued returnable to the 23rd of February, 2022, grounded on Affidavits of Mr. Murtagh sworn on the 9th and 17th of February, 2022 and Ms. O'Connell sworn on the 15th of February, 2022 and served on the First Named Defendant and Persons Unknown in occupation of the property.

11. In his Affidavit sworn on the 9th of February, 2022, Mr. Murtagh identified himself as a director of the Plaintiff company. He exhibited the contract for sale entered into by Ms. Murtagh on behalf of the Company with the Receiver appointed in respect of the interest of Mr. and Mrs. Coyle. Paragraph 7 of the contract of sale between the Receiver and the Respondent expressly provides that the:

> *"The Vendor does not hold a copy of any leases or any information relating to the occupiers of the property in sale…. The receiver is not accepting rent in regards this property"*

12. He further exhibited the Land Registry Folio showing the registration of the Plaintiff's ownership of the property.

13. He described the property and gave a summary of the history of litigation concerning the property between Paul and Mary Coyle and Start Mortgages DAC and John Coulston being

proceedings issuing in on the 19th of November, 2021 bearing record number 2021/6378P on foot of which a *lis pendens* had been registered.

14. He asserted that neither Mr. nor Mrs. Coyle resided at the property but that they had "*installed a number of persons to trespass and secure*" the property. He said that he attended at the property on the 27th of January, 2022 to gain access to the property having been contacted by people residing at the complex and An Garda Síochána complaining of anti-social behaviour of "*the persons installed*".

15. Notably, Mr. Murtagh did not identify his familiarity with the property prior to purchase or his means of knowledge as to its occupants. He stated that the occupants refused to vacate the property but contacted an individual by telephone in his presence. This individual identified himself to Mr. Murtagh as Mr. Coyle and he claimed to be the owner of the property.

16. He averred to the Plaintiff/Respondent having sought advice from its solicitor as to next steps but that subsequent to this he was contacted by unnamed "*other residents*" complaining of altercation between the occupiers on the 2nd of February, 2022 during which it was claimed a communal door to the complex was kicked in (photograph exhibited). He claimed that he attended with the Gardaí at the scene the next day and noted that a camera had been installed.

17. He claimed that he was informed by another resident (unnamed) that they felt obliged to leave the complex "*for a couple of weeks*" due to being intimidated. No details of the allegations of intimidation were provided. He concluded his affidavit by stating that "*it is not absolutely clear if the occupants had been installed by Mr. Coyle but they certainly had his phone number.*" He further averred, but without disclosing his means of knowledge in terms of his familiarity with the previous occupation of the property "*to the best of my knowledge and belief the current trespassers started occupying after the purchase by the Plaintiff herein.*" He did not in his affidavit address the condition of sale regarding occupancy set out above.

18. In his subsequent affidavit sworn on the 17th of February, 2022, Mr. Murtagh asserted in very bare terms that he has been contacted by other residents, by An Garda Síochána and by the Management Company in relation to anti-social behaviour. He gives no names or details of incidents. He asserted that certain tenants had refused to involve themselves in the

proceedings for fear of reprisals. He referred to his liability for the damage caused to the door and potential liability arising from the actions of the occupants of the property over which he had no control. No particulars of any costs incurred were given.

19. In her affidavit on behalf of the Plaintiff, Ms. O'Connor said that she was the owner of the management company responsible for the complex in which the property was located. She said that she had been made aware that the Named Defendant and unnamed persons had started occupying the dwelling since January, 2022 and contended that since occupation, the Defendants had engaged in anti-social behaviour. Ms. O'Connor did not depose to any direct observation of occupation before or since January, 2022, of anti-social behaviour or give the details of any complaints from other residents.

20. When the motion was returned before the Circuit Court on the 23rd of February, 2022, the Court (Her Honour Judge Fergus) directed delivery of replying affidavits (from both the Named Defendant and former owner, Mr. Coyle) by the 4th of March, 2022.

21. In his replying affidavit sworn on the 4th of March, 2022, the Named Defendant/Appellant claimed to have been residing at the property as a tenant since the 19th of October, 2021. He exhibited a tenancy agreement which bears a signature of the former owner. It was pointed out that the contract of sale shows that the Plaintiff did not buy with vacant possession and was asserted that the Plaintiff, in entering into a contract with a receiver, accepted that the receiver had limited knowledge of occupancy. It was further claimed that one Mr. Doyle had been a tenant since the 3rd of August, 2020, and one Mr. Whittaker, had been in residence since the 4th of April, 2021. Separate affidavits were sworn by Mr. Doyle and Mr. Whittaker exhibiting copy tenancy agreements relied upon as creating a tenancy in their favour.

22. In essence, the Named Defendant/Appellant maintained that all three gentlemen occupy the property and qualify as "*Part 4*" tenants as defined under the Residential Tenancies Act(s) 2004-2015 (as amended) (the "RTB Act(s)"). He relied and continues to rely on the fact that the Plaintiff purchased the property knowing that the property was let and no notice to quit was served terminated his tenancy nor order for possession made in respect of the property.

23. No affidavit sworn by the former owner was included in the papers filed as part of the appeal, however, it was referred to in an affidavit of the Appellant filed during the appeal (see paragraph 8 of his Affidavit sworn on the 28th of March, 2022 where the Appellant purports to exhibits the affidavits but does not produce them). A copy of two affidavits and the exhibits thereto which were sworn in the Circuit Court proceedings were ultimately produced by the Plaintiff/Respondent during the course of the hearing before me. It is understood that the said exhibits were not directly furnished to the Plaintiff/Respondent but the affidavits in question were filed in the Circuit Court. At exhibit PC to the affidavit of Mr. Coyle sworn the 14th of March, 2022 an Indenture of Mortgage is exhibited for 29 Aisling Court dated the 28th of October, 2004. A certified copy of that mortgage was included as part of the documents schedule in the contract of sale from the receiver to the Respondent dated the 25th of November, 2022 exhibited at CM2 to the grounding Affidavit sworn on behalf of Respondent by Mr. Murtagh on the 9th of February, 2022. The said Mortgage expressly provided at paragraph 7 that:

> *"This indenture incorporates the clauses set out in Permanent TSB Mortgage Conditions 2002…."*

24. The Permanent TSB Mortgage Conditions were also exhibited to the affidavit of Mr. Coyle sworn the 4th of March, 2022 and contain what the Plaintiff/Respondent describes as "*the standard restrictive covenant*" at clause 9.1 as follows:

> *"The powers of leasing or agreeing to lease and of accepting of leases conferred on a mortgagor in possession by the Conveyancing Acts 1881 to 1911 or other statutory powers of leasing shall not apply to the Mortgage and the Mortgagor shall not otherwise grant or agree to grant any lease or tenancy or license or part with or share possession or occupation of the Property without the prior written consent of Permanent TSB."*

25. No evidence has been produced of the tenancy having been permitted by the lender.

26. For completeness, the affidavits of Mr. Coyle also exhibited pleadings relating to separate proceedings taken against him in respect of his indebtedness in respect of another property.

27. On the 16th of March, 2022, the Circuit Court (Her Honour Judge Fergus) granted interlocutory orders requiring the surrender of possession of the property within seven days and restraining the Defendants and persons having notice of the making of the order from impeding or obstructing efforts by the Plaintiff, its servants or agents to take possession and restraining trespass upon the property or holding themselves out as having an entitlement to sell or rent or otherwise grant an entitlement to possession of the property.

28. By Notice of Appeal filed on the 24th of March, 2022, an appeal was lodged on behalf of the Named Defendant and "*persons unknown*". Solicitors who had acted for the Named Defendant in the Circuit Court were discharged by Notice of Discharge dated the 29th of March, 2022.

29. The matter came before me on the 30th of April, 2022 seeking a stay pending a determination of the appeal and an extension of time within which to appeal. The Named Defendant relied on his asserted tenancy agreement, the fact that the Plaintiff had purchased subject to his occupation and contended that in rendering the occupants of the property homeless, the Court had made an order which disproportionately interfered with the rights of the occupants.

30. I granted a limited stay to preserve the Named Defendant's right of appeal having regard to the fact that the Named Defendant asserted a legal right to occupy the dwelling and his home was in jeopardy on undertakings as to behaviour and with liberty to apply in the event of a deterioration of behaviour at the property. An early hearing date was subsequently assigned and was brought forward on an application to vacate the stay by reason of further alleged anti-social behaviour at the dwelling.

31. The further application to vacate the stay was grounded on the affidavits of Mr. Keane, Solicitor for the Plaintiff/Respondent sworn on the 18th of May, 2022 and affidavits from two residents of the complex sworn on the 19th of May, 2022 in relation to an incident on the 15th of May, 2022. This incident was described as loud noises, banging during the night, discarded

men's clothes and a puddle of urine on the ground in a communal area. It was described as "*not the first incident*" and then reference was made to one further incident in February, 2022, presumably the incident leading to the bringing of an application for injunctive relief in the first instance.

32. In support of his application that the stay be maintained in place the Named Defendant relied, *inter alia*, on evidence of his ill-health (necessitating hospitalisation and absence from court on that date), explanation that the incident described by residents on the 15th of May, 2022 was caused by medical emergency and a loss of control associated with a medical condition and the fact that a dispute had been referred to the Residential Tenancies Board and was pending, the gist of his argument being that the RTB was the body with jurisdiction in relation to matters pertaining to breach of tenancy, anti-social behaviour or termination of tenancy.

33. On foot of the application to vacate the stay as aforesaid grounded on further alleged and disputed incidents of anti-social behaviour, the hearing date was brought forward. The parties were further requested to prepare submissions directed, *inter alia*, to the relevance of the Residential Tenancies Board Act 2004 (as amended) to this matter; the test to be applied for granting an injunction when tenancy rights have been asserted which have not been terminated where the effect of granting an injunction which will act as a *de facto* termination of tenancy and the power of a former owner to enter into a tenancy when a receiver has been appointed.

CHRONOLOGY

34. The following is the chronology of events as relevant to the issues this Court must determine is apparent from the papers:

Shay Murtagh Limited incorporated	28th April 1976
Mortgage between Irish Life and Permanent Plc and Paul and Margaret Coyle.	28th October 2004
Registration of Mortgage Irish Life and Permanent Plc	8th November 2011

Deed of Transfer between Permanent TSB (successor to Irish Life and Permanent Plc) and Start Mortgages DAC	1st February 2019
Registration of transfer of mortgage from Irish Life and Permanent Plc to Start Mortgages DAC.	27th March 2019
Purported Lease between Paul Coyle and Tony Doyle	3rd August 2020
Appointment of John Coulson as Receiver	4th August 2020
Purported Lease between Paul Coyle and David Whittaker	4th April 2021
Purported Lease between Paul Coyle and Trevor Cooke	19th October 2021
Proceedings "Paul Coyle and Margaret Coyle v Start Mortgages DAC and John Coulston [2021/6378P]" Issue	19th November 2021
Interim injunction issued by Plaintiff in above proceedings refused	25th November 2021
Sale of 29 Aisling Court to the Plaintiff by Receiver.	25th November 2021
Plaintiff's ownership registered	7th of January, 2022
Plaintiff denied access to 29 Aisling Court	27th January 2022
Proceedings "Paul Coyle and Margaret Coyle v Shay Murtagh Limited 2022/364P" issue.	31st January 2022
Alleged antisocial behaviour	2nd February 2022
Attendance of Gardai at 29 Aisling Court	3rd February 2022

Circuit Court proceedings herein issue against occupants and ex parte docket issues.	9th February 2022
Grounding Affidavit of Ciaran Murtagh sworn	9th February 2022
Affidavit from Caroline O'Connell Management Agent	15th February 2022
Alleged antisocial behaviour	2nd February 2022
Attendance of Gardai at 29 Aisling Court	3rd February 2022
Circuit Court proceedings herein issue against occupants and ex parte docket issues.	9th February 2022
Grounding Affidavit of Ciaran Murtagh sworn	9th February 2022
Affidavit from Caroline O'Connell Management Agent	15th February 2022
Mullingar – Circuit Court order for short service of injunction	16th February 2022
Appearance entered by Tony Doyle, Trevor Cooke and Paul Coyle.	16th February 2022
Notice of Motion for interlocutory injunction issued.	17th February 2022
Second Affidavit of Ciaran Murtagh.	17th February 2022
Sligo – Injunction Return date Mr Coyle and Cooke directed to filed replying Affidavit by 4th March 2022, G&N solicitors to come on record immediately and a hearing date to be assigned.	23rd February 2022
G&N solicitors come on record for Mr. Cooke.	3rd March 2022

Replying Affidavit Trevor Cooke	4th March 2022
Replying Affidavit Paul Coyle sworn	4th March 2022
2nd Replying Affidavit Paul Coyle	14th March 2022
Tullamore – hearing and Order of Her Honour Judge Fergus	16th March 2022
Notice of Appeal	24th March 2022
Affidavit of David Whittaker Sworn	26th March 2022
Ex parte docket issued by Trevor Cooke looking for Stay grounded on Affidavit sworn same date.	28th March 2022
Notice of Trevor Cooke discharging G&N Solicitors	29th March 2022
Application for stay granted on terms by Phelan J. Undertaking given.	30th March 2022
Affidavit of Trevor Cooke	21st April 2022
For mention non-jury list only appearance by Trevor Cooke adjourned to Phelan J. for mention to the 10th May 2022.	25th April 2022
Ms. Justice Phelan assigns hearing of 8th July 2022.	10th May 2022
Alleged anti – social behaviour	15th May 2022
Anti-Social behaviour reported to Garda John Walsh	17th May 2022
Ex Parte Mention to seek date to lift stay	18th May 2022
Affidavit of Pat Kinihan sworn	19th May 2022
Affidavit of Paddy Scanlon sworn	19th May 2022
Affidavit of Trevor Cooke sworn	24th May 2022

35. Of note from the foregoing in view of the Plaintiff/Respondent's contention that the Named Defendant and other occupiers had been "*installed*" is the fact that the lease between Mr. Coyle and Mr. Doyle is said to have been entered into on the 3rd of August, 2020 one day before the appointment on the 4th of August, 2020 of the Receiver. The lease relied upon by the Named Defendant/Appellant was purportedly entered into more than a year after the appointment of the Receiver but in the month prior to the sale of the dwelling by the Receiver.

SUBMISSIONS

36. The Plaintiff/Respondent submits that where it is the registered owner of the premises this is conclusive evidence of ownership and s. 31 of the Registration of Title Act 1964 is relied on. The Plaintiff/Respondent denies that the RTB Act(s) have any relevance to this application because it only applies where there is a tenancy in being binding on the receiver/lender or the Respondent. The Plaintiff/Respondent relies on the dicta of Ní Raifeartaigh and Collins JJ. in *Kennedy v. O'Kelly* [2020] IECA 288 and Simons J. in *AIB v. Richard Fitzgerald* [2021] IEHC 172.

37. In *Kennedy v O'Kelly* the Court of Appeal considered the applicability of the RTB Act(s) and the requirement to first demonstrate a binding tenancy before they can apply. It is the Appellant/Respondent's fundamental submission that it by extension cannot be bound by a lease that was not validly entered into, even if it was aware from the Contract for Sale of an "*occupancy*". This is because the tenancy was not lawfully entered into absent the consent in writing of the mortgagee under the terms of Indenture of Mortgage is exhibited for 29 Aisling Court dated the 28th of October, 2004 the restrictive leasing clause contained in the applicable Permanent TSB Mortgage Conditions, 2002. It is further submitted that the Plaintiff/Respondent is not a Landlord within the meaning of s. 5 of the RTB Acts because it is not the person for the time being entitled to the rent paid in respect of a dwelling by the tenant.

38. The Plaintiff/Respondent contends that as neither it nor previously the Lender/Receiver were entitled to receive the rent neither were nor are Landlords within the meaning of the RTB Act. The Plaintiff/Respondent relies on the decision of the Court of Appeal in *Hayes v. Minister for the Environment, Community and Local Government* [2020] IECA 54 as authority for the proposition that the effect of the appointment of a receiver and thereafter the sale of the premises to the Plaintiff/Respondent is not to interpose the Plaintiff/Respondent as a successor landlord. A further submission is advanced that as the tenancy agreement relied upon by the Appellant and exhibited to his Affidavit of the 4th of March 2022 is of indefinite duration, it may exceed a period of 35 years. This being the case, it is contended that any such agreement is excluded from the scope of the RTB Act pursuant to section 3(3) of that Act (as amended) as the Act does not apply to tenancies of greater than 35 years. Finally, it is submitted that in order to be a valid tenancy the agreement must grant exclusive possession whereas in this instance the same property is subject to three separate tenancy agreements so the Appellant does not enjoy exclusive possession.

39. The Plaintiff/Respondent maintains that as the Named Defendant/Appellant is a trespasser it should be entitled to an injunction *ex debito justitae*. Failing this, the Plaintiff/Respondent contends that it satisfies the *Maha Lingan* test.

40. On this appeal the Named Defendant contends that the previous owner entered into rental contracts with all three existing tenants and these contracts are valid and enforceable. It is contended that the Respondent was on constructive notice at the time of purchase of the existence of sitting tenants. The Named Defendant cites *Somers v. Weir* [1979] I.R. 94 where Henchy J. held at para. 14 that:

> *".... When the facts at his command beckoned him to look and inquire further, and he refrained from doing so, equity fixed him with constructive notice of what he would have ascertained if he had pursued the further investigation which a person of reasonable care and skill would have felt proper to make in the circumstances....."*

41. It is contended by the Named Defendant that in this instance, *caveat emptor* must apply since the Plaintiff/Respondent, a business, should have carried out due diligence before entering into an agreement or contract with another party. This it is contended he did not do.

42. The Named Defendant/Appellant claims that he has the benefit of a "*Part 4*" tenancy under the RTB Act(s) consequent upon a period of occupation of the dwelling exceeding a six-month period. He contends that where a Part 4 tenancy exists, a tenant enjoys certain security of tenure and the landlord can only terminate on limited, statutorily prescribed grounds. In all instances, if a landlord wants to end a tenancy, they must serve a valid written Notice of Termination. He relies on the fact that no Notice of Termination was served in this case. The Named Defendant refers to s. 49 of the RTB Act(s) in relation to multiple tenants/occupancy pursuant to which a tenant in more recent occupation can rely on the continuous period of occupation of a longer standing tenant of a particular dwelling to give rise to a Part 4 tenancy to the benefit of the newcomer. The Named Defendant further relies on the date of issue of proceedings pointing out that a dispute had been referred to the RTB ever before Circuit Court proceedings had issued.

43. In addition, the Named Defendant relies on the decision of the Supreme Court in *Clare County Council v. Bernard McDonagh and Helen* [2022] IESC 15. The Named Defendant relies on the *McDonagh* decision in circumstances where he urges on the Court that he is a recovering addict, with serious health issues and, similar to the *McDonaghs*, he claims that he is an individual "*living on the margins of society*". He claims that the effect of being ejected from his constitutionally protected dwelling will render him homeless and back living in a hostel or in a tent with detrimental consequences for his health and well-being. He urges the Court to refuse the application for injunctive relief on the basis of a proportionality assessment in line with the decision of the Supreme Court in *McDonagh*.

DISCUSSION AND DECISION

44. The Plaintiff/Respondent relies on the fact that it is the registered owner of the dwelling as conclusive evidence of ownership in reliance on s. 31 of the Registration of Title Act 1964. Section 31 of the said 1964 Act provides:

> *"31.—(1) The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or*

matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just."

45. While the affidavit evidence before the Circuit Court on behalf of the Plaintiff/Respondent was very bare and amounted to little more than unsubstantiated assertion insofar as the Named Defendant's unlawful occupation of the dwelling and alleged anti-social behaviour precipitating an application for injunctive relief was concerned, it does provide evidence of registration of the Plaintiff/Respondent's title. Evidence of registration on the 7th January 2022 is exhibited to the Affidavit of Mr. Murtagh sworn the 9th of February, 2022. Accordingly, I am satisfied on the evidence that the Plaintiff/Respondent has established its ownership of the dwelling for the purpose of these proceedings.

46. The fact that the Plaintiff/Respondent owns the dwelling is not, however, dispositive of the question as to the lawfulness of the Named Defendant/Appellant's occupation. The Named Defendant and two other named persons are claimed by the Named Defendant/Appellant to occupy the dwelling on foot of a tenancy agreement in writing, and the dwelling was purchased by the Plaintiff on the express basis that it was occupied and was "*sold subject to and with an occupancy*" and "*the vendor does not hold a copy of any leases or any information relating to the occupiers in the property in sale. It shall be a matter solely after completion for the purchaser to deal with the occupiers…. The Purchaser shall not be entitled to vacant possession of the property in sale on completion of the Sale*".

47. Accordingly, the Affidavit evidence establishes the Plaintiff/Respondent's ownership of the dwelling but in circumstances where the dwelling was occupied and ownership is therefore subject to the legal interest of those in occupation. Those in occupation claim a tenancy in the dwelling and accordingly an issue remains as to whether those persons are trespassers whose occupation of the property may properly be terminated by way of interlocutory injunction or lawfully entitled to remain on in occupation pending a termination in accordance with law of their rights of occupancy.

48. Notwithstanding that the Plaintiff/Respondent purchased the dwelling with notice of occupation by persons unknown on terms which were equally unknown, the

Plaintiff/Respondent proceeded in its' application before the Circuit Court and before me on the basis that the Named Defendant/Appellant is a trespasser with no right to be present at the property. I must now determine how strong the case is that those in occupation are in unlawful occupation as trespassers.

49. No direct evidence from a person with means of knowledge is relied upon to confirm that the Named Defendant and other occupiers were not present in the property prior to January, 2022 and that the occupiers referred to in the contract of sale are other than the persons now in occupation as appears to be contended on behalf of and by the Plaintiff/Respondent. Allegations of anti-social behaviour at the time of the injunction application appear to relate to one specific night in February, 2022 when a door was damaged but again without any proper evidence as to who caused the damage or that there was a recurring issue of anti-social behaviour. I am not prepared to attach much weight to evidence of previous occupation by others and assertions that the Named Defendant and others were "*installed*" in January, 2022. Nor do I attach much weight to such allegations of anti-social behaviour as have been adduced on behalf of the Plaintiff/Respondent. This is because of the weakness of the means of knowledge relied upon and the absence of proper particulars and specificity. I appreciate that there may be good reasons for this lack of detail but this does not obviate the fact that the affidavit evidence is weak.

50. As the Named Defendant/Appellant claims that his entitlement to occupy the dwelling derives from a Part IV tenancy and that this tenancy has not been terminated in accordance with the provisions of the RTB Act(s), the first question I must consider is what, if any, relevance the provisions of the RTB Act(s) have to these proceedings and what status the putative tenancy has.

51. The Plaintiff/Respondent relies on the dicta of Ní Raifeartaigh and Collins JJ. in *Kennedy v. O'Kelly* [2020] IECA 288 which considered the applicability of the RTB Act(s) and the requirement to first demonstrate a binding tenancy before the RTB Acts can apply. The Plaintiff/Respondent maintains that, where the tenancy purportedly entered into between the Appellant and Mr. Coyle was neither authorised by the lender nor the receiver, it is not a valid tenancy having regard to the *N17 Electrics* line of authority.

52. At exhibit PC to the Affidavit of Mr. Coyle sworn the 14th of March, 2022 an Indenture of Mortgage is exhibited for 29 Aisling Court dated the 28th of October, 2004. The Plaintiff/Respondent points out that a certified copy of that mortgage was included as part of the documents schedule in the contract of sale from the Receiver to the Plaintiff/Respondent dated the 25th of November, 2022. As noted above the said Mortgage expressly provided at paragraph 7 that:

> *"This indenture incorporates the clauses set out in Permanent TSB Mortgage Conditions 2002…."*

53. The Permanent TSB Mortgage Conditions in turn provide in the terms set out above that the consent of the mortgagee is required for any agreement to lease and that the Mortgagor shall not otherwise grant or agree to grant any lease or tenancy or license or part with or share possession or occupation of the Property without the prior written consent of Permanent TSB. The Plaintiff/Respondent further relies on the fact that paragraph 7 of the contract of sale between the Receiver and the Plaintiff/Respondent expressly provides that the Vendor does not hold a copy of any leases or any information relating to the occupiers of the property in sale as evidence that any tenancy with the Named Defendant/Appellant was not consented to by the Bank and was therefore not lawfully entered into. It seems to me that this is a reasonable inference to draw on the evidence. I am satisfied that the case is strong that no consent was obtained from the Bank to the tenancy having regard not only to paragraph 7 of the contract of sale but also to the surrounding circumstances, including the dates of the purported tenancy agreements which are relatively recent and coincide so proximately in time with the appointment of the Receiver and litigation between the former owners and the Bank.

54. In *Kennedy v O'Kelly*, relied on by the Plaintiff/Respondent, the notice party, Ms. McGuiness, had entered a tenancy agreement with the Defendant, Mr. O'Kelly, and which had not been authorised by the lender or the receiver and she sought to invoke the provisions of the RTB Act(s) against the receiver (Mr. Kennedy) to prevent an injunction effectively requiring her to vacate the premises. Judge Ní Raifeartaigh upheld the finding at first instance by McDonald J. characterised as follows at para. 48 of her judgment:

"The N17 Electrics case could not support the suggestion that merely because back in 2005 the bank may have envisaged there would be a lease put in place, this meant that the bank was bound by a tenancy agreement that was put into place without any prior notice to it, without giving it any opportunity to consider to quality of the tenant or the quality of the rent, and it would be difficult to see how in those circumstances the bank would be bound. Without making any final determination on the issue, the Receiver had a strong argument to make that he was not bound by the tenancy and therefore an equally strong argument that the 2004 Act did not apply. He said: "it would be an extraordinary thing that someone could be bound by the provisions of 2004 Act in respect of a tenancy to which they never consented. That seems to me to be a contradiction in terms".

55. The learned Court of Appeal Judge went on to hold at para. 74 of the judgment that:

"A submission of the notice party which was strongly urged upon the Court was that section 59 of the Act of 2004 required that MARS or the Receiver had to serve a valid notice of termination in accordance with Part 5 of the Act, and that the Act excluded the application of Fennell v N71 Electrics Ltd (in liquidation). It seems to me that this is to put the 'cart before the horse', as it were, and that the appropriate sequence is to inquire as to whether there is a valid tenancy (whether a residential tenancy or other form of tenancy), in the first instance; and only if that question is answered in the affirmative does the Act come into play. The point is dealt with in further detail in the judgment of Collins J. and I wish to express my agreement with his analysis."

56. Judge Collins held from para. 9 of his concurring judgment:

"In this context, I consider that the Receiver has indeed established a "strong case" that he is entitled to take possession of, and deal with, the mortgaged property on behalf of MARS (because any letting of the property was in breach of clause 11(l) of the mortgage) and that such entitlement is unaffected by the provisions of Part 5 of the 2004 Act. The argument that Part 5 constrains the receiver rests on the contention that the receiver (and/or MARS) on the one hand and the Notice Party on the other are in a relationship of landlord and tenant. But it follows from Fennell v N17 Electrics Ltd (in liquidation) that, as a matter of general principle, a letting entered into by a mortgagor

and a third party in breach of a negative pledge clause in the mortgage does not give rise to any relationship of landlord and tenant between the third party and the mortgagee. That being so, it does not seem to me that the principle in Fennell v N17 Electrics Ltd (in liquidation) is properly characterised as a rule of law "which applies in relation to the termination of a tenancy" any more than section 18 of the Conveyancing Act 1881 can properly be characterised as a provision of an enactment having such application. Fennell is not concerned with the termination of any tenancy by the mortgagee; rather it is concerned with the distinct issue of whether a tenancy entered into by a mortgagor, in breach of a negative pledge clause, affects the rights of the mortgagee, and in particular its rights of recourse to the mortgaged property as security: see Fennell, at paragraph 47. Put another way, the effect of the principle in Fennell is to preclude the creation of a tenancy relationship between mortgagee and third party, rather than providing for the subsequent termination of such relationship. The argument that, in enacting Part 5 of the 2004, the Oireachtas intended to abrogate the principle in Fennell v N17 Electrics Ltd (in liquidation) appears to me to be inherently implausible. Had the Oireachtas intended to change the law in this area, one would expect that it would do so in clear terms: see, by way of illustration, Minister for Industry & Commence v Hales [1967] IR 50. That is not to suggest that the principle in Fennell v N17 Electrics Ltd (in liquidation) is beyond legislative reform. Clearly it is open to the Oireachtas to legislate in this area and it has in fact done so in the Land and Conveyancing Law Reform Act 2009. That Act repealed (inter alia) many of the extant provisions of the Conveyancing Act 1881, including section 18, and makes new provision for the leasing powers of mortgagors in Part 10, Chapter 4. While section 112(1) of the Act requires the consent in writing of the mortgagee to any lease of mortgaged land, it also provides that such consent shall not be unreasonably withheld. Furthermore, section 112(2) provides that a lease made without such consent is voidable (rather than void) by a mortgagee if it establishes actual knowledge of the mortgage on the part of the lessee and that the granting of the lease had prejudiced the mortgagee. Section 113, which appears to be entirely new, provides that a section 112 lease must reserve the best rent that can reasonably be obtained and otherwise be granted on the best terms that can reasonably be obtained, in default of which any lease will be void. It would appear to follow that a lease entered into by a mortgagor will bind the mortgagee, even in the absence of the mortgagee's consent, provided that the lease complies with section 113, unless the mortgagee establishes that the lessee had

actual knowledge of the mortgage and also establishes prejudice arising from the lease. However, the section 112 power to lease applies only to mortgages created after the commencement of Part 9 (which commenced on 1 December 2009) and thus had no application here, where the mortgage dates from August 2004."

57. I am satisfied that the Respondent is correct in its submission in reliance on the decision of the Court of Appeal in *Kennedy v. O'Kelly* that it cannot be bound by a lease, even if it was at the time of purchase aware from the Contract for Sale of an "*occupancy*", because the tenancy was not lawfully entered into absent the consent in writing of the mortgagee in accordance with the terms of the Indenture of Mortgage and the restrictive leasing clause contained in the applicable Permanent TSB Mortgage Conditions, 2002. I have already found that I am satisfied that the Plaintiff/Respondent has established a strong case that no such consent was given.

58. The *Kennedy* case followed by Simons J. in *AIB v Richard Fitzgerald* [2021] IEHC 172 where he held *inter alia* (paras. 35 to 38):

"The question which now arises for determination is how a lease with such a hybrid status falls to be treated under the Residential Tenancies Act 2004. As between the mortgagor/landlord and tenant, the position is clear-cut. The mortgagor/landlord cannot assert the absence of consent from the mortgagee so as to avoid his statutory obligations under the RTA 2004. The mortgagor/landlord cannot rely on his own default, i.e. the failure to obtain the requisite consent from the mortgagee, so as to deny his tenant their statutory rights. The position as between the mortgagee and the tenant is more complex. It might be tempting to say that the tenant should not be prejudiced by the failure of the mortgagor/landlord to obtain the requisite consent, and to insist therefore that the tenant should be allowed the same notice period applicable to a termination by the mortgagor/landlord. Such an approach would, however, fail to observe the well-established limits on a mortgagor's capacity to create a lease binding on the mortgagee. The mortgagee is not bound by a lease which has been granted in breach of the mortgage. There is no inconsistency between this principle and the provisions of Part 5 of the Residential Tenancies Act 2004. Part 5 regulates the termination by notice of a tenancy. Section 59 expressly identifies the purpose of Part 5 as being to specify the requirements for a valid termination by the landlord (or tenant)

of a tenancy of a dwelling. That is a very different concept from that involved in the granting of an order for possession to a mortgagee against whom the tenancy is void because of the failure to obtain consent. The tenancy is not enforceable against the mortgagee, still less is the mortgagee to be regarded as being in the position of landlord. It is unnecessary for a mortgagee to terminate a lease in circumstances where they are simply not bound by the lease at all. In this regard, I respectfully adopt the analysis of the distinction between the creation of, and the termination of, a lease as set out by Collins J. in Kennedy v. O'Kelly [2020] IECA 288 (at paragraphs 10 and 11). In so doing, I am conscious that that analysis had not been intended to be definitive, having been made in the context of an application for an interlocutory injunction. However, having had the benefit of full argument on the issue in the present proceedings, I am satisfied that that analysis is correct."

59. Simons J. went on to consider an argument made that a mortgagee fulfils the statutory definition of a "*landlord*" under the RTB Act(s) rejecting that argument in the following terms:

"I turn next to address the argument that a mortgagee fulfils the statutory definition of a "landlord" under section 5 of the RTA 2004. It will be recalled that the term "landlord" is defined as meaning the person for the time being entitled to receive (otherwise than as agent for another person) the rent paid in respect of a dwelling by the tenant. For the reasons which follow, I have concluded that this argument is incorrect. A mortgagee is not privy to a tenancy agreement which has been entered into between the mortgagor and a third party without the mortgagee's consent. There is no contractual relationship between the mortgagee and the third party. The mortgagee has no right to call for the rent. This remains the legal position unless and until the mortgagee chooses to ratify the tenancy agreement or otherwise acts in a manner which indicates that the mortgagee intends to enter into a relationship of landlord-and-tenant. The law in this regard is well settled. The position is put as follows in In re O'Rourke's Estate (1889) 23 L.R. Ir. 497 (at page 500), in a passage cited with approval in N17 Electrics Ltd. "I take it that the law on this subject is free from all manner of doubt. A lease made by a mortgagor, subsequent to the mortgage, and not coming within the provisions of the Conveyancing and Law of Property Act, 1881 ... is absolutely void as against the mortgagee. He can treat the tenant as a trespasser, and evict him without

notice. It is open, however, to the mortgagee and the tenant by agreement, express or implied, to create a new tenancy; and the question which always arises is the mere question of fact, whether such an agreement has been made in the particular case. If the mortgagee enters into the receipt of the rents and continues to take them from the tenants, this is almost conclusive evidence of an agreement between the mortgagee and the tenant for a new tenancy from year to year on the terms of the old tenancy; or, if the mortgagee serve notice on the tenant, requiring him to pay his rents direct to the mortgagee, and the tenants do not dissent, these are facts from which a jury may, and probably ought, to infer the existence of such a contract of tenancy …". Applying these principles to the facts of the present case, I am satisfied that no relationship of landlord-and-tenant exists between the Bank and the Lessee. The Bank is not entitled to receive the rent payable under the 2002 lease agreement. Insofar as the Bank is concerned, the Lessee has no right to possession of the mortgaged property. The Bank is entitled to treat the Lessee as a trespasser. The provisions of Part 5 of the Residential Tenancy Act 2004 are 6 inapplicable in such a scenario. The Bank's interest in the mortgaged property is unaffected by the unauthorised lease between the Borrower and the Lessee. It is not necessary for the Bank to terminate the tenancy: it is simply not bound by it.

60. It seems to me that the decisions in *Kennedy v. O'Kelly* and *AIB v. Richard Fitzgerald* [2021] IEHC 172 squarely apply and are dispositive of the question of whether the Named Defendant/Appellant or the other occupiers may rely on a putative tenancy. These authorities establish that in the absence of evidence of consent of the mortgagor to the tenancy agreement, no tenancy agreement binding on the Bank or the receiver appointed by the Bank is created. Accordingly, the case the Plaintiff/Respondent makes in this regard is very compelling, in my view.

61. In light of my findings in reliance on *Kennedy v. O'Kelly* and *AIB v. Richard Fitzgerald* [2021] IEHC 172 line of authority, it is not necessary to address further the question of who was entitled to rent under the putative tenancy agreement or whether a tenancy of indefinite duration fell without the scope of the RTB Act as I am satisfied, given the strength of the case that no lawful tenancy was entered into binding on any party other than the parties to the agreement itself, the other issues are unlikely to arise for determination. Nor does the issue of who was first seised, the RTB or the Courts require further consideration. The RTB only has jurisdiction where a tenancy is found to exist. These authorities also obviate the necessity to

address further the Named Defendant/Appellant's submissions in reliance on a contention that the Plaintiff/Respondent was on notice or constructive notice that the dwelling was occupied when it was purchased from the receiver as it is clear that this would not validate any agreement unlawfully entered into by the previous owner without the consent of the mortgagor.

62. It follows from the foregoing that I am satisfied that there is a very strong likelihood or probability that the Named Defendant/Appellant and the other occupiers are trespassers *vis-a-vis* the Plaintiff/Appellant's interest in the dwelling. While it remains possible that the Named Defendant/Appellant can demonstrate consent from the lender to the tenancy at a full hearing upon the making of discovery, I consider the possibility of this happening in the light of the evidence in the case to be very slim. I have regard to the fact that in *Fennell and Another v. N17 Electrics Limited (In Liquidation)* [2012] IEHC 228, Dunne J. found that that the onus of proving that a mortgagee had consented to a lease which contravened the mortgage lay on the party seeking to rely upon the terms of the lease. Although affidavits were sworn by Mr. Coyle, the former owner, neither he nor the occupiers have provided any evidence that the mortgagor consented to the tenancy agreements relied upon in resisting these proceedings.

63. This brings me to the test to be applied to the grant of injunctive relief in the case of trespass. The Plaintiff/Respondent maintains that in the case of trespass it is entitled to an injunction *ex debito justitae*. In this regard, I have considered the dicta of Costello J. in *Havbell Dac v. Dias* [2018] IEHC 175 relied upon by the Plaintiff/Respondent. In that case the learned judge followed previous authority of Birmingham J. in *Ferris v. Meagher* [2013] IEHC 380; Laffoy J. in *Kavanagh and Lowe v. Lynch and St Angela's Student Residences Ltd* [2011] IEHC 348, Keane J. in *Keating & Co Limited v. Jervis Shopping Centre* [1997] 1 I.R. 512 and held at para. 44 *et seq* as follows:

> *"In Ferris v. Meagher [2013] IEHC 380 Birmingham J. held that the second named defendant was a trespasser who had no entitlement to remain in occupation of the lands in question. He held that the plaintiff was entitled to an order restraining the trespass 'without the necessity of considering the Campus Oil principles'. In Kavanagh v. Lynch [2011] IEHC 348 Laffoy J. considered an application by a receiver to restrain the defendants from remaining on or continuing in occupation of property over which he had been appointed receiver. She referred to the decision of Keane J. in Keating & Co. Ltd v. Jervis Shopping Centre Ltd [1997] 1 I.R. 512 where Keane J. held:- 'It is clear*

that a landowner, whose title is not in issue, is prima facie entitled to an injunction to restrain a trespass and that this is also the case where the claim is for an interlocutory injunction only.' He noted that the principle was subject only to the qualification that the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass. If a defendant did so, the court must consider the application of the principles in American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396. In Tyrrell v. Wright [2017] IEHC 92 I followed the decision of Keane J. in Keating & Co. Ltd v. Jervis Shopping Centre Ltd and I held that prima facia the plaintiff was entitled to an injunction to restrain a trespass on an interlocutory basis unless the defendant puts in evidence to establish that he has a right to do what would otherwise be a trespass. In this case the defendant has not put in evidence to establish that she is entitled to remain in possession of the property as against the plaintiff. On that basis, it is not necessary to consider the principles in Campus Oil. The plaintiff is entitled to the injunctive relief it seeks."

64. I note that notwithstanding this finding, Costello J. proceeded to consider *Campus Oil* principles in case she was wrong in this conclusion. She stated that she was satisfied that on the facts of that case the plaintiff had in fact made out a very strong *prima facie* case such that it not only met the threshold requirements in *Campus Oil* but also satisfied the test in *Maha Lingham v. HSE* [2006] IEHC 24.

65. The Plaintiff/Respondent has further pointed to the grant of identical relief to that granted by Her Honour Judge Fergus at first instance in the instant application by Reynolds J. against the occupants of Little Mary Street in the case of *Pepper Finance Corporation (Ireland) DAC v Persons Unknown in Occupation of the property known as 21 Little Mary Street Dublin* [2021] IECA 277. There, the occupants sought to rely on leases entered into between them with one Jerry Beades to avoid the injunction. In that case the occupants brought an application to the Court of Appeal to extend the time allowed for an appeal and this application was refused by Donnelly J. on the basis that the arguable grounds were not presented. She held at 60 *seq*:

"Arguments about obtaining rights under the 2004 Act can only reach the launch pad where there is a valid tenancy in the first place. As Ní Raifeartaigh J. phrased it in Kennedy v. O'Kelly:- "It seems to me that this is to put the 'cart before the horse', as it

were, and that the appropriate sequence is to inquire as to whether there is a valid tenancy (whether a residential tenancy or other form of tenancy), in the first instance; and only if that question is answered in the affirmative does the Act come into play".

66. The entitlement to an injunction *ex debito justitae* in the case of trespass was affirmed more recently by Keane J. in *Albert Beit Foundation v. David Egar* [2021] IEHC 65. A detailed examination of this jurisdiction was undertaken at paras. 85 to 92, culminating with reference to the decision of the Court of Appeal in *McDonagh v. Clare County Council* [2020] IECA 307 where an injunction had been granted by the Court of Appeal without considering the balance of convenience. At the time of the decision of Keane J. in *Albert Beit Foundation v. David Egar,* the decision of the Court of Appeal had not yet been overturned in the Supreme Court.

67. The Plaintiff/Respondent has argued that in the event that I am not satisfied that the Plaintiff/Respondent is entitled to an injunction *ex debito justitiae* then, where the effect of the injunction is in reality mandatory, the *Maha Lingham* principles apply with the result that the Respondent must show a strong case.

68. As the Named Defendant/Appellant has relied on a tenancy agreement and there remains a possibility that the Named Defendant/Appellant may establish at a full hearing that there was in fact consent from the mortgagor to the letting, I am not satisfied that the Plaintiff/Respondent is entitled to an injunction *ex debito justitiae.* I am quite satisfied, however, as set out above, on the authority of the *Kennedy* and *AIB* cases, that a very strong case has been made out that the Named Defendant/Appellant and others in occupation are trespassers. In the circumstances I do not need to consider what implications, if any, the decision of the Supreme Court may have for the exercise of an *ex debito jusitae* jurisdiction.

69. Applying *Maha Lingham* principles I have further considered whether damages would be an adequate remedy. In *Havbell v. Dias*, Costello J. had the following to say on this subject (para. 47):

"On the question whether damages would be an adequate remedy for the plaintiff, I note that Laffoy J. observed in Dwyer Nolan Developments Ltd v. Kingscroft

Developments Ltd [2007] IEHC 24 that it is not necessary to prove damage in the case of trespass. I cited this decision with approval in Tyrrell v. Wright and the decisions in Metro International S.A. v. Independent News and Media Plc [2006] 1 I.L.R.M 414; McCann v. Morrissey [2013] IEHC 288; Westman Holdings Ltd. v. McCormack [1992] 1 I.R. 151; AIB p.l.c. v. Diamond [2012] 3 I.R. 549 and Dellway Investments Limited v. NAMA [2011] 4 I.R. 1. In light of these authorities I concluded that there were two limbs to the adequacy of damages criterion. The first is whether in fact damages were an adequate remedy for a plaintiff and that in general as regards interests in land damages were not considered to be an adequate remedy. Secondly, and equally significantly, if an injunction is to be refused on the basis that damages would be an adequate remedy, the defendant liable to pay such damages must be able to do so.

70. In this case there is no evidence at all that the Named Defendant/Appellant and other occupants would be able to pay damages to the Plaintiff/Respondent in respect of losses sustained. It seems to me most unlikely that they would be in a position to meet any award in damages that might be made. Similarly, I appreciate that the potential consequences of being made unlawfully homeless are not readily remediable in damages. It seems clear to me that damages would not be an adequate remedy for either party.

71. In terms of the balance of convenience, while affirming the Circuit Court injunction will have the effect of requiring the Named Defendant/Appellant and other occupiers to vacate the premises, I have regard to the fact that even if the Named Defendant/Appellant had the benefit of a lawful tenancy, it could always be terminated when required by the owner for his own use or other prescribed grounds. In such circumstances, the Named Defendant/Appellant is in no different position to tenants generally by being obliged to seek accommodation elsewhere in the market. An appropriate stay can negate inconvenience and also seek to ensure that the Named Defendant/Appellant has notice of termination not dissimilar to that to which he would have been entitled were a valid tenancy found to exist. In this case, however, the Named Defendant/Appellant has been aware for many months of the precarious nature of his occupation of the dwelling and the fact that it is maintained that he is a trespasser. He has already had significant notice and time within which to seek alternative accommodation.

72. In applying the balance of convenience test I have also had regard to the decision of the Supreme Court in *Clare County Council v. Bernard McDonagh and Helen McDonagh* [2022] IESC 15.

73. In *Clare County Council v. Bernard McDonagh and Helen McDonagh*, the High Court granted an interlocutory order on a summary basis requiring the Traveller families to leave the lands in question before the full hearing of the merits of the case - and this Order was approved by the Court of Appeal. The Supreme Court rejected this approach as flawed and remitted the case back to the High Court for a full hearing. In the Supreme Court, Hogan J. considered the constitutional protection afforded to the home and also under Article 8 of the European Convention on Human Rights ("ECHR"). While he accepted that the Traveller families concerned were trespassers on the land and also that the placing of their caravans was in breach of planning law, he did not consider that this justified a Court granting an injunction requiring the removal of the caravans before the proportionality of the making of such an order was considered in full.

74. The Named Defendant relies on the *McDonagh* decision in circumstances where he urges on the Court that he is a recovering addict with serious health issues. He claims that the effect of being ejected from his constitutionally protected dwelling will render him homeless and back living in a hostel or in a tent with detrimental consequences for his health and well-being. He urges the Court to refuse the application for injunctive relief on the basis of a proportionality assessment in line with the decision of the Supreme Court in *McDonagh*.

75. I accept that that the dwelling in question is protected within the ambit of Article 40.5 of the Constitution even if the occupation of the dwelling is unlawful. Accordingly, on the authority of the Supreme Court in *McDonagh*, a proportionality exercise must be performed by me in considering whether the Plaintiff/Respondent is entitled to interlocutory relief in the light of the likely impact of the granting of relief on those occupying the dwelling. It seems to me that it is logical and appropriate that a proportionality assessment be conducted as part of the balance of convenience assessment normally conducted by the Court. I am further satisfied on the authority of *McDonagh* that I should refuse to make an interlocutory order which I find offends against the doctrine of proportionality by reason of the extent of interference with Article 40.5 rights when balanced with competing interests and where the order is neither necessary nor sought in pursuit a legitimate purpose.

76. While I have considerable sympathy for the difficulties of anyone required to seek alternative accommodation at this time and take judicial notice that the State is experiencing an unprecedented housing crisis, I do not consider that a proper application of the decision in *McDonagh* can avail the Named Defendant/Appellant and the other occupiers in this case, not least in view of the fact that they occupy privately rather than publicly owned property. It is recalled that in *McDonagh*, the local authority owned the land on which the *McDonagh* family were camped and the local authority also bore statutory responsibility for the provision for accommodation needs within its functional area. In his judgment Hogan J. expressly stated (paras. 97 to 98):

> *97. Second, a critical consideration here is that the present case concerns an application brought by a Council in its role qua landowner and planning authority. Yet the Council is also a housing authority which has specific statutory duties via-a-vis the appellants. It has – arguably – failed in its duty qua housing authority to offer suitable accommodation to the appellants, having regard in particular to Ms. McDonagh's medical needs. If, moreover, a mandatory interlocutory injunction were to be granted, it would mean, in effect, that the appellants would have nowhere to go without necessarily trespassing on the lands of another party.*
>
> *98. These are special and particular considerations which, it is important to stress, would not apply, for example, in the case of a private landowner seeking an injunction to restrain trespass. In that situation any Article 8 ECHR issues would not in strictness even arise by way of possible defence as the litigation would then be between purely private bodies. The courts are not themselves "organs of the State" for the purposes of s. 1(1) of the 2003 Act, save, of course, for the interpretative obligation imposed on the courts by s. 2(1) of that Act to ensure that, whenever possible, a statutory provision is construed "in a manner compatible with the State's obligations under the Convention provisions": see generally, Kinsella v. Kenmare Resources plc [2019] IECA 54, [2019] 2 IR 750 at 783, per Irvine J. So far as constitutional considerations are considered, the courts' first duty would normally be to ensure, in the words of Article 40.3.2, that the property rights of the private landowner to protect his or her own property were adequately vindicated, whether by means of an order restraining trespass or otherwise."*

77. At para. 104 of his judgment, Hogan J. added:

> *"If in this situation the applicant for such relief was a purely private party, then the case for the granting of interlocutory relief would, at least generally speaking, be almost unanswerable."*

78. Notwithstanding the undoubted difficulties faced by the Named Defendant/Appellant where an order for possession and restraining further trespass is made, my first duty must be to ensure that the property rights of the private landowner are adequately vindicated. In weighing the competing interests, I accept that the Named Defendant/Appellant suffers ill-health, that he is a recovering addict who has been able to find work in recent times and that he is rebuilding his life but will have significant difficulties in sourcing suitable alternative accommodation with potentially far reaching adverse *sequalae* for him in terms of his health, life and work. I take full cognizance of these factors in reaching my decision in this case.

79. As noted above, however, I am satisfied that there is a strong case that the Named Defendant/Appellant and the other occupiers are trespassers on private property. The Plaintiff/Respondent's rights as property owner are safeguarded under the Constitution (under Articles 40.3 and 43) and its enjoyment and use of its property is damaged by unlawful acts of trespass. The Plaintiff/Respondent, as private property owner, is under no legal duty to provide for the accommodation needs of strangers and is under no obligation to trespassers. The acts of trespass are alleged to constitute a threat to the peaceful enjoyment of the homes of other occupants and it is alleged that the occupiers have engaged in anti-social behaviour. While I find the evidence in this regard to be bare, it is nonetheless a feature of the case that disturbance has been shown to have been caused to others, even if the extent and nature of this disturbance has not been fully set out and must therefore be weighed accordingly. The timing of the putative tenancy agreements entered into with the former owner is also certainly consistent with an inference that, whether with or without the knowledge of the occupiers, the intention of the former owner may have been to frustrate a sale of the dwelling for the benefit of the mortgagor.

80. In this case, taking all factors advanced in the evidence into account, including the personal circumstances of the Named Defendant/Appellant as outlined in evidence and

accepted by me, I am satisfied that the Plaintiff/Respondent's rights outweigh those of the Named Defendant/Appellant and may only be adequately vindicated by making an order restraining trespass to enable the Plaintiff/Respondent recover possession of their property and that such an order is necessary. I am satisfied thathe making of such an order is proportionate having regard to the competing interests identified in the evidence.

CONCLUSION

81. The Plaintiff/Respondent is entitled to possession of the dwelling from the Named Defendant/Appellant and other persons in occupation and to an order restraining trespass and I will so order. I will hear submissions from the parties in relation to the terms of the order.