



THE HIGH COURT

[2024] IEHC 268

[Record No. 2023/5422P]

BETWEEN

ADRIAN FOX

PLAINTIFF

AND

**DAVID WALSH, CAROLINE O'GRADY, WATERFORD TRANS FREIGHT
STORAGE & WAREHOUSING LIMITED**

AND

**OTHER PERSONS UNKNOWN IN OCCUPATION OF 2 MANOR WALK,
ROSEHILL, KILKENNY**

DEFENDANTS

JUDGMENT of Mr Justice Kennedy delivered on the 6th day of August, 2024.

Introduction

1. Having discontinued against the Second Defendant, the Plaintiff seeks interlocutory reliefs against the remaining Defendants (“the Defendants”) pending the trial of these proceedings. Because it is an interlocutory application, this judgment does not conclusively determine the factual or legal merits of any claims or defences, although it does consider some of those issues on a provisional basis for the limited purposes of the application.

Background

2. Having purchased a property, 2 Manor Walk, Rose Hill, Kilkenny (“the Property”) from a receiver, the Plaintiff seeks interlocutory orders to restrain the Defendants from trespassing and to yield up possession of it. His evidence can be summarised as follows: (a) on 2 March 2007, Mr Ivor O’Brien (“the Mortgagor”) acquired the Property, a terraced house, with finance provided by AIB Mortgage Bank and Allied Irish Bank plc (“the Banks”); (b) on 20 February 2015, the Banks appointed a receiver/agent over the Property and initiated summary judgment and, subsequently, bankruptcy proceedings against the Mortgagor which ultimately resulted the Mortgagor being adjudicated bankrupt; (c) on 14 June 2019, Everyday Finance DAC (“Everyday”) acquired the Banks’ interest in the Property and was substituted as the mortgagee; (d) on 10 February 2023, Mr Damien Harper was substituted as the receiver/agent (“the Receiver”). He was subsequently instructed to sell the Property; (e) on 17 August 2023, the Plaintiff bought the Property from Everyday for €170,000, following an auction process, becoming the registered owner; (f) the terms of sale confirmed that the Property was unlawfully occupied. The Plaintiff was therefore on notice of the Defendants’ claim and of the facts that: (i) the Receiver could not gain access and was being impeded; and (ii) “the Occupants” were refusing to engage with the Receiver or to recognise his entitlements (while declining to identify themselves); (g) unsigned correspondence between the Occupants and the Receiver’s solicitors asserted equitable interests in the Property and demanded payment of €146,475 to the First Defendant, asserting that the Property had been his private residence for a number of years; (h) the First Defendant owns a majority stake in the Third Defendant (“the Company”) which was operating from the Property and designating it as its registered office (until after the institution of these proceedings); and (i) there was reason for concern that the Defendants would damage the Property and strip it of fixtures and fittings.

3. The Plaintiff's essential submissions were that the Plaintiff had shown good title to the Property and the Defendants had no right to be in occupation. Therefore, the onus passed to the Defendants to show that they were not trespassers. They had not done so: (a) there was no evidence of any lease or tenancy (or of rent having been paid) nor was it asserted that the Defendants ever had any lawful basis for their occupation; (b) the Defendants' affidavits had not disclosed a defence, nor had they disclosed how they came to be in occupation, nor had they disclosed any legitimate interest in the Property or the identity of any person whose permission was obtained in that regard. On the evidence, the Defendants could only be regarded as trespassers; (c) any claim to adverse possession was broken by the Mortgagor's bankruptcy (on the mortgagee's application) and by the first receiver's appointment on 20 February 2015 and his replacement on 10 February 2023; (d) nor could such a claim be grounded on the Defendants' unlawful interference with receivers.

4. Service was duly established (and undisputed in any event). In addition to documents relating to the mortgage and its assignment, the receiverships, and the sale of and change of registered title to the Property, the Plaintiff exhibited correspondence between the receivers and the Property's "occupier". The latter's epistles contained assertions, threats and demands with no credible legal or factual basis. Despite being asked to do so, the Occupants did not identify themselves. It is worth considering that correspondence in detail.

Receivers' Correspondence with the "Occupier"

5. Following the original receiver's appointment, his solicitor wrote to the Mortgagor in the usual terms, but also sent a letter, dated 8 March 2022, to the occupants of the Property, notifying them that the receiver was the only party entitled to deal with the Property or to consent to its occupation. Although the letter was not specifically addressed to the First Defendant, he has confirmed to the Court that he was the principal occupant over the years. He

did not specifically reference this letter in his evidence or submissions. In the circumstances, it is likely that the First Defendant did in fact receive the 8 March 2022 letter and that he was the author or instigator of the “Occupier’s” response dated 10 March 2022, which said that he was:

“sick and tired of the threats, knock and bangs on my door and assault causing me an injury which you are involved in doing to me”.

6. The Occupier’s response also warned the receiver and his solicitors:

“Do not trespass on my dwelling or private property to change my locks without my full written consent, a receiver cannot delegate his powers and as you are aware the Forceable Entry Act 1381 is still on the statute books...

*I am sure you are aware of my rights under law to protect my family in my dwelling against forced or unconsented entry, as a court order is required to change locks my family are entitles to the protections under law as I have no debt with you and the property belongs to me, you are now been put on **NOTICE of Defence of the Dwelling Act 2011**, I will use all legal remedies available under the Act to protect my dwelling and family.” [sic].*

7. The Occupier’s letter concluded that:

“I have been in my dwelling with over 13 years and have private equity for consideration, so if your documentations are in order I will be happy to give the market price led my private equity for consideration however if your documentation is not in order then the price will reflect this. both Ben and myself are more than happy to meet to discuss this proposal and enter into a confidentiality agreement between all parties.

If you fail to respond to this NOTICE within 7 days I will assume that you did not possess the necessary above documentation or rights and the matters is closed, further correspondence will incur a cost of €10,000.00 per letter as my time must be paid going forward” [sic].

8. For completeness, I should note that the footer on each page of the letter stated that:

“THIS IS MY DWELLING AS PER THE CONSTITUTION, NOT A PROPERTY, HOUSE, PPR OR ANY OTHER LEGAL FICTION TITLE YOU TRY TO GIVE IT TO GAIN JURISDICTION. DO NOT MAKE THE MISTAKE OF THINKING THIS IS CONSENT TO CONTRACT OR FORMS ANY PART OF”.

9. The Occupant's letter dated 15 September 2023 to the then Receiver also objected to the sale of the Property which, it claimed, the First Defendant had occupied since 2013 (rather than 2011 as had been asserted in other correspondence):

“Re property located at 2 Manor Walk, Rosehill, Kells Road, Kilkenny R95 KOF 8. It has recently been brought to my attention, that the legal interest, only, such as that was held by the agent BCM Global DAC, has been offered for sale by Wilson Auctions and purportedly sold, with the underlying authority for such purported sale, being achieved by the contested appointment of the receiver Grant Thornton and of its subsequent actions against Mr David Walsh's Private equitable interest in the referenced property. The purported sale of the legal title, only, may have resulted in some legal entitie(s), as yet unconfirmed, trespassing upon Mr Walshe's Private Equitable Interest in the above referenced property, of which such Private Equitable Interest, I Charles Allen hold in a Private Family Trust and I am thus bound to protect such described interest(s), as held in Trust, by all and any Lawful and legal means available to me. With the Jurisdiction of any necessary Proceedings being held in the High Court of the Republic of Ireland. As is clearly evidenced by the various correspondences by the referenced partie(s) and Affidavit made available to me, it is beyond any doubt, both reasonable and otherwise, that Wilson Auctions and all other parties involved with this possible sale, without consent, including the referenced intending purchaser's, have accepted the existence of Mr Walshe's Private Equitable Interest in the above referenced property, upon the purchase of the legal interest in it, by way of further accepting Mr Walshe's continued and existing right of possession of the property, as evidenced by its use, by Mr Walshe, as his Private and primary Residence. While legal title may have been offered to Wilson Auctions for subsequent sale, without the consent or the courtesy of awareness of the intending sale (or the opportunity to purchase it) to Mr Walshe, by BCM Global, the principal of selling the legal title is not disputed. The property was nonetheless offered for sale by Wilson Auctions, whom I contend were fully aware of it being Mr Walshe's Private Residence and used permanently by Mr Walshe since 2013 for that purpose. Accordingly I hold Wilson Auctions fully accountable and liable for any negative actions resulting from this sale, against Mr Walshe's Private Equitable Interest, should Wilson Auctions attempt to rely upon the Doctrine of Acting in Good Faith.

I will strenuous challenge that on the basis of the further Doctrine of Notice To Agent IS Notice To Principal and Notice to Principal IS Notice To Agent.

Wilson Auctions, have upon accepting instructions from the agent BCM Global, to offer for sale legal title, only, accepted the legal obligation of making all and any intending purchasers aware of Mr Walshe's existing and continuing right of permanent residency in the above referenced property. As a direct consequence, all and intending, or actual purchaser(s), will be and should be, fully aware of and accepting Mr Walshe's permanent Right of Residency in the referenced property.

To attempt to claim otherwise would be a nonsense. I say that, as Mr Walshe was denied the opportunity to purchase the legal title to his residence, both by the beneficial legal title holder and their agent BCM Global and thus have full union of all title to the above referenced property.

Mr Walshe is prepared to consider, to remain in honour, in the alternative, without prejudice to the following, an offer of €146,475.00 that is one hundred and forty thousand, four hundred and seventy five euros, in full and final settlement for the release of his Private Equitable Interest in the above referenced property, to whom ever that might concern.” [sic]

10. The Plaintiff submitted that the Occupants' letters were evidently sent by the First Defendant (and the latter did not respond to that submission). Notwithstanding the obscure reference in the 15 September 2023 letter to Charles Allen and to a trust, I agree that there is little doubt that the First Defendant was the author or instigator of the correspondence. This appears from: (a) the repeated demand for a substantial payment to him, which tended to undermine the anonymity of the epistles; (b) the fact that - while making no admission - he consistently avoided commenting on the letters in his affidavits and submissions; (c) the fact that he did not deny responsibility for them or disassociate himself from the demand for compensation on his behalf; (d) the fact that the legal and factual assertions and arguments in the letter have been echoed in the First Defendant's subsequent affidavits and submissions; (e) the fact that he appears to have been the principal, if not the only, occupant at the material time, coupled with references in the letter such as to “*Ben and myself*”; (f) the absence of any other

plausible author; and (g) his failure to challenge the Plaintiff's submission as to the genesis of the correspondence.

YouTube Video and related issues

11. The Plaintiff referenced the First Defendant's alleged history of agitation and similar activities, including the dissemination of advice (which the Plaintiff criticised as dubious) as to how defaulting borrowers should resist attempts by lenders and receivers to enforce their lawful right to possession of properties. He particularly relied on a *YouTube* video (published by the First Defendant himself), recording a heated confrontation between him and representatives of the Official Assignee, who appear to be seeking to perform their lawful duties. However, there was some uncertainty as to whether the incident concerned the Property or related to another local address, which was likewise the subject of entirely independent enforcement action involving other parties. If, as he maintains (in submissions rather than on affidavit), the latter was the position, then the reason for the First Defendant's involvement was, at best, obscure. In any event, the interactions with Insolvency Service Ireland on the video were not constructive and did the First Defendant little credit. The Plaintiff contended that such alleged activities and associations reinforce and justify the concern as to the extent to which any attempt by the Plaintiff to exercise his rights would be aggressively resisted and the fear that he might damage the Property. In similar vein, the Plaintiff exhibited a newspaper report, referencing the First Defendant's criminal convictions for headbutting and kicking a man, ramming a Dublin Airport police jeep and causing criminal damage. Having noted such evidence for completeness, I regard the value of such prejudicial material as marginal (including because of the uncertainty as to the video). I prefer to determine the application on the basis of more objective and more obviously relevant evidence (and would likewise

disregard prejudicial evidence which the First Defendant tendered in respect of the Plaintiff, which has no obvious bearing on the entitlement to occupy the Property).

Basis for the First Defendant's opposition to the application

12. The First Defendant only seriously challenged or responded to the Plaintiff's case in one respect, which is dealt with below. His affidavits said that: (a) the Property was his private dwelling house and family home. He had been in lawful occupation for many years (although he was inconsistent as to the precise period); and (b) an interlocutory injunction would be disproportionate, putting him and his family out of their home contrary to their ECHR rights (he later confirmed after the hearing that, at that time, he was the only person residing at the Property on a permanent basis).

13. The only real basis on which the First Defendant resisted the Plaintiff's application was by asserting the claim to adverse possession based on his alleged occupation of the Property for between 11 and 13 years (and I will return to the evolution of his position on this crucial issue). However, the affidavits which he filed before the hearing did not furnish sufficient details or documentation to lend any credence his assertion of a right to adverse possession. He appeared to have taken no steps to progress an adverse possession claim.

14. The First Defendant's claim to have enjoyed an uninterrupted and unchallenged occupation for 13 years appears inconsistent with his 6 December 2023 affidavit. Although different positions had been adopted in correspondence, the First Defendant was very clear in his affidavit as to his period of occupation, asserting that:

"... I am in Lawful Possession of the above referenced home since 2013, being the dwelling known as 2 Manor Walk, Rosehill, Kilkenny, and this private family dwelling being my family home and only home.

I say and believe that to grant an interlocutory injunction would be grossly disproportionate, and to put me out of my family home that I have been living in for over 11 years before any interlocutory trial would leave me homeless, out in the cold in the

middle of winter with my medical conditions and against ECHR basic rights” (emphasis added in both cases).

Developments since the interlocutory injunction hearing

15. The First Defendant had issued two applications in these proceedings which were listed for hearing along with the injunction application. However, those applications could not proceed as he had not filed the necessary books in respect of his motions. I determined that the injunction hearing should proceed, since a date had been set, and, at the conclusion of the hearing, I gave the parties a provisional indication of my thinking. However, I afforded the First Defendant considerable latitude because he had no legal representation. I was concerned that he had advanced sweeping submissions which were not supported by affidavit evidence. I offered him the opportunity to file a further affidavit to clarify the basis for his adverse possession claim because, if he had established an arguable basis for such a claim, I would have needed to consider whether case management directions to secure the early resolution of his claim were more appropriate than the interlocutory orders sought by the Plaintiff. I encouraged the First Defendant to set out any grounds for his adverse possession claim in detail, putting all material on which he relied on affidavit and to exhibit all documents which supported his claims.

16. The First Defendant has filed affidavits and issued motions following the injunction hearing which assert various allegations and prejudicial claims against the Plaintiff. He also filed an application with Tailte Éireann for registration of his alleged interest only seven days after the hearing. However, most of the applications, affidavits, exhibits and other documents and submissions filed by him since the hearing are not relevant to the current application, except to the extent that they concern the adverse possession claim.

17. In the course of the hearing, the First Defendant stated that he either had sold or was selling his interest in the Company, but there was no affidavit evidence in that regard. Almost three months after the hearing, an appearance was entered on the Company's behalf on the instructions of its new owners, and the Plaintiff has since proceeded with an application for a freezing order in respect of the Company's assets. I deal with that application, and an application for security for costs against the First Defendant, in a separate judgment.

Earlier Possession Proceedings against the First Defendant

18. However, perhaps the most significant development after the injunction hearing was the disclosure of the position with regard to certain earlier litigation in respect of the Property. In the course of the hearings before me, the Plaintiff requested that the First Defendant furnish copies of orders apparently made in High Court proceedings initiated against him previously by the Banks. The First Defendant professed himself unable to do so and unclear as to the details of any such proceedings, for reasons which were never entirely clear. In order to resolve the impasse, it was agreed that the Court should arrange for a copy of the orders to be circulated. Having done so, it emerged that in proceedings 2016/3052P, *AIB Mortgage Bank and Allied Irish Banks plc v David Walshe*, Mr Justice Binchy made an order on 22 July 2016, which required the defendant to deliver up vacant possession of the property (2 Manor Walk, Rosehill, Maidenhill, Kells Road, Kilkenny) within three months, and to be restrained from trespassing (the 2016 Order for Possession). It appears that the defendant represented himself on the occasion of the making of that order, so he was been aware of it, although he never adverted to that litigation in his affidavits and submissions, some of which appear difficult to reconcile with the terms of that order and the existence of those proceedings. After a copy of the order of the 2016 Order for Possession was circulated to the parties, the First Defendant informed the Court that he believed that Mr Justice Binchy had set aside that order and dismissed the

proceedings issued by the Mortgagor. However, his explanation does not seem consistent with the Court's records or with information furnished by the solicitors who represented the Banks. The true position seems to be that Mr Justice Binchy made a further order on 13 December 2016 in response to the First Defendant's application for a stay of the 2016 Order for Possession pending his appeal but the Court struck out the First Defendant's application. The order records "*the Court noting that it has no function in the hearing of the Motion herein*". Since the stay on the original 2016 Order for Possession would have already expired by the time of the Defendant's application, it seems to me that Mr Justice Binchy evidently took the view that the High Court had conclusively dealt with the matter and that the Court was "*functus officio*" and that any further application for a stay would need to be directed to the Court of Appeal. No such application seems to have been made and, although the First Defendant maintains that Mr Justice Binchy reversed his earlier order and struck out the proceedings, it appears to me that he is mistaken. The record suggests to me that it was the First Defendant's motion (for a further stay) that was struck out, leaving the 2016 Order for Possession intact. The First Defendant says he was never served with a copy of that order (penally endorsed or otherwise) and it is not clear what, if any, attempts were made by the Banks to enforce it over the years, of the explanation for any forbearance,

First Defendant's 2 May 2024 Affidavit

19. The closest the First Defendant came after the hearing to respond to my repeated exhortation to clarify the basis for his plea of adverse possession was by way of his 2 May 2024 affidavit, which sought to ground a motion to strike out the Plaintiff's claim as frivolous and vexatious (I will separately and briefly address below, for the sake of completeness, other points ventilated in this and other filings on the First Defendant's behalf, raising various points

and arguments which do not affect my conclusions on the current application). As for the adverse possession claim, the affidavit says:

“3....I assert my position of Adverse Possession, Deal number D2024LR062969V, I have my application in with Teale Eireann, first Court of instance...

4. ... I can't argue against Adrian Fox registering his name at land registry because I'm not party to that, while his legal team may argue it is relevant to Adrian Fox's position, it is not relevant to my position and he has no right to say I shouldn't be there, I'm not a squatter or a trespasser and any claim by the Adrian Fox regarding being the current registered owner is void abanesio,

5.... by the virtue of the statute of limitations and the occurrence of Adverse Possession(fait Accompli) that any Nexus, if such exists, as between first named respondent Adrian Fox and the defendant David Walshe was extinguished by virtue of the Statute of Limitations and the Adverse possession of property...” [sic].

20. The affidavit adds that:

“No action has been taken against David Walshe for the recovery of property by the Original registered owner, (Ivor O'Brien) any such action is Statute Barred ...” [sic].

21. While the First Defendant's averment is technically correct, in that the original owner did not take any proceedings against him for the recovery of the Property, his averment was seriously misleading to the extent that it failed to reference the correspondence with the receivers or the proceedings commenced by the mortgagee, or, most importantly, the High Court order requiring him to vacate the Property (as noted above, although the First Defendant maintains that the 2016 Order for Possession was set aside, this is not my understanding of the effect of Mr Justice Binchy's subsequent order in the proceedings – as far as I can see, the original order stands to this day).

22. While continuing to advance sweeping assertions as to rights of adverse possession, the affidavit fails to set out the basis for such claims or make any serious attempt to particularise, let alone verify, them. Nor does he exhibit the documents required to support his plea.

The First Defendant's unsworn document

23. The First Defendant's affidavit was accompanied by a typed and unsworn document entitled "*DEAL NO: D2024LR062969V*". This note, while not formally exhibited, references, without exhibiting, the First Defendant's recent (and apparently pending) application to the Land Registry. Although the unsworn document is not formally in evidence, I note its contents for the sake of completeness. It states that:

a. having become homeless in 2011 after separating from his wife, "*a friend*" told the First Defendant of the Property, saying that he "*might be able to use for a while until*" he got himself "*sorted*" [*sic*];

b. in April 2011, he:

"fully moved into the property and done some minor works on it to make it liveable over the following months, as outlined on my Adverse Possession application form, which is Private Family Business only shared with Tailte Eireann as required by the application".

No details or documentary evidence are provided;

c. he lived uninterrupted in the Property since April 2011, having had family members to stay with him over the years. He had never been approached for rent, to sign a lease or to vacate by anyone nor been asked to leave by the registered owner in all of that time;

d. he maintained the upkeep of the Property, paying the utility bills and other works, but does not provide documentary evidence;

e. he asserts a right on the basis of his adverse possession claim "*to the fee simple interest in the property*";

f. he:

"applied for my Capital Acquisitions Tax as required by 62(2) of the Capital Acquisitions Tax Consolidation Act 2003 (as amended by section 128 of the Finance Act 2008) or, if appropriate, a solicitor's certificate on a form prescribed by section 62(7) of the Capital Acquisitions Tax Consolidation Act 2003 (as

amended by section 128 of the Finance Act 2008) which I received and forwarded with my application to Tailte Éireann.”

24. The document does not explain the inconsistency between information previously provided by the First Defendant and on his behalf as to the crucial date on which he moved into the Property, other than to observe that:

“At one point I was considering my options only to discover my situation, and as you can imagine the years fly by and it is not always possible to get dates correct when asked off the cuff so to speak”.

The Plaintiff’s response to developments following the hearing

25. The Plaintiff argues that the First Defendant’s filing of the s. 49 application, seeking the registration of his adverse title by Tailte Éireann, was a transparent attempt to frustrate these proceedings, coming days after the injunction hearing (where I indicated the order I was minded to make) and that any legitimate claim to adverse possession could have been lodged much earlier. Furthermore, he submits that the application is unstateable, bound to fail and an abuse of the processes of this Court and of Tailte Éireann. He submits that any claim to adverse possession was broken by the mortgagee’s bankruptcy, and by the attendance at the Property of the Official Assignee in Bankruptcy (but there was no direct evidence of the Official Assignee’s intervention, apart from the disputed video).

Other Points Raised in the First Defendant’s Affidavits

26. The First Defendant raised numerous other issues which are of, at most, marginal relevance to this application and which I therefore do not propose to comment on in detail, save to note that they include contested allegations, including incidents which the First Defendant reported to the Gardaí, concerning: (a) alleged attempts by the Plaintiff to disconnect the electricity supply; (b) altercations during a visit or visits by the Plaintiff or his representatives

in which the First Defendant claims to have been injured; and (c) alleged interference with a security camera installed by the First Defendant. He also made allegations concerning the Plaintiff's character and past which have no obvious bearing on the application. He has issued a motion alleging impropriety by the Plaintiff in gathering evidence to refute the First Defendant's earlier allegations, and there are separate proceedings underway in respect of some of these points. The Plaintiff denies the First Defendant's allegations which, he says, are false and malicious.

Accommodation available to the Defendants

27. While asserting that the Property was his family home, the First Defendant confirmed to the Court following the hearing that he is the only person permanently living at the Property at present but he has more recently indicated in submissions on the hearing of other applications that in the months to come his children may be living with him on a full time basis because their mother will be undergoing medical treatment. However, it appears that he has alternative accommodation available to him - the Plaintiff's affidavits confirm other residential addresses used by the First Defendant in different contexts, some very recent, and the First Defendant did not respond to these averments. For example, the Plaintiff exhibited media clippings of court proceedings in 2011 and 2013, which recorded the First Defendant's address as 10 Sweet Auburn, Carrickbeg, Carrick-on-Suir, County Tipperary. The electoral register continues to record Sweet Auburn as his current address, and an annual general return which he signed as secretary of the Third Named Defendant on 7 May 2024 did likewise. However, the First Defendant has also given other addresses on occasion, such as when he informed the Northern Ireland Registrar of Companies in a 20 October 2020 filing that he resided in Crossmaglen.

Legal Principles

(a) Registration of Title Act 1964 (“the 1964 Act”)

28. Section 19(1) provides as follows:

“Any person aggrieved by an order or decision of the Authority may appeal to the court and the court may annul or confirm, with or without modification, the order or decision.”

29. Section 31(1) of the 1964 Act provides that:

“The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just.”

30. Section 49(2) provides:

“Where any person claims to have acquired a title by possession to registered land, he may apply to the Authority to be registered as owner of the land and the Authority, if satisfied that the applicant has acquired the title, may cause the applicant to be registered as owner of the land with an absolute, good leasehold, possessory or qualified title, as the case may require, but without prejudice to any right not extinguished by such possession.”

31. Section 72(1) provides as follows:

“Subject to subsection (2), all registered land shall be subject to such of the following burdens as for the time being affect the land, whether those burdens are or are not registered, namely—

...

(p) rights acquired or in course of being acquired under the Statute of Limitations, 1957”.

(b) Provisions of the Statute of Limitations

32. The following provisions of the Statute of Limitations, 1957 (as amended) are relevant:

a. Section 13(2) fixes the limitation period within which an action for the recovery of adversely possessed land must be taken:

“The following provisions shall apply to an action by a person (other than a State authority) to recover land—

(a) ... no such action shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to some person through whom he claims, to that person”.

b. Section 18 requires that there must be adverse possession by some other person for a right of action to accrue to the title holder:

“(1) No right of action to recover land shall be deemed to accrue unless the land is in the possession (in this section referred to as adverse possession) of some person in whose favour the period of limitation can run.

(2) Where—

(a) under the foregoing provisions of this Act a right of action to recover land is deemed to accrue on a certain date, and

(b) no person is in adverse possession of the land on that date,

the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.

(3) Where a right of action to recover land has accrued and thereafter, before the right of action is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action shall be deemed to accrue unless and until the land is again taken into adverse possession”.

c. Section 24 sets out the consequences of adverse possession for the full limitation period:

“Subject to section 25 of this Act and to section 49 of the Registration of Title Act, 1964, at the expiration of the period fixed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished”.

(c) Adverse Possession

Dunne v CIE

33. The leading authority as to “adverse possession” is the decision of Clarke J. (as he then was) in *Dunne v CIE* [2007] IEHC 314, affirmed by the Supreme Court at [2016] 3 IR 167 (“*Dunne*”), in which Charleton J. approved (at p. 188) Clarke J.’s encapsulation of the principle:

“4.9 ... In *Powell v. McFarlane Slade J.* noted, at p. 472, that “an owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession”. It is, therefore, important to emphasise that minimal acts of possession by the owner of the paper title will be sufficient to establish that he was not, at least at the relevant time of those acts, dispossessed. The assessment of possession is not one in which the possession of the paper title owner and the person claiming adverse possession are judged on the same basis. An owner will be taken to continue in possession with even minimal acts. A dispossessor will need to establish possession akin to that which an owner making full but ordinary use of the property concerned, having regard to its characteristics, could be expected to make. It is not, therefore, a question of weighing up and balancing the extent of the possession of an owner and a person claiming adverse possession. Provided that there are any acts of possession by the owner, then adverse possession cannot run at the relevant time.”

34. Charleton J. also approved Clarke J.’s determination that mere possession is not sufficient, there must be an intention to dispossess (at p. 187):

“mere occupation is not enough to ground a claim of adverse possession and that what is also required is that the ostensible adverse occupier of the land does so with the intention of excluding the original owner. The matter is put thus in *Halsbury's Laws of England* (5th ed., LexisNexis, 2016), volume 68 at p. 317: -

“1078 For there to be adverse possession the person claiming possession should have the necessary intention, that is, an intention to possess the land to the

exclusion of all other persons including the owner with the paper title so far as is reasonable and so far as the process of the law will allow. An intention to use the land merely until prevented from doing so does not amount to the requisite intention.””

Atlantis Developments Ltd

35. The judgment of Mulcahy J. on 10 November 2023 in *Atlantis Developments Ltd (In Receivership) v Considine and Liscannor Development Co Ltd* [2023] IEHC 608 (“*Atlantis*”) provides a helpful summary of the current position with regard to claims for adverse possession. However, section 31 of the 1964 Act was inapplicable in *Atlantis* because neither party was the registered owner at the relevant time. Mulcahy J. considers the combined effect of ss. 13, 24 and 28 of the Statute of Limitations, noting (at para. 86) that, taken together, the provisions mean that:

“if the owner of lands allows a period of twelve years to elapse with another party in adverse possession of those lands, then the owner’s title will be extinguished, and the person in adverse possession will be entitled to be registered as owner of the lands”.

36. Having considered *Dunne*, Mulcahy J. observed (at para. 89) that:

“It is thus clear that minimal acts of ownership will defeat or negative a claim that lands have been adversely possessed, but the question of whether lands have been adversely possessed must be determined by reference to the particular facts of any given case.”

37. In considering what positive acts of ownership might have broken the period of adverse possession, Mulcahy J. noted, at paragraph 93, that:

“There were positive assertions of ownership by the second Defendant, in particular its solicitor’s correspondence from 2000 and 2001. These letters assert ownership by the second Defendant to the exclusion of the first Defendant or his predecessors in title.”

38. Mulcahy J. concluded that:

“94.... the letters do enable an inference to be drawn that, at least by that time, the second Defendant had the requisite intention to possess the lands to the exclusion of the

registered owner. However, there is no evidence of when this intention was first formed and therefore no basis on which it could be said to have existed for sufficient time to have been capable of displacing the title of the owners...

95. The exchange of correspondence between the solicitors following the agreement to sell the lands is evidence of a positive assertion of ownership by James Considine after the wall was built around the field.”

Tailte Éireann Guidance

39. Although not binding on the Court, it is instructive to note the helpful guidance published by Tailte Éireann (originally by the Property Registration Authority in 2009, and updated August 2017) entitled “*Adverse Possession – Title by Adverse Possession to Registered Land*”, which contrasts Irish and English authorities and notes at para. 2.1 that:

“... where any acts in connection with the property by the owner have been established, consideration is to be given to refusal of the application on the grounds that it has not been established as a matter of fact that the owner has been dispossessed. Such issue is properly a matter for the court and not the Land Registry”.

40. The Tailte Éireann guidance notes the need for the party claiming adverse possession to demonstrate not only the fact of possession for the relevant period but also the necessary “*Animus Possendi*”. This is the intention to possess the property and involves the demonstrable intention (throughout the relevant period) to exclude the true owner from the enjoyment of the estate or interest and that, as the guidance puts it:

“the squatter’s use and occupation of the lands was made with the intention of acquiring possession.”

41. The guidance also notes at para. 4.1 that:

“A mere claim that the applicant has acquired title by operation of the Statute of Limitations is not of itself sufficient and should not be accepted. It is for the applicant to prove the facts on which he bases his claim and it is a matter for the officer dealing with the case to decide whether on the facts proved, the title sought has been established. Each case is to be considered on its merits in relation to adverse possession.”

42. The Tailte Éireann guidance also notes in section 23 that:

“Where there is a clear conflict between averments of the applicant, on the one hand, and objection(s), on the other hand, the Registry is not the appropriate forum to resolve such conflict.

In such situations the applicant is to be informed that the Authority is not satisfied that he is entitled to the registration sought, for stated reasons, and that the application is to be refused.

The applicant should be informed of the right of appeal to court pursuant to section 19(1) of the 1964 Act.”

(d) Criteria for interlocutory relief

43. I need not set out at length the well-established and uncontroversial principles applicable to interlocutory injunctions as set out in *Campus Oil Ltd v Minister for Industry and Energy (No. 2)* [1983] IR 88, *Okunade v Minister for Justice & Ors* [2012] 3 IR 152 (“*Okunade*”) and, more recently, in *Merck Sharpe & Dohme Corporation v Clonmel Healthcare Ltd* [2020] 2 IR 1 (“*Merck*”) where O’Donnell J. (as he was) set out the correct approach to such applications. The core questions in this case are whether the Plaintiff has established a sufficiently strong case and, if so, whether the balance of convenience or balance of justice favours the grant or refusal of the injunction.

44. As to the first question, applicants seeking prohibitory interlocutory relief generally need only establish a fair issue or serious question to be tried. However, a higher standard applies where the interlocutory injunction might carry a greater risk of more serious injustice - applicants must establish a strong case that they are likely to succeed at trial. In particular, the higher standard is generally imposed where mandatory orders are sought (*Maha Lingham v Health Service Executive* [2006] IESC 89 (“*Maha Lingham*”)) or where an interlocutory application will effectively determine the proceedings. As Clarke C.J. observed in *Okunade* at para. 9.16:

“...where the result of the interlocutory application will either completely, or significantly, decide the case, the courts have felt it necessary to impose a higher standard before a mandatory injunction can be granted (normally the *Maha Lingham* standard).”

45. Dignam J. likewise applied the higher standard in *O’Brien & Anor v Markham & Ors* [2024] IEHC 202 (“*Markham*”), citing the comments of Clarke C.J. at paragraph 6.12 of *Charleton v Scriven* [2019] IESC 28 (“*Scriven*”) as authority for his conclusion that:

“...a receiver who wished to obtain possession of residential property or a family farm so that it could be sold would need to make out a strong arguable case for it to be appropriate, having regard to the greatest risk of injustice test, to allow such an order to be made.”

46. *Markham* concerned a receiver’s application for possession against a defaulting borrower and Dignam J. concluded that there was a strong argument that the higher standard applied to all reliefs where the plaintiff’s stated intention was to sell the property (the Plaintiff in this case has not disclosed his plans for the Property).

47. The Plaintiff submitted that a *Merck* balance of justice analysis is not required in trespass cases, citing Kirwan’s *Injunctions: Law and Practice* (3rd Ed., Roundhall, 2020) at para. 6-276:

“the courts are prepared [to grant an injunction] without reference to the *American Cyanamide/Campus Oil* principles, where no evidence is before them to show that the defendant has a right to what would otherwise be a trespass”.

The learned author cites numerous authorities for that proposition including *Ferris v Meagher* [2013] IEHC 380 (“*Ferris*”) (at para. 19), *Havbell DAC v. Dias* [2018] IEHC 175 (“*Havbell*”) (at para. 42) and *Kavanagh v. Lynch* [2011] IEHC 348 (“*Kavanagh*”), noting that, in *Havbell*:

“the High Court held that, *prima facie*, the plaintiff was entitled to an injunction to restrain a trespass on an interlocutory basis unless the defendant put in evidence to establish that he had a right to do what otherwise would be a trespass. Costello J. observed that there was no such evidence before the court. That being so, she felt that it

was not necessary to consider the Campus Oil principles. Equally, in Beltany Property Finance DAC v Doyle, Allen J. was quite clear in his assertion that “[a]bsent any bona fide issue which would engage the Campus Oil principles, the plaintiff is entitled to an interlocutory injunction ex debito justitiae’.”

48. Clarke J. discussed the extent to which damages could be deemed an adequate remedy for breach of property rights in *AIB plc v Diamond* [2012] 3 IR 549 (at pp. 589-590):

“The courts have always been anxious to guard property rights in the context of interlocutory injunctions; see for example Metro Inter v Independent News [2005] IEHC 309, [2006] 1 ILRM 414. The reason for that is clear...If someone could take over my house and avoid an injunction on the basis that my house can readily be valued and he is in a position to pay compensation to that value (even together with any consequential losses), then it would follow that that person would be entitled, in substance, to compulsory acquire my house. The mere fact that it may, therefore, be possible to put a value on property rights lost does not, of itself, mean that damages are necessarily an adequate remedy for the party concerned is entitled to its property rights instead of their value...”

49. In the judgment cited in the above passage, *Metro International SA v Independent News & Media plc* (“Metro”) [2005] IEHC 309, Clarke J. had previously observed:

“... in many cases where the plaintiff alleges an infringement of his property rights the court will intervene by injunction where those property rights have been established rather than compensate the plaintiff for the loss of those property rights... the mere fact that a property right (or indeed a diminution in such a right) can be valued in monetary terms does not of itself mean that damages for an infringement of that property right can necessarily be said to be an adequate remedy.”

50. Clarke J. also noted that, where arguments (on the balance of convenience) were finely balanced, the disproportionate strength of an appellant’s case may merit the granting of an injunction in a property case - he agreed with the observation of McCracken J. in *B&S Limited v Irish Auto Trader Limited* [1995] 2 IR 142 that, in finely balanced cases:

“the court may consider the relative strength of each party’s case as revealed by the affidavit evidence adduced at the interlocutory stage where the strength of one party’s case is disproportionate to that of the other.”

51. *Shay Murtagh Ltd v Cooke and Persons Unknown* [2022] IEHC 436 (“*Cooke*”) is very similar to the current situation. A plaintiff who had bought a property on notice of its occupation by persons unknown successfully sought possession on the basis that the defendants were trespassers with no right to be present at the property. The occupants had entered into a tenancy agreement with the original owner. However, Phelan J. determined that the agreement was invalid in the absence of the mortgagee’s approval, rendering the defendants trespassers. She considered submissions that the plaintiff was entitled to an injunction *ex debito justitiae*, and referenced the judgments of Costello J. in *Havbell*, Birmingham J. (as he was) in *Ferris*, Laffoy J. in *Kavanagh* and Keane J. in *Keating & Co Limited v Jervis Shopping Centre Ltd* [1997] 1 IR 512 (“*Keating*”) and Costello J.’s decision in *Tyrrell v. Wright* [2017] IEHC 92 (“*Tyrrell*”). Phelan J. noted that Costello J. in *Havbell* held at para. 44 *et seq* as follows:

“In *Ferris v. Meagher* [2013] IEHC 380 Birmingham J. held that the second named defendant was a trespasser who had no entitlement to remain in occupation of the lands in question. He held that the plaintiff was entitled to an order restraining the trespass ‘without the necessity of considering the *Campus Oil* principles’”.

52. Also in *Cooke*, Phelan J. noted similar dicta in *Kavanagh* and *Keating*, observing that, in *Keating*, Keane J. held that:

“... a landowner, whose title is not in issue, is *prima facie* entitled to an injunction to restrain a trespass and that this is also the case where the claim is for an interlocutory injunction only.’ He noted that the principle was subject only to the qualification that the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass. If a defendant did so, the court must consider the application of the principles in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396.”

53. Phelan J. noted that Costello J. had followed *Keating* in *Tyrell*, holding that:

“prima facie the plaintiff was entitled to an injunction to restrain a trespass on an interlocutory basis unless the defendant puts in evidence to establish that he has a right to do what would otherwise be a trespass. In this case the defendant has not put in evidence to establish that she is entitled to remain in possession of the property as against the plaintiff. On that basis, it is not necessary to consider the principles in Campus Oil. The plaintiff is entitled to the injunctive relief it seeks”.

However, as Phelan J. noted, Costello J. nevertheless applied Campus Oil principles in case she was wrong in this conclusion.

54. Phelan J. concluded in *Cooke*, at para. 68, that a very strong case had been made out that the defendants were trespassers. However, she was not entirely satisfied that the plaintiff was entitled to an injunction *ex debito justitiae* because the defendant relied on a tenancy agreement, and he might establish at a full hearing that the mortgagor had consented to the letting. Accordingly, she undertook a balance of justice assessment (simultaneously considering the proportionality of an order which would affect a dwellinghouse). Firstly, she noted a series of eminent authorities confirming that it is not necessary to prove damage in the case of trespass, citing *Havbell* and observing that:

“ ...In light of these authorities I concluded that there were two limbs to the adequacy of damages criterion. The first is whether in fact damages were an adequate remedy for a plaintiff and that in general as regards interests in land damages were not considered to be an adequate remedy. Secondly, and equally significantly, if an injunction is to be refused on the basis that damages would be an adequate remedy, the defendant liable to pay such damages must be able to do so.”

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

55. The remarks of Phelan J. in the context of the balance of justice assessment are, at least, equally applicable to the current situation:

“71. ... the Named Defendant/Appellant has been aware for many months of the precarious nature of his occupation of the dwelling and the fact that it is maintained that he is a trespasser. He has already had significant notice and time within which to seek alternative accommodation”.

56. Phelan J. also had regard to the Supreme Court’s decision in *Clare County Council v. McDonagh* [2022] 2 IR 122 (“*McDonagh*”), for the purpose of the balance of convenience test. In that case, the Court upheld an appeal against orders requiring the defendants to leave a property before the hearing of the merits. Phelan J. noted at paras. 73-75 that:

“73....Hogan J. considered the constitutional protection afforded to the home and also under Article 8 of the European Convention on Human Rights (“ECHR”). While he accepted that the Traveller families concerned were trespassers on the land and also that the placing of their caravans was in breach of planning law, he did not consider that this justified a Court granting an injunction requiring the removal of the caravans before the proportionality of the making of such an order was considered in full.

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

75. I accept that that the dwelling in question is protected within the ambit of Article 40.5 of the Constitution even if the occupation of the dwelling is unlawful. Accordingly, on the authority of the Supreme Court in McDonagh, a proportionality exercise must be performed by me in considering whether the Plaintiff/Respondent is entitled to interlocutory relief in the light of the likely impact of the granting of relief on those occupying the dwelling. It seems to me that it is logical and appropriate that a proportionality assessment be conducted as part of the balance of convenience assessment normally conducted by the Court. I am further satisfied on the authority of

McDonagh that I should refuse to make an interlocutory order which I find offends against the doctrine of proportionality by reason of the extent of interference with Article 40.5 rights when balanced with competing interests and where the order is neither necessary nor sought in pursuit a legitimate purpose”.

57. While Phelan J. resolved to undertake a proportionality assessment as part of her balance of justice assessment, the outcome was that the injunction should be granted:

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

“97. Second, a critical consideration here is that the present case concerns an application brought by a Council in its role qua landowner and planning authority. Yet the Council is also a housing authority which has specific statutory duties vis-a-vis the appellants. It has – arguably – failed in its duty qua housing authority to offer suitable accommodation to the appellants, having regard in particular to Ms. McDonagh’s medical needs. If, moreover, a mandatory interlocutory injunction were to be granted, it would mean, in effect, that the appellants would have nowhere to go without necessarily trespassing on the lands of another party.

98. These are special and particular considerations which, it is important to stress, would not apply, for example, in the case of a private landowner seeking an injunction to restrain trespass. In that situation any Article 8 ECHR issues would not in strictness even arise by way of possible defence as the litigation would then be between purely private bodies. ... So far as constitutional considerations are considered, the courts’ first duty would normally be to ensure, in the words of Article 40.3.2, that the property rights of the private landowner to protect his or her own property were adequately vindicated, whether by means of an order restraining trespass or otherwise.”

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

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

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

79. As noted above, however, I am satisfied that there is a strong case that the [defendant] and the other occupiers are trespassers on private property. The [plaintiff’s] rights as property owner are safeguarded under the Constitution (under Articles 40.3 and 43) and its enjoyment and use of its property is damaged by unlawful acts of trespass. The [plaintiff], as private property owner, is under no legal duty to provide for the accommodation needs of strangers and is under no obligation to trespassers. ...

80. ... I am satisfied that the [plaintiff’s] rights outweigh those of the [defendant] and may only be adequately vindicated by making an order restraining trespass to enable the [plaintiff] recover possession of their property and that such an order is necessary. I am satisfied that the making of such an order is proportionate having regard to the competing interests identified in the evidence” (emphasis added).

Orders against “persons unknown”

58. As the Plaintiff named certain “persons unknown” as defendants, it is necessary to have regard to the recent Supreme Court decision in *Pepper Finance Corporation (Ireland) DAC v Persons Unknown in Occupation of the Property known as 21 Little Mary Street, Dublin 7* [2023] 1 ILRM 381 (“*Pepper Finance*”). That decision confirms that proceedings should generally be issued only against named parties (as opposed to “persons unknown”). However,

it also confirms the jurisdiction for proceedings to be issued, and relief granted, against persons unknown in exceptional cases. In *Pepper Finance*, the plaintiff was criticised because, unlike the Plaintiff in these proceedings, it failed to take reasonable steps to identify the defendant and, even where it had established the identity of certain defendants, it had still not added them as named parties. Also, unlike the current case, which involved a single terraced house, those proceedings concerned a multi-unit building, giving rise to greater uncertainty as to whether all occupants would be on notice, since the plaintiff had made no attempt to ascertain the identity of the occupants, by, for example, visiting each unit in the development with the papers to be served or by writing to the occupants of each unit.

59. The Supreme Court acknowledged (citing *Moorview Developments Ltd. v. First Active plc* [2012] IESC 22) the continuing jurisdiction to litigate against “*persons unknown*” where necessary, but it is a jurisdiction to be exercised sparingly, where it was not possible to identify the defendants. Hogan J stressed that *Pepper Finance* concerned the failure to name identifiable defendants and that different considerations applied where it was not possible to identify defendants – in such cases it could be necessary to issue proceedings (and make orders) against “*persons unknown*” on occasion:

“... the administration of justice should not be placed at the mercy of those who would resort to anonymity and evasion as a ploy to hand trip the efforts of plaintiffs. The point here is that while resorting to the expedient of suing persons unknown should very much remain the exception, it may sometimes nonetheless be necessary to do so.”

Discussion

(a) Standard to be applied to determine the sufficiency of the Plaintiff’s case

60. On the basis of, *inter alia*, the Supreme Court's decision in *Scriven*, I am satisfied that the higher standard of the test for granting interlocutory injunctions should apply to the Plaintiff because: (i) the application primarily seeks mandatory reliefs; and (ii) as the First Defendant emphasised, the granting of an order could, in practice, effectively determine the proceedings. Accordingly, the Plaintiff must show a strong case likely to succeed at trial (whereas the First Defendant is only required to show an arguable case in respect of his plea of adverse possession).

(b) The need for a balance of justice assessment in trespass cases

61. The Plaintiff also cited the jurisprudence in respect of the Courts' approach to interlocutory injunctions in cases of trespass or other blatant breaches of property rights. Those authorities go to the extent to which a balance of convenience analysis is required once the Plaintiff has established a cause of action to the appropriate standard. I agree with the logic of those authorities in principle (although even where such authorities apply, the granting of interlocutory relief remains a discretionary remedy). However, to the extent that, lawfully or not, the Property is serving as the First Defendant's home, then a proportionality analysis is appropriate, in any event, and I believe that it is appropriate to consider both proportionality and the balance of justice in the context of the exercise of my discretion.

First Defendant's Adverse Possession Plea

62. The only real justification advanced by the First Defendant for his continued occupancy of the property was his adverse possession plea. If he had shown an arguable case for that plea, then – subject to the balance of justice/proportionality – that might be a reason to decline the application. However, while not determining the substantive issue in that regard, I accept the

Plaintiff's submission that, the evidence currently before the Court suggests that the adverse possession plea faces enormous factual and legal obstacles.

63. The adverse possession plea advanced by the First Defendant is subject to at least four major factual and legal challenges:

a. Firstly, on his own account, he appears to have only been in possession for 11 years at the time of the instigation of these present proceedings, notwithstanding his subsequent assertions of a longer period. If he is taken at his word, on the basis of his first affidavit – and I believe that he must be - then his period of occupation was too short to ground a claim of adverse possession.

b. Secondly, the First Defendant's affidavits do not confirm when he formed the intention to claim the exclusive right of possession. The unsworn document served along with his 2 May 2024 affidavit seem to suggest that he did not until relatively recently. It stated:

“I never really bothered with researching this issue properly until Adrian Fox started harassing and threatening me, leaving me with no alternative but to do my research only to discover I have adverse possession”.

Accordingly, the First Defendant's own evidence does not provide a clear basis to conclude that he had the necessary intention (*animus possidendi*) for a sufficient period to ground his adverse possession claim.

c. Thirdly, the initiation of proceedings by the then mortgagee, the Banks, in 2016 (which culminated in an order for possession at that time) appears to have interrupted and “reset the clock” at least twice in terms of the First Defendant's entitlement to claim adverse possession, meaning that he falls even further short of the requisite period (although the First Defendant has a different recollection of those proceedings, the record does not appear consistent with his account).

- d. Fourthly, as noted above, the Plaintiff relies on various other points as defeating any claim to adverse possession, even if the First Defendant otherwise had a basis to assert 12 years unchallenged possession. These include: (i) the appointment of the receivers and their attempt to assert their rights, attempts which the Plaintiff accuses the First Defendant of unlawfully thwarting, including in their correspondence and in their sale of the property; (ii) the bankruptcy proceedings; and (iii) the sale of the property and the registration of changes of title.

64. Any one of these grounds might be sufficient to defeat the plea of adverse possession. I consider that more extensive evidence and detailed legal submissions would be required to assess at least some of the points raised under (d), because much will depend on the precise circumstances and evidence, and, once the facts had been further probed as necessary, fuller legal argument would be appropriate before drawing conclusions on some of those points as to whether the Plaintiff had established more than “*minimal acts*” sufficient to interrupt the period of adverse possession. However, the position is clearer in respect of points (a), (b) and (c), each of which appears to present insurmountable challenges to the adverse possession plea.

65. As far as point (a) is concerned, the First Defendant’s first challenge is to demonstrate that he has occupied the Property for the requisite 12 year period prior to the initiation of these proceedings. However, he has simply made generalised (and inconsistent) assertions as to his occupation (not only in correspondence but also on affidavit), without putting flesh on those bones, despite my exhortation to him to do so.

66. The Plaintiff emphasised at the injunction hearing that the adverse possession claim was contradicted by the First Defendant’s own testimony as to his occupancy period. The First Defendant’s first affidavit averred that he had been in residence from 2013, too late to ground his plea. Although he subsequently averred that his occupancy actually commenced in 2011, he never adequately explained his earlier averment or the reference in the occupier’s letters to

it having commenced in 2013 (the correspondence was inconsistent and contradictory in that regard). Nor has he given meaningful particulars to substantiate his alleged occupation of the Property from the earlier date. If the position subsequently asserted by the First Defendant was correct, it would follow that his first affidavit was wrong. If any party becomes aware of a material inaccuracy in an affidavit sworn and filed on their behalf, then, to avoid persisting in misleading the Court, it is incumbent upon them to file a further affidavit without delay, explaining that the earlier affidavit was incorrect, clarifying how the incorrect affidavit came to be filed and confirming the true position. The First Defendant has never filed such a supplemental affidavit to correct his earlier averments. He has simply made conflicting claims in later affidavits without explaining his fundamental *volte face*. I regard the First Defendant as bound by his original affidavit. It fatally undermines the adverse possession claim. That issue does not require further evidence or submissions for the purposes of the application.

67. As far as point (c) identified in paragraph 59 is concerned, the implications of the previous proceedings against the First Defendant, serious issues emerge from the High Court order dated 22 July 2016:

- a. Firstly, the First Defendant failed to disclose those proceedings and orders when advancing his plea of adverse possession as a defence to the injunction application in these proceedings (although it may be that he misunderstood their import and outcome).
- b. Secondly, the Order shows that the High Court previously made an order for possession of the Property against the First Defendant (in favour of the mortgagee) which has never been appealed or varied or set aside. However, it appears that the First Defendant never been complied with that order.
- c. Thirdly, claims repeatedly advanced by the First Defendant in his submissions and affidavits (that he has enjoyed unchallenged occupation of the Property over the

years) are contradicted by the very existence of the earlier proceedings, and the order in particular.

d. Fourthly, on its face, the fact that the mortgagee initiated possession proceedings in 2016 appears fatal to the adverse possession plea because the commencement of those proceedings necessarily interrupted and “reset the clock” on the First Defendant’s period of alleged adverse possession. The order of 22 July 2016 would have had the same effect. I have seen no documentary evidence to support the First Defendant’s contentions that the 2016 Order for Possession was subsequently set aside or that the proceedings were struck out. However, even if that was correct, the very fact of the initiation of the proceedings might still be fatal to his claim of adverse possession, irrespective of the outcome of the particular application.

68. As I have noted, the position may be somewhat more arguable in respect of other issues raised by the Plaintiff (point (d) in paragraph 59), such as the impact of: (i) the Mortgagor’s bankruptcy; (ii) the receivers’ appointments; and (iii) the latter’s attempt to assert their rights, attempts allegedly thwarted by the Defendants under guise of anonymous letters. In view of the limited evidence and the generalised assertions on both sides in respect of such events, and the need for more extensive legal submissions in respect of that aspect, it would be premature for me to assess the arguability of those aspects of the adverse possession plea. However, my decision on this application is made easier by the weakness of the First Defendant’s position in respect of points (a) and (c) in that paragraph in particular.

69. In concluding that the First Defendant has not made out an arguable case for his plea of adverse possession, I would reiterate that, because I was concerned to make as many allowances as were reasonably possible in circumstances in which the First Defendant did not have the benefit of legal representation, at the conclusion of the injunction hearing, I afforded the First Defendant an unusual (and extended) opportunity to file further papers or materials to

clarify the basis for his adverse possession claim, emphasising that he should set out any concrete grounds for his claim, putting all material on which he relied on affidavit, and that he should also exhibit associated documents which supported his claim. However, the subsequent filings do not lend any credence to his position. Nor do they adequately address his contradictory testimony as to his period of occupation.

70. In particular, the First Defendant's 2 Mary 2024 affidavit, grounding his motion to strike out the claim, again advances sweeping assertions as to acquired rights of adverse possession without explaining the basis for such claims and with no attempt to verify the allegations. I do not consider that the unsworn document which accompanied the affidavit is admissible but, even if it were, it does not lend credibility to the adverse possession plea because of, *inter alia*: (i) the failure to exhibit the application to Tailte Éireann; (ii) the failure to identify the mysterious "friend" who suggested that the First Defendant use the Property does not add credibility to his position; (iii) the implicit admission that the First Defendant was never lawfully invited to occupy the Property; (iv) the failure to provide details of the alleged minor works carried out by him or to produce any documentary evidence to support the suggestion that he moved into the property in April 2011; (v) the inconsistencies between, on the one hand, his claim to have lived uninterrupted and unchallenged in the Property without being asked to vacate and, on the other, the correspondence with the receiver's solicitors, the proceedings commenced against him and the terms of the order granted on 22 July 2016; (vi) his failure to exhibit utility bills dating back to 2011 to support his contention in that regard; and (vii) his failure to exhibit the Capital Acquisition Tax filings on which he relies. The First Defendant cannot credibly assert adverse possession without disclosing the matters relied upon. His continued failure to exhibit the Tailte Éireann application or other evidence (despite being offered ample opportunity to do so) undermines the credibility of his contentions.

71. Perhaps the greatest flaw in the unsworn document, apart from its failure to advert to the previous possession proceedings, is its failure to satisfactorily explain the inconsistency between information previously provided by the First Defendant and on his behalf as to the crucial date on which he moved into the Property. The closest the document comes is a bland and unconvincing statement that:

“At one point I was considering my options only to discover my situation, and as you can imagine the years fly by and it is not always possible to get dates correct when asked off the cuff so to speak”.

72. The unsworn document also claims that the First Defendant had never been:

“approached for rent, to sign a lease, to vacate by any one or asked to leave by the registered owner in all that time, and now its statute barred [sic].”

However, this statement appears inconsistent with both the correspondence with the receivers and with the proceedings commenced by the mortgagees which resulted in an order for possession against him. The document fails to address either issue.

73. As noted above, the unsworn document also fails to confirm a sufficient *animus possidendi* to ground an adverse possession plea.

74. Accordingly, the First Defendant’s 2 May 2024 affidavit and his unsworn document and associated materials do not assist him. The Plaintiff may be correct in his submission that the plea of adverse possession (including the recent application to Tailte Éireann) is purely a tactical device to obstruct and delay the Plaintiff’s attempts to gain possession of the Property.

75. On the basis of the very serious issue of the conflict between his affidavits and the failure to explain that discrepancy, and on the basis of the First Defendant’s failure to disclose and deal with the earlier possession proceedings and order, I have concluded that, despite being given ample opportunity to do so, the First Defendant has not provided a stateable basis for his repeated assertion of rights acquired on the basis of alleged adverse possession since 2011. If the First Defendant does have proper grounds on which to advance such an application, then

he is free to do so. However, because he has failed to satisfy me that he has an arguable basis to advance such a claim, I do not consider that the Tailte Éireann application or his assertion of an adverse possession claim is a basis to oppose the current application or a legitimate factor in any balance of justice assessment.

76. For completeness, I should note that, while the First Defendant asserts other allegations and prejudicial claims, the various applications and affidavits and submissions filed by him either before or since the hearing are not relevant to the current application, except to the extent that they concern the adverse possession claim.

Has the Plaintiff established an arguable case to the requisite standard?

77. Returning to the substance of the Plaintiff's application, I am satisfied, for reasons outlined below, that the Plaintiff, as the registered owner of the property, meets the higher, *Maha Lingham*, test in the absence of any arguable basis for the Defendants' occupancy. The Plaintiff has established a very strong *prima facie* case that he would be likely to succeed at the trial of the action:

- a. He has furnished evidence of registration of his title, establishing his ownership of the dwelling for the purpose of the application. As the registered owner, he is presumed to have good title (pursuant to section 31 of the 1964 Act). No evidence has been adduced to impugn his title.
- b. Nor have the Defendants adduced evidence to suggest that they have any lawful basis for their occupation of the Property. There is no suggestion of any lease, or payment of rent or permission from the original owner.
- c. The only ground asserted by the Defendants to justify their continued occupation, adverse possession, appears entirely untenable on the basis of the evidence asserted to date by the Defendants for the reasons outlined above, not least due to the

lack of any concrete evidence from the First Defendant to his broad assertions, but also due to: (a) his failure to explain the inconsistency between the position as previously outlined on his behalf in correspondence and in his own first affidavit and the position he has subsequently sought to assert; and (b) his failure to disclose the existence of the previous possession proceedings or the order for possession. While it appears from that the Plaintiff's affidavits that he would not be able to demonstrate the *animus possidendi* for a sufficient period, an essential element to an adverse possession plea, that issue was not canvassed in argument, so I disregard it for the purposes of this decision.

Other Legal Authorities relied upon by the First Defendant

78. The First Defendant cited various authorities as supposedly supporting his position, generally without explaining their relevance or considering the extent to which the predicate facts necessary to invoke such decisions had been established as at least arguable. I have tried to examine all significant submissions which I understood him to be seeking to make. For example, he relied on an unreported Supreme Court decision in *Somers v Weir* (Unrep., Supreme Court, 14 February 1979) and the decision of the Court of Appeal in *Fannon v O'Brien and Promontoria (Oyster) DAC* [2024] IECA 51 ("*Fannon*") adequately explaining their perceived applicability. I do not see how either decision assists him. The former confirmed that the Family Home Protection Act, 1976 prevented the alienation of the family home without the consent of the owner's spouse. No such issue arises in this case.

79. *Fannon* may have been cited to impugn the Plaintiff's title in the absence of evidence of a valid assignment by the original mortgagee to the vendor which sold the property to the Plaintiff. However, I do not believe the decision is relevant in this context. In *Fannon*, the bank was invoking an assignment as a defence to a claim (essentially, on the basis that it was no longer liable as mortgagee). However, it had not proved the assignment on which it relied,

failing to exhibit the deed of transfer pursuant to which the assignment was effected. Accordingly, the facts in *Fannon* were different from the present case - the borrower was suing various parties, including Ulster Bank, the original mortgagee, which denied liability on the basis that it had assigned its interest to another party. However, it had not proved the assignment. As Barniville J. (as he was) observed at para. 7 of the Court of Appeal judgment:

“Ulster did not, therefore, put before the High Court or this Court, for the purpose of its application to dismiss the plaintiff’s claims, evidence that the alleged assignment was an ‘absolute assignment’ ...”.

Furthermore, as Keane J. noted at para. 53 of the High Court judgment, the Plaintiff’s three heads of claim concerned events which predated the assignment. The fact that the assignee was registered as the new owner of the charge was irrelevant in those circumstances. The Court noted that s. 31(1) of the 1964 Act provides that the Register shall be conclusive evidence of the owner’s title to the interest in the land. Ulster Bank’s was not concerned with proving title but rather with determining the terms of the assignment. As the Court of Appeal noted at para. 99:

“The provisions of s. 31 of the Registration of Title Act 1964, do not cure this evidential deficit as that section does not provide that the entry on the register is conclusive evidence of the terms of the alleged assignment and of whether it is ‘absolute’ or not”.

80. In this case, and in the absence of any challenge by the Mortgagor, the Plaintiff does not need to prove the chain of title from the original mortgagee. He is the registered owner of the Property. His title is presumed valid in the absence of fraud and mistake. No plausible basis has been articulated to impugn the Plaintiff’s title. Any attempt to require registered owners to prove the chain of title prior to their registration would undermine a key objective of the registration process. Section 31(1) of the Registration of Title Act 1964 renders such an approach impermissible.

81. The First Defendant also relied on the Supreme Court decision in *McDonagh* which recognises the significance of possession proceedings in respect of family homes or private residences. However, as that judgment made clear, the pivotal fact in that case was that the defendant was a local authority and subject to specific obligations. Hogan J. made the distinction clear. He also observed that when dealing with private parties:

“the case for the granting of interlocutory relief would, at least generally speaking, be almost unanswerable.”

Proportionality Test

82. Notwithstanding the Plaintiff’s contention that the Defendants have failed to adduce any evidence to refute the *prima facie* evidence that they are unlawful trespassers, I also apply a proportionality test as part of a balance of convenience test for the cogent reasons outlined by Phelan J. in *Cooke*. I propose to adopt the same approach here in favour of the First Defendant, although he is in a significantly weaker position than the defendant in *Cooke*, since he does not have even an unauthorised lease, and it appears that alternative accommodation is available to him. Accordingly, I have considered Phelan J.’s helpful analysis in detail.

Miscellaneous points raised by the First Defendant

83. For completeness, I note that the First Defendant’s submissions and affidavits, including his 2 May 2024 affidavit, raise miscellaneous points which I consider to be without merit, including the following:

- a. **His attempt to invoke doctrines such as “*Caveat Emptor*”, “*Nemo Dat Quod Non Habet*” and to argue that the Plaintiff’s title is subject to the First Defendant’s interest in the property.** The flaw in these contentions is the failure to demonstrate any basis to assert an arguable claim to adverse possession or to any other legal or

equitable interest in the property. The mere assertion of an equitable interest does not entitle the First Defendant to priority, unless there is a legal and factual basis for such a contention. None has been shown. The First Defendant has failed to demonstrate an arguable interest in the Property to which the Plaintiff's rights could be subordinated. Although the First Defendant repeatedly cites the "*Namo Dat*" doctrine, that venerable rule is subject to the 1964 Act – by virtue of the legislation, the Plaintiff as registered owner has conclusively established his title (in the absence of fraud or mistake).

b. The First Defendant is also misconceived if he is suggesting that the sale was void because the vendor did not have physical possession. He has not demonstrated an arguable basis for his contention that the vendor was not lawfully entitled to possession and to sell the Property. In any event, as a trespasser who has demonstrated no legitimate interest in the Property and who appears to have been in breach of a High Court order requiring him to yield up the Property, the First Defendant has no basis on which to impugn the vendor's title.

c. **The doctrine that applicants for injunctive relief must come to the Court with "clean hands"**. Although the First Defendant has made various claims, including that he has made criminal complaints to "Teale Éireann", and that the Plaintiff is vicariously liable for his agents, the Plaintiff disputes these allegations. Those issues are the subject of separate applications or proceedings. However, the sweeping claims do not provide a basis to prevent the registered owner seeking injunctive relief against an unlawful trespasser. If there was a "clean hands" issue in this case, then it would arise from the First Defendant's own failure to comply with the order for possession and to disclose the existence of that order or of the associated proceedings in his affidavits and submissions in these proceedings.

d. Criticism of banks, receivers etc. The First Defendant relies on news reports of opinions expressed by the former Master of the High Court and by a non-government TD. These do not constitute admissible evidence or legal precedent. They do not assist in the determination of the application.

e. The First Defendant claims that the Plaintiff does not have proper title because it acquired title from a vendor, which was itself acting unlawfully. He alleges the vendor was acting as a credit servicing fund without authorisation. I am not satisfied that the First Defendant has established the factual and legal premise for that argument (having regard to recent decisions on the issue which were not cited by the First Defendant), but if there had been any issue in that regard – and I am not convinced there is - it would be a matter between the Mortgagor and the alleged assignee. By virtue of the Plaintiff's status as the registered owner, I do not believe that the First Defendant has any standing on which to take these points. No basis has been established to impugn the Plaintiff's title.

f. The Plaintiff issued but discontinued proceedings against the Second Named Defendant, which the First Defendant apparently saw as a "clean hands" issue. The Plaintiff cannot fairly be criticised for initially naming the Second Defendant in the proceedings. Greater culpability lies with the elusive "occupants" who declined to identify themselves (and the First Defendant has never denied his involvement in that correspondence). I accept that the Plaintiff issued proceedings in the genuine belief that the Second Named Defendant was an occupant of the Property. When it was confirmed that he was under a misapprehension in that regard, the proceedings were, entirely properly, discontinued against her. The Plaintiff did not act unreasonably, and the issue has no ongoing relevance.

g. The First Defendant claims that Everyday, which sold the Property to the Plaintiff, was guilty of misrepresentation because it wrongfully claimed to have acquired the mortgagee's rights and because it sold the Property without a valid BER certificate. The First Defendant has not shown an arguable basis for these claims but, in any event, I do not consider that the First Defendant has any basis as a trespasser to challenge the vendor's title. In any case, the Plaintiff is entitled to rely on his status as the registered owner, and no arguable basis has been established to look behind the Register. I am likewise satisfied that the documents before the Court suggest that the BER claim is factually wrong, but I do not believe that the First Defendant would have any standing to take such an issue in any event.

h. The plenary summons is void and has no force or effect due to the fact that it was not signed by a solicitor, it was signed by the legal corporate fiction. The First Defendant seems to be disputing the validity of the plenary summons on the basis of the decision of Bradley J. in *Donegal County Council v Quinn* [2024] IEHC 160. However, that decision concerned the validity of a summons issued pursuant to section 1 of the Courts (No. 3) Act, 1986 (as amended) to ground a criminal prosecution, rather than a plenary summons in civil proceedings. I am satisfied that the plenary summons in these proceedings does comply with the applicable requirements which are set out in Order 4, rule 14 of the Rules of the Superior Courts ("RSC"). That provision specifies that the solicitor acting for a plaintiff shall indorse his or her name or that of his or her firm upon the civil bill, a different requirement to that applicable to the summonses initiating District Court prosecutions, and it is unsurprising that there should be more onerous requirements in the context of criminal prosecutions. In any event, the name of the Plaintiff's firm does appear to be duly recorded (handwritten) on the plenary summons, in the same terms as the firm's listing on the Law Society of Ireland website.

Accordingly, so the letter and the spirit of the rules appear to have been met. In any event, having regard to the terms of Order 124, rule 2 RSC, I do not consider it would be open to the First Defendant to take such an objection to the plenary summons at this late stage. I not convinced at any point arises but, if it did, Order 124 rule 1 would apply.

Balance of Convenience and Proportionality Analysis

84. In summary, the Plaintiff has established a strong case that the Defendants are trespassers. The Defendants have not advanced any stateable defence to the permanent relief sought, nor have they shown any stateable interest in (or entitlement to occupy) the Property. For the reasons noted above, a balance of convenience analysis is technically not required given the absence of any evidence from the Defendants of a lawful basis for their continued occupancy. Nevertheless, I will consider the issue in case I am wrong in that regard, and because it is necessary in any event to consider the proportionality of relief sought for the reasons outlined by the Supreme Court in *McDonagh* and by Phelan J. in *Cooke*.

85. Factors militating in favour of the interlocutory reliefs in terms of both proportionality and the balance of convenience include: (a) the strength of the Plaintiff's claim to being the only party with any lawful interest in the Property; (b) the apparent attempts to obstruct the receivers and, subsequently, the Plaintiff; (c) the Defendants' failure to identify themselves when asked to do so, including in correspondence; (d) the Defendants' actions in denying the receivers and Plaintiff access to or control of the property; and (e) the risk of damage. As far as the last factor is concerned, although the Defendants' affidavits did not deny the risk of damage to the Property, the First Defendant did continue to offer an undertaking to the Court on his own behalf and on behalf of other occupants that they would not damage the property or remove any fixtures or fittings, etc.

86. Although the First Defendant has adduced minimal evidence in this regard, I accept that an order for possession will inevitably have an adverse impact on him. There can be no impact on the Company, on the basis of its position that it is not using the premises. The Defendant has also suggested that an order could impact his family. While he has been the only consistent occupier of late, at the most recent directions hearing he suggested, albeit without putting this on affidavit, that he might have greater need to accommodate his children in the coming months for the reason adverted to above. These are legitimate considerations in the context of the balance of justice and proportionality assessment. However, I must also have regard to the Plaintiff's compelling case that they are trespassers without any legitimate interest in the Property who have been resisting the lawful efforts of those entitled to possession for more than two years. In *Cooke*, Phelan J. described the defendant as having been aware for many months of the precarious nature of his occupation of the dwelling and the fact that it was maintained that he was a trespasser. Those observations would apply with far greater force in these proceedings, in circumstances in which the First Defendant has never claimed to have been lawfully invited to take up residence at the Property and in which he seems to have already been the subject of an earlier possession order (although, as I have noted, that is not his understanding of the position). Furthermore, as was noted by Dignam J. in *Markham*, the interests of justice can be addressed by an appropriate stay.

87. I am satisfied that the balance of justice and the proportionality analysis favour the reliefs sought. Factors which led to this conclusion include: (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 legitimate enquiries from and steps by the receivers were dealt with and obstructed; (iv) the Defendants' failure to make any proposal to pay rent to those entitled to possession; (v) my conclusion that damages would be an adequate remedy if the Defendants were to successfully

defend the proceedings (including the undertaking furnished by the Plaintiff); (vi) my doubt as to the enforceability of any damages award against the Defendants; (vii) the fact that the High Court has already made an order for possession in respect of the Property with which the First Defendant failed to comply and which he also failed to disclose in these proceedings (although he asserts a different understanding of the outcome of that litigation).

The Company

88. There was no appearance on the Company's behalf at the hearing of the injunction application on 18 April 2024. The First Defendant did suggest in oral submissions in the course of that injunction hearing that he had disposed of or was disposing of his interest in the Company and that it was no longer operating from the Property, but no affidavits addressed that issue. Accordingly, at the conclusion of the hearing, I indicated that I was minded to make the orders sought in respect of both the First Defendant and the Company. Given the lack of clarity as to the position, and in the light of the evidence of its past involvement in the course of the unlawful occupation of the Property, I concluded that the injunction should extend to the Company. More recently, an appearance has been entered and affidavit filed on the Company's behalf on the instructions of its new owners, the affidavit suggesting that the Company has indeed been sold by the First Defendant, although the circumstances and legal basis of the transaction can best be described as opaque. I will deal in a separate judgment with the Plaintiff's application for a freezing order against the Company. For present purposes, it suffices to note that the Company's new owners have only recently become aware of the litigation, although there was no attempt to dispute the proper service of the proceedings at its then registered office – they appear to be criticising the First Defendant for failing to pass on the documents and keep them informed. They also submitted that no injunctive relief was required because, since they now own the business, there is no question of their operating from

the Property, and it would be prejudicial to the Company for an order to be made against it in that regard. These submissions seemed to ignore the fact that the proceedings were duly served on the Company, an independent legal entity, at its then registered office. It is the responsibility of its directors to deal with such matter appropriately. The uncontroverted evidence did suggest that the Company had been carrying on business from the Property – which was actually its registered office at the time the proceedings were launched. In those circumstances, I was satisfied that any injunction should extend to the Company as well as the First Defendant. The subsequent change of ownership does not change my analysis, particularly given the opacity in respect of the legal basis of the transaction.

Orders Against “Persons Unknown”

89. If the difficulties initially encountered in identifying the Defendants had continued and, in the light of their evident reluctance to identify themselves and in circumstances in which it is unlikely that any of them were ignorant of these proceedings (since they share a single terraced house, unlike the multi-unit building in *Pepper Finance*), I would have been satisfied that this was the sort of exceptional case in which it was appropriate for the proceedings to be issued against – and for interlocutory orders to be made – in respect of “*persons unknown*”. However, that is not an issue at present. The Plaintiff had identified parties to the extent it was able to (even joining the Second Defendant in an apparent a case of mistaken identity). Furthermore, the First Defendant has offered undertakings to the Court, not only on his own behalf, but also on behalf of all persons in occupation. Helpfully, he has confirmed that he is the only person in regular occupation, apart from his stepson who was visiting on a temporary basis, and also apart from his children who stay with him regularly (and may need to do so more frequently in future). In the circumstances, the injunctive relief need not apply to the Fourth Named Defendant at present (but I would entertain an urgent application from the

Plaintiff to extend the relief if any further issue was to arise with regard to “*persons unknown*” so as to stop the sort of issues referenced by Hogan J. in *Pepper Finance*).

Conclusion – Balance of Justice & Proportionality

90. Taking all the aforesaid factors into account, I am satisfied that the balance of justice favours the grant of the reliefs against the First and Third Defendants. The First Defendant remains entitled, if he wishes, to a determination of the proceedings and, indeed, to pursue a counterclaim, and, if it transpires that the injunction was incorrectly given, to seek damages on foot of the Plaintiff’s undertaking. To that end, I will continue to facilitate any request from either party to make directions to progress the resolution of any outstanding issues and, indeed, to progress matters to trial if necessary.

Undertakings

91. For completeness, I should note that, in addition to the undertaking as to damages which the Plaintiff has proffered in the usual terms, the parties previously furnished undertakings to the Court and confirmed at the hearing before me that all such undertakings will remain in force following, and irrespective of the outcome of, this application and irrespective of any further undertakings that may be given, on the following basis: (a) the Plaintiff has undertaken not to intimidate or harass the First Defendant (while not conceding that he has done so). The undertaking does not prevent the service of legal documents, nor, obviously, would it prevent the enforcement of any order of the Court; (b) the Plaintiff provided his personal undertaking to the Court to take all steps within his power to ensure that the First Defendant’s outstanding applications and the proceedings as a whole are resolved as expeditiously as possible, and his solicitor provided corresponding undertakings to similar effect. The First Defendant volunteered a corresponding undertaking on his own behalf and on behalf of the other

occupants; and (c) the First Defendant has reconfirmed his undertaking that neither he nor any other occupant will damage the Property or remove fixtures and fittings (irrespective of the outcome of this application).

92. In addition to the foregoing undertakings, the First Defendant has helpfully offered his undertaking to the Court to comply with any order for possession which might be made and to vacate the Property peacefully and without difficulty, if so directed by this Court. This is subject to his entitlement to seek a stay (or, as appropriate, an 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, he will immediately comply with any order for possession which might be granted by this Court. The First Defendant confirmed his undertaking to the Court to comply with any such order for possession on this basis.

Possible Stay on Order

93. Having indicated that I was minded to grant the interlocutory injunction, I also received submissions as to whether any form of stay being placed on the reliefs, with the Plaintiff opposing any stay and the First Defendant seeking a stay until the final determination of his adverse possession claim. The Plaintiff relied on the decision of Kelly J. (as he then was) in *AIB v O'Reilly* [2014] IEHC 326, at para. 60, to the effect that:

“A creditor who has obtained a judgment has a strong prima facie entitlement to immediately execute on foot of it in whatever way the law permits. Whilst there is undoubtedly a jurisdiction in the court to suspend such an entitlement, the court should exercise particular care and caution before so doing. The grant of a stay is, in effect, a refusal to permit a judgment creditor to exercise legal rights obtained on satisfying a court as to the entitlement to judgment. The grant of a stay negates the entitlement of a judgment creditor to exercise the very rights which that creditor acquired by obtaining the judgment.”

94. However, that decision concerned enforcement of debts under multi-million-euro development loans secured by charges over commercial property assets, so the decision appears less relevant in the context of a family home, albeit one apparently unlawfully occupied. Kelly J. also observed that:

“It would not be wise to attempt to set out, even in a general way, hard and fast rules which ought to apply to the exercise of the judicial discretion to grant a stay. The reason for that is simple. There are so many circumstances in respect of which the court may be asked to consider granting a stay that it is impossible to contemplate them all. They cover a vast range of circumstances and even, on occasions, issues of humanitarian concern. Whilst judicial sympathy and humanitarian concern do have a part to play, it is the duty of the court to uphold the law and to maintain a fair balance between litigants so as to achieve a fair result.”

95. Collins, in *Enforcement of Judgments* (2nd ed., 2019) observed at para. 1-33 that the court should approach applications for stays with caution and exercise its discretion judiciously, since a stay is a serious curtailment of legal rights. Applying those principles to the present circumstances, the stay would be on an interlocutory order. Such orders are intended to deal with the position pending trial. Where a court concludes that a sufficiently strong case has been shown and that the balance of justice and a proportionality assessment weighs in favour of the Plaintiff, then it would generally be counterintuitive to grant a stay, as such a stay would undermine the interlocutory order (save for a stay of short duration to allow the occupants to vacate and make alternative arrangements).

96. Against this, it is important to bear in mind Article 40.5 and the Supreme Court decision in *McDonagh*, and the considerations which arise when a party is being required to vacate a dwelling house even if there is a strong arguable case that they have no lawful right to remain therein (but also the countervailing constitutional property rights at play). It is also appropriate to consider the extent to which a stay would prejudice either party. In view of the Plaintiff’s concern as to potential damage to the Property, it is helpful that the First Defendant has

volunteered his undertaking on his own behalf and on behalf of any other occupants to comply with any order for possession and vacate the Property peacefully if required to do so and also to continue to safeguard and preserve the Property for so long as he was occupying it.

97. The Plaintiff has a strong basis for submitting that there should be no stay whatsoever, given the strength of his claim and the circumstances of the earlier possession proceedings. The First Defendant is not in a strong position, in that he has been unlawfully residing in the Property for a number of years and previously (unlawfully in my view) resisted the receivers' demands that he vacate the property. Accordingly, to borrow the language of Phelan J. in *Cooke*, he must have been well aware that his occupancy was precarious. The First Defendant suggests that it is his home, but the Plaintiff offered uncontroverted evidence of other addresses used by the First Defendant as evidence that it is not his only residence. The First Defendant had also confirmed that there are no other permanent occupants at this time. However, although this material is not formally in evidence, I have taken cognisance of the particular developments to which the First Defendant drew the Court's attention, which might increase his need to be able to accommodate his children over the coming period, although those considerations could still not justify an indefinite or prolonged stay.

98. In circumstances in which the First Defendant has been residing in the Property as a family home for a number of years, albeit he has not established any entitlement to do so and appears to have been ignoring a previous High Court order for possession, and in view of the family circumstances which he has recently called to the Court's attention, I consider that it would be appropriate to give him a period to make alternative arrangements and to vacate the premises. I will place a stay on my order until 31 October 2024. The selection of that date means that the hearing of the First Defendant's various applications will have taken place before he is required to vacate the Property and he has a further opportunity to substantiate his claims as to the outcome of the earlier possession proceedings or to seek an extension of the

stay from me or, if necessary, from the Court of Appeal. I also made clear that the First Defendant should not assume that there was any likelihood of further requests for stays being granted and that it was unlikely that such requests would be entertained, save in exceptional circumstances and on the basis of detailed evidence on affidavit. As matters stand, I have no reason to expect that any extension to that stay would be granted and that, in the absence of such a further stay being granted by me or by the Court of Appeal before 31 October 2024, then he will be required to peacefully vacate the Property by that date, in accordance with his undertaking to the Court.

99. I am not foreclosing the possibility of the First Defendant's continued pursuit of his section 49 application in the event he is required to vacate the Property. However, he has not demonstrated an arguable case as of yet. If, having been required to vacate, he is ultimately successful in establishing a claim to adverse possession, then he will be entitled to seek damages from the Plaintiff on foot of the Plaintiff's undertaking, and damages would be an adequate remedy. However, for the reasons I have outlined, the balance of justice requires the return of the Property to its registered owner in the meantime, and I am granting a considerable indulgence to the First Defendant and his family by directing such a stay, in circumstances in which the Plaintiff's application for possession was issued on 5 December 2023.

100. In the circumstances, having been successful in his application against the First and Third Defendants, it seems that the Plaintiff is presumptively entitled to his costs (on a party and party basis). I will allow the parties leave to file written submissions (2000 words or less) on or before 9 September 2024, if they wish to contend for an alternative order as to costs in any respect. If either party wishes to respond to the other's submissions, they may do so by 16 September 2024 and subject to the same word limit.