THE HIGH COURT

[2024] IEHC 631

BETWEEN

F.

PLAINTIFF

AND

W., G., A COMPANY

AND

OTHER PERSONS UNKNOWN IN OCCUPATION OF A PROPERTY

DEFENDANTS

JUDGMENT of Mr Justice Liam Kennedy delivered on 6th November 2024.

1. This judgment has been anonymised on the application of the First Named Defendant to the proceedings in accordance with s.27 Civil Law (Miscellaneous Provisions) Act 2008. The Court having been satisfied that the broadcast of any material related to this judgment that would identify the First Named Defendant as having ADHD or dyslexia would be likely to cause him undue stress, acceded to the application and prohibiting the publication or broadcast of any matter relating to the proceedings which would, or would be likely to, identify the Defendant as a person having those conditions.

2. This judgment explains my reasons for my decision: (a) to refuse the Defendant's application to stay these proceedings and/or adjourn a long scheduled and previously adjourned hearing; (b) to grant the Defendant a 21 day extension to the stay granted in my previous order that he vacate the premises in issue (until 21 November 2024); and (c) to grant (in part) the Plaintiff's application to strike out the defence in these proceedings. I will first explain the background and status of the litigation by way of context, confining myself as far as possible to the points relevant for present purposes and using abbreviations employed in earlier judgments in these proceedings but referring to the First Named Defendant as "the Defendant", being the only Defendant for present purposes.

Background

1. The proceedings concern a property in Kilkenny ("the Property") which the Plaintiff purchased from a receiver appointed by AIB Mortgage Bank and Allied Irish Bank plc ("the Banks"), who held a mortgage over it, and which the Defendant (who was not the Mortgagor) was unlawfully occupying. The Plaintiff issued these proceedings and an application for injunctive relief on 3 November 2023. He sought orders to require the Defendant to yield up possession. After affidavits were exchanged, the application came on for hearing and I delivered judgment on 6 August 2024 granting the application in the terms detailed therein ("the Injunction Judgment").

2. As appears from the Injunction Judgment:

a. In 2015, the Banks appointed a receiver/agent over the Property;

b. On 17 August 2023, the Plaintiff bought the Property from the Banks' successor in title, doing so in the knowledge that; (i) the Property was unlawfully occupied; (ii) the Receiver could not gain access; and (iii) the Occupants were refusing to identify themselves, to engage with the Receiver or to recognise his entitlements and were

demanding payment of €146,475 on the basis that the Property had been the Defendant's home for a number of years;

c. The Plaintiff established a very strong prima facie case that he would be likely to succeed at trial. He proved his title. As the registered owner, he is presumed to have good title. No evidence was adduced to impugn his title.

d. The Defendant had not adduced evidence to suggest that he had a lawful basis for their occupation of the Property or legitimate interest therein. There was no lease, payment of rent or permission from a previous owner. The only ground asserted to justify the Defendant's continued occupation - adverse possession - was demonstrably untenable for reasons outlined in the judgment including, inter alia, the Defendant's failure to particularise or substantiate his broad assertions and, more importantly: (i) the terms of his own first affidavit; (ii) the existence of the Banks' previous possession proceedings; and (iii) the July 2016 Order.

3. At the end of the Injunction Hearing, I gave the parties a provisional indication of my intention to grant the orders sought by the Plaintiff, but I delayed formalising my decision because the Defendant's motions (which had also been listed for hearing but had been adjourned in the absence of any books being filed) were pending and I wanted to give the unrepresented Defendant a full opportunity to make his case and also to address outstanding matters simultaneously. Accordingly, I afforded the Defendant an extended opportunity to file further papers or materials to clarify the basis for his adverse possession plea. I offered him the opportunity to file a further affidavit to clarify the basis for his adverse possession claim, emphasising that he should put all material on which he relied on affidavit and that he should exhibit any documents which supported his claim.

4. The Defendant did take various steps following the Injunction Hearing. However, the applications, affidavits, exhibits and other documents and submissions filed by him after the

hearing were generally not relevant to the injunction application, except to the extent that they concerned the adverse possession claim.

5. The most significant development after the Injunction Hearing (and before the delivery of my August 2024 judgment) was the emergence of details of earlier litigation involving the Defendant in connection with the Property - 2016/3052P, *AIB Mortgage Bank and Allied Irish Banks plc v David Walshe* ("the 2016 Proceedings"), of which the Plaintiff had previously been unaware. It emerged that Mr Justice Binchy made an order in those proceedings on 22 July 2016 ("the July 2016 Order"), requiring the Defendant to deliver up vacant possession of the Property and restraining him from trespassing. The Defendant had not adverted to that litigation (or the July 2016 Order) in his affidavits and submissions at the hearing of the injunction application.

6. The Defendant's averments and adverse possession plea appear fundamentally inconsistent with the July 2016 Order and, indeed, also with the very existence of the 2016 Proceedings. He maintains that Mr Justice Binchy subsequently set aside the July 2016 Order on his application on 13 December 2016. The Court's records tell a different story, and they are consistent with information furnished by the solicitors who represented the Plaintiffs in those proceedings. The Defendant may have misunderstood the significance of the order made by Mr Justice Binchy on 13 December 2016. It is clear that the 13 December 2016 Order struck out the Defendant's application (rather than the July 2016 Order) on the basis that the Court had *"no function in the hearing of the Motion herein".* Since the stay on the July 2016 Order had already expired by the time of the application, the Court presumably accepted the Plaintiffs' submission that the Court was "*functus officio*" and that any stay application would need to be directed to the Court of Appeal. No such application was made. Although the Defendant may have been under the impression that Mr Justice Binchy reversed his earlier order and/or struck out the 2016 Proceedings, he is evidently mistaken. I am satisfied that it

was the Defendant's own application (for a stay) which was struck out, leaving the July 2016 Order intact. Accordingly, the Defendant's claim (to have enjoyed unchallenged occupation of the Property over the years) is undermined by the fact of the 2016 Proceedings, even more so in view of the July 2016 Order. The mere initiation of the 2016 Proceedings appears fatal to his adverse possession claim, irrespective of the outcome of those proceedings. The ultimate outcome, the July 2016 Order, presents yet another obstacle.

7. The Defendant's 2 May 2024 affidavit was his main response to my repeated exhortation to clarify the basis for his plea of adverse possession, reiterating his assertion of adverse possession and disclosing he had lodged a claim with Tailte Éireann (which was subsequently exhibited without greatly advancing matters). While again advancing sweeping assertions, the affidavit did not adequately set out, particularise, document or verify, the basis for such claims. Nor did the Defendant adequately explain his contradictions as to when he moved into the Property. In the meantime, days after the Injunction Hearing (at which I had indicated that I was minded to make an order for possession) he filed his application under s.49 of the Registration of Title Act 1964, seeking the registration of his adverse title by Tailte Éireann. (A further application was apparently filed following the rejection of the initial submission but nothing turns on that for present purposes).

8. Although his affidavits asserted that the Property was his family home, the Defendant helpfully confirmed to the Court following the Injunction Hearing that he was the only person permanently living at the Property. Furthermore, it was established that he has alternative accommodation available to him and he has used other residential addresses in different contexts, some very recently.

9. None of the Defendant's filings since the Injunction Hearing adequately address the fundamental issues with the case he seeks to advance. Nor do they not lend any credence to his position. Nor do they adequately address the issues noted in the Injunction Judgment.

Accordingly, despite being given ample opportunity, he has still not advanced a stateable basis for his repeated assertion of rights acquired on the basis of alleged adverse possession.

10. The Injunction Judgment concluded that the balance of justice and the proportionality analysis favoured the reliefs sought on the basis of, inter alia: (i) the Plaintiff's entitlement in respect of the Property; (ii) the fact that the Defendants have unlawfully occupied the Property for several years, obstructing those lawfully entitled to possession; (iii) the manner in which the receivers were dealt with and obstructed; (iv) the Defendants' failure to make any proposal to pay rent; (v) the fact that damages would be an adequate remedy if the Defendants were to successfully defend the proceedings); (vi) my doubt as to the enforceability of any damages award against the Defendants; (vii) the fact that the High Court previously made an order for possession in respect of the Property with which the First Defendant failed to comply and which he failed to disclose in these proceedings (although he has a different understanding of the outcome of that litigation). Accordingly, I directed the Defendants to vacate the Property pending trial (with a stay to 31 October 2024). The judgment noted that the parties furnished undertakings to the Court. In particular, the Defendant undertook to comply with any order for possession and to vacate the Property peacefully and without difficulty, if so directed, subject to his entitlement to seek a stay/extension from this Court or, if necessary, from the Court of Appeal. However, in the event of the absence, refusal, or expiration of any stay/extension, he will comply with any order for possession granted by this Court.

11. I gave the Defendant until 31 October 2024 to yield up the Property to afford him time to make alternative arrangements and to vacate and to allow the hearing of his then pending applications, giving him yet another chance to substantiate his claims or to seek an extension from me or from the Court of Appeal. I made clear that he should not assume that extensions would be granted.

12. My 4 September 2024 judgment related to the 30 July hearing and noted that several motions had been listed for that date, but the Defendant's motions were again adjourned at his request. In addition, the Plaintiff applied to summarily strike out other proceedings initiated by the Defendant. However, in fairness to the (unrepresented) Defendant, I determined that any such application should be grounded on a Notice of Motion and a comprehensive affidavit, setting out all facts and matters relied upon, to which he would have the opportunity to respond. I gave directions to facilitate the listing of any such application along with the other outstanding motions and other matters, including for the subpoena and cross examination of witnesses.

Defendant's Application for a Stay

13. As noted above, I originally intended the July hearing to deal with outstanding issues following the Injunction Hearing, including the Defendant's motions. However, the Defendant was not in a position to proceed with his motions so, despite the Plaintiff's opposition, I adjourned those matters and directed that the Plaintiff's proposed strike out motion should be dealt with on the same occasion, to resolve various outstanding pre-trial issues. I listed the matter for mention in advance of the new (October) hearing.

14. At a directions hearing on 26 September 2024 the Defendant disclosed that he had recently been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and sought to adjourn the 29 October 2024 hearing accordingly. I directed that the Defendant issue an application, explaining that detailed medical evidence would be required to ground any such application if he wished to pursue the issue. I noted clear that, even if the hearing was adjourned, that would not necessarily lead to an extension to the date on which he would have to vacate the Property. I also encouraged him to obtain legal advice and representation and, pending such advice becoming available, suggested he consider arranging to be accompanied in court by a friend to help him organise his notes and his thoughts. I noted that the Court would

continue to endeavour to accommodate his need for additional time as much as reasonably possible (in accordance with the approach adopted throughout the proceedings prior to his diagnosis). I repeated these points at a further directions hearing on 22 October 2024.

15. The Defendant duly issued an application on the basis of his recent diagnosis seeking the adjournment of the proceedings and/or the motions listed for hearing on 29-30 October 2024. The Notice of Motion states that the Courts Service has no facilities or processes in place to assist him with his disability and that a process is required to allow him fair and equal treatment in the courts. His grounding affidavit exhibits the report of two Psychologists, Dr Carol O'Dwyer and Aoife Keating and asserts that the Courts Service are in breach of s.26 of the Disability Act 2005 in the absence of a facility or process to deal with someone with a cognitive disability whereas s. 26 requires public bodies:

> *"to ensure that their services are accessible for persons with disabilities by providing integrated access to mainstream services where practicable and appropriate"*

16. The affidavit also states that the Courts Service's lack of facilities was

> *"in clear breach of articles by The Human Rights and Equality Commission and Persons with disabilities under the European Convention on Human Rights which I feel is a degrading treatment (Article 3 of the Convention) over the lack of empathy, facilities and processes available to me by the Courts Services. Discrimination is when someone treats you worst or 'less favourably' than another person is, has been, or would be treated, in a similar situation, because you fall under the 'protected grounds'."*

17. The affidavit also exhibits correspondence with the Courts Service in relation to the services available together with a report of the National Disability Authority and states that any past mistakes or errors on his part were the result of his undiagnosed disability and that there had been no intention to mislead.

18. The genesis of the Accredited Clinical Psychologist's 16 September 2024 report is significant. The Defendant's self-referred, without reference to the general practitioner, who

had been treating him for depression. They were not informed of the legal proceedings. The report notes that the Defendant sought assessment:

> *"following long-standing attentional and behavioural concerns querying a possible diagnosis of attention deficit hyperactivity disorder."*

19. The Defendant informed the authors of the report that he required the assessment:

> *"to understand himself and his past behaviour, to 'close that chapter' and move onto the next stage of his life in peace."*

20. The report

a. confirms that the Defendant

> *"meets the criteria for a diagnosis of Attention Deficit Hyperactivity Disorder (combined presentation) with co – occurring Specific Learning Disorder with impairment in spelling (dyslexia)."*

b. summarises the Defendant's account of his concerns, included his experiencing intense bouts of anger throughout his life, his difficulty controlling his emotions followed by guilt and regret, struggles to listen to conversations or to follow through on tasks, his education difficulties with deficits in reading and comprehension, creating a sense of constant anxiety and hypervigilance.

c. showed that the Defendant's composite scores for his self-reporting questionnaire fell in the *"Markedly Atypical/Very Significant Problem"* range for Focus, Effort, Emotion, Memory and Action. His Activation score fell in the *"Moderately Atypical/Significant Problem"* range.

d. referred to his requiring two attempts to complete an online ADHD test, concluding that the Defendant

> *"has a High Level of ADHD symptoms when compared to the general population."*

e. summarises the Defendant's account of his inattentiveness, tendency to lose focus or become distracted, noting that previously his ex-wife organised his tasks, telling him

what to do and what to bring and his current partner now helps him keep track of appointments and responsibilities.

f. places his overall cognitive ability and perceptual reasoning in the very low range for his age; his verbal comprehension and working memory abilities are average.

g. concluded that he met the criteria for an ADHD diagnosis and contained (apparently generic) information about possible treatment options and strategies.

21. The Defendant submitted that:

a. *"disability"* includes physical, intellectual, mental and emotional conditions and his application for a stay was based on evidence which wasn't available at the injunction hearing and which would have affected the outcome as the judgment referred to issues which he attributes to his cognitive disability as a litigant in person. The outcome

> *"could have been completely different had the honourable judge been aware of this at the time to take this into consideration".*

b. Submitted that the Courts Service had made it unduly difficult to avail of any services in the absence of reasonable accommodation and did not have the processes or facilities required pursuant to the Disability Act 2005. He alleged degrading treatment and discrimination contrary to the European Convention on Human Rights and cited sundry sources, including the European Parliament's Recommendation 1592 (2003) as support for the proposition that

> *"there was a European and worldwide consensus on the need to protect people with disability from discriminatory treatment (Glor v Switzerland, 2009, 54) which included an obligation for the states to ensure "reasonable accommodation" to allow persons with disabilities the opportunity to fully realise their rights, and a failure to do so amounted to discrimination."*

c. Having referenced his rights to a fair trial and to an effective remedy, submitted that the injunction judgment was unsafe, as the Court Service failed in their duty towards him *"which had a serious effect in the judgement outcome"*.

d. Complained that his cognitive disability controlled his life, it was like climbing Mount Everest on a daily basis, that he was required to face this hurdle regardless of the stress and anxiety it subjected him to and that the proceedings had been stressful due to the short timeframes afforded to him but that he could deal with motions once they were separated on a one at a time basis.

e. Noted that service providers were obliged to do all that is reasonable to accommodate the needs of the person with the disability, asserting that the Court Service had not helped him which was discriminatory and the Plaintiff accordingly had an unfair advantage. Accordingly, the case should be extended until the plenary hearing and any motions should be dealt with one at a time because over the last 12 months he had been

> *"emotionally overwhelmed, suffering from brain fog lack of focus, task paralysis and burnout, it is totally unreasonable and unrealistic to expect someone with a Cognitive Disability to work at the same pace, speed, or ability as (the Plaintiff's counsel)."*

f. Responded to my previous encouragement to him that he retain solicitors or bring a friend to court. He was waiting to hear from solicitors and two friends who he would have chosen to bring to court were unavailable.

22. The Plaintiff submitted that; (a) it was a novel application. Many people operate with ADHD but it has never derailed legal proceedings or required their truncation; (b) the report does not refer to the legal proceedings, calling into question whether he informed the doctors of the proceedings and no weight should be attached to it; (c) the conditions and alleged brain

fog etc had not inhibited the Defendant to date. He had initiated approximately 20 motions or affidavits[1] and had not been inhibited in his defence of the proceedings.

23. The Defendant responded to the Plaintiff's submissions by emphasising that he had been diagnosed with dyslexia as well as ADHD. He said that he had not told the psychologists about the proceedings because the referral was purely on medical grounds. He saw no need to mention proceedings. ADHD testing was stressful enough without referencing the litigation. He had received help with the affidavits from others, which explained his ability to file the various documents, notwithstanding his condition. He acknowledged that many people have ADHD and that the condition covers an array of different things, submitting that some people have coping skills but that he didn't, having been diagnosed late in life, which is why he had recently sought help.

24. After the conclusion of the hearing of the Defendant's adjournment/stay application, I indicated that I was not minded to grant the application and that my reasons would follow. Thereafter, the Defendant submitted additional documentation by email in support of his application for a stay. When the Court resumed (to deal with the next application in the proceedings), I noted the inappropriateness of the informal submission of further documents in this way, particularly when the hearing on that issue had concluded. I also noted that the documents appeared irrelevant in any event. Several related to criminal rather than civil proceedings and the relevance of the others was obscure. Nevertheless, to ensure that no material point was overlooked, I asked the Defendant to clarify their significance, but he declined to do so, saying he had just forwarded onto the Court the material sent to him over lunch and he would deal with them on appeal if necessary.

Conclusion on Application for a Stay

[1] There seems to be some question as to that figure.

25. The timing of the applications for a stay or adjournment goes to their credibility and to my discretion. The proceedings have been underway since November 2023 and the Defendant has responded to the injunction application with counter motions and affidavits. I have delivered two judgments, the first requiring the Defendant to vacate the Property by 31 October 2024. There have been several hearings. The Defendant's applications must be seen in the light of previous adjournments (including of his own motions) sought by him. They come late in the day, as the possession order was due to take effect.

26. Against this, the Defendant submits that his delay (and any criticism of his past conduct of the litigation) should be attributed to his recent diagnosis. The report confirms the Defendant's diagnosis as far as it goes but does not go as far as the Plaintiff submits. I accept that the Defendant may well suffer from ADHD; indeed, both sides noted that the condition is not uncommon within the general population. I accept that many Irish people have experience of the condition, personally or through friends or family, and the experience of people with the condition may vary. The evidence before me would not justify a conclusion that the condition generally prevents all persons with ADHD or dyslexia from effective participation in legal proceedings nor am I satisfied that this was the case here.

27. The report does not change my assessment of the proceedings to date or of the fundamentals of the parties' positions. In the absence of cross examination at plenary hearing, I accept for present purposes that the Defendant may have been under a genuine misapprehension as to the significance of the Banks' repossession proceedings and the July 2016 Order. It is not clear to me that any such misapprehension was attributable to his recently diagnosed condition and the credibility of this explanation is reduced since he was assisted in the preparation of his affidavits and other filings. I have noted ongoing issues with the timing, content and organisation of the affidavits and other documents filed and served (or not properly filed and served) by the Defendant and have emphasised his obligation to ensure that all

documents are duly filed (and served on the Plaintiff) and that documents are lodged in accordance with the applicable practice direction (which was furnished to the Defendant). However, such issues are often encountered in the case of unrepresented parties and I am not convinced that particular significance should be attributed to them in this case in the light of the Defendant's recent diagnosis particularly since he has confirmed the assistance available to him. Most importantly, having observed the Defendant on many occasions and having benefitted from his wide ranging oral and written legal submissions, I am satisfied that the Defendant was well able to understand the proceedings and the legal principles and to articulate his position.

28. Many of the Defendant's criticisms were directed at the Courts Service's alleged failure to respond to his condition which he described as discriminatory, prejudicial and a breach of his ECHR rights. There are significant factual and legal issues with such contentions, including, for example: (a) how the Courts Service could be expected to respond to a condition which, according to the Defendant was only diagnosed in mid-September (b) whether the diagnosis constitutes a *"disability"* within the meaning of the Disability Act 2005, which defines the term at s.2(1)as:-

> *"a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment"*;

and (c) the nature of the support which the Courts Service could reasonably be expected to proffer. None of these points were sufficiently addressed by his submissions or medical evidence. In any event, the Defendant does not appear to have availed of the applicable procedures under the Disability Act, including the complaints and inquiry processes under s.38 & 39. In any event, if the Defendant wishes to pursue a claim against the Courts Service under that legislation he would need to do so independently of these proceedings. It is not for me to resolve those issues, to advise him as to strategy or to express a view in that regard.

29. My concern is the fair conduct of these proceedings and whether the Defendant is or has been prejudiced in his ability to defend them. I am not satisfied that this has been the case. I place little weight on the psychologists' report because:

a. I find it difficult to credit the Defendant's submission that the report was for medical rather than legal reasons. Its timing suggests otherwise, as does the fact that it was on the basis of a self-referral, with no briefing from his GP as to his medical history including his treatment for depression (omissions which themselves reduce the reliance that can be placed on such a report).

b. he failed to disclose the existence of these proceedings to the psychologists or the possibility that he would exhibit the report in the proceedings.

c. it diagnosed him as experiencing conditions (ADHD and dyslexia) which, both sides acknowledged in submissions, are scarcely unique to the Defendant but it did not prescribe specific treatment. Nor did it conclude that the condition had the prejudicial effect on his ability to defend these proceedings which he seeks to infer.

d. My recent judgment in *Lynch v Motor Insurers' Bureau of Ireland* [2024] IEHC 587 sets out the standards applicable to such evidence at paragraphs 96 – 103 and 111. For expert evidence to be admissible, the Court must be satisfied not only of their expertise and credentials, but also that they have given an independent opinion, in the knowledge of their duty to the Court and based on an objective assessment of all relevant evidence. The authors of the report were not instructed to proceed on that basis, and I am not satisfied that their report meets that standard. In particular, it does not go beyond a high level diagnosis – it stops short of specifying treatment

or gauging the impact on the Defendant's ability to participate in the proceedings, and it is not appropriate for the Defendant to endeavour to supplement this lacuna in his oral submissions, particularly since I very clearly explained the evidential requirements to him in September. I would have expected that if the authors were concerned that the diagnosis meant that the Defendant required help or intervention then there would have been specific and tailored recommendations to that effect.

e. Most importantly, the report fails to consider what, if any, impact the conditions may have had on the Defendant's defence of the proceedings to date because he did not disclose the full background to them (and his explanation of his reason for seeking the assessment was incomplete). I accept that he found the assessment difficult and was inhibited in discussing the issues, but his failure to be more open with the psychologists necessarily reduces the weight to be placed on their report.

30. I accept that the term "*disability"* may include certain intellectual, mental and emotional conditions but it is not necessary for me to determine in these proceedings whether ADHD or dyslexia constitute a disability for the purposes of the Disability Act 2005, either generally or in the Defendant's case. I have no reason to doubt that the Defendant may suffer from ADHD and dyslexia (as do, it was conceded, a significant proportion of the population) but I have seen no evidence that he has been prejudiced or discriminated against in the proceedings. To the contrary he has consistently been afforded considerable latitude. Indeed, the Plaintiff has objected to this and has protested that the progress of the proceedings has been delayed by such accommodation of him. In *R.B. v A.S.* [2002] 2 I.R. 428 Keane CJ explained at p.447 the balance to be struck in the conduct of litigation involving lay litigants:

"The conduct of a case by a lay litigant naturally presents difficulties for a trial court. Professional advocates are familiar with the rules of procedure and practice which must

be observed if the business of the courts is to be disposed of in as expeditious and economic a manner as is reconcilable with the requirements of justice. That is not necessarily the case with lay litigants. Advocates, moreover, are expected to approach cases with a degree of professional detachment which assists in their expeditious and economic disposition: one cannot expect the same of lay litigants, least of all in family law cases".

31. For me, the key point is that, irrespective of the recent diagnosis, there is no suggestion that there is any evidence or point going to the substantive issues in the proceedings (the Plaintiff's title and the Defendant's claim to adverse possession) which the Defendant has been prejudiced in presenting. I would be more sympathetic to the application if there was a scintilla of evidence to suggest that any crucial points were missed due to the Defendant's condition. None have been identified. The Defendant has been afforded ample opportunity to present his case and has fully and capably availed of that right. The lack of success enjoyed by his submissions is attributable to the fundamental evidential shortcomings rather than to any failure to properly articulate his case due to his recent diagnosis.

32. Because the Defendant was representing himself, I have been at pains throughout the proceedings to make sure he understood what was going on and had the opportunity to put his case. I have given him ample time to make his points and have generally accommodated his requests for adjournments. I did so without being aware of his report but, having seen the report it is not clear to me that any different course of action would have been required if it had been made available to me at the outset of the injunction hearing. Since the Defendant was unrepresented, my approach throughout the proceedings has been informed by the helpful summary by Evan Bell (a Master of the Queen′s Bench and Matrimonial Divisions of the Court of Judicature for Northern Ireland) in the 2010 volume of the Judicial Studies Institute Journal

No.1 which was endorsed by Clarke J. (as he then was) in *ACC Bank v. Kelly* [2011] IEHC 7 (Unreported, High Court, Clarke J., 10th January, 2011):

> *"The primary principle applied by Judges in cases involving self-represented litigants is the principle of fairness. Fairness is the touchstone which enables justice to be done to all parties. A judge in proceedings involving a self-represented litigant must balance the duty of fairness to that litigant with the rights of the other party and with the need for as speedy and efficient judicial determination as is feasible. Achieving this balance is one of the most difficult challenges a judge can face. While a trial judge's overarching responsibility is to ensure that the hearing is fair, it is not unfair to hold a self-represented litigant to his choice to represent himself. A litigant who undertakes to do so in matters of complexity must assume the responsibility of being ready to proceed when his case is listed. If he embarks upon the hearing of his case, he is representing to the court that he understands the subject matter sufficiently to be able to proceed.*
>
> *Although it may later become patently obvious that he is not, litigants who choose to represent themselves must accept the consequences of their choice. While the court will take into account the litigant's lack of experience and training, implicit in the decision to represent himself is the willingness to accept the consequences that may flow from that lack. Indeed, to hold to the contrary would mean that any party could derail proceedings by dismissing his representatives. It is the courts duty to minimise the self represented litigant's disadvantage as far as possible, so as to fulfil its task to do justice between the parties. However, the court should not confer upon a lay litigant a positive advantage over his represented opponent nor is it the position that the party with the greater expertise must be disadvantaged to the point at which they have the same expertise effectively as the other party. That would be a perversion of*

what is required, which is a fair and equal opportunity to each party to present its case.'"

33. The Defendant's report is in generic terms in terms of possible treatment options, failing to identify a specific requirement relevant to the proceedings. It would be different if the need for some specific accommodation was identified (such as an interpreter for a non-English speaker, or facilities for someone with a hearing problem). No such need has been identified beyond the general diagnosis of ADHD and dyslexia.

34. To be clear, I accept the Defendant's submission that the diagnosis may go some way to explaining his contradictory averments at certain points and his failure to understand the significance of the Bank's 2016 Proceedings and the orders therein, including the July2016 Order and the order dismissing his challenge thereto. To that extent it may support him by showing that he may have misunderstood the position and that there was no intention to mislead the Court. However, even if that is so, it does not alter the basic fact that those proceedings (and the July 2016 Order) in particular, appear fatal to his adverse possession claim. At most, his condition may have led him to an unrealistic and delusional assessment of the merits of his case; it did not prevent him articulating that case and the weaknesses in his case have nothing to do with his condition. The Defendant appears to have no answer in respect of the fundamental issues with his case, regardless of any allowance for his conditions.

35. I should also note that I have observed the Defendant represent himself at several hearings. He was well able to present and articulate his position. He made wide ranging submissions citing numerous authorities, latin maxims and legal principles and consistently showed himself well able to defend the proceedings. While I generally did not accept his submissions or their application to this case, his comprehensive defence to date undermines his assertion that he was prejudiced in his ability to contest the proceedings. Accordingly, I agree with the Plaintiff that the diagnosed conditions have not inhibited the Defendant's defence of the proceedings or his advocacy.

36. I also note that the Defendant is a retired company director having founded his own transport and freight business which operated in Ireland, the UK and in Europe. It seems to have been a significant enterprise. The fact that the Defendant was able to found, manage and operate such a business suggests that he could be perceived as reasonably "*high performing*" in that context notwithstanding his diagnosis. The report does not address this issue.

37. If I was inclined to attach any weight to the medical evidence, it could go some way to explaining actions and statements made by the Defendant in these proceedings and the contradictions in his evidence, showing there was no intention to mislead. However, even if ADHD and dyslexia may explain his failure to explain the contradiction in his affidavits and his failure to refer to the Banks' proceedings or the July 2016 Order, they would not change the reality that the objective facts on those points undermine his position. For the same reason the diagnosis would not have affected the ultimate outcome of the injunction application.

38. I am satisfied on the balance of probabilities that the outcome would have been the same if I had been aware of his conditions at the time of my judgment. I see no basis to assert that the Plaintiff had an unfair advantage over the Defendant (nor do I accept the converse proposition which the Plaintiff has advanced). I see no basis for adjourning the proceedings in the circumstances. I previously adjourned a specially fixed hearing date in July at the Defendant's request despite the Plaintiff's objections. A further adjournment would have increased costs and would be unfair to the Plaintiff who had incurred costs in preparing for the hearing, costs which it may be difficult to recoup from the Defendant. The Defendant has not demonstrated disability or prejudice which would justify the reliefs claimed.

39. In the final analysis, it seems to me that the fundamental obstacle which the Defendant faced in the proceedings had nothing to do with the presentation of his case to the Court. His essential problem was not his medical condition but rather the evidential deficit. Despite being afforded ample opportunities to do so, he has not identified a plausible factual basis to contest

the claim. Even leaving aside his own affidavit, his adverse possession defence is contradicted by the objective evidence, including the existence of the Banks' possession proceedings and the July 2016 Order. I accordingly rejected the application.

Application for an Extension to the date by which the Defendant must vacate.

40. The Defendant also sought to extend the 31 October deadline by which he was directed to vacate the Property, relying on the recent diagnosis and on a delay in perfecting the order for possession which prevented him from applying to the Court of Appeal for an extension. The Plaintiff claimed not to have been expecting this application. It is true that the application was only formally made on 29 October at the outset of the hearing but I am surprised that the application was unexpected as the possibility was clearly flagged at both recent directions hearings.

41. The Plaintiff vigorously opposed even a short extension arguing that he had made arrangements with contractors to take possession on 31 October under the current order and would be prejudiced by any delay in circumstances where he had established his title to the property and the Defendant was an unlawful trespasser.

42. For the reasons specified in the first part of this decision, I am not inclined to make a significant change to the date specified in the Order for Possession. I see no basis to do so on the basis of the diagnosis in circumstances in which: (a) the overwhelming evidence suggests that the Property belongs to the Plaintiff and the Defendant is a trespasser with no legitimate interest therein; (b) Contrary to the Defendant's previous averments, the Property does not appear to be his principal private residence and he has alternative accommodation available to him. Indeed, the medical report appears to reinforce this conclusion. It refers to the Defendant living with his partner (which seems to confirm the Plaintiff's evidence - and my earlier finding

- that the Property was not his home or principal private residence) in the light of the Defendant's own statement to the Court that no one else was regularly living in the Property.

43. The Defendant's alternative (and only slightly more persuasive) ground was that an extension was sought to enable him to seek a stay of the Order for Possession from the Court of Appeal in advance of his appeal of that order and the associated judgment. He said that he had tried to file papers in the Court of Appeal but had been unable to do so because the Order for Possession had not been perfected. This explanation of the need for an extension is not entirely satisfactory. I indicated my likely ruling at the end of the Injunction Hearing many months ago and confirmed it in my 6 August 2024 judgement which stipulated the 31 October deadline, so the Defendant has long been aware of the date (and these possession proceedings were launched almost a year ago). However, it appears that he did not take any step to progress the appeal until 2 October 2024 when he unsuccessfully tried to lodge the papers. He drew the matter to my attention at a directions hearing on 22 October and the order was perfected at my direction the following day. If he had taken such steps earlier than the issue could have been quickly addressed. Accordingly, I regard him as primarily responsible for the delay.

44. Nevertheless, despite the Plaintiff's protestations I doubt that a short extension of the date to vacate the property would cause him significant prejudice. In the circumstances, including those disclosed in the recent report, I am concerned to ensure that the Defendant has an opportunity to pursue an appeal and to apply to the Court of Appeal for extension if he decides to do so. For some, but certainly not all, reasons raised by the Plaintiff in its submission I am certainly not inclined to grant a long extension (such as until the appeal was determined) but I agreed to extend the date by which the Defendant must vacate the premises to 21 November 2024 on the basis that the Defendant's undertakings would continue in full force and effect (which he which he confirmed would be the case).

Motion to Strike out the Defendant's Claims

45. The remaining issue was the Plaintiff's application to strike out the Defendant's *"claims"*. The Notice of Motion dated 2 September 2024 sought an order pursuant to Order 19 rule 28 of the Rules of the Superior Courts dismissing the Defendant's claims

> *"on the grounds that the claims as pleaded are frivolous and/or vexatious and the pleadings, including the First Named Defendant's various motions and affidavits, disclose no reasonable cause of action or answer"* or pursuant to the court's inherent jurisdiction on the grounds that *"the claims as pleaded are bound to fail and/or an abuse of process"* (emphasis added in both cases)."

46. The pertinent section of the current Order 19 rule 28 (which effectively combines the old rule with the codification of the inherent jurisdiction of the High Court and provides for the striking out of a defence on similar terms to the striking out of a claim) is as follows;

> *"(2) The Court may, on an application by motion on notice, strike out any defence or part of a defence which:*
> *(i) discloses no reasonable defence to the action, or*
> *(ii) amounts to an abuse of the process of the Court, or*
> *(iii) is bound to fail, or*
> *(iv) has no reasonable chance of succeeding.*
> *(3) The Court may, in considering an application under sub-rule (1) or (2), have regard to the pleadings and, if appropriate, to evidence in any affidavit filed in support of, or in opposition to, the application.*
> *(4) Where the Court makes an order under sub-rule (1), it may order the action to be stayed or dismissed, as may be just, and may make an order providing for the costs of the application and the proceedings accordingly.*
> *(5) Where the Court makes an order under sub-rule (2), it may make an order giving judgment in such terms as it considers just, and may make an order providing for the costs of the application and the proceedings accordingly." (emphasis added)*

47. Three procedural issues arose with the application:

a. Firstly, the Plaintiff's Notice of Motion dated 28 May 2024 sought to consolidate these and three other proceedings. One of those "proceedings" was actually a land

Registry application. An examination of the relevant orders and a review of the DAR for all relevant dates confirms that there had been no such consolidation. On 30 July 2024 I queried the basis for consolidating the Tailte Éireann application with High Court proceedings and the DAR confirms that counsel for the Plaintiff confirmed that he was not seeking reliefs under paragraph 1 of the relevant Notice of Motion (which dealt with consolidation) because *"we would say that the purposes of it have been achieved"*. In those circumstances, given the terms of the Notice of Motion, it is evidently confined to these proceedings.

b. The second procedural issue was that the Plaintiff wished to cross examine the Defendant for the strike out application. It had been envisaged and proposed that there should be oral evidence and cross examination at the 29-30 July hearing but that was in the context that the hearing was also to deal with other motions which required oral testimony. These included factual disputes as to the Defendant's allegations that the Plaintiff or his agents had: (i) harassed and/or assaulted the Defendant; or (ii) wrongfully damaged the property or (iii) acted improperly in seeking to gather evidence. The Plaintiff strongly disputes these claims and also challenges the bona fides of the Defendant's complaint to the Gardai in relation to alleged actions of the Plaintiff or his representatives at the Property. Applications relating to those issues were to have been dealt with at the 29-30 October hearing and oral evidence would have been required to that end in view of the conflict of evidence. Accordingly, it was agreed that evidence adduced under subpoena and cross-examination would be necessary. In the event, the Defendant's applications ventilating those issues did not proceed at the hearing. The Plaintiff's strike out application did proceed but did not in my view require oral evidence and no such oral testimony or cross examination took place. I deemed it inappropriate to permit

cross examination for that application because oral evidence would be a significant departure from the well-established practice on such applications and would be tantamount to a plenary hearing. I did not consider it would be fair to the (unrepresented) Defendant to allow the application to proceed in that manner. To allow cross examination in such circumstances would be contrary to long established practice and jurisprudence (and the terms of Order 19 rule 28). It would have amounted to an expedited and one-sided preliminary plenary hearing. I did not consider there was any basis to proceed in that way.

c. The third and related point is that many of the Plaintiff's submissions hinged on his rejection of claims advanced by the Defendant, being matters that can only be resolved at plenary hearing. Rather than focusing on whether the claim was stateable or bound to fail on the basis of the pleadings and the Defendant's affidavits, the Plaintiff's oral submissions seemed to seek what was tantamount to summary judgment on the basis of strident submissions reflecting his view that the Defendant's statements and claims were untrue and describing his averments as "barefaced lies", an approach which I regarded as unhelpful and inappropriate. Such comments appeared primarily directed to disputed allegations which the Plaintiff clearly regarded as offensive, including claims of harassment or suborning of evidence by the Plaintiff or his representatives, the physical confrontation at the property and the bona fides of a report by the Defendant to the Gardaí. Apart from the fact that these points are disputed, they are peripheral since the central issues, as the Plaintiff has previously stressed, are his title and lawful right to possession and whether the Defendant had any basis to assert adverse possession. I have entirely disregarded such submissions from the Plaintiff where the truth or falsity of such factual issues can only be resolved at plenary hearing. I also reminded both parties

> that the fact that litigants may have different perceptions of particular issues and may regard the other's position as wrong does not mean that the other party is deliberately being misleading and that more measured language may be appropriate. Even allowing for the Plaintiff's understandable resentment of some of the allegations made against him, which he clearly regards as baseless, the tenor and content of some oral submissions was inappropriate and insensitive, particularly in view of the Defendant's diagnosis.

48. The Plaintiff's written submissions correctly summarised the relevant principles noting at paragraphs 21 – 24 that the Court was not limited to the pleadings and could hear evidence on affidavit relating to the issues, but that the extent to which it was appropriate for me to assess the evidence and the facts on such a motion to dismiss was extremely limited (*Keohane v Hynes* [2014] IESC 66). The written submissions correctly acknowledged that any factual conflict must be resolved in favour of the person against whom the application was brought and that it must be assumed that every fact pleaded or asserted on affidavit was correct and could be proven at trial. They also referred to the jurisprudence confirming that the strike out jurisdiction should be used sparingly but that it was appropriate, inter alia, where it can be shown that litigation is brought for an improper purpose or there has been impropriety in the conduct of the proceedings which could objectively be described as oppressive or vexatious. Accordingly, I understand that the Plaintiff rejects many assertions in the Defendants pleadings and affidavits and therefore personally regards them as an abuse of process. However, many contentions advanced on his behalf are also disputed by the Defendant and such factual issues can only fairly be resolved at trial.

49. Although I am not convinced that the Defendant has established a basis for his s. 49 adverse possession application, he was entitled to make such an application and to raise it in

his defence. Indeed, the absence of such an application was commented on in the course of argument at the Injunction Hearing. It was logical for the Defendant to issue such an application if he believed that he had a basis to do so and he would have been prudent to have done so sooner if the facts had justified such an application.

50. The August 2024 judgment identified fundamental issues with the defence advanced by the Defendant. I have afforded the Defendant ample opportunity to file submissions or affidavits to provide a coherent basis for his alleged right of adverse possession but his attempts to do so have not advanced his defence, and I see no basis for an amendment to the current proceedings based on his affidavits, pleadings, and the other material before the court. Some issues could in principle require resolution at plenary hearing and I have therefore disregarded such points. However, the Defendant's first affidavit dated 7 November 2023 undermines his claim to adverse possession, as does the fact of the 2016 Proceedings (irrespective of their outcome). The July 2016 Order has the same effect, irrespective of whether it was enforced and irrespective of the Defendant's current attempt to apply to the Master to set it aside (apparently on the grounds of non-enforcement). It seems to me that for those three reasons alone, the defence is bound to fail and has no reasonable chance of succeeding. Furthermore, most, if not all, of the defence appears unsustainable, with no reasonable chance of success and bound to fail in the light of apparently incontrovertible facts and the evidence of the Plaintiff's title.

51. The Defendant's Defence and Counterclaim in these proceedings was furnished by way of an affidavit sworn 29 May 2024 entitled "*Grounding affidavit of David Walshe in Reply to the Statement of Claim and David Walshe Counterclaim*". It is not necessary or appropriate to parse that document line by line. Much of it is repetitious or plainly without factual or legal foundation. The main themes emerging from that document are as follows;

a. In particular, as appears from various paragraphs including, in particular, paragraphs 3, 7 – 11, 20 – 21, 26 -27 of the pleading, the Defendant claims adverse possession since April 2011 stating that

> *"I was told by a friend that this house was available and I have no intention of discussing my Private Family Affairs in relation to Adverse Possession in the Court for the benefit of Adrian Fox, as I have no contract with him or contractual obligation to him, he is third party interloper in my case".* (sic)

b. Paragraph 9 claims that the Defendant had

> *"no contact with any alleged previous lenders, or was party or contact nor was it necessary for me to seek permission from any lender or receiver to remain in my property". (sic)*

c. Paragraph 28 alleges that the Plaintiff:

> *"bought what he believes was a repossessed property from a Vulture Fund, which has admitted they knew I was living in over 12 years, title to ownership of my property is subject to Adverse Possession, and Adrian Fox would have known this if his due diligence was done correctly, the bank That allegedly sold the interest because they could not get any money from it in law, he bought the rights to litigate or maintain to litigate for himself. I say that Adrian Fox is Champertous, meaning he is trying to get what the Bank could not get and return himself a huge profit. Adrian Fox solicitor failed to get good title in the property and this has resulted in where we are today, Adrian Fox has failed to Make show and prove good title, Good Marketable Title and good title other principal jobs of his Solicitor who acted on his behalf in dealing with Wilson Auctions, he has failed to do this or ignore the issues and is now seeking the courts to remedy his mistakes".*(sic)

52. The plea in paragraph 9 is patently false not only by virtue of the 2016 Order, which the defendant disputes on grounds which appear unsustainable, but by virtue of the fact of the

2016 Proceedings having been initiated, a fact which is indisputable and appears fatal to his adverse possession play. The Plaintiff deals with the 2016 Proceedings at paragraph 13:

> *"AIB tried to take get an interlocutory injunction against me in front of Judge Binchy against me in 2016 but were unsuccessful, case 2016 3052 P AIB Mortgage Bank v David Walshe. I was awarded costs in this case which I have still never received."*

53. As I have noted, that description of the outcome of the 2016 Proceedings is incorrect. Other pleas in the Defence appear equally unsustainable.

a. various paragraphs (including 2 (a) to (m), 23, 25, 28 and 29) seek to impugn the title of Plaintiff's predecessor in title, alleging fraud on the part of the vendor who sold to the Plaintiff (largely by advancing sweeping factual and legal assertions challenging the validity of the assignment of the original mortgage over the property to the vendor on various grounds). The defendant does not allege that the plaintiff was involved in the alleged fraudulent dispossession of the original mortgagor by the vendor or his predecessors in title, but he states that the Plaintiff:

> *"was a victim of this fraud and was entitled to participate by the knockdown price. However, the principles of fraud unravel everything, and caveat emptor applies. These principles make it impossible for Mr Fox to have any legitimate or bona fide claim to the property".*(sic)

These group of allegations are primarily directed at the Vendor (who is not a party to these proceedings) rather than the defendant. They could face significant factual and legal hurdles) if pursued against the Vendor or its predecessor in title. However, such pleas, even if well founded (and I have seen no evidence that they are), do not provide the Defendant with a defence in these proceedings as against the Plaintiff. Firstly, the Plaintiff was not a party to the wrongs alleged. Even more importantly, the Defendant: (i) was not the original mortgagor/owner; (ii) has no rights derived from him; (iii) has

not identified any lawful interest in the property; (iv) has no standing to challenge the Vendor's or the Plaintiff's title. Paragraph 3 of the pleading confirms that the defendant does not claim to have been a party to the mortgage *"or any dealings with the underlying transaction or conveyancing of the property"*. Paragraph 6 likewise acknowledges that he was not a party to the acquisition of title by the vendor and its predecessors in title or the appointment of receivers or the sale to the Plaintiff or the registration of his title. Accordingly, he has no basis to take these points and the Plaintiff, as registered owner, is entitled to rely on the presumption that he has good title pursuant to s.31 of the Registration of Title Act 1964.

b. At various points, including paragraphs 14 - 19, 30 – 31 and 36 – 38, the Defendant made a range of factual allegations against the Plaintiff and his representatives. Some of those claims could be very serious if there was any substance to them (which the Plaintiff vigorously disputes). However, they do not change the fact that the Plaintiff has good title and that the Defendant is an unlawful trespasser. They do not provide a defence to the claim. Nor can the Defendant simply assert the "clean hands" doctrine to prevent the Plaintiff securing relief to which he is entitled on the basis of such, as yet unproven, allegations. If there was substance to such claims they would be dealt with by damages. The pleading advanced various other points, including at paragraphs 12, 20 – 21, 24, 32 – 35 and 39 - 42, which were, on their face, legally unsustainable and/ or irrelevant and thus do not afford a defence, many of which were dealt with in my earlier judgments and also raised issues such champerty and maintenance, whether the Property sale was void because of the alleged absence of a BER rating and further allegations in respect of the Plaintiff's title and that of the parties from whom he derived

title, but without advancing coherent or stateable bases for defences in respect of such assertions.

54. Having formed the view that large parts of the Defence are bound to fail and have no reasonable chance of success, I reviewed the remaining paragraphs but have not identified any residual pleas which would constitute a potential defence. On the basis of my review of the pleading, I believe that all matters raised in the Defence are bound to fail and my provisional view is that the Defence should be struck out in its entirety. The Plaintiff maintains that the Counterclaim is also without foundation. That may be so, but that requires a factual determination which I cannot make on the basis of the papers alone. That issue would need to be resolved at plenary hearing. The Defendant may pursue his counterclaim in the usual way if he wishes, subject to the risk of adverse cost orders if he is unsuccessful. It is neither necessary nor appropriate for me to comment on the merits of those claims. I am not inclined to strike out the Counterclaim since those pleas would require a factual determination, save to note that the Defendant would be well advised to review his Counterclaim since certain please would appear difficult to maintain in view of my findings in this judgment and its predecessors. Accordingly, my provisional view is that I should direct that the Defence (but not the Counterclaim) be struck out, the Plaintiff to apply to have the matter listed for an assessment of damages. However, the specific provisions of the Defence and Counterclaim were not examined in either side's submissions on the strike out motion, I will therefore offer each party the opportunity to make further submissions in response to my provisional observations in this regard before determining the extent to which some or all of the pleading should be struck out and the terms of any consequential orders.

55. I will list the matter for any such submissions on 12 November 2024 at 10am.

Addendum

A directions hearing was scheduled following the circulation of this judgment. The Defendant circulated a draft amended Defence and Counterclaim on the day before that hearing. At the hearing, the Defendant made no submissions in response to my provisional conclusion that the defence (but not the counterclaim) in its current form should be struck out. However, he sought leave for the amended pleading to replace the current pleading. The Plaintiff opposed the application on the basis of its lateness but also because the amendments were advancing claims which were unsustainable in the light of my earlier rulings. If the only issue was timing, and it appeared the Defendant had a valid defence, then I might be inclined to show him as much latitude as possible in circumstances in which he is unrepresented and in view of his medical condition. However, even if I was to give leave for the defendant to amend the pleading, the proposed amendments would not advance matters. They rehash issues and positions which are manifestly unsustainable. In particular, the focus of the draft amended pleading shifts from the defendant's alleged adverse possession claim to an attack on the plaintiff's title on the basis that there was no valid transfer to Everyday Finance and therefore the subsequent transfer to the plaintiff was not only invalid but fraudulent. This plea goes considerably further than the case previously advanced by the Defendant and contradicts his previous case in some respects (notably the Defendant's previous express disavowal of any such criticism of the Plaintiff with regard to the title of his predecessors). The plea appears to be a *"cut and paste"* from arguments commonly made by parties resisting receivers' attempts to gain possession from mortgagors. Whether there is any basis in fact or law for such a plea in the context of such mortgage proceedings obviously depends on the circumstances of the individual case but there is certainly no basis for the Defendant, who was purely a trespasser, to advance such a plea in

this case. Nor, for example does his reference to *"dealing as a consumer"* advance matters when defending his position as a trespasser.

The bottom line is that, even if the Defendant's allegations in respect of Everyday Finance were correct – and I have no reason to suspect that they are, and I make no finding in that respect - he would have no standing to take such points against the Plaintiff. The Plaintiff is the registered owner of the property. The pleas advanced in the draft amended defence and counterclaim have no legal merit and are bound to fail. Accordingly, I refused leave for the amendment and directed that the existing defence (but not the counterclaim) should be dismissed.