THE HIGH COURT

[2022] IEHC 302

[2021 No. 73 CA]

BETWEEN

CLUID HOUSING ASSOCIATION

PLAINTIFF

AND

ANTHONY WHELAN AND SYLVIA WHELAN

DEFENDANTS

JUDGMENT of Ms. Justice Bolger delivered on the 20th day of May, 2022

1. This is an appeal from a decision of the Circuit Court dated 20 May 2021, granting the plaintiff an injunction ordering the defendants and all other persons in occupation to vacate the property known as Apartment 205, Burnell Court, Northern Cross, Clarehall, Dublin 17 and a subsequent decision of 11 October 2021 granting the plaintiff their costs of the application. The plaintiff's application was grounded on a notice of motion dated 9 October 2020 seeking an interlocutory injunction requiring the defendants to vacate the property, and on an equity civil bill dated 9 October 2020, in which the plaintiff sought an order for possession of the property, mesne rates, and damages for trespass.

Background

2. The plaintiff is a private company, a registered charity and an approved housing body for the purpose of the Housing (Miscellaneous Provisions) Act, 1992 engaged in the provision of affordable housing. On 6 May 2014, the plaintiff entered into a tenancy agreement with the defendants for Apartment 48, Churchwell Crescent, Belmayne, Malahide Road, Dublin 13 (hereinafter referred to as "the first apartment"). By November 2014, that tenancy had become a tenancy of indefinite duration as a "Part 4 tenancy" within the meaning of the Residential Tenancies Act, 2004.

3. During their occupation of this property the defendants made complaints to the plaintiff about antisocial behaviour and other matters. On 19 September 2018, the property was badly damaged by a storm and the defendants had to move out to allow the plaintiff to carry out essential repair works. The plaintiff arranged temporary alternative accommodation for the defendants, initially in a hotel and then in self-catering accommodation. The defendants found this accommodation to be unsatisfactory, and the plaintiff arranged to make another one of its apartments at 205 Burnell Court (hereinafter referred to as "the second apartment") available to the defendants on a temporary basis.

4. Shortly after the defendants moved to the second apartment they informed the plaintiff that they wished to stay there but the plaintiff, at all times, made it clear that the defendants were in the second apartment on a temporary emergency basis, and would have to return to the first apartment once the repair work was completed.

5. On 19 December 2018, the plaintiff telephoned the defendants to advise them that the repair work on the first apartment was complete and asked them to move back into that apartment. By letter dated 3 January 2019, the plaintiff advised the defendants again that the repair work on the first apartment was complete and asked them to move back to the first apartment by 14 January. The letter warned them that if they did not move back to

the first apartment, that the plaintiff would invoke its right to terminate that tenancy. The defendants did not vacate the second apartment or move back to the first apartment. By letter dated 13 March 2019, the plaintiff advised the defendants again that they were required to vacate the second apartment and move back to the first apartment. The letter stated that the defendants' failure to move back to the first apartment was a breach of their tenancy agreement and that remaining in the second apartment without permission was trespass.

6. By letter dated 20 May 2019, the plaintiff advised the defendants that they had abandoned their tenancy of the first apartment, and that the plaintiff was going to terminate the tenancy and repossess the property. Around the same time as that letter, the plaintiff decided to carry out further repair work on the first apartment while it was unoccupied. Those works were certified as complete in September 2019, and on 20 September 2019, the plaintiff wrote to the defendants calling on them to vacate the second apartment by 4 October 2019. The defendants did not do so. The plaintiff sent the defendants a further warning letter on 27 January 2020 and, thereafter, the plaintiff's solicitors sent a final warning letter dated 5 February 2020.

7. The plaintiff's intention at that time was to issue these proceedings in March 2020 but, due to the onset of the covid-19 pandemic, the resulting restrictions and the need to gather up documentation, they did not do so until 9 October 2020.

8. When the matter came before the Circuit Court on 20 May 2021. the first apartment was still vacant, even though the defendants' tenancy of it had been terminated. The plaintiff advised the court that it would permit the defendants to move back into the first apartment. The defendants declined to do so. The Circuit Court granted an injunction directing the defendants to vacate the second apartment on 20 May 2021. Thereafter the plaintiff assigned the first apartment to another family on Dublin City Council's housing list. The defendants have remained in occupation of the second apartment pending the outcome of this appeal.

The plaintiff's submissions

9. The plaintiff contends that the agreement between it and the defendants in respect of the second apartment was not a tenancy but was a license agreement which they could terminate at will. The plaintiff did terminate it on a number of occasions between January and March 2019 and since then, the defendants have been trespassing in the second apartment. The plaintiff disputes there was ever a tenancy in being or that it was, at the time of the commencement of the agreement allowing the defendants to occupy the second apartment, the intention of either party that it would ever be a tenancy agreement. The plaintiff accepts that the defendants have always paid rent but maintains that the rent was, initially, in respect of the first apartment. Thereafter, when that tenancy was terminated, an increased rent was paid by the defendants which the plaintiff's deponent, John Kennedy, says was "presumably" to discharge their arrears which he said had accumulated.

10. The plaintiff relies on the decision of the Supreme Court in *Gatien Motor Company Ltd v. Continental Oil Company of Ireland Ltd* [1979] IR 406 in arguing that evidence of exclusive possession is not decisive in establishing a tenancy. They also rely on the decision of the Supreme Court in *Irish Shell Ltd v. Costello Ltd* (No. 2) [1984] IR 511 where the court held that "*In all cases it is a question of what the parties intended, and it is not permissible to apply an objective test which would impute to the parties an intention which they never had*". They contend that both decisions require the intention of the parties to be established in determining whether a lease came into existence.

11. The plaintiff accepts that because it seeks a mandatory injunction at the interlocutory stage, it must show it has a strong case that it is likely to succeed at the hearing of the action; *Maha Lingam v. HSE* [2005] IESC 89. The plaintiff maintains that it has established a strong case that the defendants have no lawful basis for remaining in the second apartment and are, therefore, trespassing and that any existence of a tenancy is readily capable of being determined on an interlocutory basis. They argue that damages are not an adequate remedy as, while they accept the defendants are paying rent, the defendants' continued unauthorised occupation of the second apartment prevents the plaintiff from making it available to other tenants on Dublin City Council's social housing list. The plaintiff says that this an ongoing and serious harm and is not capable of being remedied by damages. The plaintiff also questions the defendants' capacity to meet any award of damages that might be made in its favour. The plaintiff contends that the balance of convenience favoured, and continues to favour, the granting of the relief sought as the plaintiff had allowed the defendants to return to the first apartment until after the Circuit Court hearing. The defendants' Part 4 tenancy rights in respect of the first apartment, and their right to housing could have been fully vindicated (at the time of the Circuit Court hearing), even though they were not permitted to remain in the second apartment.

12. The plaintiff cites the recent decision of *Clare County Council v. McDonagh* [2022] IESC 2 in which the Supreme Court refused to grant an injunction restraining the defendants' trespass of the Council's lands on the basis that the defendants, as members of the traveller community, were owed statutory duties by the Council to offer suitable accommodation to them. The plaintiff distinguishes this situation on the basis that it is not a housing authority and does not have a statutory duty to house the defendants.

13. Finally, the plaintiff submits that an interlocutory order that the defendants vacate the second apartment is proportionate, as the defendants' decision to remain in the second apartment, instead of returning to the first apartment that was available for them (up to the date of the Circuit Court order), was a conscious choice by the defendants. They made said decision in full knowledge of the risk they were running, that they might ultimately lose the right to reside in either properties.

The defendants' submissions

14. The defendants contend that they have a tenancy agreement with the plaintiff in the second apartment on the basis of their exclusive occupation of the property and the rent they have paid consistently since they moved in. Whilst they do not dispute that the

intention of the initial occupancy was on an emergency and temporary basis, they argue this does not render their occupation as being under a licence rather than a tenancy. They highlight the fact that the plaintiff only mentioned a licence for the first time in the proceedings and, up to that time, the plaintiff always referred to and sought to rely on the temporary and emergency nature of the arrangement.

15. The first named defendant said on affidavit that he increased his payment of rent when it was conveyed to him that the rent in the second property would have been higher than the rent in the first property and he says that higher payment was accepted by the plaintiff. He disputes having had any arrears.

16. Because the arrangement continued after a period of six months, the defendants contend that they have acquired Part 4 tenancy rights and are therefore entitled to exercise those rights and stay in the second apartment until that tenancy is lawfully terminated. The defendants rely on the decision of this Court in *PRTB v. Judge Linnane & ors* (Unreported, Budd J., 23 April 2010) in which Budd J. held that if the PRTB is not to be allowed to deal with an issue to do with a residential tenancy, then its jurisdiction would have to be specifically excluded in the legislation. The legislation does not exclude a temporary or emergency lease, and so the defendants argue that there is no basis for this Court to read an exclusion into the legislation that is not expressly identified therein, and that the matter should be determined by the RTB rather than by this Court.

17. The defendants argue that the plaintiff delayed in seeking an injunction and that their delay defeats the equitable remedy they seek.

18. The defendants argue that granting an injunction would be disproportionate as it would render them homeless, whereas the impact on the plaintiff of not granting the injunction is far less serious. The fact of the defendants' homelessness, if the injunction is granted, is not challenged by the plaintiff, as the first apartment has been given to another family and as such is no longer available to the defendants.

19. The defendants challenge the plaintiff's entitlement to seek injunctive relief in their notice of motion where no such relief is sought in their equity civil bill.

20. Finally, the defendants claim the plaintiff is seeking to prevent the full scrutiny of its claim by having the matter concluded at an interlocutory stage, instead of pursuing the matter at plenary hearing. The defendants contend that the plaintiff is seeking to bypass the full scrutiny of the court by seeking to have what they claim is a complex matter determined at an interlocutory stage.

Has the plaintiff satisfied the strong case test

21. The plaintiff must satisfy the court that it has a strong case that it will succeed at trial, that the arrangement between the parties viz-a-viz the second apartment in which the defendants took up residence on 26 September 2018 was a licence and not a tenancy.

22. Some issues have been raised which I do not consider to be relevant to what this court needs to decide. Firstly, the defendants claim that it is for the RTB rather than the Circuit

Court, or this Court, to determine whether the agreement between the plaintiff and the defendants was a licence or a tenancy. However if this Court were to hold it has no jurisdiction to determine the nature of the agreement, and that the issue should be determined by the RTB, that would, in effect, deem the relationship to be a tenancy, as there is no other basis on which the RTB could have jurisdiction to hear and determine a dispute. Secondly, issues are raised in relation to the nature of the parties' agreement in the first apartment, but I do not consider them to be relevant because the issue for this Court is the nature of the agreement in relation to the second apartment only.

23. There are three elements to a tenancy, two of which are set out at s. 3 of Deasy's Act, 1860; (1) an express or implied agreement between the parties and (2) payment of rent. Subsequent case law has confirmed a third requirement of exclusive occupation.

24. It is common case that the defendants had exclusive use of the second apartment and that they were paying rent to the plaintiff throughout their occupation. The parties disagreed whether the rent was for the first apartment or for the second apartment, but agreed that the rent paid after the defendants moved into the second apartment was higher. The plaintiff claims that the additional payment was towards accrued arrears, but no evidence was put before the court of any such arrears, or why, or how, the additional money was intended to discharge them. The defendants dispute the existence of any such arrears. I find that the defendants believed the higher rent they agreed to pay was for the second apartment. I find no basis for the plaintiff's claim that the rent was for in respect of arrears on the first apartment.

25. The agreement between the parties in relation to the second apartment has to be determined as of 26 September 2018, when the defendants were permitted by the plaintiff to take up exclusive occupation of the property. What happened, thereafter cannot of itself determine the nature of the relationship that was entered into by the parties on 26 September 2018.

26. The parties agree that the defendants' occupation of the second apartment was a temporary arrangement to provide for an emergency situation that had arisen when the first apartment was badly damaged by a storm. The fact that the defendants' occupation of the second apartment was intended initially by both parties to be temporary does not automatically render it a licence. In the absence of a written agreement the court must have regard to any evidence of the parties' intention at the time in order to determine the true nature of the agreement. This is to be determined by their subjective intention in accordance with the decision of the Supreme Court in *Shell Ltd v. Costello*.

27. The plaintiff places emphasis on their request to the defendants in December 2018 and again in January and March 2019 to leave the second apartment. However, at that point in time, even if the relationship was a tenancy rather than a licence, no Part 4 entitlements had accrued and the plaintiff was entitled to require the defendants to leave.

28. The plaintiff highlights the absence of any positive assertion by the defendants at that time that a tenancy existed. I do not set much by that as the defendants were not legally

represented at that stage. Nevertheless they were clearly asserting their wish and intention to stay in the second apartment. In terms of the presence or absence of assertions by the parties as to the nature of the relationship, I note that the plaintiff mentioned licence for the first time when the proceedings were issued in October 2020. At all times up to the issuing of the proceedings, the plaintiff's correspondence referred only to the temporary and emergency nature of the provision of the second apartment to the defendants.

29. The plaintiff also places heavy emphasis on their letter of 10 October 2018 and the reference therein to the defendants' request to stay on in the second apartment, which they say reflects the terms of the agreement as a licence rather than a tenancy. I do not think that letter is indicative of either a licence or a tenancy as regardless of what the relationship was, it was one of well less than six months which meant that the defendants had no right to continue with any tenancy that may have existed against their landlord's wishes.

30. The Supreme Court in *Gatien Motor Company and Irish Shell v. Costello (No. 2)* confirmed the fundamental requirement of establishing the intention of the parties in determining whether a lease came into existence.

31. The defendants urge me not to rely on the decision of this Court in *Smith v. Irish Rail* [2002] IEHC 103 where Peart J. determined that the payment of rent coupled with exclusive possession was conclusive in establishing that a licence and not a lease, was created by the undisputed evidence that the parties expressly intended to create a licence rather than a lease. I do not think it is necessary to decide whether *Smith* was correctly decided as the parties in that case had entered into a written agreement confirming their intention to create a licence. There is no evidence of any such agreement here and no document has been exhibited confirming the parties' express intentions when the defendants took up occupation of the second apartment on 26 September 2019.

32. The intention of the parties at the time the defendants entered into possession of the second apartment must, therefore, be garnered from what they say they agreed when they discussed the matter at the time. The plaintiff's grounding affidavit sworn by John Kennedy, the plaintiff's housing officer, simply states that "*The plaintiff arranged to make another housing unit which it owned at 205 Burnell Court available to the defendants on a temporary basis*". Mr. Kennedy exhibits a letter dated 10 October 2018 from Colin Byrne, the plaintiff's housing manager, to the first named defendant which refers to a conversation between the first named defendant and the plaintiff's head of housing management, John Cotterell. Neither Mr. Cotterell nor Mr. Byrne have sworn affidavits in this application. Mr. Byrne's letter refers to the first named defendant's request to remain in the second apartment. He advises the second named defendant that this is not possible for the following reasons: (1) his tenancy with the plaintiff is for the first apartment; (2) the defendants were accommodated with emergency accommodation as a short-term measure; and (3) once the works had been completed in the first apartment, that the defendants would be required to move back to their apartment there.

33. The first named defendant in his affidavit states that after the first apartment was damaged by a storm, he and his wife were placed in temporary accommodation initially in a hotel and then in self-catering accommodation for a number of days. He says that he and his wife were then relocated to the second apartment. He says that the plaintiff's claim that his tenancy in the second apartment was a temporary one and subject to that of a licence only is at complete odds with the actual circumstances surrounding what he says is a tenancy.

34. The plaintiff maintains that there was always a clear and express understanding that the defendants would return to the first apartment when the storm damage was repaired. That does not seem to me to be particularly at issue. The fact that the parties intended the arrangement to be temporary and for the purpose of covering the emergency created by the storm damage does not in itself evidence an intention that the relationship was to be one of licence rather than tenancy. It does not seem to me that the parties intended at the outset that the temporary need would go beyond six months.

35. It is clear that the defendants repeatedly said that they did not wish to return to the first apartment. I do not consider that to be relevant in determining their intention was at the time they entered into the agreement with the plaintiff viz-a-viz their occupation of the second apartment on 26 September 2018, although it could potentially corroborate whatever evidence they may give at trial of what their intention was at the relevant time.

36. The defendants submit that the general approach of the RTB's Tenancy Tribunals have been to find that a tenancy exists unless it is abundantly clear that a licence arrangement was intended instead. They argue that this follows the jurisprudence predating the 2004 Act where a court were concerned about protecting the interests of a more vulnerable party in a residential tenancy agreement and tended to find that a tenancy agreement existed, unless the opposite was clear (*Street v. Mountford* [1985] A.C. 809; *AG Securities v. Vaughan* [1990] A.C. 417). However it is not necessary for the purpose of this interlocutory application for me to determine, in the absence of clear evidence as to the intention of the parties, whether the default position is that of tenancy or licence. The only issue is whether the plaintiff has satisfied the strong case test, i.e. that there is a strong case that they will succeed at trial in establishing that the arrangement between the plaintiff and the defendants as of 26 September 2018, when the defendants moved into the second apartment, was a licence and not a tenancy.

37. The evidence that has been adduced by the plaintiff on affidavit as to the intentions of the parties at the time the agreement was entered into is vague and some of it is hearsay. There is direct evidence of the plaintiff's intention at that time that the defendants' occupation of the second apartment was to be on a temporary basis. I do not think that has been seriously disputed by the defendants for all the concerns they had with the first apartment and their reluctance to move back into it when they were asked to do so in December 2018. However, even if the plaintiff can establish that it was their intention at the time (and possibly even the intention of the defendants) that the defendants' occupation of the second apartment was to be temporary, that does not, of itself,

establish the existence of a licence and does not, of itself, challenge the existence of a tenancy. A temporary occupation could still either be a tenancy or a licence.

38. The defendants have satisfied me of the existence of two of the three necessary elements of a tenancy, namely exclusive occupation and the payment of rent. I am not satisfied that the plaintiff has discharged the strong case test in establishing evidence that their agreement with the defendants, in relation to the defendants' occupation of the second apartment on 26 September 2019, was a licence and not a tenancy. The ability of both sides to make their case may be improved by discovery and/or oral testimony that can be examined and cross examined, including from potential witnesses whose evidence on affidavit has not been put before this Court.

39. That finding is sufficient to refuse this application for interlocutory injunctive relief and to overturn the decision of the Circuit Court to grant the injunction . However, even if the plaintiff had satisfied me as to the strong case test, there are a number of additional elements to this application that gives rise to concern and, for the purpose of completeness, I set out below my decision on the other issues that have been raised by the defendants as reasons for this Court to refuse the interlocutory injunctive relief that is sought.

Delay

40. By February 2019 the plaintiff contends that the defendants were trespassing at the second apartment. Nevertheless, the plaintiff permitted the defendants to continue in their occupation and availed of the opportunity to carry out further work to the first apartment which was completed in September 2019. The plaintiff then reiterated their request to the defendants to vacate the second apartment. By this time if the relationship between the parties was a tenancy, Part 4 rights had accrued. If it was a licence, the plaintiff was entitled to seek vacant possession whenever it decided to do so.

41. The proceedings were issued on 9 October 2020. The plaintiff contends on the one hand that the matter was urgent because another family had been allocated the second apartment, and on the other hand accepts that it took the plaintiff considerable time to issue the proceedings. The plaintiff stated that it was on the point of issuing the proceedings in early March 2020 when its plans were disrupted by the onset of the covid-19 pandemic and the resultant restrictions. The plaintiff decided to postpone issuing these proceedings because they believed that by operation of s.5(7) of the Emergency Measures in the Public Interest (Covid-19) Act 2020, the plaintiff was precluded or likely to be precluded from seeking to remove the defendants from their dwelling during the continuation of the emergency which they believed continued until 1 August 2020. The plaintiff averred to s.5(7) expressly extending to "all of which" including those outside the scope of the Residential Tenancies Act 2004. However, even if during the period of time that all evictions were precluded by those statutory provisions, that can only excuse the delay in issuing the proceedings from March 2020 to 1 August 2020. The additional works that the plaintiff decided to carry out were completed by September 2019. By letter dated 23 September 2019 the plaintiff called on the defendants to give undertakings that they would vacate the second apartment by 4 October 2019 and return to the first

apartment. The plaintiff states in its grounding affidavit that it was at this time it decided to issue legal proceedings against the defendants but states that "it took some time to carefully assemble the necessary documentary proof, hence the passage of several months before the plaintiff was ready to issue the proceedings". The documentation that the plaintiff had to assemble essentially comprised its own correspondence with the defendants, its tenancy agreement with the defendants in relation to the first apartment, and some documentation in relation to the additional works carried out on the first apartment.

42. Whilst I accept that it was the plaintiff's intention to issue the proceedings in March 2020 and that the plaintiff was precluded from doing so because of restrictions imposed on the plaintiff from March 2020 until 1 August 2020, I do not accept that the delay from October 2019 when the plaintiff said they had decided to issue the proceedings, to March 2020 was justified by the need to assemble documentation.

43. There was also a further two months' delay from 1 August 2020 when any restrictions that may have applied to the plaintiff's attempts to evict the defendants from a property they claimed the defendants held by way of licence, had come to an end. Nevertheless, the plaintiff waited another two months before issuing these proceedings on 9 October 2020.

44. The defendants contend that the plaintiff's delay in seeking urgent injunctive relief defeats an equitable remedy. There is merit in that proposition. Collins J. in the Court of Appeal decision of *Betty Martin Financial Services Limited v. EBS DAC* [2019] IECA 327, at para. 102, stated "It is clear that, as a general principle, a party seeking interlocutory relief is bound to move with reasonable expedition". He cites the decision of Keane J. in *Nolan Transport (Oaklands) v. Halligan (Unreported, High Court, Keane J, 22 March 1994)* where Keane J. stated:

> "In all cases of this nature, where interlocutory relief is sought, the courts expect the parties to move with reasonable expedition where they are seeking interlocutory relief, because it is of the essence of such relief that if it turns out that it has been wrongly granted, one party has suffered an injustice. It is, therefore, a remedy which should not be lightly invoked; and if invoked, it should be invoked rapidly and where a party simply awaits events as they unfold, they cannot expect to find the court amenable to the granting of this relief, as it would where a party moves expeditiously to protect his rights."

45. Keane J's decision was unsuccessfully appealed to the Supreme Court[1999] 1 IR 128 at 134. O'Flaherty J. made reference to the application for the interlocutory injunction having been "brought with no excessive haste -twelve months after the beginning of hostilities".

46. Here, the plaintiff first asserted their position that the defendants were trespassing in February 2019. They then decided to carry out additional repair works on the first apartment which were complete by September 2019. I find their explanation for their

delay from then to October 2020 when they issued the proceedings and the motion seeking interlocutory relief (other than the period from March to 1 August 2020 in respect of covid restrictions) to be unconvincing.

47. Therefore, even if I was satisfied as to the other components necessary for a plaintiff to establish in order to secure an interlocutory injunction, I would still be of the view that the delay was at such a level as to defeat the equitable remedy of an injunction.

The nature of the injunctive relief being sought

48. The plaintiff seeks an interlocutory injunction directing the defendants to vacate the second apartment. Neither the notice of motion nor the Circuit Court Order of 20 May 2021 requests or imposes any time span on the injunction. The court assumes that the intention of any interlocutory injunction is to secure relief pending matters being determined by the court at the trial of the proceedings. The equity civil bill identifies the plaintiff's claim as an order for possession of the second apartment but does not seek permanent injunctive relief. However, para. 14 of the equity civil bill states that the proceedings are commenced in circumstances "where the plaintiff's claim is for an injunction in relation to property other than as ancillary relief…". The defendants plead at para. 2 of its defence that the plaintiff has issued the proceedings in a *male fide* manner which seeks to bypass the scrutiny of the court and obtain interlocutory injunctive relief as a final order. The first named defendant states at para. 25 of his first replying affidavit that the plaintiff is using the injunction to determine the entire case.

49. The nature of the interlocutory injunction as a relief has been clarified by the Supreme Court in its decision in *Merck Sharp & Dohme v. Clonmel Health Care* [2020] 2 IR 1 in which the remedy was described as flexible with its essential function being to find a just solution pending the hearing of an action. The court held that the test for an interlocutory application has to be applied with a degree of flexibility and sensitivity.

50. I have concerns about what seems to have motivated the plaintiff to pursue relief by way of interlocutory injunction and how they have viewed the progress of the litigation since they secured the injunction from the Circuit Court. The plaintiff acknowledged that they have not motioned the defendants for their defence, though they did note in their solicitor's letter of 2 July 2021, that the defendants had not delivered a defence, either within the time period provided for by the rules of the Circuit Court, or at all. Counsel for the plaintiff justified the decision not to issue a motion for judgment in default of defence on the basis that the plaintiff had secured an interlocutory injunction and "could not do any better". They also stated that the injunction would effectively determine the issue in the proceedings which they described as being in the nature of trespass. At para. 27 of their legal submissions they described the reality as being that the interlocutory order "does substantively dispose of the proceedings and there was no reason for the plaintiff to progress to plenary hearing in the absence of a defence".

51. This Court is very concerned about an interlocutory injunction being used as an alternative to proceeding to trial and in that regard is mindful of the observations of the

Supreme Court decision of Irvine J. (as she was then) at para. 31 in *Taite & Ors. v. Beades* [2019] IESC 92 as follows: -

> "As an interlocutory injunction is merely a stepping stone towards a trial, a court must ensure that such relief is not, in practice, treated as a means of obtaining summary judgment against the defendant."

Adequacy of damages/balance of convenience/proportionality

52. If I am incorrect in my finding that the plaintiff has failed to establish a strong case that they will succeed at trial, I am in any event of the view that an injunction is still an inappropriate remedy in the circumstances of this case. The Supreme Court held in *Merck Sharp and Dohme v. Clonmel Health Care* that the court should consider the adequacy of damages as part of, and not antecedent to, the balance of convenience, as this approach tended to reinforce the essential flexibility of the remedy of an interlocutory injunction.

53. I note that the plaintiff has given an undertaking as to damages. However, I am not satisfied that damages could adequately compensate the defendants for the consequences of an injunction being granted at this time given that they would be rendered homeless.

54. The court must assess the proportionality of the prejudice to the defendants in granting an injunction as versus the prejudice to the plaintiff in refusing it. Collins J. in *Betty Martin Financial Services v. EBS* confirmed that the grant of an interlocutory injunction: -

> "Has the capacity to give rise to injustice in that it may restrain a party from taking action which, it transpires, they were fully entitled to take or (in the case of mandatory injunctions) require them to undertake some course of action they do not wish to undertake in which, it transpires, they were under no obligation to undertake." (At para. 31).

He went on, at para. 34, to state that: -

> "The decision to grant or refuse thereafter becomes a matter of overall assessment of where the balance of justice lies."

55. Here the defendants have given an undertaking (at para. 30 of the first named defendant's affidavit grounding his application to this Court for a stay on the injunction granted by the Circuit Court) to discharge the damages which he says is an adequate remedy in the event that the defendants are unsuccessful in this appeal. He points to the fact that the plaintiff has retained rental monies which the defendants had paid for what they claim is their tenancy in the second apartment and if, as the plaintiff claims, they had been residing there under a licence, then the plaintiff already holds significant monies belonging to them.

56. The defendants have emphasised to this Court that if the injunction is granted, they will be rendered homeless. This is not disputed by the plaintiff but they nevertheless contend that an interlocutory order that the defendants vacate the second apartment is

proportionate because they say the defendants' decision to remain in the second apartment instead of returning to the first apartment was their conscious choice, made in full knowledge of the risks they were running that they might ultimately lose both properties.

57. The defendants have always insisted that they would not return to the first apartment and they seek to justify their decision by reference to the second named defendant's medical condition. I make no finding based on that, as an assessment of the subjective suitability of the second apartment is hypothetical now, as the first apartment is no longer available. The non-availability of the first apartment also means that the plaintiff can no longer make the case that two apartments are being held by or for the defendants thereby denying another family access to one of them. The plaintiff can certainly contend that the defendants have no legal right to the apartment (a logical consequence of their case that there is no tenancy and that the licence has been lawfully terminated) but in terms of establishing irreparable damage, one of the plaintiff's apartments is now being used to house a family whom Dublin City Council determined were entitled to social housing. I do not suggest that this in any way entitles the defendants to continue to occupy the second apartment, as that will be a matter for the trial judge, but rather that the urgency arising from the irreparable damage a plaintiff must establish in order to secure an interlocutory injunction, is now more diluted.

58. The court in determining an application for interlocutory injunctive relief must have regard to maintaining the *status quo*. Collins J. in *Betty Martin Financial Services Limited v. EBS*, at para. 89, stated that the court cannot or should not "ignore the fact that, in the event that the injunctions are discharged, that will immediately lead to a significant change in the *status quo*." He went on to say at para. 100: -

> "On the other hand, were the injunctions to be discharged, that would have a significant and immediate adverse impact on the Agent. Its business would be lost, until trial at least. Its capacity to pursue these proceedings effectively could be undermined. Its relationship with existing staff would be ruptured. The *status quo* that has been in place since 2011 (and earlier) would be profoundly altered."

59. This Court must have also seek an outcome that will involve the least injustice. As observed by the Supreme Court (per Clarke J. as he was then) in *Okunada v. Minister for Justice and Minister for Finance* [2012] 3 IR 152, "the underlying principle must be that the court should put in place a regime which minimises the overall risk of injustice".

60. Having regard to the consequences for the defendants of granting the injunction in circumstances where they have no other accommodation available to them (regardless of whether that accommodation is subjectively acceptable to them or not), I am of the view that even if the plaintiff had satisfied the strong case test, I would consider an injunction to involve a disproportionate impact on the defendants with too high a risk of injustice to disturb the current *status quo* by requiring the defendants to vacate their home and be rendered homeless.

61. I am deciding this case primarily by reference to the principles applicable to the interlocutory injunctive reliefs being sought by the plaintiff. I have been urged by the defendants to take account of the decision of the Supreme Court in *Clare County Council v. McDonagh* [2022] IESC 2 but I do not consider that any case has been made here concerning a statutory duty by the plaintiff to provide the defendants with housing or that any such alleged duty has been breached by the plaintiff. It has not been established that the plaintiff has any such obligation either personally or via their relationship with Dublin City Council. If Dublin City Council is to have any such obligation to the defendants it might have been more appropriate for them to have been joined but for the moment I do no more than confirm that there was insufficient evidence put before this Court of the existence of any such statutory duty to allow the ratio of *McDonagh* to be applied.

Summary

62. The plaintiff has not satisfied the court that they have a strong case that will succeed at trial in satisfying the Circuit Court that their agreement with the defendants in relation to the second apartment was a licence and not a tenancy, to which Part 4 rights could apply. The case could get better at trial for either side with the benefit of discovery and the evidence of whoever may be called to establish what was said to and agreed by the parties at that time. That prospect is inconsistent with the satisfaction of the strong case test.

63. Even without the strong case test being satisfied, I am also concerned at the dramatic change to the current *status quo* that an injunction would bring about, and the enormity of the consequences for the defendants who would be rendered homeless as versus the damage suffered by the plaintiff who cannot currently assign the second apartment (in which the defendants are living) to another family. I am not denying the plaintiffs their opportunity to assert their case that the defendants are trespassing and have had no right to be in possession of the property since 2019, when the plaintiff first asked them to leave. I am simply requiring the plaintiff to proceed to trial in order to make that case, rather than allowing them to secure vacant possession of their property by way of an interlocutory injunction.

Indicative view on costs

64. I am satisfied that the plaintiff is not entitled to an injunction and must proceed to trial if they wish to pursue their claim against the defendant. In those circumstances it seems to me that the outcome of the trial will not change the fact that this injunction should not have been brought. Whilst circumstances have changed since the Circuit Court Order in terms of the availability of the first apartment to provide accommodation to the defendant, that only goes to the proportionality of the remedy and the maintenance of the *status quo*. It does not impact on the fact that the plaintiff has been unable to satisfy the strong case test and that the Circuit Court erred in law insofar as it found that it had.

65. I also consider it relevant in determining costs that the defendants offered an undertaking by letter dated 20 November 2020, to the plaintiff, that the injunction hearing be adjourned to the hearing of the substantial action and that directions be agreed in regard to the exchange of documents.

66. My indicative view on costs is that costs should follow the cause as per s.169 of the Legal Services Regulatory Act 2015 and/or that it is possible to fairly adjudicate on costs at this point in time in accordance with O.99, r.4 of the Rules of the Superior Courts, i.e. that the defendants are entitled to their costs of this appeal and their costs before the Circuit Court.

67. If either party wishes to contend for a different order on costs and in order to make final orders, I will list the matter before me at 10 a.m. on 16 June. If that date does not suit either party I will relist it on an suitable alternative date,