APPROVED **[2024] IEHC 178**

THE HIGH COURT
CIRCUIT APPEAL

2024 43 CA

BETWEEN

WILLIAM MCLOUGHLIN
BRIDGET MCLOUGHLIN

PLAINTIFFS

KEN FENNELL
JAMES ANDERSON
START MORTGAGES DAC

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered *ex tempore* on 21 March 2024

1. These proceedings arise out of a sale of premises known as Elizabeth's Cottage, Knockroe, Kilcommon, Thurles, County Tipperary ("*the dwelling house*" or "*property in sale*" as convenient). Title to the property is registered under Folio 20955 County Tipperary.

2. In order to understand the dispute that has arisen between the parties, it is necessary to say something about the mortgage attaching to the property. There is a registered charge on the property, and this reflects a mortgage or charge which was entered into on 26 March 2006 between Seán Shields and Michelle Shields, of the one part, and Irish Life and Permanent plc of the other. The

mortgage was subsequently transferred to Start Mortgages DAC on 1 February 2019. There is an entry on the folio which confirms that Start Mortgages is now the owner of the charge.

3. These proceedings seek relief in relation to a contract for sale in relation to the property. This contract for sale was executed following an online auction on 29 February 2024.

4. The unusual aspect of the case is that the proceedings have been brought not by the mortgagors, as is often the case in these so-called "*receiver injunctions*", but rather they have been brought by the neighbouring landowners. The plaintiffs, William McLoughlin and Bridget McLoughlin, are the owners of the neighbouring property which is held under Folio 26490F County Tipperary.

5. The basis of the claim made by the plaintiffs is two-fold. In the first instance, they say that there has been a trespass on their lands. The plaintiffs assert that in or about 2007, their neighbours (the Shields) built an extension to their existing dwelling house and that part of this extension encroaches upon the lands within the plaintiffs' folio. Although not on affidavit evidence, a surveyor's report has been handed into me on a *de bene esse* basis, and that suggests that the floor area of the extension which encroaches on the plaintiffs' lands is approximately 68m². I have been shown photographs which indicate that, in layman's terms, approximately one half of the extension is built on what, on the plaintiffs' case, is their lands. The first leg of the case is a claim in trespass. It is said that the building has been constructed and built upon the plaintiffs' lands.

6. The second aspect of the case is in relation to adverse possession. It is alleged that, in or about 2007 and 2008, the following events occurred, and I take this

from the affidavit of Mr. McLoughlin grounding the application (at paragraph 15):

> "[…] Mr Sean Shiels our then neighbour erected an extension to Elizabeth's Cottage and trespassed upon our lands. At the time Mr. Shiels gave us an assurance that he would either remove the extension and restore the boundary or that we would be compensated for the trespass. Mr. Shiels however got into financial difficulty and in or around 2008 he left the country. I believe that he has resided since in Australia with his family. Mr Shiels gave us the keys of the property and advised us that we could take possession of the property as compensation for the act of trespass. We thereafter moved into possession of the property and proceeded to pay and discharge the outgoings including the ESB bill. We also carried out and maintained repairs to the property over the last 15 years of which we will give evidence at the hearing of this action. We are currently collating documentation evidencing this ownership …"

7. The ESB bill is exhibited. The only acts of occupation that are actually averred to, other than payment of the ESB bill, are an overnighting by the plaintiffs' children in the property (in September 2023) a number of days before there was a visit by the agents on behalf of the defendants.

8. It is necessary, then, to look at the sequence of events leading up to the institution of these proceedings. The first event of note is in relation to an application made to the Land Registry in 2013.

9. On 12 November 2013, the following application was made on behalf of the first plaintiff, Mr. McLoughlin, and that is set out in an exhibited "*public counter query*" as follows. Having cited the relevant folio numbers of the plaintiffs' own property and the Shields' property, it is stated as follows:

> "The boundary of folio TY20955 is encroaching on folio TY26490F. The boundary should be amended to revert back to the way it was registered in 1998. The additional land on which a portion of the house appears to be registered should actually be on TY26490F and not TY20955 as per the pre-digital maps."

10. That query triggered a chain reaction within the Land Registry. A letter was sent to the Shields, c/o a solicitor's firm, on 14 November 2013 and that indicated that unless a valid legal objection was received within 21 days the folio would be amended as requested on behalf of the first plaintiff. It seems that no response was ever sent by the Shields. Thereafter, some twelve months later, further correspondence from the Land Registry was sent to the Shields, again care of their solicitor, and relevantly there was also a letter sent to Irish Life and Permanent plc who were then the charge holder. The transfer of the charge to Start Mortgages did not occur until December 2019.

11. I move then to consider the pre-litigation correspondence. It appears that the plaintiffs became aware in July 2023 of an intention by the receivers of the property to sell same at public auction. The plaintiffs' (then) solicitors sent a letter to the nominated estate agent on 26 September 2023. Having regard to the dispute that has since arisen, it is necessary to refer in some detail to that letter. The key point made in that letter is that part of the property in sale was comprised *within* the plaintiffs' folio. In other words, what I have referred to earlier as the trespass claim is articulated.

12. The solicitor's letter then went on to indicate that there were also pipes, a septic tank and waste pipes which passed through the plaintiffs' folio. There was no assertion made at that stage that the plaintiffs had obtained possessory title by way of adverse possession. The only request made in the letter of 26 September 2023 was that the foregoing matters be brought to the attention of any person or entity who might view the property in sale.

13. It seems that the agents or solicitors acting on behalf of the defendants reacted to that letter and same had been disclosed in the *pro forma* contract for sale which

was posted online ahead of the (initial) auction date in December 2023. It appears that a special condition had been attached to the contract for sale which expressly refers to that correspondence. That is set out at special condition 12C where it is stated as follows:

> "In particular, the Purchaser is placed on notice of the letter dated 26 September 2023 from James O'Brien & Company Solicitors in respect of the boundary discrepancy. The Purchaser fully accepts the position and the Vendor will not assist with any rectification of the boundary whatsoever. No objection, requisition or enquiry shall be raised in this regard."

14. That is significant because it means that any purchaser of the property in December 2023 would have been on express notice of the fact that there was a dispute. Counsel on behalf of the plaintiffs has criticised the fact that the dispute is described as a "*boundary discrepancy*". It is suggested that this minimises the true nature of the claim, which is a claim for trespass. But the special condition has to be seen in a context where the letter which had been authored on behalf of the plaintiffs by their then solicitors had been included in the package of documents made available to a potential purchaser. In other words, precisely what the plaintiffs' solicitor had asked to be done was in fact done.

15. Events took a dramatic turn then in December. On 1 December 2023, a letter was sent from the plaintiffs' new solicitors. This letter was sent, I understand it, to an auctioneer, and was ultimately not seen, as I understand it, by the defendants' solicitors until a number of days later on 11 December 2023. I do not think that much turns on that. What is relevant is the following statement in the letter of 1 December 2023:

> "An assurance was given by Mr Shields that he would either remove the extension and restore the boundary or our clients would be compensated for the trespass and the lands which Mr Shields attempted to take possession of.

> Unfortunately, due to the economic downturn, Mr Shiels got into financial difficulties and left the country advising our clients that they could take possession of the property as compensation for the act of trespass. Immediately thereafter, our clients moved into possession of the property and proceeded to pay and discharge the outgoings including ESB bill. Our clients also maintained and carried out repairs to the property over the last 15 years. Our clients have the keys of the property which had been given to them by Mr Shields but recently the locks were removed forcibly without the permission of our clients."

16. It would appear from that letter that what was now being articulated was not simply a claim in trespass in relation to a *portion* of the property in sale (more specifically, approximately half of the extension). What was now being said is that the plaintiffs have a possessory title to the *entire property*, not just the extension but the entire dwelling house and the lands attached thereto. I simply observe that it is remarkable that this claim is only made for the first time in December 2023, within a period of two weeks of the date of the (then) intended auction. This is not referenced in the solicitor's letter which was sent in September 2023.

17. At all events, the present proceedings were issued, and an application was made *ex parte* before the Circuit Court for short service on 12 December. The matter was made returnable to 13 December 2023, which was the day before the (then) scheduled auction and an undertaking was given by the defendants that they would not proceed to sell the property in that particular auction. The application for an interlocutory injunction was adjourned for full hearing on 30 January 2024. On that date, the application was refused by Judge O'Donohoe. No order for costs was made.

18. The written order recites an interlocutory injunction having been lifted but I think that is incorrect: what seems to have happened is that an undertaking was

given in December 2023 and therefore matters never proceeded as far as an order of the court in December. But at all events, Judge O'Donohoe in the Circuit Court on 30 January 2024 was not persuaded to grant an interlocutory injunction and the costs of the interlocutory injunction were reserved pending the determination of the proceedings.

19. An appeal was then brought to the High Court. There was a delay in filing the appeal. It was necessary to seek consent from the defendants to the late filing of the appeal, and the appeal was ultimately filed on 28 February 2024. An application was then made on 8 March 2024 for an early hearing date, and the matter was fixed for hearing before me today (21 March 2024).

20. It is next necessary to refer briefly to the principles governing interlocutory injunctions. These were not in controversy between the parties, but it is salutary to remind ourselves of the principles.

21. The principles governing the grant of interlocutory injunctions have recently been restated by the Supreme Court in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd* [2019] IESC 65, [2020] 2 I.R. 1. In brief, a court hearing an application for an interlocutory injunction should first consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief pending the trial could be granted. The court must consider whether the plaintiff has established that there is a "*serious issue*" to be tried (sometimes referred to as an "*arguable case*" or as a "*fair issue*" to be tried). If so, the court should then proceed to consider how matters should best be regulated pending the trial. This involves consideration of the balance of justice (sometimes referred to as the "*balance of convenience*").

22. The preferable approach is to consider the adequacy of damages as part of the balance of justice, rather than as a separate step in a three-stage test. It is not simply a question of asking whether damages are an adequate remedy. An interlocutory injunction should not be granted merely because the plaintiff can tick the relevant boxes of arguable case, inadequacy of damages, and ability to provide an undertaking as to damages. By the same token, an interlocutory injunction should not be refused merely because damages may be awarded at trial.

23. If the balance of justice is finely balanced, then it might be appropriate for the court to consider, even on a preliminary basis, the relative strengths and merits of each party's case as it may appear at the interlocutory stage. This will be necessarily dependent upon the proceedings presenting a legal issue upon which the court could confidently express a view, and also dependent upon any facts relevant to the disposition of that issue being supported by credible evidence (*Ryan v. Dengrove DAC* [2021] IECA 38).

24. The threshold to be met by the plaintiff will be more exacting in circumstances where mandatory relief is being sought by way of an interlocutory injunction. Rather than simply demonstrate a serious issue to be tried, it will be necessary for the plaintiff to establish a strong case that they are likely to succeed at the hearing of the action (*Lingam v. Health Service Executive* [2005] IESC 89). In the case of an alleged trespass, the mere fact that a defendant is in occupation of the property does not render the relief sought *mandatory* in nature if the defendant's occupation is not lawful. In such a scenario, the application is more correctly characterised as an application for a prohibitory injunction to restrain an ongoing trespass rather than a mandatory injunction requiring a defendant to

deliver up possession of property to which they might have lawful title (*Start Mortgages v. Rogers* [2021] IEHC 691).

25. So I turn to apply those principles to the facts of the present case. The primary issue to be addressed is whether or not the plaintiffs have established a serious issue to be tried. As noted at the outset of this judgment, there are in fact two limbs to the plaintiffs' claim, and I will deal with those in turn.

26. The first limb is in relation to the claim for trespass. I am satisfied that there is a serious issue to be tried in relation to that. It seems, particularly having regard to the events of November 2013 and 2014, that part of the property in sale may lie on the plaintiffs' lands. That I understand will be disputed at the full hearing, but it does seem to me that having regard to the fact that the folio maps were recalibrated in 2014 that there is an arguable or serious issue to be tried that there has been a trespass.

27. The second limb is the claim for adverse possession and in relation to that I am not satisfied that a serious issue has been made out. The reason for that is that the entire basis of the claim for adverse possession is undermined by the plaintiffs' own evidence. It is trite law that adverse possession cannot occur if a person has gone into possession or occupation of lands with the consent or permission of the landowner. Here, the point made by Mr. McLoughlin in both of his affidavits is that Mr. Shields, the registered owner of the lands, handed over the keys to him, handed over possession of the property by way of compensation for the trespass arising from the construction of the extension on the plaintiffs' lands. There is nothing in the evidence which suggests that that was time limited. The implication seems to be that Mr. Shields was emigrating permanently to Australia, he was walking away from a property and presumably

attempting to walk away from his debts, and that he purported to hand over possession of the property to the plaintiffs. That averment simply cannot be reconciled with a claim for adverse possession. The registered owner has given consent and there is no suggestion that it was time limited, there is no suggestion that there has been any attempt since to revoke that consent. Therefore, the claim for adverse possession is simply not made out at this stage. It may well be that better and different evidence is produced at the hearing of the action, but there is nothing before the court on this application in terms of evidence which supports a claim for adverse possession.

28. During the course of the written legal submissions, there is an attempt made to introduce a *different* argument, i.e. that some form of tenancy at will had arisen which has since been terminated. With respect, that is not the case that is pleaded. The case pleaded is for adverse possession. If there was any doubt about that, it is removed by the terms of the solicitor's affidavit sworn by Mr. Fitzpatrick on 7 March 2024. At paragraph 7 of that affidavit, he specifically and correctly characterises the claim as a claim in adverse possession and says that the plaintiffs' claim is that they have extinguished the rights of the borrowers who emigrated to Australia over fifteen years ago. There is no criticism of Mr Fitzpatrick intended. He is, in fact, correct: that is the case that is being made. It may be that there will be an application to amend the Equity Civil Bill. It may be that different evidence is produced at the hearing of the action, but as I say, on the evidence currently before the court, there is simply no serious issue to be tried in relation to the adverse possession claim.

29. It is necessary, then, to move on to consider the balance of justice. It is necessary to consider what prejudice, if any, the plaintiffs would suffer in the event that an interlocutory injunction is refused.

30. In analysing prejudice where an interlocutory injunction is refused, sometimes there can be immediate prejudice; sometimes there can be a longer term prejudice. For example, if in the context of an employment dispute an injunction is *refused* that can cause immediate prejudice and the employee who claims to have been wrongfully dismissed may be put out of their wages and they may suffer an immediate financial prejudice. There may also be a loss of reputation if they have been removed from the post and that is a prejudice which is caused and would not be properly remedied even if they are put back in post after the full hearing. An example of a longer term prejudice would be where the failure to grant an interlocutory injunction may render the proceedings, in part at least, nugatory. An example might be where a complaint has been made that a structure is being demolished as part of a development project and that demolition is unlawful. If no interlocutory injunction is granted, then even if the plaintiff in the hypothetical case were to succeed at the trial of the action they would have suffered irremediable prejudice in that the structure they were seeking to protect would be gone.

31. Nothing of that sort arises in the present case. The logic of the plaintiffs' claim in trespass is that, following the trial of the action, they would be entitled to either (i) an injunction directing the removal of that part of the extension to the dwelling house which is said to have been constructed on their lands; or, alternatively, (ii) an award of damages to compensate them for the loss in value of their lands. The refusal of an interlocutory injunction does not create any

prejudice for the plaintiffs in the short or long term. The claim for trespass is confined to a relatively small part of the overall dwelling house. It has never been suggested that the plaintiffs would be entitled, on the basis of the claim for trespass alone, to occupy the dwelling house. This is not a case, therefore, where a party has been put out of a property in respect of which they claim a possessory interest.

32. There is no prejudice in the long term. The ability of the court of trial to grant an injunction or damages is not adversely affected by the transfer of title to the lands to the new purchaser. The purchaser of the dwelling house is on *actual notice* of the claim in trespass. In this regard, it is a special condition of the contract for sale which has been entered into in relation to the property that the purchaser is on notice of the boundary discrepancy. I have since been provided with a *pro forma* copy of the contract for sale entered into on 29 February 2024. In the document schedule, expressly included at point 8 is a copy of the Equity Civil Bill in these proceedings of 11 December 2023. In other words, the purchaser of the property is on express notice of the existence of these proceedings. They are bound by that notice, and, therefore, they cannot resist any claim which may be made against them either by their being added to these proceedings, or separate proceedings in trespass being taken against them. They cannot claim, for example, to be a *bona fide* purchaser for value without notice. They are bound by the claim as is made, and, therefore, there was no prejudice suffered by the plaintiffs. As correctly put by counsel for the defendants in his written submissions, the plaintiffs are no worse off if the sale goes through. Their claim for trespass, such as it is, continues. They may have to modify the proceedings, but they have a claim which, if it is made out on the merits, is

binding and can be enforced against the purchaser. Therefore, there is no prejudice.

33. It is unnecessary to consider the issue of prejudice in relation to the claim for adverse possession in circumstances where, as already indicated, the threshold of a serious issue has not been reached.

34. It was urged on me during the course of the hearing that I should refuse relief by reference to delay. It is not necessary for me to deal with that in this judgment in circumstances where the outcome of the interlocutory injunction is clear by reference to the principles identified by the Supreme Court in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd*. Therefore I make no comment one way or another in relation to the issue of delay. That concludes my ruling.

[Counsel then made submissions as to the allocation of the legal costs of the application for an interlocutory injunction]

35. I will now deal with the issue of costs. Under the amended rules, and particularly having regard to the Legal Services Regulation Act 2015, the court is required, when it can, to deal with the costs of an interlocutory injunction at the time, rather than simply reserve them. However, that is subject always to the overriding proviso that if the costs cannot be dealt with justly at this stage, they should be reserved or at least made costs in the cause. Here, I am satisfied, having regard to the principles laid down by Clarke J. in *ACC Bank plc v. Hanrahan* [2014] IESC 40, [2014] 1 I.R. 1, that this is an appropriate case in which to allocate the costs. It seems to me that the application for an interlocutory injunction was misconceived in that it was based on a misunderstanding of the significance or otherwise of the sale of the property. It

has never been the case that a neighbour who has a dispute in relation to trespass is entitled to injunct the sale of the entire property, that is because remedies are available in trespass and those are not in any way diminished or undermined by the sale of the property. One of the factors identified by Clarke J. in the *Hanrahan* judgment is whether something may turn up at trial or whether an issue may be revisited at trial and that the trial judge may have a better understanding of the factual matrix than the judge hearing the interlocutory application. That does not arise here. The issue on which I have decided the application for an interlocutory injunction will not be revisited. The point is that the application for an interlocutory injunction in relation to the claim in trespass was misconceived.

36. The defendants are entitled to recover the costs of the application for the interlocutory injunction in this court and the court below. The costs of the High Court stage are to be adjudicated as High Court costs, i.e. not on the Circuit Court scale.

Appearances

Helen McCarthy for the plaintiffs instructed by Smithwick Solicitors
Michael Connolly for the defendants instructed by Fieldfisher Ireland LLP

APPROVED
22 MARCH 2024