[2020] IEHC 132

THE HIGH COURT
COMMERCIAL

[2019 No. 9812 P.]

BETWEEN

K.W. INVESTMENT FUNDS ICAV

PLAINTIFF

AND

LORGAN LEISURE LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Denis McDonald delivered on 13 March, 2020

The application before the court

1. In the interlocutory motion before the court, the plaintiff seeks a mandatory order directing the defendant to deliver up vacant possession of the premises known as Leisureplex, Stillorgan, County Dublin ("*the premises").* The plaintiff claims to be entitled to immediate possession of the premises in circumstances where the plaintiff has exercised a break option in the Short Term Business Letting Agreement between the parties dated 26th February, 2019 ("*the 2019 agreement*") by giving three months' notice to the defendant on 10th October, 2019 expiring on 10th January, 2020. The plaintiff also claims, on a number of grounds, that the defendant has no right to a new tenancy in the premises under Part II of the Landlord and Tenant (Amendment) Act, 1980 ("*the 1980 Act*"). In the first place, the plaintiff relies on a written renunciation of rights executed by the defendant on 26th February, 2019. Secondly, the plaintiff maintains that the defendant does not have 20 years' occupation of the premises as required by s. 13 (1) (b) of the 1980 Act. Thirdly, the plaintiff contends that the defendant is estopped from claiming a new tenancy under Part II of the 1980 Act. Fourthly, in reliance on the fact that the plaintiff has the benefit of a planning permission for a development on the site of the premises (which involves the demolition of the premises) the plaintiff says that, as a consequence of s. 17 (2) (a) (i) of the 1980 Act (addressed further in para. 28 below), the defendant will not be entitled to a new tenancy in the premises.

2. The defendant contends that the 2019 renunciation is restricted to its right to a new tenancy under s. 13 (1) (a) of the 1980 Act based on five years' business user. However, the defendant claims that the renunciation does not extend to its right to a new tenancy under s. 13 (1) (b) of the 1980 Act based on 20 years' continuous occupation. Prior to the commencement of these proceedings on 19th December, 2019 the defendant, on 12th December, 2019, served a notice of intention to claim relief under s. 20 of the 1980 Act. In that notice, the defendant intimated an intention to claim a new tenancy under Part II of the 1980 Act or, in the alternative, compensation for disturbance. The notice claimed that the premises has been continuously in the occupation of the defendant or its predecessors in title for a period of more than 20 years. Subsequently, on 9th January, 2020 the defendant issued a Landlord and Tenant Civil Bill in the Circuit Court seeking an order granting a new tenancy in the premises on terms to be fixed by the Circuit Court under s. 18 of the 1980 Act. In the alternative, the Civil Bill claims compensation for disturbance.

3. In circumstances where Part II of the 1980 Act confers jurisdiction on the Circuit Court to hear and determine the claim for a new tenancy, it was strongly argued on behalf of the defendant that the plaintiff's application for an interlocutory order for possession is an "*ill-conceived attempt to circumvent the entire statutory scheme governing landlord and tenant relations*" and that there is no authority to support what counsel for the defendant described as the "radical proposition" advanced on behalf of the plaintiff that a commercial tenant, who is not in breach of the terms of the tenancy, with a proper claim to renewal rights (or compensation in lieu) can be denied the right to apply for relief from the Circuit Court under the 1980 Act through the mechanism of an interlocutory application mounted by the plaintiff to the High Court. In short, the defendant argues that the Circuit Court is the appropriate forum in which to resolve the present dispute and that the application for an interlocutory injunction should not be entertained.

4. It will, accordingly, be necessary to consider whether it is permissible for the High Court to intervene in this case notwithstanding the existence of the Circuit Court proceedings. If it is appropriate to intervene, it will then be necessary to consider whether the plaintiff has demonstrated that it has a strong case sufficient to warrant the grant, at an interlocutory stage, of a mandatory order for possession. If the plaintiff satisfies that hurdle, it will be necessary to consider whether the balance of convenience lies in favour of the grant of the order sought or whether the balance of convenience favours the *status quo* such that the defendant should be entitled to remain in possession of the premises pending the determination of these proceedings. Having regard to the case law discussed below, it may also be necessary to consider whether, even if the plaintiff is entitled to a mandatory order, a stay should be placed on that order pending the determination of the proceedings commenced by the defendant in the Circuit Court. Before doing so, it is necessary, in the first instance, to describe the underlying facts in more detail and also to outline the respective positions taken by the parties.

Relevant facts

5. Although the premises are currently described as Leisureplex, they were previously well known as the Stillorgan Bowl which was the name of the facility when it first opened in 1963. In addition to traditional ten pin bowling, the premises also provide facilities for snooker, pool, a Quasar games room, a children's adventure play area and a number of amusement machines. The facility is used by a number of clubs and community groups including several Special Olympics clubs. The defendant currently employs 55 staff at the premises. According to the affidavit of Ciaran Butler sworn on behalf of the defendant on 21st January, 2010, several of the staff employed at the premises have never worked anywhere else.

6. The facility was originally developed by a company called Ten Pin Bowling Company of Ireland ("*Ten Pin Bowling")* which was unconnected with the defendant. In 1995 there was a corporate reorganisation under which a new company known as Amesview Ltd ("*Amesview*") became a tenant of the property and a twenty-year lease dated 26th February, 1996 ("*the 20-year lease*") was executed by a number of parties including

Amesview and Ten Pin Bowling. Under the 20-year lease, the relevant term commenced on 29th December, 1995.

7. Not long after the corporate reorganisation described above, a company called Entertainment Enterprises Ireland Ltd ("*EEI*") purchased all of the shares in Ten Pin Bowling, Amesview and in another corporate entity which was also a party to the 20-year lease. Thereafter, there were a number of assignments of the tenant's interest to different companies within the EEI group but ultimately on 8th August, 1999 there was an assignment of the tenant's interest to Penmay Ltd (which is a former name of the defendant).

8. From 8th August, 1999 to 1st December, 2006, the defendant was the tenant and occupant of the premises (under the name Penmay Ltd up to October 1999 and thereafter under the name Leisureplex Stillorgan Ltd). On the latter date, a company called Tenderbrook Ltd ("*Tenderbrook*"), in the Treasury Holdings group, acquired the landlord's interest in the premises. On the same date, the defendant surrendered the leasehold interest in the property and a new lease was granted to a company called Vencam Ltd ("*Vencam*") which the defendant maintains is part of the EEI group of companies. It is the defendant's case that both it and Vencam are subsidiaries of Entertainment Enterprises Trading Ltd ("*EET*"). On the same day a three-year letting agreement was executed between Tenderbrook and Vencam but the defendant says that it continued to operate the business at the premises throughout that period. In the affidavits sworn on behalf of the defendant, a number of documents are exhibited in support of its case that the defendant continued to occupy the premises notwithstanding the lease to Vencam. These include (a) documents evidencing that the employees at the premises continued to be employed by the defendant; (b) rates demands issued by the local authority (Dun Laoghaire Rathdown County Council) to the defendant; and (c) Public Music and Singing Licenses issued by the District Court to the defendant which were necessary for certain aspects of the defendant's business at the premises.

9. The plaintiff has suggested that any such occupation of the premises by the defendant after 1st December, 2006 would have been contrary to clause 2 (c) of the 2006 lease under which Vencam agreed with Tenderbrook not to assign, sublet or part with or share the possession of the premises without the prior consent in writing of the landlord. While there is no evidence of any such consent having been forthcoming from Tenderbrook, there is equally no evidence that Tenderbrook ever objected to the continued presence of the defendant in the premises at that time.

10. A new Short Term Business Letting Agreement was executed between Tenderbrook and the defendant on 13th April, 2011 for a term of three years from 1st March, 2011 to 28th February, 2014 at an annual rent of €355,000 payable quarterly in advance. In advance of execution of the 2011 letting agreement, a letter was written on 7th April, 2011 by Ciaran Butler on behalf of Vencam (Mr. Butler is also a director of the defendant) to Treasury Holdings in which he referred to the 2006 letting agreement and confirmed that Vencam ceased trading on 13th November, 2010 and that:

"All and any occupants, licensees, successors in title or assignees (whether permitted or otherwise) of the Premises pursuant to the lease duly vacated the Premises on 13th November, 2010".

11. Subsequently, Tenderbrook was placed in receivership. By a further Short Term Business Letting Agreement made between the receivers of Tenderbrook and the defendant, the premises were again let to the defendant for a term of two years from 1st March, 2014 to 29th February, 2016 at an annual rent of €220,000.00 together with value added tax. At the same time, a Renunciation was executed on behalf of the defendant which recorded the agreement of the defendant, under the provisions of s. 47 of the Civil Law (Miscellaneous Provisions) Act, 2008 ("*the 2008 Act*") renouncing any entitlement which the defendant might have under the provisions of the Landlord and Tennant Acts to a new tenancy in the premises on the termination or expiration of the term of the letting agreement or any extension or renewal thereof.

12. A further Short Term Business Letting Agreement was executed between the receivers on behalf of Tenderbrook and the defendant on 17th February, 2016 for a term of one year from 1st March, 2016 to 28th February, 2017 at an annual rent of €220,000.00 plus value added tax. Again, a renunciation was executed at the same time by the defendant in similar terms to the renunciation executed in 2014.

13. According to the affidavit of Jason Byers sworn on behalf of the plaintiff on 20th December, 2019, the plaintiff acquired the landlord's interest in the premises in April 2016 with a view to redeveloping the premises in the "*relatively short term*". In the same affidavit Mr. Byers explains that the premises forms part of a wider block of lands acquired from the County Council and it was the plaintiff's intention to develop the entire of the lands comprised in that block.

14. After it acquired the landlord's interest in 2016, the plaintiff entered into a Short Term Business Letting Agreement with the defendant for a term of two years commencing on 1st March, 2017 and concluding on 28th February, 2019 at an annual rent of €220,000.00 together with value added tax. This contained a landlord break option which allowed the plaintiff to terminate the agreement by four months' prior written notice to the defendant. At the same time a Deed of Renunciation was executed by the defendant on 9th March, 2017 which was in more detailed terms than the previous renunciations executed in 2014 and 2016. However, in common with the earlier renunciations, the Deed recorded that the renunciation was pursuant to s. 47 of the 2008 Act.

15. According to the affidavit evidence before the court, there was discussion between the parties in the period after 2016 in relation to the inclusion of plans for a bowling alley in any future development of the premises by the plaintiff. However, on 24th January, 2019, Mr. Byers (along with a colleague, Mr. Peter McKenna) met with Mr. Ciaran Butler and Ms. Mary Rose O'Shea of the defendant to update the defendant in relation to the plaintiff's plans for the premises. At that meeting Mr. Butler and Ms. O'Shea were informed that the defendant intended to proceed with a development which did not include a bowling alley. According to Mr. Byers, the defendant was informed at that time

that the plaintiff would require vacant possession of the property in order to proceed with its proposed development. Mr. Butler, in response, says on affidavit that he was disappointed by this news but that he did not express this in any overt way. However, in the same affidavit, he stressed that he never (either at this meeting or at any other time) gave any assurance to any representative of the plaintiff that the defendant would be prepared to offer up vacant possession. Mr. Butler also states that at no time did he ever engage in any discussions with the plaintiff about the "*legal rights*" of the defendant.

16. In the following month (February 2019) a further meeting took place between the parties at which Mr. Butler enquired as to whether the plaintiff would consider an offer from the defendant to purchase the premises. This proposal was rejected by the plaintiff.

17. In February 2019, the plaintiff was involved in pre-planning engagement with An Bord Pleanála. This pre-planning consultation was necessary in circumstances where the plaintiff proposes to carry out a strategic housing development. In the same month, on 26th February, 2019 a further Short Term Business Letting Agreement was executed between the parties which contained a landlord break option in Clause 4.4 (exercisable on three months' prior written notice). According to the affidavit evidence, a period of two months was initially proposed by the plaintiff but, at the request of the defendant, this was extended to three months. At the same time a further Deed of Renunciation was executed by the defendant in similar terms to the Deed which had been executed in 2017. Again, the renunciation was expressly stated to be made pursuant to the provisions of s. 47 of the 2008 Act. At this point, it may be useful to note that s. 47 of the 2008 Act amended s. 17 (1) (a) of the 1980 Act (which sets out a number of circumstances under which a tenant will not be entitled to a new tenancy under Part II) by substituting the following for sub-paragraph (iiia): -

> "*(iiia) if section 13(1)(a) (as amended by section 3 of the Landlord and Tenant (Amendment) Act 1994) applies to the tenement, the tenant has renounced in writing, whether for or without valuable consideration, his or her entitlement to a new tenancy in the tenement and has received independent legal advice in relation to the renunciation…".*

18. Section 17 (1) (a) (iiia) of the 1980 Act had previously been inserted by s. 4 of the Landlord and Tenant (Amendment) Act, 1994 which was in more restrictive terms. In particular, it required that the "*tenement*" had been wholly and exclusively used as an office. The amendment made by s. 47 of the 2008 Act is not qualified in that way and would apply to any business user which satisfies the requirements of s. 13 (1) (a) of the 1980 Act.

19. It may be necessary at a later point in this judgment to consider the terms of the 2019 Deed of Renunciation in more detail. The plaintiff vehemently contends that the Deed of Renunciation was sufficient to extend to any right to a new tenancy under Part II of the 1980 Act. However, the defendant argues that the Deed applies only to the right to a new tenancy that arises under s. 13 (1) (a) of the 1980 Act (namely the five-year business user provision) and that it does not apply to the alternative right conferred by s.

13 (1) (b) which allows a claim to be made for a new tenancy where 20 years' continuous occupation can be shown. The defendant also argues that it is not lawful under the 1980 Act to renounce the right to a new tenancy based on 20 years' business user. In this context, the defendant draws attention to the manner in which the 1980 Act was amended in the case of residential tenancies. While s. 17 (1) (iiib) of the 1980 Act (as inserted by s. 191 (2) of the Residential Tenancies Act, 2004 ("*the 2004 Act*")) authorises a renunciation of a right to a new tenancy based on 20 years continuous occupation, the defendant argues that this applies solely to residential tenancies and does not extend to a renunciation of the s. 13 (1) (b) right in respect of other forms of tenancy. The defendant argues that, insofar as the plaintiff contends that any of the Deeds of Renunciation extend to the right available to the defendant under s. 13 (1) (b), the renunciation is void. The defendant relies on s. 85 of the 1980 Act which provides:-

"85.— (1) So much of any contract, … as provides that any provision of this Act shall not apply in relation to a person or that the application of any such provision shall be varied, modified or restricted in any way in relation to a person shall be void.

(2) Subsection (1) does not apply to a renunciation referred to in —

(a) subparagraph (iii a) (inserted by section 47 of the Civil Law (Miscellaneous Provisions) Act 2008), or

(b) subparagraph (iii b) (inserted by section 191 of the Residential Tenancies Act 2004),

of section 17(1) (a)."

20. The plaintiff rejects the interpretation of the 1980 Act put forward by the defendant. In addition, the plaintiff emphasises the course of conduct between the parties and, in particular, draws attention to the fact that, although the defendant, on its own case, could have applied for a new tenancy at any time after December 2015, it did not do so but instead sat back and allowed the plaintiff to expend significant expense and invest substantial time in its plans for the development of the property without ever raising its claimed entitlement to a new tenancy. Furthermore, the plaintiff says that the defendant entered into a series of short term letting arrangements (accompanied by Deeds of Renunciation) which were clearly designed to ensure that the landlord would be in a position to proceed with development works at an early opportunity once all necessary permissions and consents for the development had been obtained. In the course of his submissions, counsel for the plaintiff also highlighted in this context the negotiations in respect of the 2019 letting agreement during which the defendant sought three months' notice of the exercise of the landlord's break option rather than two months as originally proposed by the plaintiff. Counsel urged that it made no sense to do so if, at all times, the defendant intended to claim relief under Part II of the 1980 Act.

21. On 24th August, 2019, the plaintiff made an application direct to An Bord Pleanála in respect of a strategic housing development comprising the demolition of the existing

buildings on site (including the Leisureplex and associated structures) and the construction of a development (ranging in height from two to eight stories) of 232 "*build-to-rent*" apartments, two retail shops and four restaurants or cafés together with associated infrastructure. The defendant was duly notified by the plaintiff that the application had been made. In the course of the affidavit evidence and the submissions, the plaintiff highlighted that the defendant had not objected to the proposed development. However, the defendant's response on affidavit was that landlord and tenant issues were not a matter for An Bord Pleanála.

22. As noted above, the plaintiff exercised the landlord break option available under Clause 4.4 of the 2019 Short Term Business Letting Agreement and, on 10th October, 2019, gave three months' notice to the defendant expiring on 10th January, 2020. It should be noted that the latter date is subsequent to the commencement of these proceedings but no point was taken in that regard by the defendant in the course of the hearing before me. I assume that the plaintiff believes that it was entitled to commence proceedings in advance of the date of expiry of the notice in circumstances where it became apparent in December 2019 that the defendant was not going to vacate the premises in January 2020.

23. On 5th December, 2019 An Bord Pleanála granted permission for the proposed development. On the same day, Mr. Byers notified Mr. Butler and Ms. O'Shea of the defendant by email of the fact that permission had been granted. On 12th December, 2019 Mr. Butler sought a meeting with Mr. Stefan Foster of the plaintiff. That meeting took place on the following day. At that meeting Mr. Foster informed Mr. Butler that the plaintiff intended to start works on the site once the defendant had vacated the premises on 11th January, 2020. However, at that meeting, Mr. Butler handed an envelope to Mr. Foster enclosing the notice of intention to claim relief under Part II of the 1980 Act. In para. 49 of his affidavit sworn on 20th December, 2019 Mr. Byers says that the plaintiff was very surprised to receive the notice to claim relief. In the same para., Mr. Byers says-

> *"Although the Plaintiff had been engaging with the Defendant since 2016, had entered into two short term letting agreements with it, and had kept it informed through 2019 of its redevelopment plans, the Defendant had never previously suggested that it had or could have any entitlement to a new tenancy. Indeed, in circumstances where the Defendant had executed deeds of renunciation in respect of those short term letting agreements, discussions had at all times proceeded on the basis that the Defendant had no such entitlement. I believe that the belated and unfounded assertion of such an entitlement is calculated to cause financial loss to the Plaintiff…."*

24. In response, in para. 32 of his affidavit, Mr. Butler says that this averment by Mr. Byers is "not correct". Mr. Butler continues: -

> *"I was of the view since 2016 that the Defendant has a statutory right to claim relief pursuant to the 1980 Act, and that the Defendant never renounced that right*

under Section 13 (1) (b) …. Indeed, I believe that Mr. Byers has missed the context of the discussions that took place between 2016 through 2018 and that neither he nor the Plaintiff should have been surprised to receive the Defendant's notice to Claim Relief as this was our first reaction to the Landlord's declaration that it intended to terminate our business. We were fully aware of Tenancy rights and never felt obliged to voice these rights in the discussions as it did not seem to be required until we received the notice to vacate the premises".

25. In turn, when Mr. Byers came to swear a replying affidavit on 27th January, 2020, he did not contend that the defendant had ever expressly stated that it did not intend to claim a new tenancy. However, in para. 14 of this affidavit, Mr. Byers stated:-

> *"Despite having been aware that a bowling alley would not form part of the Development since January 2019, the Defendant did not submit any observations … in respect of, or object to, the … application for planning permission, which was subsequently lodged in August 2019. I am advised and believe that, by executing deeds of renunciation, agreeing to the inclusion of a break clause in the 2019 Letting Agreement, not objecting to the planning application for the redevelopment of the Premises and not ever suggesting that it retain statutory tenancy rights, the Defendant represented to the Plaintiff that it did not have and would not claim such statutory tenancy rights and would vacate the Premises when the break option was exercised. The Plaintiff relied on this representation to its detriment. Had it known that the Defendant intended to claim that it retained statutory tenancy rights, it would not have entered into the 2019 Letting Agreement and would have litigated the issue of the Defendant's entitled (sic) to statutory tenancy rights at a time when it would have been possible to do so without causing delay to the redevelopment of the Premises. In the circumstances, I am advised and … believe that it would be inequitable if the Defendant were permitted to rely on its alleged entitlement to statutory tenancy rights and it is estopped from doing so".*

26. This averment on the part of Mr. Byers was met with a reiteration in para. 27 of Mr. Butler's next affidavit sworn on 3rd February, 2020 that: -

> *"I wish to clarify categorically that the defendant never made any such representation to the effect that it would not claim statutory tenancy rights based on long possession. Indeed, the Defendant's statutory tenancy rights were never even discussed".*

27. The plaintiff claims that it will be exposed to very considerable financial loss if the injunction sought is not granted. Although it has not yet entered into any contract with a contractor for the construction of the proposed development, the plaintiff claims that it is ready to enter into such a contract. No details of its engagement with any prospective contractor have been provided in the affidavit evidence before the court. However, Mr. Byers, in para. 63 of his affidavit sworn on 20th December, 2019 suggests that construction inflation is running at approximately 6% to 7% and that this upward trend is expected to continue through 2020. Mr. Byers claims that, based on current estimated

construction costs, this could amount to an increase in costs of €400,000 per month or €5 million per year. The plaintiff contends that the defendant will not be in a position to meet any claim for damages. In response, the defendant maintains that it is a substantial business with assets worth over €1.2 million and that it has consistently paid the current annual rent of €220,000 together with VAT and that it has always discharged its obligations promptly. The defendant says that the plaintiff's application, if successful, will put it out of business with significant knock-on consequences for its 55 employees. It is also submitted on behalf of the defendant that the plaintiff's contention that it will suffer financial loss is speculative and vague. In addition, the defendant maintains that the plaintiff can have no right to any award of damages in circumstances where, pending the determination of the proceedings in the Circuit Court, the defendant is entitled under s. 28 of the 1980 Act to remain in occupation of the premises. Section 28 of the 1980 Act provides as follows: -

> "Where an application is pending under this Part for a new tenancy … and the pre-existing tenancy was terminated otherwise than by ejectment or surrender the tenant may, if he so desires, continue in occupation of the tenement from the termination of the tenancy until the application is determined by the Court or, in the event of an appeal, by the final appellate court, and the tenant shall while so continuing be subject to the terms (including the payment of rent) of such tenancy, …".

28. The plaintiff maintains that there is no substance to the suggestion that the defendant will suffer irreparable harm in the event that the relief sought is granted at this stage. In this context, it draws attention to the fact that it now has the benefit of a planning permission from An Bord Pleanála for a development which involves the demolition of the existing buildings on site. In those circumstances, the plaintiff says that s. 17 (2) (a) (i) of the 1980 Act applies and that, accordingly, the defendant will not be entitled to a new tenancy under Part II even if the defendant is correct in its contention that the Deed of Renunciation is void. Section 17 (2) (a) (i) provides as follows: -

"(2)(a) A tenant shall not be entitled to a new tenancy under this Part where it appears to the Court that—

(i) the landlord intends or has agreed to pull down and rebuild or to reconstruct the buildings or any part of the buildings included in the tenement and has planning permission for the work, …".

29. The defendant, however, argues that, under Part II of the 1980 Act, it will be entitled to remain in occupation of the premises pending the determination of the Circuit Court as to whether it is entitled to a new tenancy or whether, instead, it is entitled to compensation for disturbance. The defendant submits that this opportunity to remain in the premises pending the determination of the claim under Part II is essential to the survival of the defendant's business. The defendant argues that s. 28 of the 1980 Act (which operates whether or not s. 17 (2) (a) (i) applies) provides an important breathing space to a tenant to enable the tenant to find new premises in the event that the landlord is entitled

to rely on any of the factors outlined in s. 17 (2) (a). In contrast, if the defendant is required to immediately vacate the premises (as the plaintiff seeks), it will be left with nowhere from which to carry on its business. In addition, the defendant says that the fixtures which currently exist within the premises are not capable of being removed and that, as a consequence, the defendant would have to start from scratch if it is to find new premises.

The issues which require to be considered

30. Having regard to the summary of the relevant facts and the respective positions taken by the parties, the following issues fall for consideration by me: -

(a) In the first place, it will be necessary to assess whether it is appropriate for the High Court to intervene in a case of this kind in circumstances where there are currently proceedings pending before the Circuit Court in which the defendant seeks a new tenancy pursuant to Part II of the 1980 Act. In this context, it is important to bear in mind that, in enacting the 1980 Act, the Oireachtas, specifically designated the Circuit Court as the relevant court to hear and determine claims under the 1980 Act. Section 3 (1) defines "*the Court*" for this purpose as the Circuit Court. In addition, s. 8 expressly states that the jurisdiction conferred by the 1980 Act on the Circuit Court "*shall be exercised by the Judge of the Court for the time being assigned to the Circuit in which are situate the premises… in relation to which the jurisdiction is exercised*". In the present case, the relevant Circuit Court is the Dublin Circuit Court.

(b) If I conclude that the High Court should intervene in this case, I must then consider whether the plaintiff has established a sufficiently strong case (meeting the standard set out in the decision of the Supreme Court in *Lingam v. Health Service Executive* [2006] ELR 137) to warrant the grant of interlocutory relief and mandatory terms;

(c) If I am satisfied that the plaintiff has established such a strong case, I must then consider where the balance of convenience lies in accordance with the principles set out in the judgment of the Supreme Court in *Merck Sharpe & Dohme Corporation v. Clonmel Healthcare Ltd* [2019] IESC 65;

(d) If I reach the conclusion that it is appropriate to grant the interlocutory injunction sought, I must also consider whether, in accordance with the case law discussed below (including the decision of Finlay Geoghegan J. in *Crofter Properties Ltd v. Genport Ltd* [2007] IEHC 80 and the decision of Twomey J. in *Ferris v. Markey Pubs* Ltd [2019] IEHC 117), a stay should be placed on any order made by the court in these proceedings to last until the outcome of the Circuit Court proceedings.

31. I now deal, in turn, with each of the above issues (to the extent that it is necessary to do so).

The jurisdiction of the High Court to intervene

32. This issue has been addressed in a number of decisions from which it appears that the High Court can, in appropriate circumstances, resolve issues of the kind which arise in these proceedings notwithstanding the existence of parallel proceedings in the Circuit Court under Part II of the 1980 Act. Based on the case law discussed below, it appears that the High Court can proceed in this way where it is satisfied, in the circumstances of a particular case, that there is a serious danger that justice would not be done if the court declined to exercise jurisdiction. The case law suggests that the court may intervene in at least two circumstances: -

    (a) Where it is clear that the application pending in the Circuit Court by a tenant has no prospect of success; or

    (b) where the plaintiff establishes a sufficient degree of urgency to persuade the High Court to intervene.

33. There is a very deep chasm between the parties as to the correct approach to be taken in this case. In view of the depth of the dispute between the parties as to the appropriate approach to be taken in relation to this issue, I believe that it is important to carefully consider the existing authorities with a view to identifying the principles that should be applied in determining whether the High Court should accept jurisdiction in an individual case. The first relevant authority is the decision of O'Byrne J. in *Walpoles (Ireland) Ltd v. Dixon* (1935) 69 ILTR 232 which was affirmed on appeal by the Supreme Court. In that case, it was clear that the claim by the defendant to a new tenancy under the Landlord and Tenant Act, 1931 could not succeed in circumstances where the tenant of a property in Suffolk Street (which was to be redeveloped by the linen merchants, Walpole Brothers) had entered into a tenancy agreement for a period of nine months which was expressly stated to be for the temporary convenience of the landlord. As such, it was not a tenement within the meaning of s. 2 of the 1931 Act. In those circumstances, O'Byrne J. entertained proceedings by the landlord in which the landlord sought immediate possession of the property. O'Byrne J. granted the order sought. Based on the relatively short report, it would appear that this order was made on the hearing of the summons. There is nothing in the report to suggest that the plaintiff had applied for an interlocutory injunction.

34. At p. 233 of the report, O'Byrne J. explained the rationale for his decision in the following terms: -

> *"Mr. Campbell, who appears for the defendant, says that his client has served a notice under [the 1931 Act], and that the issue raised … will come on for hearing in the Circuit Court; and that pending such hearing I should adjourn this action. I would certainly take that course if I thought there was any substantial ground on which such application might be granted, but in my opinion, having regard to the facts of the case, and to the documents and to the provisions of the Act of 1931, such an application could not possibly succeed. Mr. Campbell relied on Section 38… which provides that where an application under the Act is made … for a new tenancy, the tenant may … continue in occupation of the tenement to which such*

application relates from the expiration of such tenancy until such application is heard by the Court …. The difficulty which arises on the threshold of this case … is that the premises … do not seem to me to come within the definition of a tenement in Section 2 …. That section contains various definitions of a 'tenement' …. One of the conditions is that the contract of tenancy was not a letting which was made for the temporary convenience of the lessor…. It has not been suggested in this case that the arrangement made between the parties and contained in the tenancy agreement was a bogus arrangement, and that being so, then it is clear that the letting was made, as it is expressed to be made, for temporary convenience. For these reasons I have come to the conclusion that this tenancy is, by the terms of the Act, excluded from its provisions and therefore the application to allow this action to stand over pending the decision of the Circuit Court cannot be granted. In my opinion, no defence has been shown to the action, and I must therefore give judgment for possession of the premises".

35. It is evident from his judgment that O'Byrne J. came to a clear conclusion that the tenant in that case had no prospect of successfully maintaining a claim for a new tenancy under the 1931 Act (which was then in operation). It is also clear from his judgment that if he had thought that there was any substantial ground on which the Circuit Court might grant the application for a new tenancy, the outcome would have been different. As noted above, the decision of O'Byrne J. was affirmed by the Supreme Court on appeal although the judgment of the Supreme Court does not appear to be available. The next case which addressed a similar issue was *Kenny Homes & Co. Ltd. v. Leonard*, High Court, unreported, 11th December, 1997 in which Costello J. (as he then was) came to the conclusion that the High Court, having regard to the "*particular urgency*" of the case, should not decline jurisdiction to hear and determine the claim for repossession of property from the tenant. His decision was upheld on appeal by the Supreme Court in a judgment delivered by Lynch J. (Supreme Court, unreported, 18th June, 1998). The underlying urgency of the application is explained in the judgment of Lynch J. in the Supreme Court. It is clear from that judgment that there were two particular reasons why the case was very urgent: -

(a) In the first place, notwithstanding the presence of a petrol filling station on the site the subject matter of the proceedings, there was no policy of insurance in place; and

(b) The premises were in a designated area. The designation was subject to time limits and the plaintiff was exposed to very substantial loss if it was unable to avail of the incentives available for that designated area in the event that the development did not proceed.

36. It is important, in my view, to bear in mind that, although Costello J. held that the High Court can exercise jurisdiction in such a case, he nonetheless stressed that issues in relation to a contested claim for a new tenancy should ordinarily be determined in the

Circuit Court. At p.p. 4-5 of his judgment he explained why the High Court should not decline jurisdiction in the particular circumstances of the case as follows: -

> *"It was submitted that the court had no jurisdiction to grant an injunction because of the proceedings pending in the Cork Circuit Court under the 1980 Act. It was urged that (a) exclusive jurisdiction was given to the Circuit Court under the 1980 Act to determine Lecorne's right to a new tenancy, (b) that this court had no jurisdiction to determine the issues arising on that application, (c) that by virtue of section 28 of the 1980 Act Lecorn (sic) were entitled to retain possession … pending their application for a new tenancy, (d) that accordingly the injunction claimed could not be granted. I disagreed with these submissions. I concluded that (a) the Circuit Court had exclusive jurisdiction under the 1980 Act to hear and determine claims for a new tenancy, (b) that the present proceedings were for injunctive relief based on a claim that the defendants were trespassers (c) that the 1980 Act did not deprive this court of jurisdiction to hear such a claim, (d) that ordinarily, where a right to a new tenancy under the 1980 Act was contested on the ground that a 'tenancy' did not exist or that the premises were not a 'tenement' these issues should be determined in the Circuit Court and this Court should stay proceedings in which these issues were raised, that (e) because of the particular urgency in this case the court should not decline jurisdiction, that (f) should the court decide that (i) the agreement … constituted a 'tenancy' and (ii) the site constituted a 'tenement' … then section 28 of the Act applied and Lecorn (sic) would be entitled to retain possession pending the determination in the Circuit Court … and I would accordingly dismiss these proceedings. I therefore decided to hear oral evidence and determine these two issues."* (emphasis added).

37. It will be seen from the above extract from the judgment of Costello J. that, although he was prepared to entertain the proceedings in view of the very particular urgency that arose in that case, he nonetheless made clear that, in the absence of that urgency, the correct approach to take would usually be to stay the proceedings in the High Court to allow the claim under Part II of the 1980 Act to be pursued in the Circuit Court. It should also be noted that, although the matter had started by way of an application for an interlocutory injunction, Costello J. had directed that the matter should proceed to a full hearing on oral evidence such that he was in a position to reach a final determination on the issues in question. That is not the course which has been taken in the present case. The plaintiff, here, has chosen to pursue an application for an interlocutory injunction and has not sought to have the hearing of the application treated as the trial of the action. Nor has the plaintiff sought any order pursuant to O.63A r.6 for an order for the trial of a preliminary issue or for the trial of a discrete issue.

38. Having heard evidence in the matter, Costello J. proceeded to find that the contract in issue in that case did not create a tenancy but was nothing more than a licence which had been validly terminated. He also held that the premises were not a tenement. In those circumstances he was in a position to conclude that the defendant had no right to a new tenancy under the 1980 Act and no right to retain possession pending the resolution of

the application then pending before the Circuit Court. As previously mentioned, the decision of Costello J. was upheld on appeal. In the course of his judgment in the Supreme Court, Lynch J., at p. 8, confirmed that he agreed with the views expressed by Costello J. He added:-

> *"…in doing so I have regard to Articles 34 Section 3(1) of the Constitution, the decision of the former Supreme Court in … Walpoles (Ireland) Ltd -v- Dixon … and the decisions of the High Court in R -v- R. [1984] IR 296 and O'R -v- O'R [1985] IR 367."*

39. It will be seen from the observations of Lynch J. that, in expressing agreement with the views of Costello J. in the High Court, he also drew attention to the approach taken by the High Court in *R. v. R.* [1984] I.R. 296 and *O'R. v. O'R*. [1985] I.R. 367. In my view, having regard to the endorsement by the Supreme Court of the approach taken in those cases, it is important to consider both judgments. In *R. v. R*., an issue arose as to whether the High Court continued to have jurisdiction to hear and determine claims under the Guardianship of Infants Act, 1964 ("*the 1964 Act*") and the Family Law (Maintenance of Spouses and Children) Act, 1976 ("*the 1976 Act*") subsequent to the enactment of the Courts Act, 1981 ("*the 1981 Act").* There were significant jurisdictional changes made by the 1981 Act insofar as family law proceedings were concerned. Prior to its enactment, both the 1964 Act and the 1976 Act expressly conferred jurisdiction on the High Court in relation to proceedings under those Acts. However, the 1981 Act inserted a new provision in each of the 1964 and 1976 Acts declaring that the jurisdiction of the courts under those Acts was to be exercised by the Circuit Court or the District Court. The amendment made by the 1981 Act removed any reference to the High Court in the 1964 and 1976 Acts respectively. The plaintiff instituted proceedings under the 1964 and 1976 Acts in the High Court and claimed that the exclusion of the High Court from the definition of the "*court*" in the Acts in question was unconstitutional.

40. In his judgment, Gannon J. drew attention to the provisions of Article 34.3.1 of the Constitution which provides that the High Court is "*invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal"*. At p. 308 of the report, Gannon J. came to the conclusion, in light of Article 34.3.1, that the Oireachtas cannot validly create "*a new juridical jurisdiction and withhold it from the High Court; nor can it reduce, restrict or terminate any jurisdiction of the High Court"*. He therefore held that the 1981 Act could not exclude from the High Court jurisdiction in matters of family law, custody of children or maintenance. Thus, the fact that the 1981 Act had purported to confer jurisdiction solely on the Circuit and District Court did not exclude the jurisdiction of the High Court. In accordance with the principles of interpretation established in the decision of the Supreme Court in *East Donegal Co-Operative v. Attorney General* [1970] I.R. 317, Gannon J. held that the 1981 Act had to be construed as though it had not excluded the jurisdiction of the High Court in relation to claims under the 1964 and 1976 Acts. Nonetheless, he went on to hold at p. 310 that: -

"it is competent for the High Court to decline to entertain applications for orders obtainable in such other courts, or to remit to such other courts for hearing such applications brought in the High Court as are within the jurisdiction of such other courts."

41. Subsequent to the decision of Gannon J. in *R. v. R.*, a High Court practice direction was issued which required parties to proceedings issued in the High Court under (*inter alia*) the 1964 and 1976 Acts to submit, at an early stage in the proceedings, such evidence or arguments as they saw fit as to whether it was appropriate that the case should be retained in the High Court or whether the case should be remitted to the Circuit Court or District Court. The decision of Murphy J. in *O'R. v. O'R.* addresses the application of the practice direction in question. The plaintiff, in that case, argued that the High Court could not decline jurisdiction in favour of the Circuit Court or the District Court (as the case might be) unless a formal motion to remit the proceedings had been brought pursuant to the rules of the Superior Courts. This argument was rejected by Murphy J. who took the view that there was no necessity to bring a formal motion to that effect. Murphy J. provided very valuable guidance as to the approach to be taken by the court in deciding whether to retain proceedings in the High Court or to direct that the proceedings should continue in either the Circuit or District Court. In the particular case before him, he concluded that it would not be appropriate to retain the case in the High Court. He came to that view in circumstances where it had not been established that there would be a denial of justice if the High Court were to decline jurisdiction. In reaching that conclusion, Murphy J. placed particular emphasis on the fact that the Oireachtas had clearly intended that proceedings under the 1964 and 1976 Acts should be dealt with in the Circuit and District Courts. At p. 372 he said: -

"The fact that… the Family Law (Protection of Spouses and Children) Act, 1981 defined the words 'the Court' as used in that Act as meaning 'the Circuit Court or the District Court' and then went on to provide in effect that the form of relief granted under s. 5, 6, 7 and 9 of the Act of 1976 might be granted by 'the Court' with no reference to any express jurisdiction of the High Court to deal concurrently with those matters indicated, as Mr. Justice Gannon has already pointed out in R. v. R. … at p. 304, 'a clear intention on the part of the Oireachtas' that such applications should be made in the first instance to the court of a limited local jurisdiction.

There are many cases in which the Oireachtas has indicated a similar intention. An obvious example would be the Landlord and Tenant Act, 1931, which conferred upon 'the Court' far reaching and, perhaps by reference to then accepted concepts of contractual and property law, revolutionary powers enabling 'the Court' to ensure security of tenure to a wide range of tenants of urban property. Section 5 of the Act defined 'the Court' as meaning the Circuit Court and made no express reference to any jurisdiction in the High Court to exercise similar powers. Again the Workmens' Compensation Act, 1934, s. 4, defined the tribunal which was to exercise and did exercise the important powers conferred by that Act as being 'the

Circuit Court'. Whilst it might be said that the various Courts Acts have from time to time evinced an intent on the part of the legislature that claims in contract and tort for sums below a stipulated figure should be brought in a court of limited jurisdiction rather than in the High Court, there is no doubt that a distinction could be made between that type of case on the one hand and cases relating to the matrimonial legislation, the Landlord and Tenant Acts and the Workman's Compensation Code on the other hand, where the legislation itself contemplated the exercise of the jurisdiction by the Circuit Court only and not by the High Court."

42. Murphy J. then asked himself the question whether the court should give effect to the intention of the Oireachtas "*as expressed in legislation validly and constitutionally enacted?"*. At p. 372-373, Murphy J. answered that question as follows: -

> *"I have no hesitation in answering that question in the affirmative. That answer might be justified in short by saying that it is proper for one organ of the State set up under the Constitution to respect the actions and wishes of another such organ. More fully, it must be recognised that in accordance with Article 36 of the Constitution the Oireachtas is bound to enact legislation regulating in accordance with the law (among other things) the constitution and organisation of the courts and the distribution, jurisdiction and business among the courts. The enactment of legislation involves the consideration of, and the selection from, a variety of methods of providing for the needs of the persons affected by the legislation. The legislative process itself as ordained by the Constitution requires that the legislation should be considered by the elected representatives of the people, and in practice the Oireachtas has available to it all the resources of the permanent administration in assessing the nature and extent of the problems to be resolved and the extent of the resources which could be made available for that purpose. In connection with the legislation involved in the present application, I would readily assume that the appropriate research was undertaken to establish how, where, and at what economic and financial cost, matrimonial and family disputes may best be dealt with and the nature of the facilities which could and should be made available at different venues to deal with litigation touching on these matters… It seems to me that the only circumstances in which the court would be justified in departing from the procedure envisaged by the legislature would be where the High Court was satisfied that in the circumstances of a particular case there was a serious danger that justice would not be done if that court declined to exercise the jurisdiction vested in it by the Constitution in relation to that particular case".* (emphasis added).

43. Murphy J. then proceeded to consider whether, in the particular circumstances of the case before him, there was a serious danger that justice would not be done if the High Court declined jurisdiction. He examined the evidence in the case and came to the conclusion, at p. 374, that while the allegations made in the proceedings were serious and while the plaintiff wife had "*entirely understandable*" concerns about the behaviour of the

respondent husband, the complaints in question were insufficient to merit the High Court assuming jurisdiction. At p. 374 he said: -

> *"Whilst these allegations are serious and the concern of the wife entirely understandable it is unfortunate to have to recognise that complaints of that nature would not distinguish the present case from many others. I cannot see any question of fact or law … which would suggest that the failure of the High Court to accept and exercise jurisdiction in this case might result in a denial of justice.*
>
> *In the circumstances it seems to me that the appropriate course is to decline to exercise the inherent or constitutional jurisdiction of the court to determine the issues in this case and to leave the parties to pursue their remedies in those Courts on which the Oireachtas has expressly conferred jurisdiction."*

44. The decision in *O'R. v. O'R*. predates the decision of the Supreme Court in *Tormey v. Ireland* [1985] I.R. 289 (which was discussed by Barrett J. in *Cuprum Properties Ltd v. Murray* addressed in more detail below). However, the decision in *O'R. v. O'R*. is consistent, in substance, with the approach taken by the Supreme Court in *Tormey*. That case was concerned with criminal proceedings rather than civil proceedings. The plaintiff had been sent forward for trial to the Dublin Circuit Court on a charge under the Larceny Act, 1916. He brought an action in the High Court challenging the constitutionality of S. 31 of the 1981 Act which abolished the right previously available under the Courts Act, 1964 to have a case before the Dublin Circuit Court transferred to the Central Criminal Court. He argued that the provisions of s. 31 were invalid having regard to Article 34.3.1 of the Constitution. His proceedings were dismissed by Costello J. in the High Court and his decision was upheld by the Supreme Court in a judgment delivered by Henchy J. While the Supreme Court recognised that the full original jurisdiction of the High Court under Article 34.3.1 could not be abrogated save to the extent expressly provided for in the Constitution itself, the jurisdiction vested in the Circuit Court by s. 31 of the 1981 Act was of a local and limited nature and did not give rise to any prejudice to the plaintiff. It was therefore consistent with the requirements of Article 34.3.4 which provides for the establishment of courts of local and limited jurisdiction with a right of appeal. At p.p. 296-297 Henchy J. explained the rationale for the decision as follows: -

> *"The Court accepts that Article 34, s. 3, sub-s. 1, read literally and in isolation from the rest of the Constitution, supports the plaintiff's claim to be entitled to a trial in the High Court. But the Court considers that such an approach would not be a correct mode of interpretation. The 'full' original jurisdiction of the High Court … must be deemed to be full in the sense that all justiciable matters and questions (save those removed by the Constitution itself from the original jurisdiction of the High Court) shall be within the original jurisdiction of the High Court in one form or another. If, in exercise of its powers under Article 34, s. 3, sub-s. 4, Parliament commits certain matters or questions to the jurisdiction of the District Court or of the Circuit Court, the functions of hearing and determining those matters and*

questions may, expressly or by necessary implication, be given exclusively to those courts. But that does not mean that those matters and questions are put outside the original jurisdiction of the High Court. The inter-relation of Article 34, s. 3, sub-s. 1 and Article 34, s. 3, sub-s. 4 has the effect that, while the District Court or the Circuit Court may be given sole jurisdiction to hear and determine a particular matter or question, the full original jurisdiction of the High Court can be invoked so as to ensure that justice will be done in that matter or question. In this context the original jurisdiction of the High Court is exercisable in one or other of two ways. If there has not been a statutory devolution of jurisdiction on a local and limited basis to a court such as the District Court or the Circuit Court, the High Court will hear and determine the matter or question, without any qualitative or quantitative limitation of jurisdiction. On the other hand, if there has been such a devolution on an exclusive basis, the High Court will not hear and determine the matter in question, but its full jurisdiction is there to be invoked – in proceedings such as habeas corpus, certiorari, prohibition, mandamus, quo warranto, injunction or a declaratory action – so as to ensure that the hearing and determination will be in accordance with law. Save to the extent required by the terms of the Constitution itself, no justiciable matter or question may be excluded from the range of the original jurisdiction of the High Court.

As to indictable offences, the combined effect of the relevant statutory provisions is that all indictable offences save those which Parliament considered to be the most serious (notably treason, genocide…murder, attempted murder and piracy), are triable in the Circuit Court, and only in the Circuit Court. The jurisdiction thus vested in the Circuit Court is local and limited and there is a provision for an appeal in all cases in which there is a conviction. In the opinion of the Court, that vesting of jurisdiction in the Circuit Court is in compliance with the requirements of Article 34, s.3, sub-s. 4 and the fact that it has a consequence that such cases cannot be tried in the High Court does not amount to a violation of Article 34, s.3, sub-section 1. Apart from the fact that an accused person in such a case may, if convicted, seek leave to appeal to the Court of Criminal Appeal, he may in appropriate proceedings invoke the original jurisdiction of the High Court to prevent the trial being entered on or being conducted in violation of his fundamental rights.

The plaintiff in this case has not suggested that he is in danger of being prejudiced by the mere fact of having to stand trial in the Circuit Court rather than in the Central Criminal Court. It is difficult to see how any such prejudice could be advanced, considering that the law and procedure in both courts are the same, that the judge presiding in the Circuit Court enjoys no less independence than a judge of the High Court, and that for a trial in either court the jury is drawn from the same jury panel". (emphasis added).

45. It is, of course, important to bear in mind that *Tormey* was concerned with a criminal trial rather than a civil proceeding. Nonetheless, it seems to me that the approach taken by the Supreme Court in that case is, in substance, very similar to the approach taken by

Murphy J. in *O'R. v. O'R.* In particular, it is clear from the passage highlighted above from the judgment of Henchy J. that the court addressed its mind to whether the plaintiff, in that case, would be prejudiced by a trial in the Circuit Court. This is not unlike the approach taken by Murphy J. which involved a consideration as to whether there was a serious danger that justice would not be done if the High Court declined jurisdiction.

46. In my view, the approach taken by Murphy J. in *O'R v. O'R*. is particularly helpful and instructive. Of the judgments endorsed by the Supreme Court in *Kenny Homes* it is, by far, the most closely reasoned in relation to the issue of jurisdiction and it provides considerable guidance as to the approach to be taken in cases where the Oireachtas has decided, in the exercise of its legislative function, that a particular court is to have jurisdiction in relation to certain types of dispute. Although Costello J. at first instance, in *Kenny Homes*, did not expressly refer to *O'R v. O'R,* his decision (and that of the Supreme Court on appeal) is entirely consistent with the approach suggested by Murphy J. There were very particular factors which existed in the *Kenny Homes* case which required, in the interests of justice, that the High Court should not decline jurisdiction in that case. These are the factors explained by Lynch J. in his judgment in the Supreme Court in the same case – namely that the plaintiff was at risk of losing the benefit of the designated status for the development proposed by it and that the premises (which included a petrol station) were uninsured. Those factors were sufficient to distinguish that case from what might be described as the general run of cases which arise as between landlords and tenants under Part II of the 1980 Act.

47. The issue was again considered by Finlay Geoghegan J. in the course of her judgment in *Crofter Properties Ltd v. Genport Ltd* [2007] IEHC 80. That case concerned Sachs Hotel on Morehampton Road in Donnybrook which had been the subject of a 21-year lease which had expired in 2001. On the date of expiry of the lease, the defendant tenant served a notice of intention to claim relief under Part II of the 1980 Act. On 18th January, 2002, the tenant issued proceedings in the Circuit Court claiming a new tenancy. Those proceedings were pursued at a very leisurely pace. In the meantime, it remained in occupation pursuant to s. 28 of the 1980 Act. However, it paid no rent subsequent to 1st May, 2004. In May 2005, the landlord issued proceedings claiming possession of the property for non-payment of rent. In the following month, the hotel was closed down and boarded up. In June 2005, the landlord issued a further set of proceedings claiming an injunction restraining the defendant from carrying out building works in the premises. A third set of proceedings was commenced in September 2005 by the landlord claiming possession of the premises on the grounds that there had been multiple breaches of covenant. All three sets of High Court proceedings came on for hearing before Finlay Geoghegan J. in 2007. At that hearing, the landlord claimed that the breaches of covenant and failure to pay rent on the part of the tenant automatically brought to an end the tenant's entitlement to remain in occupation pursuant to s. 28. In response, the tenant argued that it had an absolute right pursuant to s. 28 to remain in occupation pending the final determination of the application to the Circuit Court (or, in the event of an appeal, the High Court) and that, accordingly, the High Court had no jurisdiction in the

three sets of High Court proceedings commenced by the landlord to grant an order for possession notwithstanding the breaches of covenant on its part.

48. Finlay Geoghegan J. considered the decisions of the High Court and Supreme Court in *Kenny Homes* and the decision of O'Byrne J. in *Walpole*. At p. 13 of her judgment, Finlay Geoghegan J. suggested that the approach taken, at first instance, in both *Kenny Homes* and in *Walpole*, was to the effect that the High Court *"would not have proceeded with the action for possession if there was a claim for a new tenancy before the Circuit Court which prima facie came within the terms of the relevant Landlord and Tenant Act."*

49. The case was principally concerned with the operation of s. 28 of the 1980 Act (which I address in more detail below). At this point, it is sufficient to record that Finlay Geoghegan J. came to the conclusion that, notwithstanding breaches of covenant on the part of the tenant, no injustice would be done to the landlord in the event that an order was made in the terms set out in para. 50 below.

50. At p. 25 of her judgment, Finlay Geoghegan J. indicated that the appropriate course to take was to permit the tenant to remain in occupation pursuant to s. 28 but "*only on terms that it complies precisely with its obligations in relation to the payment of rent, insurance and rates* …". She therefore made an order restraining the tenant from continuing in occupation with a stay on the order provided rent rates and insurance were all paid; the stay to remain in place pending the determination of the tenant's claim to a new tenancy. Thus, although Finlay Geoghegan J. entertained the High Court proceedings, notwithstanding the existence of Circuit Court proceedings in which the tenant sought a new tenancy, she nonetheless made clear that the High Court would only interfere with the tenant's right of occupation under s. 28 in exceptional circumstances where it is established that there was a risk of serious injustice to the landlord (for example where the tenant purported to remain in occupation while continuing to act in breach of the terms of a tenancy). In substance, the approach taken by Finlay Geoghegan J. in relation to s. 28 chimes with that proposed by Murphy J., in the family law context, in *O'R. v. O'R.* (discussed above) in relation to whether the High Court should assume jurisdiction.

51. The next relevant decision is that of McGovern J. in *Esso Ireland Ltd v. Nine One Retail Ltd* [2013] IEHC 514. In that case, an agreement described as an "*Operating Agreement and License*" in relation to the defendant's occupation of a garage premises and service station expired and the plaintiff (who was the owner of the property in question) brought proceedings for possession. The plaintiff claimed that the defendant was in unlawful occupation of the garage premises and brought an application for an interlocutory injunction. This was refused by Kelly J. (as he then was). However, he directed that the case should be given an expedited hearing. Such a hearing subsequently took place before McGovern J. In the course of that hearing the defendant argued that, in circumstances where it had served a notice to claim relief under the 1980 Act, the Circuit Court had exclusive jurisdiction under the 1980 Act to deal with the claim. McGovern J. held against the defendant on that issue on the basis of the decision of the High Court

and Supreme Court in *Kenny Homes*. At p. 7 of his judgment, he drew attention to the observation made by Costello J. in *Kenny Homes* that, because of the particular urgency in that case, the court should not decline jurisdiction. McGovern J. stated that he was satisfied that: -

> *"In a case such as this, the court has power to decide the issues in dispute without first remitting the matter to the Circuit Court. The jurisdiction of the Circuit Court only arises in the event that I conclude the relationship between the parties is one of landlord and tenant."*

52. While McGovern J. did not elaborate on his reasons for concluding that it was an appropriate case for the High Court to retain jurisdiction, it is noteworthy that, at a later point in his judgment, he concluded that there were no facts surrounding the defendant's occupation of the premises which would entitle the court to say that it did so under a tenancy agreement. Thus, on the facts, the case was not unlike the situation which arose in *Walpoles*, McGovern J. was in a position, at a full hearing, to conclude that there was no substance to the contention that the defendant in those proceedings had any right to a new tenancy under Part II of the 1980 Act.

53. The next case to address a similar issue is the decision of Barrett J. in *Cuprum Properties Ltd v. Murray* [2017] IEHC 699. In that case, an interlocutory injunction was sought by the receivers of the landlord of a public house premises in Townsend Street, Dublin 2. The defendant tenant argued that the case should not proceed in the High Court in circumstances where he had served a notice to claim relief under the 1980 Act and he maintained that his continued occupation of the premises was protected under s. 28. In response, the plaintiff landlord relied upon a Deed of Renunciation which had been executed by the tenant at an earlier stage. Barrett J., having examined the decision of the Supreme Court in *Tormey v. Ireland* and also the decisions in *Walpoles, Kenny Homes*, and *Esso Ireland*, concluded that the High Court should not take seisin of the case. Having analysed the decision of Costello J. in *Kenny Homes*, Barrett J., at p. 17 of his judgment, distinguished the case before him on the facts in circumstances where there was no dispute that the public house in question was a tenement within the meaning of s. 5 of the 1980 Act. Barrett J. took the view that, accordingly, there was no basis for the proposition that the tenant "*who presently enjoys the statutory protection afforded by s. 28"* could be said to be a trespasser. Barrett J. held that both *Kenny Homes* and *Walpoles* were confined in their application to cases where the premises could not be said to be a tenement within the meaning of s. 5 such that the relevant tenant fell outside the protection afforded by s. 28 of the 1980 Act (or the equivalent provision in the 1931 Act namely s. 38). In those circumstances, Barrett J. declined jurisdiction.

54. A different view was taken by Haughton J. in *Castletown Foundation Ltd v. Magan* [2018] IEHC 653. In particular, Haughton J. could not agree that the principles established in *Kenny Homes* were confined to cases where the premises in issue could not be said to constitute a "*tenement*". In the *Castletown* case, proceedings were commenced in the High Court by the landlord of a substantial country house in County Kilkenny to recover

arrears of rent. In the proceedings, the landlord also sought a declaration that the tenancy had been validly terminated and that the tenant was not entitled to seek a new tenancy under Part II of the 1980 Act. This was on the basis that the letting agreement had been terminated because of non-payment of rent and/or breach of covenant (which is one of the cases under s. 17 (1) (a) where a tenant will not be entitled to a new tenancy). A motion was brought seeking summary judgment against the tenant in respect of the arrears of rent. In turn, the tenant issued a cross motion seeking an order dismissing the proceedings for want of jurisdiction. The tenant had served a notice of intention to claim relief in June 2018. This was followed by the commencement of proceedings in the Circuit Court seeking a new tenancy.

55. For reasons which are explained in his judgment, Haughton J. granted summary judgment for the plaintiff in relation to the arrears of rent claim. With regard to the balance of the claim made by the plaintiff, Haughton J. stayed the proceedings pending the final determination of the application to the Circuit Court for a new tenancy. In reaching that conclusion, Haughton J. took a wider view of the ambit of the decision in *Kenny Homes* than Barrett J. had taken in *Cuprum Properties*. In paras. 104-108 of his judgment, Haughton J. explained why he had taken this approach as follows: -

"*104. Clearly the Circuit Court, and that court alone, has original jurisdiction to grant a new tenancy, or to determine and grant compensation for disturbance or improvements, where such entitlements are proven to exist …. However, as the Supreme Court noted by its reliance in Kenny Homes on Article 34.3.1, the High Court is invested with full original jurisdiction. This entitles the High Court in appropriate cases to determine issues concerning a claimed entitlement to a new tenancy.*

105. It is difficult to discern as a matter of principle why such matters should be limited to determining whether a premises is a 'tenement' or whether it is held under a 'contract of tenancy'.

…

106. [Sections 5, 14 and 15 of the 1980 Act] raise many potential issues which Kenny Homes suggests can be determined by the High Court in an appropriate case. It is notable that … Costello P. at full trial determined not only the question of whether there was a contract of tenancy, but also whether land not covered by buildings was subsidiary and ancillary to the filling station.

107. While these issues have been described as 'threshold' issues, in my view they are better characterised as issues related to conditions that must be satisfied for a tenant to have an entitlement to claim a new tenancy. Why then should the High Court be excluded, even in an urgent case, from determining whether a tenant is disentitled to a new tenancy by virtue of section 17, or at any rate by virtue of one of the circumstances provided for in section 17(1) or (2) where no discretion is vested in the Circuit Court? I cannot discern any difference in principle between

issues raised by section 5 and disentitlement issues raised in section 17. This question of principle does not appear to have been addressed in Cuprum, and with the greatest of respect to Barrett J. I do not accept that the decision of Costello P. in Kenny Homes is as narrow in effect as he suggests in paragraph 26 of his judgment. Section 17 sets out restrictions on entitlement which could equally be regarded as circumstances or conditions which prevent a tenant having an entitlement. The drafters of the legislation and the Oireachtas cannot have intended that issues arising under section 5 could be determined by the High Court in an urgent case, but issues arising under section 17 could not.

108. What does emerge clearly from the jurisprudence is that the High Court should only determine issues of entitlement under the 1980 Act where there is urgency. This is very important in light of the statutory jurisdiction of the Circuit Court which this court should respect." (emphasis added).

56. Notwithstanding that Haughton J. took a different view to Barrett J. in *Cuprum*, Haughton J. nonetheless held that the plaintiff landlord had failed to make out a case of sufficient urgency to justify the maintenance of the balance of the proceedings in the High Court. It is clear from para. 110 of his judgment that Haughton J. took into account that the underlying premises would not be at risk while the outcome of the Circuit Court proceedings was awaited. In the same paragraph he said: -

"By comparison there was real urgency in Kenny Homes (lack of public liability insurance and the running of 'designated area' time limits)."

57. As can be seen from the passage quoted above, Haughton J. accepted that the High Court could determine whether the right claimed by a tenant to a new tenancy was excluded under s. 17 of the 1980 Act but he made clear that this would only be appropriate in cases of "*real urgency*" as occurred in the *Kenny Homes* case. It is particularly striking that, in that case, there was very clear evidence that no rent had been paid for a considerable period of time. This is relevant to the provisions of s. 17 (1) (a) which sets out a number of circumstances in which a tenant will not be entitled to a new tenancy under Part II of the 1980 Act. Among the specific circumstances where the right to a new tenancy will be lost is that set out in s. 17 (1) (a) (i) which provides that the entitlement to a new tenancy will not arise where the tenancy has been terminated because of non-payment of rent. Nonetheless, Haughton J. stayed the High Court proceedings. In para. 113 of his judgment he said: -

"*113. While I have already determined that the plaintiff is entitled to pursue its claim in relation to the validity or otherwise of the purported termination of the Letting Agreement for non-payment of rent, I am of the view that it would not be an efficient or cost saving exercise for that issue to be determined in isolation by this court. Rather it should be determined by the Circuit Court because it will inevitably arise as an issue that falls to be determined under section 17. In conclusion absent compelling urgency these issues should be determined in a timely fashion at the trial of the Landlord and Tenant … proceedings...".*

58. The question of jurisdiction was addressed more recently by Twomey J. in *Ferris v. Markey Pubs* Ltd [2019] IEHC 117. In that case, the plaintiffs were receivers of the landlord of a public house in Suffolk Street. The defendant claimed to be entitled to a tenancy in the property and had commenced Circuit Court proceedings in which it sought a new tenancy under Part II of the 1980 Act. However, the case made by the defendant for a new tenancy was based partly on what Twomey J. described as a "*sham lease*" and partly on an assignment by an over holding tenant. It is well settled that such a tenant has no estate in the land and accordingly there is nothing which is capable of assignment. This was therefore a clear case where the claim to a new tenancy was unlikely to succeed. In his judgment, Twomey J. considered the decisions in *Kenny Homes, Walpoles, Crofter Properties* and also a decision of McDermott J. in *EMO Oil Ltd v. Oil Rig Supplies Ltd* [2017] IEHC 594. For completeness, it should be noted that, in the *EMO Oil* case, the *Kenny Homes* line of authority does not appear to have been brought to the attention of McDermott J. It is nonetheless noteworthy that, although McDermott J. entertained the application for an injunction, he was prepared to place a stay on the injunction (on terms as to payment of rent) pending the determination of a claim brought by the tenant in the Circuit Court seeking a new tenancy under Part II of the 1980 Act. In *Ferris v. Markey Pubs Ltd*, Twomey J. concluded that, in the particular circumstances of the case, it was appropriate for the High Court to deal with the matter. However, like McDermott J. in *Emo Oil*, Twomey J. indicated a willingness to place a stay on the order pending the determination of the Circuit Court proceedings – provided that the tenant paid the rent due. He did so notwithstanding his view that there was little or no substance to the claim for a new tenancy. At paras. 15-16 of his judgment, he said: -

> *"15. To put the matter another way, if the alleged tenant is making an application for a renewal of a tenancy under the 1980 Act with little or no hope of success, but in the hope of gaining rent-free or rent-reduced use of the property (for the year or two that it takes to have the Circuit Court proceedings and any appeal to the High Court, determined) at the expense of the holder of security over the property that funded the purchase of the property, this Court can exercise its full original jurisdiction under Article 34(1) of the Constitution to decide whether there is, in reality, any merit to the claim for a new tenancy, notwithstanding the fact that the general rule is that the Circuit Court has exclusive jurisdiction under the 1980 Act to determine claims for a new tenancy.*
>
> *16. If the High Court were to do otherwise, and allow proceedings which have little or no hope of success to thwart or delay the enforcement of the rights of a holder of security, this would, in this Court's view, amount to permitting an abuse of process since it would permit the use of the court's processes for tactical or other motives, rather than being used for the genuine resolution of bona fide disputes."*

59. In the balance of his judgment, Twomey J. dealt with the application for the interlocutory injunction. He held that, in light of the matters outlined in para. 58 above, the plaintiff there had a strong case to make which satisfied the *Lingham v. HSE* standard and that the balance of convenience favoured the grant of the injunction. He therefore granted the

injunction sought but, as noted above, he held that, if the defendant was prepared to pay the ongoing rent for the premises pending the determination of the Circuit Court proceedings, he would place a stay on the injunction pending the outcome of the Circuit Court proceedings.

60. The final judgment which is potentially relevant to the question of jurisdiction is my own decision in *Dublin Port Co. v. Automation Transport Ltd* [2019] IEHC 499. In that case, after a full plenary hearing, I held in favour of the plaintiff's claim for possession of property notwithstanding that there was, at that time, an application pending before the Circuit Court by the defendant tenant seeking a new tenancy under Part II of the 1980 Act. I did so in circumstances where I found that there was a valid and effective renunciation of rights to a new tenancy by the tenant. I do not believe, however, that my decision is of any assistance, one way or the other, to the present proceedings. In the course of the hearing in the *Dublin Port Co*. case, the case law discussed above was not brought to my attention and was not the subject of debate between the parties. Moreover, the proceedings commenced by the plaintiff in that case contained what was, on the face of it, a significant claim for damages for breach of covenant (albeit that I ultimately found that there was very little substance to that claim).

The applicable principles derived from the case law

61. It seems to me that a number of principles can be extracted from the authorities discussed above. These are:-

(a) Although the Circuit Court has been entrusted by the Oireachtas with exclusive jurisdiction in relation to disputes under Part II of the 1980 Act, the High Court, having regard to the full original jurisdiction vested in it by Article 34.3.1 of the Constitution, may, in an appropriate case, assume jurisdiction notwithstanding that the issues would ordinarily be determined by the Circuit Court;

(b) The fact that the High Court has full original jurisdiction under Article 34.3.1 does not prevent the High Court from declining jurisdiction. As Gannon J. observed (albeit in a family law context) it is competent for the High Court to decline jurisdiction where another court (in this case the Circuit Court) has been invested with jurisdiction by the Oireachtas. As the decision in *O'R. v. O'R*. illustrates, it is not necessary that a formal application should be made to stay proceedings in favour of the Circuit Court. The court is entitled to address the issue of its own motion;

(c) As the judgment of Murphy J. in *O'R. v. O'R.* (endorsed by Lynch J. in the Supreme Court in *Kenny Homes*) demonstrates, the High Court should respect the choice made by the Oireachtas in conferring jurisdiction on a court other than the High Court. This was also emphasised by Haughton J. in the *Castletown Foundation* case. In particular, the High Court will only be justified in departing from the process envisaged by the Oireachtas where the High Court is satisfied that, in the circumstances of a particular case, there is a serious danger that justice will not be done if the High Court declined to exercise its jurisdiction under Article 34.3.1;

(d) I believe it is fair to say that it is only in exceptional circumstances that the High Court will intervene where a claim to a new tenancy is pending before the Circuit Court. In this context, it is clear from the judgment of Costello J. in *Kenny Homes* that, ordinarily, where a right to a new tenancy under the 1980 Act is claimed, the issues should be determined in the Circuit Court. Furthermore, as set out in para. 72-73 below, Finlay Geoghegan J. in *Crofter Properties Ltd v. Genport Ltd* (albeit in the context of s. 28 of the 1980 Act) emphasised that a tenant's right to remain in occupation under s. 28 should only be terminated in exceptional circumstances where there appears a risk of a serious injustice to the landlord if the tenant is permitted to remain. While that observation was made in the context of s. 28, it seems to me to be equally applicable with regard to the issue as to whether the High Court should accept jurisdiction in the first instance. It is noteworthy that the test suggested by Finlay Geoghegan J. chimes very closely with the test proposed by Murphy J. in *O'R. v. O'R.*

(e) Thus, if a plaintiff is not in a position to distinguish its case from the general run of cases, the High Court is likely to conclude that the proceedings should be permitted to run their course in the Circuit Court. This is clear from the judgment of Murphy J. in *O'R. v. O'R*. (quoted in para. 43 above) where he said that the complaints made in that case would not "*distinguish the present case from many others*." In those circumstances, Murphy J. could not see how the refusal of the High Court to accept jurisdiction would result in a denial of justice

(f) While I think it would be wrong to attempt to identify every type of case that would meet the test suggested by Murphy J. in *O'R. v. O'R*., there are certain categories of case where it is well established that the High Court can properly exercise its jurisdiction under Article 34.3.1. These are:-

(i) Where (as occurred in *Walpoles*) it is very clear that the tenant has little or no hope of success in proceedings under Part II. This is consistent with the approach taken in *Ferris v. Markey Pubs Ltd* where, although the court decided to retain jurisdiction, it then placed a stay on its order (on the proviso that the ongoing rent should be paid) pending the determination of the proceedings under Part II of the 1980 Act;

(ii) Where the plaintiff establishes that there is a genuine urgency which justifies the maintenance of High Court proceedings. It would appear that, in order to establish urgency, it is necessary for the plaintiff to establish that there are, essentially, special circumstances in the case which give rise to such urgency and which demonstrate that the plaintiff will suffer real prejudice if the proceedings are allowed to take their course in the Circuit Court. For example, in *Kenny Homes*, the premises contained a petrol station and there was no insurance in place. In addition, the plaintiff was at risk of losing the benefit of a designated status for the premises.

62. Before attempting to apply those principles to the present case, it is necessary to outline the statutory context in a little more detail.

The statutory context

63. As noted above, s. 3 (1) of the 1980 Act makes clear that, for the purposes of the Act, "*the Court*" means the Circuit Court. This is reinforced by the provisions of s. 8 which states that the jurisdiction conferred by the Act on the Court is to be exercised by the judge of the Circuit Court for the time being assigned to the Circuit in which the premises in question are situated. Part II then sets out a very detailed and comprehensive code in relation to claims to new tenancies. Section 13 (1) makes clear that Part II applies to a "*tenement*" if any one of three conditions are met. No issue arises in this case in relation to the meaning of "*tenement*". The three conditions are: -

    (a) Where the tenant can show five years' business user as provided for in s. 13 (1) (a).

    (b) Where the tenant can show 20 years' continuous occupation as provided for in s. 13 (1) (b); or

    (c) Where improvements have been made to the tenement which would, if Part II did not apply to the tenement, give rise to an entitlement to compensation under Part IV (provided that the improvements contribute not less than 50% of the letting value of the tenement).

64. Section 16 confers the right to a new tenancy. It provides as follows:-

    "16. —Subject to the provisions of this Act, where this Part applies to a tenement, the tenant shall be entitled to a new tenancy in the tenement beginning on the termination of his previous tenancy, and the new tenancy shall be on such terms as may be agreed upon between the tenant and the person or persons granting or joining in the grant of the new tenancy or, in default of agreement, as shall be fixed by the Court."

65. Section 17 contains a significant list of restrictions on the right to a new tenancy. As noted in para. 69 below, under the 1980 Act, it is for the Circuit Court to determine whether any of these restrictions apply in an individual case. In particular, s. 17 (1) (a) identifies six circumstances where a tenant will not be entitled to a new tenancy under Part II. These include

    (a) where the tenancy has been terminated because of non-payment of rent;

    (b) where the tenancy has been terminated because the tenant is in breach of covenant;

    (c) where the tenant has terminated the tenancy by notice of surrender;

    (d) where a renunciation has been executed which meets certain statutory requirements, including the requirement that the tenant should have received independent legal advice in relation to the renunciation. However, as discussed

further below, there are two separate provisions in relation to renunciations namely: -

(i.) a renunciation by a tenant of a tenement to which s. 13 (1) (a) applies (as provided for in s. 17 (1) (a) (iiia)); and

(ii.) a renunciation by a tenant of a tenement (comprising a dwelling to which the 2004 Act applies) to which s. 13 (1) (b) applies (as provided for in s. 17 (1) (a) (iiib)).

(e) Where the tenancy has been terminated by notice to quit given by the landlord for good and sufficient reason;

(f) Where the tenancy has been terminated otherwise than by notice to quit and the landlord has good and sufficient reasons for refusing to renew the tenancy.

66. Furthermore, under s. 17 (2) a tenant will not be entitled to a new tenancy if any one or more of six circumstances arise. For present purposes, the relevant circumstance is that provided for in s. 17 (2) (a) (i) which applies where it appears to the Circuit Court that (*inter alia*) the landlord "*intends or has agreed to pull down and rebuild or to reconstruct the buildings or any part of the buildings included in the tenement and has planning permission for the work"*. As noted above, in the present case, planning permission has been obtained by the plaintiff for a development which involves the demolition of the premises currently occupied by the defendant.

67. Section 18 deals with the fixing of terms of the new tenancy by the Circuit Court. In turn, s. 19 deals with cases where the court, on an application for a new tenancy, finds that the tenant is not entitled to such a tenancy. In such cases, if the notice of intention to claim relief includes a claim in the alternative for compensation, s. 19 (a) provides that the court is to hear and determine the claim and fix the amount of any compensation.

68. Section 20 deals with the requirement to serve a notice of intention to claim relief which may be served either before or after the termination of the tenancy (subject to certain time limits which are not here relevant).

69. Section 21 deals with the application by the tenant for relief. Section 21 (1) very clearly envisages that the relevant application will be made to the Circuit Court. Section 21 (1) provides in particular that, any time after one month from the date of service of the notice of intention to claim relief, the tenant may apply to the court (i.e. the Circuit Court) to determine "*his right to relief and (as the case may be) to fix the amount of the compensation or terms of the new tenancy to which he is found to be entitled"*. In turn, s. 21 (3) provides that the application may be made, heard and determined either before and in anticipation of or after the termination of the tenancy. In my view, s. 21 is very important in the context of the jurisdiction issue. It shows that the legislative intention is that it is for the Circuit Court to determine whether the tenant is entitled to a new tenancy. Put another way, it is for the Circuit Court to determine whether any of the grounds set out in s. 17 (1) or s. 17 (2) apply such as to defeat the claim to a new

tenancy. Thus, the Act envisages, for example, that it is for the Circuit Court to determine whether a renunciation exists of the tenant's rights within the meaning of either s. 17 (1) (a) (iiia) or s. 17 (1) (a) (iiib). Likewise, it is for the Circuit Court to determine whether the entitlement to a new tenancy is defeated by the provisions of s. 17 (2) (a) (i).

Section 28

70. Very importantly, s. 28 of the 1980 Act deals with the situation while an application under Part II for a new tenancy is pending either before the Circuit Court or by any court on appeal. The text of s. 28 has already been set out in para. 27 above. Its meaning and effect has been considered in a number of cases. In *Harrisrange Ltd v. Duncan* [2003] 4 I.R. 1, McKechnie J. provided very valuable guidance in relation to s. 28. In that case, the tenant's tenancy expired by efflux of time. The landlord issued ejectment proceedings in the Circuit Court. In its defence and counterclaim, the defendant sought a new tenancy as well as compensation for disturbance and improvements. The Circuit Court upheld the claim of the landlord and dismissed the counterclaim advanced on behalf of the tenant. This decision was affirmed by the High Court on appeal. The landlord then issued summary summons proceedings in the High Court claiming mesne rates for the period during which the tenant had remained in the property from the date of expiry of the tenancy on 1st October, 1997 up to 31st December, 2000 (which was a short time after the matter had been ultimately determined on appeal in the High Court). The landlord claimed that the tenant should have to pay, by way of mesne rates, the difference between the rent actually paid during the period up to December 2000 and a market rate rent for the property during the same period. This claim was made on the basis that, as a consequence of the findings made by the Circuit Court (upheld by the High Court on Appeal), the tenant had no right to a new tenancy and that, in those circumstances, the payment being made by the tenant to the landlord in respect of the occupation of the premises should not be limited to the rent payable under the expired tenancy. The landlord's claim was rejected by McKechnie J. who held that s. 28 provided a complete defence to the claim. At p.p. 17-18 of the report, McKechnie J. explained the position as follows: -

> "*Where an owner has been deprived of his property, he is as a result, entitled to recover possession and in addition in an action for trespass, all the profits derived out of the lands by the person wrongfully withholding them. This from the time when the owner's title accrued. Mesne rates are recoverable from the day on which the owner's title to re-enter accrues. In ejectments for overholding, this is the day on which the tenancy was terminated by efflux of time, by notice to quit, or otherwise… Even in the case of overholding, if the tenant remains on with the consent of the landlord, he is not liable for mesne rates, as there cannot be a trespass with consent: see …Deale, Law of Landlord and Tenant where, in the commentary on s. 77 … (Deasy's Act)…, it is reiterated that such a claim for mesne profits arise only on trespass, that is where the defendant wrongfully withholds possession of the plaintiff's lands. Quite evidently, for the period in question the defendant was not a trespasser and therefore I cannot see how recovery of the sum*

sought can be based on a claim for mesne profits. Neither do I think has s. 5 of Deasy's Act any relevance nor that the plaintiff can mount an action for 'use and occupation'. Under s. 46 of Deasy's Act, a landlord is entitled to recover 'a reasonable satisfaction', for a tenant's use and occupation of a demised premises but only where such tenant is occupying with the agreement of the landlord and in circumstances where no rent has been specified or determined. Obviously quite unlike s. 28. In addition, there is no suggestion that an action could be founded, much less successfully so, on the basis of any alleged breach by the defendant of his covenant to deliver up quiet enjoyment of the property on the expiration of the term created by the said lease. Furthermore, it cannot I feel be claimed that the defendant was a tenant at will or at sufferance or that some sort of estoppel existed which could operate against him in defending these proceedings. The fundamental position is that at no time up to the 4th December, 2000, could it be said that the defendant was a trespasser and accordingly, none of the aforesaid circumstances could be relied upon by the plaintiff in order to afford to it a cause of action wherein it could successfully seek the relief now demanded. Consequently, in my opinion, by virtue of s. 28 … and, in the absence of any other cause of action available to the plaintiff in which it may recover mesne rates, the defendant was obliged to the landlord only to the extent of the rent which was then current at the expiry of his tenancy. ... Since, in my view, no greater sum is due, this part of the plaintiff's claim cannot succeed." (emphasis added).

71. At the same time, McKechnie J. made clear that the right conferred by s. 28 does not create any statutory tenancy. It is simply a right to remain in occupation pending the ultimate determination of the claim by the tenant to a new tenancy. This was explained by McKechnie J. at p.p. 12-13 of the report where he said: -

> *"In my opinion, the right conferred by these sections does not create or establish any new statutory tenancy. It most certainly does not create any new contractual tenancy as where, for example, a tenant remains in possession after the expiry of his term and rent is paid and accepted, then without more the parties by operation of law are presumed to have agreed to a yearly tenancy on the same terms and conditions as are applicable: …. The right is simply one to continue in occupation and no more. Such continuation is of course on the terms as decreed by the various sections but though such terms and conditions may differ, this does not change the nature of the right so conferred. Such a right is, I think, personal, that is personal to the pre-existing tenant and, quite unlike a contractual tenancy, does not create any estate or interest capable of being transferred or transmitted either inter vivos or on death…".*

72. On the other hand, it is also important to bear in mind that, as Finlay Geoghegan J. held in *Crofter Properties Ltd v. Genport Ltd* [2007] IEHC 80 at p. 18, the tenant, for as long as occupation continues under s. 28, remains subject to the terms of the tenancy. In that case, the tenant was in breach of its obligations under the lease. Finlay Geoghegan J. held (at p. 16) that the language used in s. 28 was so clear and unambiguous that the

tenant's right to continue in occupation could not be construed as automatically coming to an end even where a tenant is found to be in breach of the terms of the tenancy. However, where the tenant was in breach of its obligations under the relevant contract of tenancy, the court could intervene in exceptional circumstances. At p.p. 18-19 of her judgment, she said:-

> *"Accordingly, I have concluded that whilst s. 28 … prima facie gives a tenant a right to remain in occupation pending the determination of the application to the Circuit Court (including on appeal), it also makes a tenant subject to the terms of the tenancy, that where the relevant tenancy includes a right of re-entry, the right to remain in occupation may be terminated by the court. The court must retain a discretion to determine whether or not to so terminate. …. This construction of s.28 confirms the view already formed that it cannot be construed as automatically bringing to an end a tenant's right of occupation by reason of a breach of the terms of the tenancy.*
>
> *… it appears to me that in the context of the above statutory scheme a right of occupation under s.28 should only be terminated in exceptional circumstances where there appears a risk of a serious injustice to the landlord if the tenant is permitted to remain in occupation whilst continuing to act in breach of the terms of the tenancy. This approach is also confirmed by the temporary nature of the bare right of occupation conferred by s. 28."*

73. In that case, Finlay Geoghegan J. came to the conclusion that the tenant should be permitted to remain in occupation under s. 28 provided the full amount outstanding in respect of rent and insurance was paid. However, in order to avoid further litigation in the event of a default by the tenant in observing its continuing obligations under the expired lease, she indicated, at p. 25 of her judgment, that the form of order to be made should be an order restraining the tenant from continuing in occupation of the hotel subject to a stay on that order provided the tenant complied with its obligations under the lease. In the event that the tenant failed to comply with the conditions specified in the order made by the court, the stay would automatically expire. For present purposes, what is notable is that, notwithstanding that, in that case, the tenant had been in default of its obligations under the lease, Finlay Geoghegan J. was still prepared to allow the s. 28 occupation by the tenant to continue (on terms) pending the determination of the Circuit Court proceedings in which the tenant sought a new tenancy. It is also significant that an order was made in those terms notwithstanding the provisions of s. 17 (1) (a) of the 1980 Act. The breaches of covenant on the part of the tenant in that case might well, having regard to s. 17 (1) (a), be found by the Circuit Court to defeat the claim to a new tenancy. Notwithstanding the fairly clear evidence of breaches of covenant on the part of the tenant, Finlay Geoghegan J. was careful not to prejudge the outcome of the proceedings in the Circuit Court. It is also noteworthy that, Finlay Geoghegan J. expressed herself in very similar language to that used by Murphy J. in *O'R. v. O'R*. At p. 25 of her judgment she said: -

"I have concluded that if Crofter now receives the full amount outstanding for rent and insurance and continues to be paid rent and recouped insurance is paid on an ongoing basis and the rates on the property are discharged, then Crofter will not suffer the type of injustice which would warrant now bringing to an end the right of Genport to continue in occupation under s. 28 of the Act of 1980".

74. The decisions in Harrisrange and in *Crofter Properties* seem to me to establish the following: -

(a) Section 28 gives a tenant a right to remain in occupation pending the ultimate determination of the claim by the tenant to a new tenancy provided the tenant continues to observe its obligations under the relevant contract of tenancy;

(b) A breach of covenant on the part of the tenant does not automatically bring to an end the tenant's right to remain in occupation under s. 28;

(c) The right of occupation under s. 28 should only be terminated by the court (in advance of the determination of the tenant's claim to a new tenancy) in exceptional circumstances where there appears a risk of serious injustice to the landlord if the tenant is permitted to remain in occupation;

(d) Even where a tenant is ultimately held not to be entitled to a new tenancy, the landlord is not entitled to recover from the tenant anything more than the rent payable under the pre-existing contract of tenancy. There is no right to recover damages or mesne rates on the basis of any alleged breach by the defendant of a covenant to deliver up quiet enjoyment of the property on the expiration of the contract of tenancy.

(e) Even where the tenant fails to obtain relief under Part II, the tenant will not be a trespasser for the period during which the tenant was in occupation under s. 28.

75. It also seems to me to be important to bear in mind that s. 28 envisages that the right of occupation will continue up to the determination of any appeal. In circumstances where the 1980 Act expressly provides that the hearing, at first instance, will take place in the Circuit Court, the Oireachtas appears to have envisaged that the parties will then have the right of appeal to the High Court under the provisions of s. 38 of the Courts of Justice Act, 1936 ("*the 1936 Act*"). Such an appeal is by way of a full rehearing (albeit on the basis of the same evidence as was heard in the Circuit Court). The ability to have two hearings in this way (one at first instance and a rehearing on appeal) provides a considerable measure of protection to the parties (both landlord and tenant) such that, if one of them is dissatisfied with the outcome of the hearing in the Circuit Court, they will each have a right to have the entire matter reheard on appeal in the High Court. This right of appeal is much more extensive than the right of appeal available to the Court of Appeal in respect of a decision of the High Court where, having regard to the principles set out in *Hay v. O'Grady* [1992] 1 I.R. 210, there is very little scope for the Court of Appeal to form its own view of the facts.

Has the plaintiff established that it will suffer an injustice if the High Court does not hear and determine its claim to an interlocutory injunction?

76. Bearing the above principles in mind, I must now consider whether it is appropriate for the High Court to intervene in this case in circumstances where the defendant's application for a new tenancy is still pending in the Circuit Court. As noted previously, the plaintiff makes the following case: -

    (a) In the first place, the plaintiff says that this case is of such urgency that the High Court should entertain the application for the interlocutory injunction sought;

    (b) Secondly, the plaintiff argues that the defendant has no hope of success in the Circuit Court proceedings in circumstances where the defendant has renounced its rights under Part II of the 1980 Act;

    (c) Thirdly, the plaintiff contends, that the defendant, likewise, has no hope of success in the Circuit Court proceedings in circumstances where the plaintiff has planning permission for a redevelopment of the site which involves the demolition of the premises. The plaintiff says that, accordingly, it will be entitled under s. 17 (2) (a) (i) of the 1980 Act to defeat the defendant's claim to a new tenancy; and

    (d) The plaintiff also contends that, in any event, the defendant is estopped from pursuing a claim to a new tenancy.

77. I now deal, in turn, with each of these aspects of the plaintiff's case.

Urgency

78. As noted in para. 27 above, the plaintiff claims that it will be exposed to very considerable financial loss if the injunction sought is not granted. This is on the basis of the current rate of construction inflation which at the time of swearing of the affidavits of the parties in January and February 2020 was running at between 6% and 7%. Whether that rate will be affected by the economic consequences of the current Covid 19 outbreak remains to be seen. In his affidavit, Mr. Byers, claims that this could lead to an increase in costs of €400,000 per month or €5 million per year. Moreover, the plaintiff claims that the defendant (even on the basis of its own evidence) would not be in a position to meet any claim for damages. In this context, in the course of the hearing which took place on 13th February, 2020, counsel for the plaintiff argued that, even if, as a consequence of s. 28 of the 1980 Act, the defendant cannot be said to be liable as a trespasser (in the event that the defendant fails in its application under Part II of the 1980 Act), the plaintiff would still have a claim in damages as against the defendant for breach of contract for failure to yield up possession of the premises on foot of clauses 2.27 and 4.4 of the Letting Agreement.

79. In my view, having regard to the decision of McKechnie J. in the *Harrisrange* case, the latter argument on the part of the plaintiff is misconceived. It is clear from the judgment of McKechnie J. in *Harrisrange*, that s. 28 protects a tenant against a claim for damages for failure to yield up possession of a tenement on the expiry of the relevant lease or contract of tenancy. The relevant findings of McKechnie J. to that effect are set out in the

extract from his judgment quoted in para. 70 above (where the relevant observation is highlighted). In that passage, McKechnie J. made clear that, in his view, there can be no suggestion that an action for damages could successfully be founded on the basis of any alleged breach by a tenant of a covenant to deliver up quiet enjoyment of property on the expiration of the term created by a lease. There is no reason why the same principle would not apply where a tenancy is terminated by the exercise by the landlord of a break option. In both cases, the tenancy would, in the absence of the provisions of the 1980 Act come to an end and the tenant would have no entitlement to remain in occupation thereafter. However, in common with the 1931 Act, which preceded it, the 1980 Act, in s. 28, effectively overrides the terms of the tenancy and permits the tenant to remain in occupation provided the rent and the other obligations under the pre-existing contract of tenancy are observed. Furthermore, as the judgment of Finlay Geoghegan J. in the *Crofter Properties* case makes clear, the right to remain in occupation is not automatically terminated even where the tenant has failed to observe the obligations arising under the pre-existing tenancy. The decisions of both McKechnie J. and Finlay Geoghegan J. must be seen in the context of the profound changes to the law effected first by the 1931 Act and continued under s. 28 of the 1980 Act.

80. As noted in para. 41 above, the changes effected by the Landlord & Tenant Acts were described by Murphy J. in *O'R. v. O'R*. as "*far reaching and, perhaps by reference to then accepted concepts of contractual and property law, revolutionary powers enabling 'the Court' to ensure security of tenure to a wide range of tenants of urban property*". Section 28 was clearly enacted as part of those changes to the law. The legislative intent, underlying the section, is clearly to ensure that, pending the determination of an application for a new tenancy under Part II, a tenant should be in a position to remain in occupation. As the decision in *Harrisrange* demonstrates, this right to remain in occupation exists whether or not the application by the tenant is ultimately successful. The right of occupation continues right up to the determination of any appeal. A tenant is not exposed to a claim for damages in the event that a claim to a new tenancy is ultimately refused.

81. In the circumstances described in paras. 79 – 80 above, I have not been persuaded by the plaintiff that the defendant has any liability to the plaintiff in respect of the damages which the plaintiff says it will sustain in the event that the court does not entertain (and grant) its application for an injunction. However, the plaintiff also argues (albeit in the context of its submissions as to the balance of convenience in respect of its application for an interlocutory injunction) that, if s. 28 has the effect of immunising the defendant from its damages claim, this makes it all the more important that an interlocutory injunction should be granted. The plaintiff draws attention in this context to the observations of Hogan J. (in the context of public procurement) in the Court of Appeal in *Word Perfect Translation Services Ltd v. Minister for Public Expenditure and Reform* [2018] IECA 35 where he said at paras. 59-60: -

> *"59. As the Supreme Court stressed in Okunade v. Minister for Justice … [2003] 3 I.R. 153, the task of the Court in the context of an interlocutory application … is to*

assess the facts and apply legal principles designed to ensure the minimum possible injustice to the parties pending the outcome of the main action. If, however, the ability of Word Perfect to recover damages is highly restrained this clearly impacts on the manner in which these factors should be weighed and balanced.

60. In the light of the conclusions I have just reached …, it cannot be said that damages have been shown to be an adequate remedy. In these circumstances, one must consider (i) whether an arguable case has been made out and (ii) where the balance of convenience actually lies."

82. In my view, those observations must be treated with some caution in the context of the issue of jurisdiction. They are relevant to the issue of the balance of convenience with regard to the plaintiff's application for an interlocutory injunction (in the event that I conclude that the court should accept jurisdiction). However, at this point, I am concerned solely with the question whether the High Court should entertain the application for an interlocutory injunction and whether the plaintiff has demonstrated that the case is one of sufficient urgency to trigger the High Court's ability to hear and determine the case notwithstanding that the Oireachtas intended that disputes of this nature should be heard and determined in the Circuit Court in the first instance. The uncompensatable loss to which the plaintiff will be exposed as a consequence of the operation of s. 28 of the 1980 Act is, in truth, the inevitable consequence of the operation of the statutory scheme which the Oireachtas has chosen to establish through the mechanism of Part II of the 1980 Act. That scheme gives a statutory right of occupation to the tenant subject to the terms of s. 28. That will be so whether or not the landlord ultimately succeeds in defeating the claim to a new tenancy under, for example, s. 17 (2) (a) (i) which is one of the subsections relied upon by the plaintiff in the present case – namely the provision which makes clear that the right to a new tenancy can be defeated where it appears to the Circuit Court that the landlord intends to pull down the buildings comprised in the tenement and has planning permission for the works. In every case where that subsection potentially applies, a landlord could make the argument made by the plaintiff in these proceedings that it will suffer uncompensatable loss in the event that immediate possession of the tenement is not delivered up. In each such case, the landlord would be able to make the case that, the delay in the development works will, in all likelihood, lead to increased costs in the future. Thus, if the plaintiff is entitled to invoke High Court jurisdiction in the present case, then every landlord with the benefit of planning permission for the re-development of lands incorporating a tenement will likewise be entitled to invoke High Court jurisdiction on the same basis. If that were so, that is likely to remove from the Circuit Court a substantial number of applications and to effectively transfer them to the High Court. That would represent a significant derogation from what the Oireachtas clearly envisaged when enacting the 1980 Act. Such a course could hardly be said to be consistent with the need to respect the choice of the Oireachtas to confer jurisdiction on the Circuit Court.

83. Moreover, it is clear from the judgment of Murphy J. in *O'R. v. O'R*. (discussed in paras. 41 – 46 above) that a party seeking to persuade the High Court to assume jurisdiction in

a case covered by legislation (under which the Circuit Court has been invested with exclusive jurisdiction) must be able to distinguish its case from the general run of cases. In other words, a party seeking to persuade the High Court to assume jurisdiction in such a case, must show the existence of exceptional circumstances which would make it unjust for the High Court to decline jurisdiction. In *Kenny Homes,* there were exceptional circumstances of that kind because, there, in contrast to the present case, the plaintiff was able to show that it would suffer very particular damage (over and above the damage which would be suffered by any other landlord with planning permission for redevelopment of a tenement to which s. 17 (2) (a) (i) applies). In particular, the plaintiff in that case was in a position to demonstrate that the premises were at risk in circumstances where there was no insurance in place. Clearly, that was a very important consideration given that the premises contained a petrol filling station. The plaintiff was also able to demonstrate that the site was subject to a designation which was about to expire. It also has to be said that, in that case, the court was in a position to form the view that there was no contract of tenancy at all.

84. In contrast, in the present case, it seems to me that, to paraphrase Murphy J. in *O'R. v. O'R.*, the complaints made by the plaintiff here (while entirely understandable) would not distinguish the present case from any other. As noted above, any landlord with planning permission for redevelopment of a tenement will be in precisely the same position as the plaintiff. It is a striking feature of the 1980 Act that, even in cases where the landlord has planning permission for a development (which involves the demolition of the subject tenement) the tenant's right to remain in occupation under s. 28 of the 1980 Act is not abrogated in any way. Section 28 has the effect that the tenant will continue to be entitled to remain in occupation of the premises pending the determination of its claim. In short, there is nothing in the terms of Part II of the 1980 Act to suggest that the right of a tenant to remain in the premises pending the determination of an application for a new tenancy is at risk where the landlord appears likely to be able to satisfy the requirements of s. 17 (2) (a) (i). There is no "*carve-out*" from the operation of s. 28 in such circumstances. Thus, the fact that planning permission is held by the plaintiff which would appear to entitle it in due course to rely on s. 17 (2) (a) (i) to defeat the claim to a new tenancy does not appear to me to be a circumstance that makes this case exceptional. On the contrary, the 1980 Act expressly envisages that a tenant will remain in occupation pending the determination of an application for a new tenancy even where the landlord has the ability to rely on s. 17 (2) (a) (i).

85. In the circumstances, I am of opinion that the plaintiff has not demonstrated a level of urgency which distinguishes its case from those of other landlords holding planning permission for redevelopment of a tenement where there is an application for planning permission pending in the Circuit Court. Given the choice made by the Oireachtas to confer exclusive jurisdiction on the Circuit Court in such cases, it seems to me that it would not be appropriate for the High Court to assume jurisdiction on this ground.

The renunciation

86. The authorities also demonstrate that the High Court may be persuaded to assume jurisdiction in cases where a plaintiff can establish that the claim made by the tenant in the Circuit Court has no prospect of success. It seems to me, however, that the court should only proceed in this way where it is clear that the tenant has no case. In cases of doubt, it would be unwise to pre-empt the outcome of the determination by the Circuit Court of the issue. This is particularly important given the statutory entitlement of the tenant to remain in occupation under s. 28. On the other hand, if it is clear that the claim of the tenant to a new tenancy has no prospect of success, it would be unjust if a landlord was prevented from pursuing an immediate remedy in the High Court particularly if the landlord is likely to suffer uncompensatable damage in the event that the High Court were to refuse to intervene.

87. In the present case, the plaintiff relies on the Deed of Renunciation. As noted previously, s. 17 (1) (a) provides that a tenant will not be entitled to a new tenancy under Part II where, subject to certain conditions, the tenant has executed a written renunciation of a right to a new tenancy under Part II. The resolution of that issue would ordinarily fall to be determined in the Circuit Court under s. 21 (1). As noted above, it is for the Circuit Court to determine the right to relief. In doing so, the Circuit Court will, to the extent that they are relevant, consider each of the matters outlined in s. 17 (1) and s. 17 (2).

88. As noted in para. 17 above, the defendant, on 26th February 2019, executed a Deed of Renunciation in respect of its right to a new tenancy under the 1980 Act. The Deed of Renunciation records that the defendant had received independent legal advice in relation to the renunciation from Gartlan Furey Solicitors and that the defendant had been advised that, under the existing legislation, it could, subject to the terms of that legislation, be entitled to a new tenancy. The operative part of the renunciation then continued in the following terms: -

> *"NOW We, the Tenant, and under the provisions of Section 47 of the Civil Law (Miscellaneous Provisions) Act, 2008 DO HEREBY RENOUNCE any entitlement which we may have under the provisions of the Landlord and Tenant Acts to a new tenancy in the Premises on determination of the Tenancy AND in consideration of the Landlord granting the Tenancy we ALSO HEREBY UNDERTAKE:*
>
> (1) To notify any proposed assignee of the Tenant's interest, of the existence of this renunciation and to obtain from the proposed assignee a renunciation in similar terms.
> (2) To notify any proposed subtenant of the Tenant, of the existence of this renunciation and to obtain from the proposed sub-tenant a renunciation in similar terms as a term of the sub-tenancy".

89. It should be noted that the renunciation is expressed to be made under the provisions of s. 47 of the 2008 Act which introduced the current version of s. 17 (1) (a) (iiia). However, in his submissions, counsel for the plaintiff drew attention to the language used in the renunciation and in particular to the use of the words "*any entitlement… to a new tenancy …*". He also argued that the clear effect of the renunciation, when read in the context of

s. 13 and s. 17 of the 1980 Act, was to renounce any right to a new tenancy under Part II of the 1980 Act. He submitted that the renunciation covered both the right to new tenancy (based on five years' business user) under s. 13 (1) (a) of the 1980 Act and also the right to a new tenancy (based on 20 years' occupation) under s. 13 (1) (b). In addition, he argued that, in any event, the defendant does not have the benefit of 20 years' continuous occupation. In particular, he drew attention to the fact that, for the period from December 2006 to December 2010, Vencam was the tenant. On that basis, the plaintiff made the case that the defendant could not claim 20 years' continuous occupation.

90. Counsel for the plaintiff also placed particular emphasis on the language used in s. 17 (1) (a) (iiia). He commenced his submission by drawing attention to the opening words of that subsection where it is made clear that, if any of the circumstances set out in subparas. (i) to (v) apply, a tenant "*shall not be entitled to a new tenancy under this Part*" (emphasis added). He then drew attention to the provisions of s. 17 (1) (a) (iiia) which opens with the words: *"if section 13 (1) (a) … applies to the tenement*". Counsel made the very simple point that s. 13 (1) (a) clearly applies to the premises here since there is no dispute between the parties that the defendant has the necessary five years' business user. Accordingly, s. 13 (1) (a) applies to the tenement comprised in the premises in this case. In circumstances where s. 13 (1) (a) applies, counsel submitted that, once a renunciation has been executed by the tenant (following receipt of independent legal advice) the tenant will not be entitled to a new tenancy under Part II. This follows from the opening words of s. 17 (1) (a) quoted above. Counsel submitted that the clear effect of the opening words of s. 17 (1) (a), was that the defendant, by executing the Deed of Renunciation, has lost all of its rights to a new tenancy under Part II including any right it might otherwise have based on 20 years' continuous occupation. Accordingly, counsel argued that the defendant had no prospect of success in its application to the Circuit Court for a new tenancy and he argued that the court should therefore assume jurisdiction in the same way as the High Court did in *Walpoles*.

91. Counsel for the plaintiff argued that it was not necessary to go beyond the literal language of s. 17 (1) (a). However, even if the court took the view that there was some ambiguity about it, and that it was necessary to look at the purpose of the provision, counsel submitted that it would be inconsistent with the purpose of s. 17 (1) (a) (iiia) for the court to hold otherwise. Counsel drew attention, in this context, to the observations made by Wylie (quoted in para. 92 below) and also to the recommendations made by the Law Reform Commission ("*LRC*").

92. In para. 30.27 of Wylie "*Landlord and Tenant Law*" (2014), the author makes the following points in relation to s. 47 of the 2008 Act which introduced the current form of s. 17 (1) (a) (iiia): -

> *"A few … points are worth noting. One was that it was suggested that another consequence of the cross-reference to the business equity in s. 13 (1) (a) of the 1980 Act is that a renunciation by a business tenant affects only his right to claim a*

new tenancy under that equity and not his rights under the other equities, i.e. long occupation (under s. 13 (1) (b)) or improvement (under s. 13 (1) (c)). Again, this would seem to be a misinterpretation of the provision in s. 47 and contrary to its objective of facilitating general contracting out. It is important to appreciate the legislative formula used. Section 47 operates by way of amendment of s. 17 (1) (a) of the 1980 Act, by adding to the list contained in it of occasions when a tenant (who might otherwise qualify) is not entitled to a new tenancy. The vital words in s. 17 (1) (a) are in the reference to entitlement 'under this Part'. Thus a renunciation removes entitlement not only under s. 13 (1) (a) but also under the other provisions of Pt II of the 1980 Act, s. 13 (1) (b) and (c). On the face of it what is removed is only the right to a new tenancy, but it seems clear that also removed is the right to claim compensation for disturbance under Pt IV of the 1980 Act…."

93. As noted above, counsel also referred to the LRC consultation paper on landlord and tenant law (LRC CP 21-2003) which was published a number of years before the enactment of s. 47 of the 2008 Act. The consultation paper set out the views of a working group comprised of Professor Wylie and a number of well known conveyancing practitioners including Judge John F. Buckley, Colin Keane, James Dwyer S.C. and Gavin Ralston S.C. Counsel drew attention to the way in which the courts have had regard in previous cases to reports of the LRC in interpreting statutory provisions which were enacted following such a report. These include the decision of the Supreme Court in *DPP v. Cagney* where Hardiman J. at p.p. 125-126 had regard to the views expressed by the LRC. A further analogous example (in the landlord and tenant context) is to be found in the decision of the Supreme Court in *Twil Ltd v. Kearney* [2001] 4 I. R. 490 where the Supreme Court had regard to recommendations made by the Landlord and Tenant Commission in seeking to interpret s. 21 (3) of the 1980 Act which the court found was unclear.

94. The plaintiff drew attention to the recommendation made by the working group in the LRC consultation paper that the arguments in favour of a general contracting out facility for the business sector were "*even stronger as the Irish economy embarks upon the 21st Century*." In the same report at para. 3.09, it was stated that the LRC remained convinced that its original recommendation to allow parties to contract out of the provisions of Part II "*was sound*".

95. The argument made by counsel for the plaintiff is logical and coherent and is supported by Wylie. However, the issue which I must confront is whether the legal position is sufficiently clear at this stage to allow me to form the view that the defendant has little or no prospect of success in its application for a new tenancy before the Circuit Court. In the course of the hearing in February, counsel for the defendant argued that the rights available to the defendant under s. 13 are threefold. There is the right to a new business tenancy (based on five years' business user) under s. 13 (1) (a). Counsel for the defendant accepted that this was not available to the defendant as a consequence of the execution of the Deed of Renunciation. However, counsel for the defendant argued that,

concurrently with its right under s. 13 (1) (a) which had been renounced, the defendant had a separate statutory right under s. 13 (1) (b) to claim a new tenancy based on 20 years' occupation. Counsel argued that this right had not been renounced by the defendant. Furthermore, it was argued that the right based on 20 years' occupation could not lawfully be renounced under the 1980 Act save in the case of residential tenancies to which the 2004 Act applies. Counsel made the point that, if s. 13 (1) (b) applies (and counsel submitted that it very clearly did) the only form of renunciation that will be valid is in respect of premises to which the 2004 Act applies. That is not a point which is expressly addressed by Wylie in para. 30.27 (quoted in part in para. 92 above). With regard to the reliance placed by counsel for the plaintiff on the LRC consultation paper, counsel for the defendant submitted that the paper was of no assistance in circumstances where (counsel suggested) the Oireachtas had clearly not followed the recommendation made by the LRC. Instead, it had plainly confined the ability to renounce the long occupation equity available under s. 13 (1) (b) to residential tenancies to which the 2004 Act applies. In the circumstances, he submitted that there was no basis on which to look behind a literal interpretation of the provisions of the Act and, accordingly, no basis to have regard to the views of the LRC working group.

96. In my view, the argument made by counsel for the defendant is logical and coherent. It is simply not possible to say, at this stage, that the argument has little or no prospect of success. In this context, it is very important to have regard to the provisions of s. 85 of the 1980 Act. Section 85 (1) contains a very strict prohibition against attempts to contract out of the rights available under the 1980 Act. The text of s. 85 is set out in para. 19 above. Section 85 (1) makes very clear that any provision of a contract which purports to vary, modify or restrict in any way the rights available under the 1980 Act will be void. There are two express exclusions from the application of s. 85 (1). These are set out in s. 85 (2) namely: -

(a) The renunciation referred to in s. 17 (1) (a) (iiia) inserted by s. 47 of the 2008 Act; and

(b) The renunciation referred to in s. 17 (1) (a) (iiib) as inserted by s. 191 of the 2004 Act.

97. It is potentially significant that s. 85 (2) breaks the non-application of s. 85 (1) into two separate and distinct categories, one dealing with the category of renunciation provided for in s. 47 of the 2008 Act and the other dealing with the renunciation provided for in s. 191 of the 2004 Act. In turn, it is arguable that s. 17 (1) (a) (iiia) of the 1980 Act (as inserted by s. 47 of the 2008 Act) is concerned solely with the right conferred by s. 13 (1) (a). Equally, it is arguable that s. 17 (1) (a) (iiib) (as inserted by s. 191 of the 2004 Act) is concerned solely with the right conferred by s. 13 (1) (b) insofar as it applies to tenements to which the 2004 Act applies. When read in that way, an argument can therefore be made that s. 85 (1) continues to apply to the right available under s. 13 (1) (b) in cases of long occupation of tenements to which the 2004 Act does not apply. This would include a right available to a business tenant who relies not on s. 13 (1) (a) but on

20 years' continuous occupation. On the basis of this argument, the use of the words "*under this Part*" in s. 17 (1) (a) (which both counsel for the plaintiff and Wylie emphasised) would not matter because, if the argument is correct, it would mean that the renunciation of 1999 is void insofar as it purports to renounce any entitlement to a new tenancy under Part II. The renunciation would only be valid insofar as it relates to the right available under s. 13 (1) (a). However, it would not be valid insofar as it relates to the right available under s. 13 (1) (b).

98. I appreciate that, as counsel for the plaintiff urged, the LRC, in its consultation paper, recommended the removal of any restrictions on the renunciation of rights in respect of a business tenancy. However, the Oireachtas was not in any way bound by the views expressed by the LRC. Moreover, the change effected in 2004 (as a consequence of the amendment made by s. 191 of the 2004 Act) could arguably be construed as a deliberate intention on the part of the Oireachtas to confine the removal on the restriction on the right to a new tenancy under s. 13 (1) (b) only to residential tenancies and not to interfere in any way with business tenancies where the relevant tenant had the necessary 20 years' continuous occupation. One might well ask why would the Oireachtas take that course. Why would the Oireachtas decide to remove the restriction insofar as residential tenancies are concerned and preserve it in relation to non-residential tenancies? However, that seems to me to be an issue that is best left to a careful consideration following a full hearing. For instance, it could be argued that the Oireachtas considered that residential tenancies now had a complete code of protection available under the 2004 Act and no longer required protection under the 1980 Act. On the basis of that argument, there would be a logical basis for the Oireachtas to differentiate between long occupation rights in respect of residential tenancies on the one hand and non-residential tenancies on the other.

99. It would be inappropriate for me to attempt to resolve these arguments at this stage. As noted above, my concern is to establish whether it can be said, at this point, that the defendant has little or no hope of success in the Circuit Court in maintaining its position that there is no effective renunciation in place in relation to the new tenancy claimed by it under s. 13 (1) (b) of the 1980 Act. In view of the fact that logical and coherent arguments have been made and are capable of being made on both sides, I do not believe that there is any basis upon which I could properly conclude at this stage that the defendant's case in relation to the renunciation is likely to fail in the Circuit Court proceeding. In those circumstances, I do not believe that the plaintiff has established that it would be appropriate for the High Court to assume jurisdiction in this case on the basis that the defendant is clearly prevented by the Deed of Renunciation from pursuing a claim to a new tenancy (or to compensation in lieu) under s. 13 (1) (b) in the Circuit Court.

The case made by the plaintiff that the defendant does not have 20 years' continuous occupation.

100. I must next consider whether, as the plaintiff contends, a defendant has no prospect of success in the Circuit Court in circumstances where (as the plaintiff suggests) the defendant does not have 20 years' continuous occupation. As noted above, this case is

made in circumstances where, in the period between December 2006 and December, 2010 the property was in the occupation of Vencam and not the defendant.

101. In this context, there is no dispute between the parties that Vencam was the relevant tenant in the period between 1st December, 2006 and 1st December, 2010. However, the defendant argues that, while Vencam was the tenant, the defendant nonetheless remained in occupation during this period. As recorded in para. 8 above, the defendant refers, in this context, to a number of documents which it contends evidences its occupation of the premises. These include documents which evidence that the employees at the premises continued to be employed by the defendant during the period in question. Furthermore, rates demands (which by law are payable by the occupier) were issued by the local authority to the defendant rather than to Vencam. In addition, the relevant Public Music and Singing Licence was held during this period by the defendant rather than Vencam.

102. In response to this element of the plaintiff's claim, the defendant makes two arguments: -

(a) Having regard to s. 5 (3) of the 1980 Act, it contends that the occupation by Vencam is deemed to be occupation by the defendant. This argument proceeds on the basis that both Vencam and the defendant are subsidiaries of EET. In this context, it is important to note that, under s. 5 (3) of the 1980 Act, where the tenant is a subsidiary of a holding company (within the meaning of the Companies Act, 1963) occupation of the tenement by another company which is also a subsidiary of the same holding company will be deemed to be occupation by the tenant; and

(b) Even if s. 5 (3) cannot be relied upon, the defendant was, as a matter of fact, in occupation of the premises for more than 20 years and the defendant relies on the material described in paras. 8 and 101 above. In light of that occupation for the entire of that period and in light of the fact that the defendant was the tenant of the premises at the time of the termination of the tenancy, the defendant claims that it satisfied the requirements of s. 13 (1) (b) which requires that the tenement must, for the relevant 20 year period, be "*continuously in the occupation of the person who was the tenant immediately before that time*". Since the defendant was the tenant at the time of termination of the tenancy, and since it was, as a matter of fact, in occupation for the entire period of 20 years, the defendant argued that it did not matter that it was not the tenant during the period when the tenancy was held in the name of Vencam.

103. In response to the first of those arguments, counsel for the plaintiff drew attention to the provisions of s. 155 of the Companies Act, 1963 (which was the relevant statutory provision in operation at the time Vencam held the tenancy). Counsel submitted that, on the basis of the annual returns made by the companies, Vencam could not satisfy the requirements of s. 155 (1) of the 1963 Act. Those returns show that Mr Colum Butler and Mr Ciaran Butler were registered as the only shareholders in Vencam. Counsel submitted that EET did not hold any shares in Vencam and accordingly Vencam could not be

regarded as a subsidiary of EET within the meaning of s. 155 (1). Insofar as the defendant itself is concerned, Mr. Byers (in his affidavit sworn on 6th February, 2020) drew attention to the fact that EET is only one of two shareholders in the defendant (the other shareholder being Mr. Colum Butler) and that EET did not hold a majority of the shares. On that basis it was suggested that the defendant, likewise, did not satisfy the requirements of s. 155 (1).

104. In order to understand this submission, it is necessary to have regard to the terms of s. 155 (1) which provides that, for the purposes of the 1963 Act, a company will be deemed to be a subsidiary of another "*if, but only if*" the latter is a member of it and controls the composition of its board of directors or holds more than half in nominal value of its equity share capital, or holds more than half in nominal value of its shares carrying voting rights. On the basis of the annual returns for both companies, counsel submitted that this requirement was clearly not satisfied in either case.

105. With regard to the evidence given by Mr. Ciaran Butler that the shares held in his name or in the name of his brother, Mr. Colum Butler, were held on trust for EET, counsel for the plaintiff submitted that this could not satisfy the requirements of s. 155. Counsel described those requirements as "*very straightforward requirements*" which were "*just not satisfied on the facts*". At this point, it should be noted that in the affidavit sworn by Ciaran Butler on 11th February, 2020, Mr. Butler accepted that the shares in Vencam were held by him and his brother. However, he said that EET was the beneficial owner of the shares in both the defendant and Vencam in the periods between December 2006 and December 2010. He continued, in para. 6, to say: -

> *"If the shares or any portion thereof in either company were held in my name or that of my brother… I can confirm we held those shares for EET. It is for that reason that the companies are correctly and accurately recorded in the Annual Accounts as being wholly owned subsidiaries of EET…".*

106. In his submission, counsel for the plaintiff did not address the provisions of s. 155 (3) of the 1963 Act on which counsel for the defendant relied in his response. In his submissions, counsel for the defendant highlighted that, under s. 155 (3), any shares held by the person as a nominee for another are deemed to be held by the latter. Section 155 (3) provides as follows: -

> *"(3) In determining whether one company is a subsidiary of another—*
>
> *(a) any shares held … in a fiduciary capacity shall be treated as not held … by it;*
>
> *(b) subject to paragraphs (c) and (d), any shares held …—*
>
> *(i) by any person as a nominee for that other (except where that other is concerned only in a fiduciary capacity); or*

(ii) by, or by a nominee for, a subsidiary of that other, not being a subsidiary which is concerned only in a fiduciary capacity;

shall be treated as held or exercisable by that other".

107. For present purposes, paras. (c) and (d) are not relevant. However, on the basis of s. 155 (3), there is, at minimum, a good basis for the defendant to make the case that Vencam and the defendant were both subsidiaries of EET. It is noteworthy that in the abridged financial statements of Vencam for the period from 7th June, 2006 to 31st July, 2009, there is a note to the effect that Vencam is a wholly owned subsidiary of EET.

108. Accordingly, it would be impossible to say that the defendant's case under s. 13 (1) (b), insofar as it is based on 20 years' occupation, has little or no prospect of success in the Circuit Court. Having regard to s. 5 (3) of the 1980 Act, there is clearly, at minimum, an arguable basis for the case made by defendant that the occupation by Vencam during the relevant period between 2006 and 2010 should be deemed to be occupation by the defendant.

109. Equally, even if I am wrong in my conclusion in relation to the effect of s. 5 (3) in the present case, it seems to me that, on the basis of the evidence before the court, and on the basis of the language used in s. 13 (1) (b), it would be impossible to say that the defendant has little or no prospect of persuading the Circuit Court that it has the necessary 20 years' occupation. As noted in para. 102 (b) above, the defendant argues that, on the basis of the evidence summarised in paras. 8 and 101 above, it has been in occupation of the premises for the last 20 years as a matter of fact. It therefore can satisfy the statutory requirement set out in s. 13 (1) (b) that there must be 20 years' continuous occupation. The defendant argues that, having regard to the language used in s. 13 (1) (b), the claimant claiming 29 years' continuous occupation is not required to show that he or she is the tenant throughout that period. It is sufficient, on the basis of the literal language of s. 13 (1) (b) that the claimant was the tenant immediately before the expiration of the relevant 20-year period. The defendant highlights that there can be no dispute but that the defendant was the tenant at that time. Although Wylie, in a footnote, has expressed some reservation about the interpretation placed of s. 13 (1) (b) advanced by the defendant in the course of the hearing of the present application, it seems to me that the interpretation suggested by the defendant is, at minimum, an arguable one. It is consistent with the literal language of s. 13 (1) (b).

110. Accordingly, I have come to the conclusion that the plaintiff has failed to establish that the defendant has little or no prospect of success in its claim to a new tenancy in the Circuit Court on the grounds that it does not have 20 years continuous occupation. It seems to me that the defendant clearly has an arguable case to make in relation to this issue. However, there remains, for consideration, the plaintiff's case based on estoppel. That is the issue to which I now turn.

Estoppel

111. The plaintiff relies on two species of estoppel namely (a) estoppel by convention and (b) estoppel by representation. Insofar as the former is concerned, the nature of estoppel by

convention is described as follows in *Treitel* on the *Law of Contract* in the following terms (in a passage expressly approved by Charleton J. in the Supreme Court in *Ulster Investment Bank v. Rock Rohan* [2015] 4 I.R. 37 at p. 53:

> *"Estoppel by convention may arise where both parties to a transaction 'act on an assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other'. The parties are then precluded from denying the truth of that assumption, if it would be unjust or 'unconscionable' to allow them (or one of them) to go back on it. Such an estoppel differs from estoppel by representation and from promissory estoppel in that it does not depend on any 'clear and unequivocal' representation or promise. It can arise where the assumption was based on a mistake spontaneously made by the party relying on it, and acquiesced in by the other party, though the common assumption of the parties, objectively assessed, must itself be 'unambiguous and unequivocal'".*

112. In support of this aspect of its claim, the plaintiff argued, in its written submissions, that, having regard to the terms of the 2019 renunciation, there can be "*no doubt but that the convention on which the parties proceeded was that the Defendant would not be entitled to claim a new tenancy on (sic) the Premises and it would be unconscionable for the Defendant to deny the validity of the 2019 Renunciation so as to copper fasten the position by making a claim to a new tenancy*".

113. The defendant's response to this argument is that the Deed of Renunciation is only valid to the extent that it complies with s. 85 (2). As discussed above, the defendant argues that s. 85 (2) does not extend to authorising a renunciation in respect of the long occupation equity which the defendant argues is available to it under s. 13 (1) (b) of the 1980 Act. The defendant makes the case that the ability to renounce the long occupation equity under s. 85 (2) is only available in relation to residential tenancies to which the 2004 Act applies. In these circumstances, the defendant says that the Deed of Renunciation cannot give rise to the estoppel contended for.

114. At this point, my only task is to consider whether the defendant has no arguable case in response to the estoppel claim. If it has no arguable case in relation to the estoppel claim, then there would be a proper basis for the court to assume jurisdiction in accordance with the principles first established in the *Walpoles* case. In my view, the defendant clearly has an arguable case to make that the Deed of Renunciation is invalid insofar as it applies to the long occupation equity under s. 13 (1) (b). If the defendant succeeds in establishing that the Deed of Renunciation is not effective insofar as that equity is concerned, I find it very difficult to see how estoppel by convention would arise. I acknowledge that, at a full hearing, the plaintiff may be in a position to persuade a trial judge to the contrary. However, at this point, I have not heard any sufficient argument from the plaintiff to establish that its claim based on estoppel by convention is unanswerable and that, as a consequence, the defendant has little or no prospect of success in its application for a new tenancy.

115. With regard to estoppel by representation, the plaintiff drew attention to the well-known principle established in *Doran v. Thompson Ltd* [1978] I. R. 223 where Griffin J. explained at p. 230: -

> *"where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has acted on it, altering his position to his detriment, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and may be restrained in equity from acting inconsistently with such promise or assurance."*

116. As noted in para. 25 above, the defendant makes the case, in relation to estoppel by representation, that, by executing deeds of renunciation, agreeing to the inclusion of a break clause in the 2019 Letting Agreement, by not objecting to the planning application for the redevelopment of the premises and not ever suggesting that it retained statutory tenancy rights, the defendant unambiguously represented to the plaintiff that it did not have and would not claim such statutory tenancy rights and would vacate the premises when the break option was exercised. The plaintiff contends that it acted on this alleged representation to its detriment (by not litigating the entitlement of the defendant to a new tenancy at an earlier time) and that, as a consequence of all these matters, the defendant is estopped from asserting that it is entitled to rights under the 1980 Act.

117. Were it not for the provisions of the 1980 Act, the plaintiff might well have an unanswerable case to make to this effect. However, I must bear in mind that the 1980 Act effectively overrides the provisions of many of the documents on which the plaintiff relies. Thus, the fact that the tenancy agreement may be terminated by a notice served by a landlord under a break option, does not prevent the tenant from seeking relief under the 1980 Act if the tenant falls within one of the categories set out in s. 13. Even where there is no break option in a tenancy agreement, there are many cases where a tenant will have entered into a succession of tenancy agreements over a long period of years, each one of which will have provided for a termination date. Yet, the 1980 Act allows a tenant in such circumstances to claim a new tenancy notwithstanding that the relevant tenancy agreements may have included covenants to deliver up vacant possession of the property on expiration of each letting agreement. That is why Murphy J., in *O'R. v. O'R.*, described the Landlord & Tenant Acts as "*revolutionary*" by reference to then accepted concepts of contract law. In the circumstances, it is by no means certain that the documents on which the plaintiff relies (under which the defendant acknowledged that it would give up possession of the property) could be said to give rise to the representation claimed. Those documents must be read in light of the 1980 Act. Again, I do not wish to suggest that the plaintiff may not succeed in making this case. My only task at this point is to consider whether the plaintiff has established that the defendant can have no argument to make in response to this element of the estoppel claim.

118. Insofar as the plaintiff relies on the failure of the defendant to voice any intimation of its intention to claim a new tenancy, I must bear in mind that under s. 20 of the 1980 Act (as described in para. 68 above), a notice of intention to claim relief may be served either before or after the termination of a tenancy. A tenant can therefore wait until after termination to assert its statutory rights. Again, I do not wish to suggest that the plaintiff may not succeed in its case based on estoppel by representation. However, it seems to me that the evidence on which the plaintiff relies falls far short of establishing that, at this point, the plaintiff's case is unanswerable. It seems to me that the estoppel claim could only be properly evaluated following a full hearing with the benefit of oral examination of witnesses and cross examination. I therefore am unable to conclude, at this stage, that the estoppel claim now advanced by the plaintiff means that the defendant will have little or no prospect of success in its application for a new tenancy.

Conclusion in relation to jurisdiction

119. For the reasons outlined above, I have concluded that the plaintiff has not established that an injustice will be done to it in the event that the court declines to accept jurisdiction in this case and instead directs that the matter should proceed in the usual way in the Circuit Court. I have not been persuaded by the plaintiff that this is a sufficiently urgent case to justify the maintenance of the proceedings in the High Court. Similarly, I have not been persuaded by the plaintiff that the defendant has little or no prospect of success in its application under Part II of the 1980 Act. In those circumstances, it seems to me that the only course that I can properly take is to decline jurisdiction to entertain the present application and instead to dismiss it. In these circumstances, having regard to the manner in which the Oireachtas has chosen to confer jurisdiction on the Circuit Court, it would not be appropriate, in my view, for the High Court to intervene in this case.

120. It is clear from the decision of Murphy J. in *O'R. v. O'R*. that it is not necessary that there should be a formal application brought by the defendant to stay or dismiss the proceedings. It seems to me that the High Court is entitled to decline jurisdiction even in the absence of such a motion. That this is so is also reflected in the approach taken in the judgment of Costello J. (as he then was) in *Kenny Homes* and, more recently, by Haughton J. in the *Castletown* case and by Twomey J. in *Ferris v. Markey Pubs*. In each of those cases, the court examined whether it was appropriate for the High Court to assume jurisdiction.

121. Accordingly, I must dismiss the plaintiff's application on the basis that it has not been properly brought in the High Court.

The application for an interlocutory injunction

122. In the circumstances, it is unnecessary to consider the application for an interlocutory injunction. However, for completeness, I should make clear that, in my view, even if I am wrong in my conclusion that the High Court should decline jurisdiction in this case, I believe that the application for an interlocutory injunction should be refused. While I accept that the plaintiff has an arguable basis for the case made by it, I do not believe

that the plaintiff has established a sufficiently strong case to meet the standard set out in the decision of the Supreme Court in *Lingam v. Health Service Executive* [2006] ELR 137.

123. In this context, it seems to me that the observations of Clarke J. (as he then was) in *Okunade v. Minister for Justice* [2012] 3 I.R. 152 at p.p. 182-183 are relevant where he said: -

> "76. …as Megarry J. observed in *Shepherd Homes Ltd v. Sandham* : -
>
> > *'In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction'*
>
> *O'Higgins C.J. made similar comments about the difficulty in granting mandatory orders at an interlocutory stage in Campus Oil v. Minister for Industry (No. 2) [1983] I.R. 88 ….*
>
> *77. …it may well be that there is a category of case where the court has to take into significant account the fact that the grant or refusal of an interlocutory order may go a long way towards resolving the case itself: see N.W.L. Ltd v. Woods [1979] 1 W.L.R. 1294. Likewise, Allied Irish Banks Plc v. Diamond … [2012] 3 I.R. 549 involved a so called springboard injunction, which involves the court in taking action to deprive former employees, who are alleged to have acted unlawfully, (either be taking their employer's secrets properly so described or by improperly dealing with the former clients while still in employment or the like) of the fruits of that alleged unlawfulness. In Allied Irish Banks Plc v. Diamond …, it was held that a higher standard, similar to that required for the granting of a mandatory interlocutory injunction, required to be established. The so called springboard injunction is only for a limited period of time and once granted cannot be undone even if the defendants win at trial leaving the court with only an award of damages on the plaintiff's undertaking as a remedy.*
>
> *78. Furthermore, injunctions which seek to interfere with continuing disciplinary proceedings can have the effect of making the management of personnel in companies virtually impossible. It is, therefore, hardly surprising that, in such cases, 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 an injunction can be granted (normally the Maha Lingam standard). That variation from the pure Campus Oil test can be seen as nonetheless still coming within the general principle of attempting to fashion an order which runs the least risk of injustice for if the grant or refusal of an interlocutory order will go a long way towards deciding the case than the risk of an injustice is even greater and the court requires a greater degree of assurance before intervening."*

124. It seems to me that those observations are relevant for a number of reasons. In the first place, it is very clear that, in cases where a mandatory injunction is sought at the interlocutory stage, the *Lingam* standard will apply. Thus, although the judgment in *Lingam* was given on an *ex tempore* basis by Fennelly J. The approach has been strongly endorsed by the full court in *Okunade*.

125. Secondly, it is clear that the same approach should be adopted in cases where the grant of interlocutory relief will bring about a situation which cannot be undone even if the defendant wins at trial. That is very similar to the rationale voiced by Megarry J. in *Shepherd Homes Ltd v. Sandham* [1971] Ch. 340 to which Clarke J. referred in the course of his judgment in *Okunade*. At p. 348-349, Megarry J. explained the concern in the following terms: -

> *"As it seems to me, there are important differences between prohibitory and mandatory injunctions. By granting a prohibitory injunction, the court does no more than prevent for the future the continuance or repetition of the conduct of which the plaintiff complains. The injunction does not attempt to deal with what has happened in past; that is left for the trial, to be dealt with by damages or otherwise. On the other hand, a mandatory injunction tends at least in part to look to the past, in that it is often a means of undoing what has already been done, so far as that is possible. Furthermore, whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps and may (as in present case) require the dismantling or destruction of something already erected or constructed. This will result in a consequent waste of time, money and materials if it is ultimately established that the defendant was entitled to retain the erection…. another aspect of the point is that if a mandatory injunction is granted on motion, there will normally be no question of granting a further mandatory injunction at the trial what is done is done, and the plaintiff has on motion obtained, once and for all, the demolition or destruction that he seeks. Where the injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or continued; except in relation to transient events, there will usually be no question of the plaintiff having obtained on motion all that he seeks. …"*

126. A very similar rationale is evident in the decision of Clarke J. (as he then was) in *Allied Irish Banks Plc v. Diamond* [2012] 3 I.R. 549. In that case, Clarke J. explained why a higher test applies where a plaintiff seeks mandatory relief at an interlocutory stage. At p. 572, he said: -

> *"[53] … It is now well settled that in cases involving a mandatory injunction the court will normally require a higher level of likelihood that the plaintiff has a good case before granting an interlocutory injunction (see for example Lingam v. Health Service …). It may well be that the logic behind that departure from the normal rule can be found in the added risk of injustice that may arise where the court is asked not just to keep things as they were by means of a prohibitory injunction but to require*

someone to actively take a step which may, with the benefit of hindsight after a trial, turn out not to have been justified. The risk of injustice in the court taking such a step is obviously higher. In order to minimise the overall risk of injustice the court requires a higher level of likelihood about the strength of the plaintiff's case before being prepared to make such an order...".

127. At p.p. 575-576, Clarke J. explained that a similar rationale applies where the grant of an interlocutory injunction may finally resolve all issues (with the exception of damages). He said: -

"[61] I have already noted the issue which arises as to whether, given that what is sought in these proceedings is a springboard injunction, there may be a case to be made that the court requires a higher level of assurance that the plaintiff will succeed by reason of the fact that the granting of an interlocutory injunction in favour of AIB might well amount to a resolution of all of the issues (with the exception of damages) in this case in AIB's favour. As noted earlier, there is an argument to be made to the effect that the court should require a higher level of likelihood that the proceedings will succeed in those circumstances. I have come to the view that there is an obligation on a plaintiff, seeking to obtain an interlocutory springboard injunction, to satisfy the court of a strong arguable case for those reasons."

128. Similar concerns arise in the case. The injunction sought here is mandatory in terms. Furthermore, the grant of the injunction now will, in effect, result in the making of an order which cannot be undone subsequently (save insofar as damages are concerned). If made, the order sought will result in the premises being handed over to the plaintiff for the purposes of a redevelopment which the plaintiff says is imminently to be commenced. The making of the order will therefore mean that the defendant will not be in a position to exercise its rights under s. 28 of the 1980 Act. While the Circuit Court proceedings might possibly be capable of continuing (but only insofar as compensation is sought for disturbance is concerned), it is nonetheless the case that the statutory regime contemplated by the 1980 Act (under which the defendant would be entitled to remain in occupation of the premises pending the determination of its claim under Part II) would be rendered nugatory. To paraphrase Megarry J. in *Shepherd Homes*, the plaintiff, on this interlocutory motion, would have achieved, once and for all, the substantive relief which it seeks. For that reason, there is, as Clarke J. explained in *Allied Irish Banks v. Diamond,* an obligation on the plaintiff to satisfy the court that it has a strong arguable case. In my view, for the reasons noted in paras. 86-120 above, the plaintiff undoubtedly has an arguable case to make. However, equally, for the reasons noted in the same paras., the defendant has an arguable case. I am unable to say, at this interlocutory stage, that the plaintiff's argument is stronger than that advanced by the defendant. At this point in the proceedings, all I can do is to say that there are arguments available on both sides. In these circumstances, I do not have what Clarke J. described as "*a higher level of assurance that the plaintiff will succeed*". Accordingly, the plaintiff's application for an interlocutory injunction falls at the first hurdle. In my view, the plaintiff has failed to

establish a strong arguable case of the kind contemplated in *Lingam v. Health Service Executive, Okunade, and Allied Irish Banks v. Diamond.*

Conclusion

129. For the reasons outlined above, I have come to the conclusion that the plaintiff's motion for an interlocutory injunction must be dismissed. I have not heard argument as to what should happen to the proceedings in the event that the motion were dismissed but, subject to any further argument that the parties may wish to offer, it would appear to me that the proceedings should be stayed pending the determination of the defendant's claim to a new tenancy but with liberty to re-enter. In this context, while I can, at present, see little scope for the re-entry of the proceedings in the future, I would not wish, at this point, to exclude the possibility that there might be a proper basis to do so. By way of hypothetical example, if the defendant were to unreasonably delay the proceedings in the Circuit Court that might have the potential to shift the balance of justice in favour of the re-entry of the proceedings. However, it seems to me that there is no reason why the claim to a new tenancy cannot proceed to a conclusion with all appropriate speed. I have no doubt that, if an application were made to the President of the Circuit Court for a hearing date, it would be given appropriate priority (consistent with the other demands on the Circuit Court). Likewise, if either party is unhappy with the outcome in the Circuit Court, there would appear to be a proper basis to have any appeal entered in the Commercial List to ensure that the appeal would be heard with appropriate expedition.