THE HIGH COURT

[2018 No. 1884 P.]

BETWEEN

BELTANY PROPERTY FINANCE

DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

JOSEPH DOYLE

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 14th day of May, 2019

Introduction

1. This is an application for an interlocutory injunction restraining trespass to land. The plaintiff's case is that it is the successor in title to a bank which funded the purchase of the property in 2006 by way of loan secured by a charge over the property, that the mortgagor has failed to pay the loan, that the mortgagor has surrendered the property, and that it is entitled to possession to realise its security.

2. The defendant's case is that he has been in continuous adverse possession of the property since 2004.

The evidence

3. By letter of offer of mortgage loan dated 28th June, 2006 Allied Irish Banks plc and AIB Mortgage Bank made available to Thomas McFeely a mortgage loan in the sum of €270,000 repayable over twenty years to allow Mr. McFeely to purchase a bungalow at 5 Meakstown Cottages, Finglas, Dublin 11. That offer was duly accepted on 18th July, 2006 and the loan was drawn down on the undertaking of Woods Hogan & Co., solicitors, in the usual form, to ensure good and marketable title and the execution by the borrower of a first charge over the property. Mr. McFeely duly executed a charge which on 5th December, 2007 was registered as a burden on folio 180716F Co. Dublin. On the same day, Mr. McFeely was registered as full owner of the property.

4. On 14th January, 2009 Woods Hogan & Co. provided to Allied Irish Banks plc and AIB Mortgage Bank a certificate of title in the usual Law Society approved form.

5. Mr. McFeely was adjudicated a bankrupt in 2012 and on 30th July, 2012 the Official Assignee was registered as full owner. In Mr. McFeely's bankruptcy Allied Irish Banks plc claimed to be owed €156,444.12. There were insufficient funds to warrant a proof of debt sitting but the Official Assignee offered to surrender the property on proof of Mr. McFeely's interest and the bank's security. On 17th August, 2015 the Official Assignee executed a deed of voluntary surrender of the property in favour of Allied Irish Banks plc.

6. By a Global Deed of Transfer and an Irish Law Deed of Transfer, both dated 30th June, 2017, made between Allied Irish Banks plc., AIB Mortgage Bank, EBS Designated Activity Company and Haven Mortgages Limited, and Beltany Property Finance Designated Activity Company, the banks' interest in the loan to Mr. McFeely and the security held in connection with it were transferred to the plaintiff, and on 15th September, 2017 the plaintiff was registered on folio as the owner of the charge.

7. From enquiries made by the bank in 2015 and 2016, the plaintiff knew that the property was, or at least on the dates on which the enquires had been made had been, occupied, and the plaintiff set about establishing the up to date position.

8. By letter dated 19th September, 2017 O'Dwyer Property Management Limited wrote to the occupier of the property. They did not identify their principal. They asserted, on the one hand, that the occupier had no authority to be occupying the property, and on the other invited the occupier to provide proof of a valid lease agreement. It was said that a locksmith would attend on 22nd September, 2017 to secure the property.

9. By letter dated 20th September, 2017 Tom Collins & Company, solicitors, replied on behalf of the defendant. They identified their client as Joe Doyle who, it was said, had been residing in the property for many years and had acquired title to same. The solicitors conveyed their instructions that Mr. Doyle had never had any contact, ever, from anyone, claiming ownership of the property.

10. By letter dated 20th October, 2017 Gore & Grimes, solicitors for the plaintiff asserted that Tom Collins & Company had not set out any legal basis as to how the defendant had allegedly acquired any interest in the property and reiterated the demand for possession.

11. By letter dated 26th October, 2017, Tom Collins & Company challenged Gore & Grimes (not unreasonably) to set out the basis upon which the plaintiff demanded possession, and went on to set out the defendant's stall. The defendant, it was said, first started using part of the property in 2002 and entered into sole and exclusive beneficial occupation of the entire property in 2004. The property, it was said, had been abandoned at that time and was in poor condition and the defendant had spent "significant" money maintaining and restoring the property to a habitable condition. The defendant had also, it was said, improved the property by building a pigeon loft in 2005 and a prayer house in about 2013. The letter continued: -

> *"Until receipt of the letter from O'Dywer Real Estate Management dated 19th September, 2017, our client had not received any communication or contact from any person or agent of such person purporting to have any claim or interest in the property. Our client has not at any time given any acknowledgment in favour of any person of any entitlement or interest in the property".*

12. The plaintiff's solicitors made further enquires with AIB Bank and were provided with a copy of a valuation dated 24th July, 2006, written in the context of Mr. McFeely's loan application, which valued the property at €400,000. The property was described, inside and out, as in good condition and a photograph was appended to the valuation report.

13. In a letter of 23rd January, 2018 the plaintiff's solicitors summarised the making of the loan to Mr. McFeely, the purchase of the property by Mr. McFeely, and the plaintiff's later acquisition of the loan and security.

14. In letter of 29th January, 2018 the defendant, by his solicitors, reiterated his position and declared that he had never given permission for any valuation and that he was at a loss to understand how the valuation had been carried out.

15. The story so far, then, is that the owners of this house, having abandoned it in or before 2004, returned in 2006 and managed to sell it (much improved) for at least €270,000 to Mr. McFeely, without any contact by the vendors, the purchaser, or any estate agent or valuer, with the defendant who had been squatting in it for two years. Surprising as this might be, the story (as counsel for the plaintiff submits) gets curiouser and curiouser.

16. The plaintiff's solicitors did some further digging and turned up a number of documents which showed, they thought, that prior to the sale to Mr. McFeely, the defendant had attempted to purchase the property. Those documents were a letter of 23rd November, 2005 from O'Reilly Doherty & Co., solicitors, to Woods Hogan & Co.; an undated contract for the sale and purchase of the property; and a copy of requisitions on title and replies dated 20th April, 2006.

17. In the letter of 23rd November 2005, O'Reilly Doherty & Co. identified their client as David Boyle and Nicola Boyle and Woods Hogan & Co.'s client as Joseph Doyle. Mr. and Mrs. Boyle were said to be most anxious to progress a sale of the property to Joseph Doyle, and Woods Hogan & Co. were asked to return executed contracts, a draft deed, and requisitions on title, by return.

18. The requisitions on title identified David Boyle and Nicola Boyle as vendor, Joseph Doyle as purchaser, and the property as 5, Meakstown Cottages, Dubber Cross, Dublin 11. By requisition 8, the purchaser's solicitors had sought the usual confirmation that clear vacant possession of the entire property would be handed over on closing: which was confirmed.

19. The undated contract identified the property and showed a purchase price of €300,000, a deposit of €30,000, and a balance of €270,000. The contract was signed by Thomas McFeely in the presence of a solicitor in Woods Hogan & Co. but had been prepared and printed in the expectation that the purchaser would be Joseph Doyle.

20. Copies of these documents, as well as Woods Hogan & Co.'s certificate of Mr. McFeely's title dated 14th February, 2009 were provided to Tom Collins & Co. under cover of a letter dated 23rd February, 2018 in which the plaintiff's solicitors asked eight questions: -

> *"1. Did your client instruct Woods Hogan & Company to purchase the property on his behalf?*
>
> *2. Did your client instruct Woods Hogan & Company to prepare a contract for the purchase of the property on his behalf?*
>
> *3. Did your client instruct Woods Hogan & Company to raise objections and requisitions on title in or about April 2006, and specifically to enquire as to whether vacant possession of the property was available?*
>
> *4. Did your client instruct Woods Hogan & Company to enquire as to whether any development had taken place on the property since 1963?*
>
> *5. Was your client aware of the purchase of the property by Thomas McFeely?*
>
> *6. Did your client consent to the purchase of the property by Thomas McFeely?*
>
> *7. Does your client have any knowledge of, or association with, Thomas McFeely?*
>
> *8. In light of the above, does your client now withdraw his claim that he entered into sole and exclusive beneficial occupation of the entire property in 2004, and that he has treated the property as his own ever since, and that he erected a substantial pigeon loft on the property in January 2005?"*

21. The defendant did not directly answer those questions but he did address the issues raised, indirectly, in his replying affidavit filed on this application.

22. This action was commenced by plenary summons issued on 5th March 2018. The interlocutory motion was issued on 15th March 2018 and an appearance entered on behalf of the defendant on 18th April 2018 by F.H. O'Reilly & Company solicitors.

23. The motion is grounded on an affidavit of Albert Prendiville, a director of the plaintiff, who put before the court the various documents and correspondence to which I have referred.

24. The defendant swore a replying affidavit on 11th May 2018.

25. Upon his oath, the defendant says that he has been in continuous possession of 5 Meakstown Cottages for a period in excess of twelve years. He says that one night in late January/early February 2002, following a heavy fall of snow, he took a horse, which he had been keeping in a field at the rear of the property, and put him in a shed at the back of the cottage. Without objection or comment from anyone, he cleared up first the shed, and then what he describes as the yard to the rear of the cottage. In the autumn of 2002, he brought a caravan into the yard, and then some hens. The cottage, he says, was occupied by a couple who had "a few" children who threw bread over to feed his hens.

26. In September 2004, says the defendant, the family moved out of the cottage. A few days later, it was broken into, and a party was held with a lot of drinking and drug taking and the cottage was wrecked. The defendant deposes that he threw the revellers out and moved in himself, with his dog, to keep drinkers and drug users out. No one came near him and after some weeks he cleaned, painted and renovated the cottage. He built a large pigeon loft, which was the subject of an enforcement notice from Fingal County Council dated 26th July 2005, but on foot of which no further action was taken. The defendant says that he built an extension to the rear of the cottage in 2006 and a prayer house in the yard in 2013.

27. As to the bank valuation report of 24th July 2006, the defendant avers that no one carried out a visual inspection of what he describes as his home in 2006. He says that the report does not accurately describe the interior of the house, but does not say how the description in the report is inaccurate. He says that he never met any agent of the bank, at any time.

28. As to the documents said to show that he attempted to buy the property, the defendant swore that he never instructed Woods Hogan & Co. to act on his behalf to purchase the property. The defendant says that in the summer of 2004 he was approached by a man named John Boyle who said that he, Mr. Boyle, owned the yard and that his, Mr. Boyle's, son owned the cottage and asked whether the defendant would be interested in buying it. The defendant swears that he told Mr. Boyle that he was interested in buying the property, because, he says, he wanted Mr. Boyle to think that: but that he did not have the money. The defendant swears that he gave Mr. Boyle the name and number of Mr. Damien Woods, solicitor, but never heard again from Mr. Boyle, or from anyone else, in relation to the property being sold until he read Mr. Prendiville's affidavit.

29. The defendant avers that he knew nothing of the correspondence, contract, or requisitions on title until he read the affidavit of Mr. Prendiville and that he was awaiting an explanation for how his name appeared on the documents to do with the purchase of the property. He said that he did not know, and had never met, Mr. McFeely. He said that Mr. McFeely had never visited the property and that he was not aware that Mr. McFeely had purchased the property.

30. The defendant swore that when the issue of the documents arose, he contacted John Boyle but that Mr. Boyle was not prepared to, or could not, provide an explanation. He said that he had instructed his solicitors to make contact with Mr. Mark Killilea, solicitor, who was thought to have taken over the files of Woods Hogan & Co. At the time of swearing his affidavit, the defendant had an acknowledgment from Mr. Killilea but no substantive response.

31. In his replying affidavit, the defendant took issue with the sufficiency of the proof that the loan and security had been acquired by the plaintiff but this was later addressed by a supplemental affidavit of Mr. Prendiville and at the hearing of the application there was no issue as to the adequacy of proof of the plaintiff's paper title, save an argument as to the description of the property on the folio, to which I shall come.

32. The defendant's case that he had been in continuous possession of the property from 2002 was supported by the affidavits of his neighbours in Nos. 6 and 12 Meakstown Cottages.

33. Just to recapitulate, the story so far is that a couple of months after the defendant told the father of the owner of the house that he was interested in buying it, the owner and his family abandoned the house and the defendant moved in, and never thereafter heard a peep from anyone. About a year later, the owners of the house were in negotiation to sell it. Coincidentally, the prospective purchaser was also called Joe Doyle and, coincidentally, the other Joe Doyle instructed Mr. Woods, whose name the defendant had given to the owner's father. About nine months after that, unknown to the defendant, the house was bought and paid for by Mr. McFeely, who was unknown to the defendant.

34. As of the date of swearing of his affidavit on 11th May, 2018, upwards of twelve years after the other Joe Doyle, using this Joe Doyle's solicitor, had tried to buy the house which this Joe Doyle had falsely said he was interested in buying, but in which he was squatting, this Joe Doyle, by his solicitor, was endeavouring to identify the Doppelgänger.

35. In their continuing efforts to understand how the defendant's name came to be on the papers, the plaintiff's solicitors followed up with Mr. Killilea, and directly with Mr. Godfrey Hogan, formerly of Woods Hogan & Co. The file was located but Messrs. Hogan and Woods took the position that they could not release it to the plaintiff's solicitors without their former client's authority. The defendant was asked to provide his consent but declined, on the basis that he was not Woods Hogan & Co.'s former client.

36. In a letter of 20th June, 2018 the defendant's solicitors wrote: -

> *"Since receiving correspondence from Mr. Killilea it has come to our client's attention that the person referred to in the letter who gave instruction is not in fact our client, although they have the same name. This explains the fact that our client was at a loss as to how it appeared that our client's name appeared on the documents."*

37. Not all together unsurprisingly, Mr. Prendiville was not convinced by this explanation which, in the supplemental affidavit, he characterised as an extraordinary coincidence. Mr. Prendiville observed that the defendant had not provided any further information as to the identity of the other Joseph Doyle. He submitted that the defendant's version of events was utterly devoid of all credibility for six reasons which were:

> *"(a) The defendant's current version of events is inconsistent with the valuation and inspection reports exhibited in my first affidavit herein;*
>
> *(b) The defendant's current version of events is inconsistent with the correspondence leading up to the purchase of the property by Mr. McFeely, the objections and requisitions, and the contract for sale itself;*
>
> *(c) The defendant's current version of events requires this Honourable Court to believe that a person unconnected to the defendant – but with the same name as the defendant – instructed the defendant's own solicitors to proceed with the purchase of the property at a time when the defendant was in possession of the property adverse to the title of the true owner and had professed to the true owner of the property to have an interest in purchasing the property, without the defendant's knowledge;*
>
> *(d) The defendant's current version of events is inconsistent with the solicitor's undertaking and certificate of title furnished by Woods Hogan & Company;*
>
> *(e) The defendant has failed or refused to permit this firm to take up the file relating to his instructions given to Damian Woods concerning the property, on the purported basis that another person of the same name was the only person who gave Mr. Woods instructions concerning the purchase of the property;*
>
> *(f) The defendant's solicitors have not yet explained what 'matters of grave concern' and 'anomalies' were conveyed to that firm by Mr. Mark Killilea".*

38. On 20th July, 2018 the defendant swore a second replying affidavit. He reiterated all that he had previously said and gave an account of his solicitors' endeavours to understand how his name had come to appear on the file of Woods Hogan & Co.

39. Since 11th May, 2018, when the defendant's first affidavit was sworn, his solicitors had had further correspondence from Mr. Killilea. In a letter of 16th May, 2018 Mr. Killilea wrote that Woods Hogan & Co. had opened a file in November, 2005 on the instructions of Mr. Joe Doyle, to purchase the property at 5 Meakstown Cottages. On 29th March, 2006 Ms. Pauline Doohan, an

assistant solicitor in the firm, was advised that Tom McFeely would be acquiring the property. It was said that the defendant was a long standing client of Mr. Woods. The contracts had been prepared in the defendant's name but had not been signed while he was awaiting finance and on 29th March, 2006 Mr. McFeely had been substituted as the purchaser. Mr. Killilea asked for confirmation that he could advise the plaintiff's solicitors of his clients' position.

40. In a letter of 14th June, 2018 to the defendant's solicitors, Mr. Killilea elaborated somewhat. He said that between 2004 and 2008 Woods Hogan & Co. had dealt with approximately twenty cases, mostly the acquisition of sites or derelict houses which were built on or renovated with a view to renting or reselling. This particular file had been opened on 16th November, 2005 and assigned to Ms. Doohan. Ms. Doohan checked the title and on 18th November, 2005 wrote to the defendant to advise that contracts had been received. "In error", Mr. Killilea wrote, "this letter was sent to Mr. Joe Doyle Senior whom we understand was also a previous client of our client". The file of Woods Hogan & Co. showed that when Ms. Doohan received the vendor's solicitors' letter of 23rd November, 2005 she phoned her client who said that he knew the vendors and would speak to them directly. Mr. Killilea gave a summary of what was on the file between then and 29th March, 2006 when Ms. Doohan was advised that Mr. McFeely would purchase the property and continued:-

> *"Finally, when the sale completed the vendors' solicitors contacted Mr. Woods to advise that the keys to the property were given to your client on completion. Mr. Woods phoned your client and he informed Mr. Woods that his father Mr. Joe Doyle Senior had the keys and advised that he would get his father to contact the Ms. (sic) McFeely to sort it out."*

41. In his second affidavit, the defendant summarises the correspondence. The Joseph Doyle to which the file relates, he says, is his son, Joseph Doyle, from whom, he says, he was estranged at the time of the purchase of the property. He says that he never got the letter of 18th November, 2005 (which the file suggests was sent to him in error) and he says that the reference to him having the keys "… makes no sense whatsoever as my son and I were not on speaking terms at the time, therefore, I would question whether that statement reflects the truth. I was not involved at all and I had no idea or knowledge of any involvement by my son in the transaction."

42. In order, says the defendant, to fully explain the confusion, but more likely in the forlorn hope that it might, the defendant gives an account of his relationship with his son. He says that he and his wife separated in 2001 when his son was fifteen years old. His son was very upset and stopped all communications from 2001 until 2013. Joseph Doyle Junior is described as an entrepreneur who has been buying up properties since he was eighteen years old.

43. In his second replying affidavit sworn on 20th July 2018 the defendant deposed:-

> *"When I asked him if the name on the documents relating to the purchase of my home was his he became very angry and refused to speak further. Subsequently through communications with my daughter he informed me that he is getting legal advice regarding how documents on which it appears his name is printed were released to third parties without his permission and also creating the impression that he was in some way linked with Thomas McFeely who's (sic) reputation is questionable to say the least. My son Joseph informed my daughter that he was going on holidays and when he returned he would deal with the issue but made it clear he would have no involvement until he had legal advice. At this point in time, therefore, it is not possible to have my son swear an affidavit regarding this matter."*

44. The defendant's case, as expressed in a letter of 16th August 2018 to Mr. Killilea, is that Mr. Woods confused the file in relation to the defendant with the file and instructions he received from Joseph Doyle Junior, which has caused the plaintiff to believe erroneously that the defendant was in some way connected to a conveyance of his home in 2006, which is entirely untrue. In an email of 10th October 2018, Mr. Killilea confirmed his instructions from Mr. Woods that Mr. Woods' initial instructions on the purchase of the property were from Joe Doyle Junior, and not Joe Doyle Senior.

45. In a third affidavit sworn on 29th November 2018, the defendant seeks to forestall any confusion or ambiguity arising out of the use by Mr. Killilea of the word "initial". His case is that he had no knowledge or involvement whatsoever in the purchase of the property and he said that he had sought confirmation from Mr. Woods that this is so. By e-mail of 30th November 2018, Mr. Killilea conveyed his instructions that the only file held by Woods Hogan Solicitors for Joe Doyle Senior was in relation to a road traffic accident which occurred on 22nd February 1993. That case is said to have been completed in 1997 and the file destroyed on 29th July 2006.

46. I referred to an argument as to the description of the property in the folio. Folio 180716F was a new folio opened at the time of the purchase of the property by Mr. McFeely. The land comprises two parcels, first, the property shown coloured red as plan 41 on the registry map, situate in the townland of Meakestown, Barony of Coolock, and electoral division Dubber (which came from Folio 6808) and secondly, the property shown coloured red as plan 53 on the registry map, situate in the townland of Meakestown, known as 8 (sic.) Meakestown Cottages, Dubber, Dublin 11 (which came from Folio 100778F).

47. The map attached to the folio shows the cottage on a plot marked 53 and the long back garden on a plot marked 41. While it is said that the description of the land on the filed plan is not conclusive as to boundaries or extent of the land, it is not suggested that the plan shows, at least more or less, the house and garden known as No. 5. While Ms. Moran-Long sought in argument to agitate the description of the property, I am satisfied that this is not an issue.

The law

48. I am in no doubt as to the applicable law.

49. In Keating & Co. Limited v. Jervis Shopping Centre Ltd. [1997] 1 I.R. 512, Keane J. said, at p. 518:

> *"It is clear 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 explained by Balcombe L.J. in the English Court of Appeal in Patel v. W.H. Smith (Eziot) Limited and Another [1987] 1 W.L.R. 853 at p. 859: -*
>
> > *'However, the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass. Then the court must consider the application of the principles set out in American Cynamid Co v.*

Ethicon Ltd. [1975] 1 A.C. 396 in relation to the grant or refusal of an interlocutory injunction.'"

50. The decision of Keane J. in *Keating & Co. Limited v. Jervis Shopping Centre Ltd.* was followed by Costello J. in *Tyrell v. Wright* [2017] IEHC 92 and *Havbell DAC v. Dias* [2018] IEHC 175.

51. In his decision in *Dunne v. Iarnród Éireann* [2016] 3 I.R. 167, at p. 186, Charleton J. recalled the explanation of the nature of adverse possession given by Kenny J. in *Murphy v. Murphy* [1980] I.R. 183, at 202:

> *"In s. 18 of the Act of 1957, adverse possession means possession of land which is inconsistent with the title of the true owner: this inconsistency necessarily involves an intention to exclude the true owner, and all other persons, from enjoyment of the estate or interest which is being acquired. Adverse possession requires that there should be a person in possession in whose favour time can run. Thus, it cannot run in favour of a licensee or a person in possession as servant or caretaker or a beneficiary under a trust: Hughes v Griffin [and Another [1969] 1 W.L.R. 23]".*

52. At p. 188 of the report, Charleton J. said:-

> *"The circumstances constituting possession will inevitably be various, but fundamental is that the new possessor takes occupation of the land or premises, or a defined portion thereof, with a view to the exclusion of all others. Such possession must not be by force, deception or with the permission of the owner of the legal title; nec vi, nec clam, nec precario. Hence, lands that are overheld but where there is a mortgage of the land to another party are a particular circumstance; Ulster Bank Limited v Rockrohan Estate Limited [2015] IESC 17, (Unreported, Supreme Court, 26th February, 2015). Licensees are another special case. Thus, permission to occupy removes the adverse element from the use of land; Murphy v Murphy [1980] I.R. 183 at p. 195."*

53. It is long established that at the hearing of an interlocutory injunction the Court cannot determine factual matters in dispute between the parties. This, however, does not prevent the court from assessing the credibility of what is said by the defendant.

54. In *I.B.RC. Ltd. v. McCaughey* [2014] 1 I.R. 749 at p. 759, Clarke J. set out the principles in relation to *"credibility"* of a defence offered in summary summons proceedings.

> *"[22] It is important, therefore, to re-emphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in Aer Rianta c.p.t. v. Ryanair Ltd. [2001] 4 I.R. 607 be clear that the defendant has no defence. …*
>
> *[23] Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in Aer Rianta c.p.t. v. Ryanair Ltd. [2001] 4 I.R. 607. It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."*

55. Earlier in his judgment in *McCaughey* Clarke J., at para. 20, recalled that:-

> *"The issues of credibility, which had formed the basis of a conclusion that the defendant had not put forward an arguable defence, in cases such as National Westminster Bank plc v. Daniel [1993] 1 W.L.R. 1453, Banque de Paris v. de Naray [1984] 1 Lloyds Rep. 21 and First National Commercial Bank plc v. Anglin [1996] 1 I.R. 75, arose, as Hardiman J. put it, 'rather starkly'. In National Westminster Bank v. Daniel the defence affidavits were mutually contradictory. In Banque de Paris v. de Naray there was clear evidence, not challenged, from a private detective, which flatly contradicted the [defendant's] case. In First National Commercial Bank plc v. Anglin the chronology asserted was entirely inconsistent with commercial documentation which was not, in itself, disputed.*

Argument

56. Mr. Brian Conroy for the plaintiff, offers a pure legal argument that by reason of Mr. McFeely's bankruptcy, the defendant cannot avail of the Statute of Limitations. Section 13(2)(a) of the Act of 1957, he says, bars an action after the expiration of twelve years from the date it first accrued to the plaintiff or, if it first accrued to some person through whom he claims, to that person. Section 44 of the Bankruptcy Act, 1988 provides that all property belonging to a person adjudicated bankrupt shall, on the date of adjudication, vest in the Official Assignee for the benefit of the bankrupt. The effect of the adjudication and the surrender, it is said, is that the Official Assignee did not acquire the property *"through or under"* Mr. McFeely. No authority was cited which supported the proposition and I do not think it unfair to say that the argument was not really pressed. Without finally deciding the issue, it seems to me that the plaintiff in this case does not claim through the Official Assignee but through the bank. This is not a claim for possession on foot of a charge over land, but an action by a chargee, which as between itself and the chargor, is entitled to possession, against a trespasser. The effect of the surrender, I think, was not to divest the Official Assignee of property vested in him by the adjudication, but only to acknowledge the plaintiff's right to possession of it.

57. Mr. Conroy's principal submission is that the plaintiff has established its title and that the evidence put forward on behalf of the defendant does not give rise to any bona fide issue to be tried as to whether he has been in adverse possession. By reference to the underlying documents and the conflicts in the defendant's affidavits, he argues, the defendant cannot possibly have been in adverse possession. *"The court"*, he submits, pithily, if a little disarmingly, *"is entitled to take account of the fact that it didn't come down in the last shower".*

58. Ms. Moran-Long, for the defendant, submits that the plaintiff has no case. By reference to the defendant's averment that he has been in adverse possession of both the house and garden since 2004, she submits that the paper title was extinguished in November, 2016: which was before the transfer of the loan and security by Allied Irish Banks plc to the plaintiff. In any event, Ms. Moran-Long submits that damages would be an adequate remedy for the plaintiff: although she acknowledges that if the plaintiff is kept out *pendente lite* the defendant would not be able to pay damages.

Analysis

59. The plaintiff's case is that it is entitled to an injunction restraining trespass to the house and lands at 5 Meakestown Cottages, Finglas, Dublin 11. As between the plaintiff and the mortgagor, the plaintiff is entitled to possession. *Prima facie* the plaintiff is entitled to an order. The issue is whether the defendant has raised a *bona fide* issue to be tried as to why such an order ought not to be made.

60. The defendant's case is that he has been in continuous adverse possession of the house and lands at 5 Meakestown Cottages, Finglas, Dublin 11 for upwards of twelve years prior to the commencement of this action.

61. The defendant's case is that in the summer of 2004 he told the father of one of the owners that he was interested in buying it (which he was not), and gave him the name and number of a solicitor who had acted for him nine years previously in a motor accident case. Neither the owners, nor the man he had spoken to, ever followed up (either with the defendant or his solicitor) but, a couple of months later, the owners abandoned the property, which the defendant annexed. About a year into the defendant's occupation, unknown to the defendant, his estranged son, aged about 19, agreed to purchase the property. The defendant's son instructed the same firm of solicitors who had previously acted for the defendant. Incidentally, the defendant's son will not unequivocally acknowledge that he attempted to buy the house, but he appears to disassociate himself from the man who later, using the same firm of solicitors, did buy it.

62. As a matter of objective fact, the house was bought and sold in 2006 for €300,000. The price was paid by a deposit of €30,000 and €270,000 borrowed by Mr. Tom McFeely from AIB Bank. The assurance was stamped and the solicitors paid. The same firm of solicitors who had nine years previously acted for the defendant, and six months previously had acted for his son, acted for Mr. McFeely.

63. Mr. Prendiville, in his grounding affidavit, deposed that *"no payments have been made against this debt since prior to 2012."* That averment was rather ambiguous, but Mr. Prendiville exhibited a letter of 26th September, 2012 from the Official Assignee to Allied Irish Banks plc which suggested that the bank's claim at that time was that it was owed €156,444.12, and he averred that as of 13th March, 2018 the amount owed was €290,076.90. As a matter of arithmetic, if the capital was paid down by upwards of €100,000 in the first six years of a twenty-year loan, the mortgage cannot have been much, if at all, in arrears at the time of Mr. McFeely's adjudication. It is clear, then, that the mortgage was paid for a considerable time.

64. The defendant's case is that throughout he had no contact with Mr. and Mrs. Boyle, or any estate agent, or his son, or the solicitors, or the bank, or Mr. McFeely. The demonstrable objective fact is that Mr. and Mrs. Boyle sold the house and someone put up the money to buy it, and serviced the mortgage for years. I am not, on this application, to express any view as to the likelihood that the defendant was living in the house while Mr. and Mrs. Boyle had it on the market, but if he was, on this side of the rabbit hole, it can only have been with the permission of the owners.

65. On the defendant's case, it was he who first introduced the prospect that Woods Hogan & Co. would act in connection with the purchase of the property. The demonstrable objective fact is that they did. If Mr. Doyle Junior does not accept that he instructed Woods Hogan & Co. to act for him, the defendant's case is that he did.

66. I am quite prepared to contemplate that the defendant's son negotiated for the purchase of the house in which his father was living, or in which he would like to live. I am not on this application to express any view as to the likelihood of a 19 year old being able to borrow the money to do so. I am prepared to contemplate that Mr. Doyle Junior might have done so notwithstanding his estrangement from his father, but not that the defendant was unaware of it. I am not prepared to contemplate that, unknown to Mr. Doyle Junior, Mr. McFeely wandered into the offices of Woods Hogan & Co. and signed a contract for the purchase of this property which had been prepared for Mr. Doyle Junior.

67. I find that it is incredible, in the sense explained in *McCaughey*, that whoever it was put up so much of the money required to buy this house as was not borrowed, and whoever it was serviced the mortgage, did so in ignorance of the fact that the defendant was living in it. Similarly, in the same sense, I find it incredible that Mr. McFeely borrowed the money from AIB Bank without knowing and permitting the position on the ground.

68. I am satisfied that the defendant has an arguable case to make that he was in possession of this property from 2004 but not, crucially, that he has established a *bona fide* issue to be tried as to whether he was so in occupation without permission.

69. Absent any *bona fide* issue which would engage the *Campus Oil* principles, the plaintiff is entitled to an interlocutory injunction *ex debito justiciae*.

70. In case the matter goes further, I think that I should express my view as to how, if I thought that they had been engaged, I would have applied the *Campus Oil* principles.

71. The plaintiff is a mortgagee of this property and is entitled to possession to realise its security. Mr. Prendiville deposes that the plaintiff's ability to realise the security will be irretrievably impaired unless the order sought is granted. I think that overstates the case. I am satisfied that the plaintiff will not be able to sell the house as long as the defendant is living in it, but the refusal of an interlocutory injunction would only postpone the exercise of the plaintiff's rights. I am unconvinced that unless and until the defendant's claim has been finally disposed of, the plaintiff will be able to sell the house. Any buyer, I expect, would have to be a cash buyer because whatever assessment might be made of the strength of the defendant's claim, a solicitor could not give an unqualified certificate of title. Any such buyer, I expect, would likely insist on a substantial reduction in the price that otherwise might be achieved. Mr. Conroy suggests that pending the trial of the action, the plaintiff might rent the house. I am not immediately convinced of that. However, this is a case of trespass to land, in which damage will be presumed. Any loss that the plaintiff might suffer could be readily calculated by applying an appropriate rate of interest to the loan, or, probably, the realisable value of the security: but the defendant appears to be no mark. That being so, damages would not be an adequate remedy for the plaintiff.

72. As far as the defendant is concerned, his case is that the house is his house, and his home. If an interlocutory injunction were to be granted and if he were to make out his case (if he had a case) at trial, unquestionably, whether or not the plaintiff might have succeeded in selling the house in the meantime, damages would not be an adequate remedy.

73. If I thought that there was a *bona fide* issue to be tried, I would have found the balance of convenience to be very much against the granting of an interlocutory injunction, but would have given directions for an expeditious trial. As Ms. Moran-Long argues, if there was an issue to be tried, the granting of an injunction would give rise to the greater risk of injustice.

Conclusion

74. There will be an order, pending the trial of the action, directing the defendant to deliver up to the plaintiff any keys, alarm codes, locks and all other security and access devices in respect of the property at 5 Meakestown Cottages, Finglas, Dublin 11, and restraining the defendant, whether by himself, his servants or agents, or otherwise from trespassing upon, entering upon or otherwise attending at the property.