APPROVED **[2024] IEHC 125**

THE HIGH COURT

2023 3473 P

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND

SIMON KAVANAGH

DEIRDRE KAVANAGH

ANY PERSON IN OCCUPATION OF THE PROPERTY KNOWN AS SITE NO. 15 PARKLANDS (OTHERWISE KNOWN AS 15 PARKLANDS LOWER) ENNISCORTHY COUNTY WEXFORD

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 4 March 2024

INTRODUCTION

1. This judgment is delivered in respect of an application for an interlocutory injunction. The plaintiff, Start Mortgages, asserts that it has the status of a mortgagee in possession. More specifically, it is asserted that Start Mortgages had been put into possession of the subject property by way of the execution of an order of possession by the Under-Sheriff. It is said that the defendants

wrongfully re-entered the property and that they continue in occupation thereof as trespassers. Start Mortgages relies on the principle that a landowner, whose title is not in issue, is *prima facie* entitled to an interlocutory injunction to restrain a trespass.

2. The first defendant, Mr. Simon Kavanagh, has put forward a series of arguments as to why he says that Start Mortgages is not entitled to possession. In particular, it is argued that the order of possession was not lawfully executed and that the lands, the subject of the order, do not include the first and second defendants' dwelling house. Mr. Kavanagh has issued his own counter motion seeking to strike out Start Mortgages' motion on the grounds that it represents an abuse of process.

PRIOR PROCEDURAL HISTORY

3. This application for an interlocutory injunction arises against the backdrop of protracted litigation between the parties. Start Mortgages initially instituted proceedings in June 2013 seeking an order for possession as against Mr. & Mrs. Kavanagh as defendants (High Court 2013 353 SP). This first set of proceedings will be referred to in this judgment as "*the possession proceedings*".

4. The possession proceedings were founded upon a mortgage which the defendants had executed in favour of Start Mortgages. The High Court (Hedigan J.) made an order for possession on 18 July 2016 ("*the order for possession*"). The order for possession directed the defendants to deliver up possession of "*the plot of ground part of the lands […] now Known as Site no. 15 Parklands, Enniscorthy in the County of Wexford*". As discussed presently, there is a dispute between the parties as to the physical extent of the lands captured by

the order for possession. In particular, there is disagreement as to whether the phrase "*plot of ground*" is apt to capture the dwelling house on the lands.

5. Neither defendant has ever brought an appeal against the order for possession. In more recent years, however, Mr. Kavanagh has attempted a number of collateral attacks upon the validity of the order for possession. In brief, Mr. Kavanagh made two applications to the High Court to have the order for possession set aside. These applications were refused for the reasons detailed in two reserved judgments: these bear the neutral citations [2023] IEHC 37 and [2023] IEHC 452, respectively.

6. In each instance, Mr. Kavanagh brought an appeal to the Court of Appeal against the High Court's refusal to set aside the order for possession. The first of these appeals was dismissed by the Court of Appeal by way of an *ex tempore* judgment delivered on 9 October 2023. The transcript of that *ex tempore* judgment has since been published on the courts.ie website: *Start Mortgages v. Kavanagh* [2023] IECA 251. The second appeal was dismissed by the Court of Appeal in circumstances where Mr. Kavanagh failed to attend to prosecute the appeal on the scheduled hearing date.

7. The present judgment should be read in conjunction with these two earlier High Court judgments and the transcript of the *ex tempore* judgment of the Court of Appeal.

EVENTS OF 20 JUNE 2023

8. Start Mortgages asserts that it had been put into possession of the mortgaged property on 20 June 2023. As of this date, the first judgment of the High Court refusing to set aside the order for possession was under appeal to the Court of

Appeal, and the second set aside application had been part-heard by the High Court. As discussed presently, Mr. Kavanagh submits that the execution of the order of possession should have been postponed until this pending litigation had been resolved.

9. The events of 20 June 2023 are described, principally, in what is labelled as an "*Affidavit of Facts*" and a statutory declaration sworn by Mr. Kavanagh, and an affidavit sworn by a Mr. Cahill from an entity described as "*Blackwater Asset Management*". It is unclear whether this is the proper description of the relevant company or merely a registered business name held by a company known as Blackwater Bailiff & Asset Management Services Ltd.

10. The following facts appear not to be in dispute. Mr. Cahill attended at the property on 20 June 2023. Mr. Cahill avers that he was accompanied by "*the appropriate Court Officer*". This individual is not named but is later described as a "*Court Messenger*". Mr. Cahill further avers that there were a number of members of An Garda Síochána present.

11. Mr. Kavanagh had been afforded the opportunity to remove certain personal belongings from the property. Mr. Kavanagh vacated the property peaceably. Thereafter, one of Mr. Cahill's colleagues changed the locks on the property.

12. It is alleged that Mr. Kavanagh re-entered the property on a date prior to 23 June 2023. There is no direct evidence of this from Start Mortgages' side, but Mr. Kavanagh does not dispute that he is back in occupation of the property. Of course, Mr. Kavanagh denies that Start Mortgages was ever lawfully in possession.

THE PRESENT PROCEEDINGS

13. Start Mortgages instituted the within proceedings on 14 July 2023 (High Court 2023 3473 P). On the same date, Start Mortgages issued a motion seeking various interlocutory injunctions. In brief, these seek to have the defendants vacate the property and return possession of same to Start Mortgages. These proceedings will be referred to in this judgment as "*the trespass proceedings*" to distinguish them from the original possession proceedings.

14. It should be explained that the trespass proceedings were mentioned to me during the course of the resumed hearing on 24 July 2023 into Mr. Kavanagh's second application to set aside the judgment and order of 18 July 2016. Directions were given on that date as to the service of the trespass proceedings and an appearance was ultimately entered on behalf of both defendants. This is a complete answer to a technical objection, subsequently raised by Mr. Kavanagh, to the effect that Start Mortgages' motion is not signed and dated: see paragraphs 54 to 56 below.

15. I subsequently gave directions, on 16 October 2023, as to the exchange of pleadings in the trespass proceedings. As matters currently stand, a statement of claim, and a defence and counterclaim, have been delivered. No defence has yet been delivered to the counterclaim.

16. At Mr. Kavanagh's request, he was given liberty, by order dated 16 October 2023, to issue a motion seeking to strike out Start Mortgages' motion. Mr. Kavanagh duly issued his motion on 7 November 2023.

17. The motion seeking the interlocutory injunction initially came on for hearing on 20 November 2023. The motion was part-heard on that date and then adjourned to allow both parties the opportunity to file further evidence in relation to the events of 20 June 2023. The original papers filed had been grounded solely on

an affidavit sworn by a solicitor who did not have any direct involvement in the events of that date. Start Mortgages was also given the opportunity to clarify an issue which had arisen in relation to the record number appearing upon the letters written by the Courts Service on 21 June 2023. This number did not tally with the record number for the possession proceedings.

18. The hearing of the application for an interlocutory injunction resumed before me on 19 February 2024. I also heard Mr. Kavanagh's motion to strike out the motion seeking the interlocutory injunction. Mr. Kavanagh furnished two sets of written submissions to the court at the hearing, and copies of same were formally filed in the Central Office of the High Court thereafter on 26 February 2024. Judgment was reserved on both motions until today's date.

PRINCIPLES GOVERNING INTERLOCUTORY INJUNCTIONS

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

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

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

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

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

DISCUSSION AND DECISION

23. Start Mortgages advances its application for an interlocutory injunction on the basis, first, that it had been put into lawful possession of the property by the Under-Sheriff on 20 June 2023, and, secondly, that the actions of the defendants in re-entering and remaining in the property thereafter constitute acts of trespass. It is said that, as a mortgagee in possession, it has a *prima facie* entitlement to restrain acts of trespass. Counsel for Start Mortgages cites the general principle that a landowner, whose title is not in issue, is *prima facie* entitled to an interlocutory injunction to restrain a trespass (citing *KBC Bank Ltd v. McGann* [2019] IEHC 667). Counsel also cites the judgments in *Carlisle Mortgages Ltd v. Costello* [2018] IECA 334 and *Start Mortgages v. Rogers* [2021] IEHC 691 as authority for the proposition that a mortgagee in possession has a right to sue the mortgagor for trespass.

24. Having regard to the argument advanced on behalf of Start Mortgages, it is necessary to refer to the principles which govern applications for interlocutory injunctions which seek to restrain a trespass to land. The general principle, as stated by the High Court (Keane J.) in *Keating & Co. Ltd v. Jervis Street Shopping Centre Ltd* [1997] 1 I.R. 512 (at 518) is 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. However, that principle is subject to the following qualification: the defendant may put in evidence to seek to establish that he has a right to do what would

otherwise be a trespass. If the defendant is able to establish that there is a "*serious issue*" to be tried in that regard, the court must then move to consider the application of the general principles in relation to the grant or refusal of an interlocutory injunction.

25. It is necessary, therefore, to consider whether Mr. Kavanagh has established that there is a "*serious issue*" to be tried as to whether Start Mortgages actually enjoys the status of a mortgagee in possession.

26. Start Mortgages asserts that the taking of possession of the property on 20 June 2023 was lawfully done pursuant to an *order of possession* dated 17 July 2022. This is a different legal instrument than the order for possession made on 18 July 2016. The order of possession is prepared, pursuant to Order 47 of the Rules of the Superior Courts, by the solicitor acting on behalf of the beneficiary of a judgment.

27. Given the objections raised by Mr. Kavanagh, it is necessary to set out the operative part of the order of possession in full:

> "To ~~the Sheriff of the County of Wexford~~* / The County Registrar for the County of Wexford greeting.
>
> WHEREAS lately in the High Court it was adjudged that the Plaintiff recover possession of All that and those the plot of ground part of the lands of Enniscorthy situate in the Barony of Scarawalsh and County Wexford, now known as Site no. 15 Parklands, Enniscorthy in the County of Wexford, more particularly the subject matter of Deed of Conveyance dated 01 September 1988 – between the Lacey Brothers Limited to Simon Kavanagh and Deirdre Kavanagh with the appurtenances in your bailiwick.
>
> YOU ARE HEREBY COMMANDED to enter same and without delay cause the said Start Mortgages Designated Activity Company to have possession of said lands and premises with the appurtenances

> AND in what manner you have executed this order, make appear to the High Court immediately after the execution hereof and have you then there this order."
>
> * These words have been struck through in the original

28. Mr. Kavanagh makes the following complaints in relation to the order of possession. First, the order is directed to the County Registrar and not to the Sheriff or Under-Sheriff of the County of Wexford. Indeed, as appears from the quotation above, the words "*the Sheriff of County Wexford*" have been struck through in the original. Mr. Kavanagh contends that only the Under-Sheriff would have jurisdiction to execute an order of possession made by the High Court (as opposed to by the Circuit Court). Mr. Kavanagh also makes the point that the subsequent paperwork on 21 June 2023 is signed by the Under-Sheriff for the County of Wexford and not by the County Registrar to whom the order of possession is addressed.

29. Secondly, attention is drawn to the description of the lands of which possession is to be taken, i.e. "*the plot of ground part of the lands […] now known as Site no. 15 Parklands, Enniscorthy in the County of Wexford*". It is submitted that this wording excludes, from the scope of the order of possession, the dwelling house which has been constructed since the date of the conveyance referred to in the order (1 September 1988).

30. Mr. Kavanagh also complains that there is no evidence before the High Court which indicates that a Court Messenger was ever authorised to assist the Under-Sheriff in the execution of an execution order. Mr. Kavanagh cites section 5(1) of the Enforcement of Court Orders Act 1926 as authority for the proposition that there should be evidence of a warrant in writing signed by the Under-Sheriff

authorising the Court Messenger to execute or assist in the execution of the particular execution order.

31. For the reasons which follow, I am satisfied that Start Mortgages has failed to establish that it has a *prima facie* entitlement to an interlocutory injunction on the basis that it is a mortgagee in possession. Rather, there is, at most, a "*serious issue*" to be tried in this regard.

32. The first reason is that it is not apparent that the order of possession was properly executed. The eviction of individuals from their dwelling house is a solemn process and it is essential that the legal formalities are properly observed. On the basis of the limited evidence before the High Court on this application, there are a number of unexplained discrepancies in the paperwork. There is a discrepancy between the addressee of the order, namely the County Registrar for the County of Wexford, and the officeholder who ultimately returned the order of possession on 21 June 2023, namely the Under-Sheriff for the County of Wexford.

33. It appears, although there is no direct evidence before the court to this effect, that the same individual, namely Deirdre Burke, may occupy both offices. It is not clear from the limited argument had to date whether there is any express legislative basis for this coincidence of offices, or, whether alternatively it is simply fortuitous. During the course of argument, I referred the parties to section 54 of the Court Officers Act 1926 which transfers certain duties of an Under-Sheriff to the County Registrar. My attention has not been brought to any legislation which indicates that not only has the County Registrar assumed certain functions previously exercised by the Under-Sheriff, but that the two offices are now, in effect, the same.

34. The potential difficulty in the present case is that the return to the order of possession is signed in the capacity of Under-Sheriff whereas the order is directed to the County Registrar. I am not satisfied, on the basis of an interlocutory hearing and limited legal argument, to decide, at this stage, that this discrepancy is immaterial. I hasten to emphasise that this does not mean that Mr. Kavanagh's objection will, ultimately, be successful. This is a matter which can only be resolved at the full hearing.

35. There is a further potential difficulty with the execution of the order of possession. Even allowing that the order of possession may have been addressed to the correct officeholder, albeit under the wrong title, there is no suggestion in the affidavits that the Under-Sheriff for the County of Wexford, Deirdre Burke, had any direct involvement in the events of 20 June 2023. Rather, Start Mortgages asserts that the order of possession had been executed by a Court Messenger. The problem is that there is no evidence that the Court Messenger was duly authorised. The furthest the evidence goes is as follows. Mr. Cahill makes this averment at paragraph 18 of his affidavit of 21 December 2023:

> "Mr. Kavanagh asked for the Sheriff to be identified and I advised him that the Order was executed by the Court Messenger duly authorised by the County Registrar for the County of Wexford who also acts as the County Sheriff. The Court Messenger handed over vacant possession of the Property to your Deponent on behalf of the Plaintiff."

36. With respect, this averment does not establish that the Court Messenger was, in fact, duly authorised. All that the deponent is doing is reciting what he said to Mr. Kavanagh. The averment is merely evidence of the statement having been made to Mr. Kavanagh; it is not evidence of the truth or accuracy of the content of that statement. This is the very definition of hearsay evidence. In any event, there is nothing in Mr. Cahill's affidavit which explains how he might have the

means of knowledge to comment on whether the Court Messenger was duly authorised. There is no suggestion, for example, that Mr. Cahill had sight of a written warrant of authorisation and no such warrant has been put before the High Court on this application.

37. The second reason for saying that there is a "*serious issue*" to be tried is that there is doubt as to the extent of the lands captured by the order of possession. This flows from the unusual wording of the order for possession of 18 July 2016. Title to the lands is unregistered and, accordingly, it was not possible to describe the lands by the expedient of referring to a Land Registry folio. The approach adopted in the deed of mortgage had been to replicate the description of the lands as *per* an earlier deed of conveyance. The difficulty is that as of the date of that earlier conveyance there was no dwelling house on the lands. Hence the lands are described as "*the plot of ground part of the lands […] now known as Site no. 15 Parklands*". Presumably, the deed of conveyance was accompanied by a building agreement for the construction of the dwelling house now on the lands.

38. There is a "*serious issue*" to be tried as to whether the formula of words employed in the order of possession is apt to capture a dwelling house which has *subsequently* been constructed on "*the plot of ground*". The term "*ground*" has a particular connotation in the context of land law: it is often used to describe the site in contradistinction to the structures upon the site, e.g. as in ground rent.

39. Counsel for Start Mortgages submits that the order of possession must be given a "*meaningful and realistic*" interpretation, and further submits that no financial institution would have defined its security in such a way as to *exclude* a dwelling house which had already been constructed on the lands as of the date of the deed of mortgage (although not as of the date of the earlier conveyance by reference

to which the lands are described). This argument may ultimately prevail at the full hearing. For present purposes, however, it should be emphasised that the court is being asked to consider the meaning and effect of the order of possession and not to interpret the deed of mortgage from which the unhappy wording is borrowed. A court order falls to be interpreted objectively by reference to its ordinary and natural meaning. The wording of the (foundational) order for possession of 18 July 2016 is, at the very least, ambiguous. The concept of a "*plot of ground*", on one reading at least, implies a vacant site. The reference to the plot of ground being "*part*" of the lands now known as Site No. 15 Parklands might be understood as indicating that the court order only applies to *part* of the overall lands. It does happen that, from time to time, an order for possession might deliberately be confined to part only of the overall lands within the ownership of a defendant. A court might, for example, decide that a family home should be excluded because of the absence of consent by the debtor's spouse to the creation of the mortgage. It cannot simply be assumed, on the basis of the limited argument had to date, that the formula employed in the order for possession—upon which the order of possession is based—must have been intended to capture a dwelling house. Put shortly, it is not immediately apparent that an order directing the County Registrar to deliver up possession of a "*plot of ground*" necessarily authorises the taking of possession of a dwelling house rather than a vacant site.

40. It should also be explained that certain language which appears in the order of possession of 17 July 2022 does not appear in the order for possession of 18 July 2016. In particular, the words "*the premises with the appurtenances*" have been added to the order of possession. It should be recalled that an order of possession

is prepared by the solicitor acting for the beneficiary of the judgment and is not a document which has been prepared by a court officer. On one reading at least, the order of possession purports to capture more than the original order for possession. This would appear to be inappropriate: an order of possession should be faithful to the wording of the order for possession to which it is intended to give effect.

41. In summary, therefore, I am not satisfied that it can be said—on the basis of the limited argument and evidence to date—that Start Mortgages' asserted status as a mortgagee in possession is clear-cut. Rather, it seems to me that Mr. Kavanagh has established that there is a "*serious issue*" or "*fair issue*" to be tried in this regard.

42. The next matter to be considered is the balance of justice (otherwise, the balance of convenience). In assessing the balance of justice, regard must be had to the fact that the effect of the interlocutory injunction, if granted, would be to require the defendants to vacate the dwelling house in which they have been residing for almost thirty years. This would be done in advance of there being a full hearing of the proceedings.

43. The only evidence which has been put forward on behalf of Start Mortgages which addresses the balance of convenience is that set out at paragraphs 19 to 23 of the grounding affidavit of 13 July 2023. In brief, it is asserted that damages would not be an adequate remedy for Start Mortgages in that the alleged trespass continues to have a "*serious detrimental effect*" upon its rights. In particular, it is averred that Start Mortgages' ability to take and maintain possession of the property will be irretrievably impaired and that it has been prevented from selling the property. It is also suggested that any undertaking as to damages

provided by the defendants would be inadequate. It is alleged that the total balance due and owing by the defendants to Start Mortgages is now in the amount of €333,235.97 and that no payment has been made since the sum of €400 was received on 30 January 2012.

44. In assessing the balance of justice, it is relevant to have regard to the procedural history. The fact of the matter is that notwithstanding that it obtained an order for possession as long ago as 18 July 2016, Start Mortgages has not sought to execute same with any great expedition. It should be acknowledged, of course, that the delay has, in small part, been caused by the various court applications brought by Mr. Kavanagh. Nevertheless, it is difficult to understand what material prejudice will be caused to Start Mortgages if it is required to await the trial of the action. It should be possible to bring the trespass proceedings on for hearing in a matter of months. As noted above, the exchange of pleadings has almost closed, save for the delivery of a defence to counterclaim.

45. There is no suggestion that the property is being neglected or not properly cared for. Moreover, there is no suggestion that the economic circumstances are such as to point in favour of an urgent sale. This is not, for example, a case where there is a falling property market and a delay in allowing a creditor to enforce might result in a reduction of the sale proceeds ultimately recoverable. No evidence has been put before the court as to the market value of the property, nor as to whether the sale proceeds are likely to be sufficient to discharge the outstanding debt. It is not apparent, therefore, whether the property is in "*negative equity*".

46. On the other side of the equation, the potential prejudice to the defendants is significant. It is not disputed that the property represents their family home. It

also appears to be the case that they have been residing there for almost three decades, albeit that, for the past seven to eight years, their occupation of the property has been in breach of the order for possession. If an interlocutory injunction were to be granted, only for it to transpire at the full hearing that Start Mortgages had not been lawfully put into possession on 20 June 2023, the defendants will have been wrongfully evicted from their dwelling house in the interim.

47. Counsel on behalf of Start Mortgages suggests that a failure to grant an interlocutory injunction will undermine the effectiveness of, and respect afforded to, court orders. This submission is, however, predicated on the court being persuaded that the order of possession was properly executed on 20 June 2023. As indicated above, at this interlocutory stage, the court is not so satisfied. Rather, there appears to be a "*serious issue*" to be tried as to whether the legal formalities were properly complied with.

48. Having regard to these findings, it is not necessary to consider in any detail the numerous other arguments advanced by Mr. Kavanagh. It is sufficient for the purpose of resolving the application for an interlocutory injunction to find that there is a "*serious issue*" to be tried on the two points identified above and that the balance of justice lies against the grant of an interlocutory injunction. Suffice it to say that, as counsel on behalf of Start Mortgages correctly observes, most of the other objections raised by Mr. Kavanagh entail an impermissible collateral attack on the order for possession of 18 July 2016. As has been explained by the Court of Appeal in its judgment of 9 October 2023, it is not open to Mr. Kavanagh to seek to relitigate matters which have been decided finally and conclusively against him.

MOTION TO STRIKE OUT

49. Mr. Kavanagh brought a parallel application to have Start Mortgages' interlocutory injunction application struck out. Mr. Kavanagh alleges, in essence, that it represents an abuse of process for Start Mortgages to have sought an interlocutory injunction. The principal objection made is that Start Mortgages acted improperly in purporting to take possession of the property on 20 June 2023. It is submitted that the execution of the order of possession should have been postponed until the second set aside application before the High Court, and the appeal to the Court of Appeal in respect of the first set aside application, which were then outstanding, had both been determined. In this regard, Mr. Kavanagh cites the judgment of the European Court of Human Rights in *Rousk v. Sweden* (App. No. 27183/04), [2013] ECHR 27183/04.

50. With respect, the circumstances of the present case are entirely distinguishable from those considered by the ECtHR in *Rousk v. Sweden*. There, the applicant had been evicted from his family home notwithstanding that, as of the relevant date, the outstanding debt was a mere €800. This was the context in which the ECtHR held that the eviction should have been postponed until the underlying contentious issues had been resolved by the domestic courts. See paragraph 125 of the ECtHR's judgment as follows:

> "[…] To the Court, both the decision to uphold the sale and the ensuing eviction of the applicant appear excessive and disproportionate, especially since the applicant had other assets, such as a car, which could have been seized and sold to cover what little remained of his enforceable debts. This is particularly so because the authorities knew that the proceedings concerning the writ of execution were still ongoing and thus had not yet gained legal force."

51. On the facts of the present case, by contrast, the total balance due and owing by the defendants is now in the amount of €333,235.97. It cannot be said, therefore, that the execution of the order of possession is disproportionate. Moreover, the possession proceedings had been conclusively determined against the defendants many years prior to the purported execution of the order of possession. The judgment and order of the High Court (Hedigan J.) of 18 July 2016 became final once the time-limit for an appeal had expired without any appeal having been filed. The matter became *res judicata* at that stage. A party cannot contrive to resurrect proceedings, which have long since concluded, by the expedient of bringing wholly unmeritorious applications to set aside a final unappealed judgment.

52. There is no parallel between the position of the defendants in the present case and the applicant in *Rousk v. Sweden*. The legal process has long since been exhausted in relation to the possession proceedings. Insofar as there were any applications and appeals outstanding as of 20 June 2023, same were procedurally irregular and lacking in any merit. The defendants cannot seek to stave off the execution of a final unappealed order by bringing an endless series of hopeless applications. In this regard, it is telling that Mr. Kavanagh did not bother to pursue the second appeal and same was struck out by the Court of Appeal on 1 February 2024 for non-prosecution.

53. For similar reasons, Mr. Kavanagh's argument that it represented a breach of Article 40.5 of the Constitution of Ireland for Start Mortgages to seek to execute the order of possession is also misconceived. Provided always that the formalities for executing an order of possession were properly observed, Start Mortgages was not precluded, by dint of the existence of the application and

appeal, from enforcing the final unappealed order for possession of 18 July 2016. Provided always that the formalities were properly observed, the enforcement of the order for possession would have been "*in accordance with law*" for the purpose of Article 40.5.

54. Separately, Mr. Kavanagh has sought to allege that the notice of motion seeking the interlocutory injunction is defective. First, objection is made that there is no express reference in the notice of motion to the effect that the injunctions are being sought on an *interlocutory* basis. It is submitted that this entails an attempted deception upon the court and Mr. Kavanagh: it is submitted that Start Mortgages is seeking to obtain a "*final disposal*" of its proceedings by way of an interlocutory application. Secondly, objection is made that the motion is not dated or signed.

55. With respect, there is no merit to either of these objections. To suggest that the court was in danger of being duped into granting *permanent* injunctions on the basis of an interlocutory hearing is, frankly, insulting. The court—and the parties—have been acutely aware at all times that this is an application for an interlocutory injunction only, and that there would be a full hearing of the plenary action shortly thereafter. This has never been in doubt. Indeed, the court has been actively case-managing the proceedings for the precise purpose of ensuring that the plenary action would be brought on for hearing expeditiously. There has never been any question but that this was an application for an interlocutory injunction to hold the ring pending the full hearing.

56. The suggestion that Mr. Kavanagh has been prejudiced by the fact that the paper version of Start Mortgages' motion does not bear a filing date or signature is absurd. The motion has been duly registered on the Courts Service's case

management system. Mr. Kavanagh has been aware at all times of the existence of the motion. Indeed, Mr. Kavanagh informed the court on 24 July 2023 that he had seen, on the courts.ie website, an entry recording that the motion had been filed on 14 July 2023 and complained that it had not yet been served upon him. Accordingly, directions were given at the hearing on 24 July 2023 as to the service of the trespass proceedings, including the motion papers. Mr. Kavanagh expressly requested that service be by way of pre-paid ordinary post at a nominated address. Service was duly effected, and an appearance was entered thereafter by both defendants. Mr. Kavanagh has attended at all of the various listings of the motion; filed affidavits in response to the motion; and appeared and made oral submissions (and furnished written submissions) at the hearing of the motion on 20 November 2023 and 19 February 2024. Having regard to this chronology, the sterile objection now made that the motion is not dated or signed is purely opportunistic. If and insofar as there might have been a technical defect in this regard, same is precisely the type of defect which can be remedied under Order 124 of the Rules of the Superior Courts.

57. Separately, Mr. Kavanagh alleges that Start Mortgages has indicated, by way of "*goodbye letter*", that it intends to transfer its mortgages to Mars Capital Finance Ireland DAC. Mr. Kavanagh submits that "*the handbrake must be pulled up on*" Start Mortgages' motion. The submission runs to the effect that Start Mortgages "*does not own the mortgage claim in this case*".

58. These submissions are not well founded. There is no admissible evidence before the High Court to the effect that Start Mortgages had, as of the date of the hearing of the application for an interlocutory injunction, divested itself of the legal ownership of either the judgment and order of 18 July 2016 or the deed of

mortgage in respect of which the judgment and order were granted. If the factual position has changed as of the date of the full hearing, Mr. Kavanagh may seek to adduce evidence to that effect.

59. For all of these reasons, then, Mr. Kavanagh's motion of 7 November 2023 is dismissed.

FURTHER AFFIDAVIT OF MR. KAVANAGH

60. In the week following the hearing on 19 February 2024, Mr. Kavanagh purported to deliver a further affidavit by way of email to the High Court Registrar and by filing same in the Central Office on 26 February 2024. This affidavit has not been taken into account in the preparation of this judgment. It is a fundamental principle that justice be administered in public and in the presence of the other parties to the proceedings. It is impermissible for a party to attempt to file further evidence without the leave of the court in circumstances where the hearing has concluded and judgment has been reserved. Aside from anything else, it would represent a breach of fair procedures for the court to receive an affidavit in respect of which the other side have not yet had any opportunity to reply.

61. The parties to these proceedings have already been shown considerable indulgence: the hearing on 20 November 2023 was adjourned until 19 February 2024 to allow both sides to file further affidavit evidence. Mr. Kavanagh has had ample opportunity to put before the court any evidence which he considered relevant. He is not entitled to introduce new evidence post-hearing.

CONCLUSION AND PROPOSED FORM OF ORDER

62. For the reasons explained above, the motion of 14 July 2023 seeking an interlocutory injunction is refused. In summary, Mr. Kavanagh has established that there is a "*serious issue*" to be tried as to whether Start Mortgages actually enjoys the status of a mortgagee in possession. First, there is a serious issue to be tried as to whether the order of possession was properly executed having regard to the fact that it does not appear to have been executed by the officeholder to whom it is addressed. Second, there is also a serious issue to be tried as to whether an order commanding the County Registrar to deliver up possession of a "*plot of ground*" necessarily authorises the taking of possession of a dwelling house rather than a vacant site.

63. The balance of convenience lies in favour of refusing the injunction for the reasons explained at paragraphs 42 to 47 above. This is subject to the caveat that these proceedings must now be brought on for full hearing as soon as is reasonably possible. To facilitate this, all further applications in these proceedings are to be made returnable to the Judge in charge of the Chancery List.

64. As to the legal costs of the motion, my *provisional* view is that same should be reserved to the trial judge. It is not possible, at this early stage of the proceedings, to make a just assessment as to where the incidence of costs should fall. This is because the outcome of the application for an interlocutory injunction turned on what was, of necessity, an *initial* assessment only of the factual circumstances of the events of 20 June 2023. These events will be the subject of a more detailed analysis at trial, resulting in a definitive ruling as to

where the true facts lie. (See, by analogy, *ACC Bank plc v. Hanrahan* [2014] IESC 40, [2014] 1 I.R. 1 at paragraphs 7 to 11 of the reported judgment).

65. Mr. Kavanagh's counter motion of 7 November 2023 is dismissed for the reasons explained at paragraphs 49 to 59 above. As to the legal costs of that motion, my *provisional* view is that Start Mortgages should be entitled to recover the costs of same from Mr. Kavanagh. The motion was entirely without merit and none of the issues raised will fall for reconsideration by the court of trial.

66. If either party wishes to contend for a different form of costs order than that proposed above, they are to file short written submissions (not to exceed 2,000 words) within seven days of today's date.

Appearances

Rudi Neuman for the plaintiff instructed by Lavelle Partners LLP
The first defendant represented himself