THE HIGH COURT

[2016 No. 8209 P.]

BETWEEN

DAVID VAN DESSEL

PLAINTIFF

AND

PAT CARTY

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 12 th day of November, 2018

1. This is an application by notice of motion issued on 28th March, 2018 and originally returnable for 30th April, 2018 for an order pursuant to O. 44 of the Rules of the Superior Courts and the inherent jurisdiction of the court for the attachment and committal of the defendant for his alleged failure to comply with an order of the High Court (Gilligan J.) made on 16th March, 2017.

2. By that order the defendant, his servants and agents and any other person having notice of the order were restrained from:

> 1. Impeding and/or obstructing the plaintiff from taking possession of the receivership property, as described in the schedule thereto, and/or collecting the rents associated with same;
>
> 2. Interfering with the functions and office of the receiver in respect of the receivership property;
>
> 3. Impeding and/or obstructing the plaintiff in changing the locks on buildings on the receivership property and/or otherwise taking steps to secure the said property;
>
> 4. Trespassing on or entering upon or otherwise interfering with the receivership property;
>
> 5. Purporting to collect rents or other payments in respect of the receivership property or holding himself out as the party entitled to let the receivership property.

3. The receivership property described in the schedule to the order is:

> 1. ALL THAT AND THOSE the lands contained within Folio 6095 of the Register of Freeholders County of Wexford containing 52 acres or thereabouts and more commonly known as Rathduff, Rathnure, County Wexford;
>
> 2. ALL THAT AND THOSE the lands contained within Folio 46658F of the Register of Freeholders County of Wexford;
>
> 3. ALL THAT AND THOSE the lands contained within Folio 46661F of the Register of Freeholders County of Wexford.

4. The circumstances in which the order of 16th March, 2017 came to be made are carefully chronicled in an affidavit of the plaintiff sworn on 23rd March, 2018, on which this application is grounded.

5. By notice of motion issued on 13th September, 2016 and originally returnable for 7th November, 2016 the plaintiff applied to the High Court for nine orders, including the orders eventually made by Gilligan J.

6. That application was grounded on an affidavit of the plaintiff sworn on 12th September, 2016 and supported by an affidavit of Jonathan Hanley of Ennis Property Finance DAC of 7th September, 2016.

7. The plaintiff's case was that he was appointed by Bank of Scotland plc, as successor in title to Bank of Scotland (Ireland) Ltd, by deed of appointment dated 5th September, 2013 in pursuance of the powers contained in mortgages and charges dated 20th December, 2004 and 6th July, 2005, each made between the defendant and Bank of Scotland (Ireland) Ltd.

8. The affidavit of Jonathan Hanley showed that Bank of Scotland (Ireland) Ltd had extended a number of loan facilities to the defendant, which facilities were secured *inter alia* by charges registered on Folio 6095 County Wexford which was later divided into three folios, or out of which two new folios were carved, the three folios being those described in the schedule to the notice of motion, and ultimately the order of Gilligan J.

9. By cross-border merger pursuant to the European Communities (Cross-Border Mergers) Regulations, 2008 of Ireland and the Companies (Cross-Border Mergers) Regulations, 2007 of the United Kingdom, approved by the High Court on 22nd October, 2010 and by the Scottish Court of Session on 10th December, 2010, all of the assets and liabilities of Bank of Scotland (Ireland) Ltd transferred to Bank of Scotland plc on 31st December, 2010.

10. By purchase deed dated 29th November, 2014 Bank of Scotland plc agreed to transfer to ELQ Investors II Ltd certain loan facilities, together with all security and ancillary rights and claims related to those facilities, including the defendant's loans and the security held in connection with them. Pursuant to a deed of novation dated 12th December, 2014 between Bank of Scotland plc, ELQ Investors II Ltd and Ennis Property Finance Ltd, all of the rights, title, interest, obligations and liabilities of ELQ Investors II Ltd under the purchase deed were novated and transferred to Ennis Property Finance Ltd and on 20th April, 2015 Bank of Scotland plc executed a deed of assignment to Ennis Property Finance Ltd.

11. In his affidavit of 12th September, 2016 the plaintiff summarised his correspondence with the defendant between the time of his appointment and shortly before the date of issue of the application to court and set out his case as to why he urged the court to make the order sought.

12. The summons server instructed by the plaintiff in September 2016 to serve the motion papers on the defendant encountered difficulties and on 10th October, 2016 the High Court (Heneghan J.) made an order for substituted service of the plenary summons and of any further documents required to be personally served on the defendant by ordinary prepaid post on the defendant at his

address in Enniscorthy, County Wexford. That order provided that the notice of motion should be served six weeks prior to the date of listing.

13. The injunction motion papers and plenary summons were sent to the defendant by post on 13th October, 2016 but in circumstances where the motion had a return date for 7th November, 2016 the plaintiff's solicitors, in the covering letter, advised the defendant that the application would be adjourned to 24th November, 2016 to ensure that he had the papers six weeks in advance.

14. On 24th November, 2016 the defendant was called at the sitting of the court but did not appear. Gilligan J. having been told of the terms of the order of Heneghan J. made a further order for substituted service of the plenary summons, the motion papers and of any further documents required to be served on the defendant by ordinary prepaid post at the same address in County Wexford and by email to the defendant's specified email address, and adjourned the injunction application for hearing on 8th December, 2016. The papers were served in accordance with the order of Gilligan J.

15. On 8th December, 2016 the defendant was called at the sitting of the court. He did not appear but when the application was taken up by Gilligan J. at midday, a Mr. Simon Kavanagh purported to appear on behalf of the defendant. Mr. Kavanagh was heard to say that the defendant was seeking an adjournment as the papers had only been received by him on 30th November, 2016. Mr. Kavanagh suggested that the defendant had a defence and needed time. Notwithstanding opposition by counsel on behalf of the plaintiff, the court adjourned the application to 19th January, 2017, with a direction that the defendant file any affidavit within fourteen days.

16. The defendant did not comply with the time limit prescribed by the court but on 16th January, 2017 filed and served a replying affidavit. On 19th January, 2017 the motion was adjourned to 16th February, 2017. Further affidavits on behalf of the plaintiff were sworn on 13th and 14th February, 2017 and served on the defendant by post and email and on 16th February, 2017 the injunction application was further adjourned, at the request of the defendant, for four weeks, with a direction that any further affidavit which the defendant wished to file be filed within three weeks.

17. On 16th March, 2017 the defendant was called at the sitting of the court but did not appear and the injunction application proceeded in his absence and the order the subject of this application was made.

18. On the application before me on 2nd November, 2018 the defendant appeared in person, accompanied by Mr. Kavanagh. He apologised for having not appeared before Gilligan J. on 16th March, 2017. He said that he thought that he had put everything he had to say on affidavit before that hearing. His objection to the application before Gilligan J. was, he said, that the deed of appointment of the plaintiff was invalid.

19. In his affidavit of 16th January, 2017, filed on the injunction application, the defendant resisted the plaintiff's application on a number of grounds. At para. 10 he challenged the validity of the appointment of the plaintiff as receiver, specifically by reference to para. 9 of the deed of charge which, he said, permitted the chargee only to appoint a receiver and manager or receivers and managers and not a receiver only.

20. At para. 11 of that affidavit he drew attention to the decision of the High Court (Gilligan J.) in *The Merrow Ltd v. Bank of Scotland* [2013] IEHC 130 which emphasised the necessity for strict compliance with the terms of the relevant mortgage.

21. At paras. 12, 13 and 14 the defendant challenged the transfer of the charges from Bank of Scotland (Ireland) Ltd to Bank of Scotland plc by reference to the Land Registry rules. At paras. 15 to 21 the defendant challenged the validity of the transfer to Ennis Property Finance Ltd, pointing in particular to the plaintiff's reliance on redacted documents. At para. 31 he objected that the plaintiff had not proved his *locus standi* by producing a general deed of power of attorney.

22. Although the defendant was not personally before the court on 16th March, 2017, his affidavit of 16th January, 2017 was.

23. The affidavit of the plaintiff sworn on 23rd March, 2018 in support of this application shows, and it is not disputed, that the defendant was informed of the making of the order of 16th March, 2017 by letter of the same day and on 30th March, 2018 the perfected order, marked with a penal endorsement, was served on the defendant by post and email in the manner provided by the order of 24th November, 2016.

24. The plaintiff instructed a firm called Ktech Security to attend at the property to secure it and on 4th May, 2017 three men from that firm and a locksmith attended at the property to secure it.

25. What happened at the property on 4th May, 2017 is set out in an affidavit of Aivis Fedejevs sworn on 26th March, 2018 and his evidence is uncontested. Mr. Fedejevs went to the property with two colleagues from Ktech Security, Andris Krustkahns and John Paul Moloney, and a locksmith, James Kenna. They arrived at about 7.00 am. Mr. Moloney asked the defendant was he giving them possession, to which the defendant replied that he was certainly not. Mr. Moloney told the defendant that he had a court order. The defendant shouted at Mr. Fedejevs and his colleagues saying "*Don't, I am telling you now, you're not to go on the property any of ye*." When Mr. Fedejevs and his colleagues walked towards the gate, the defendant said, "*Don't come on the property you know what will happen*". Mr. Moloney said to the defendant, "*Pat, I have a court order here are you refusing to let me in?*" to which the defendant answered "*exactly*".

26. On 17th May, 2017 Mr. Andrew Byrne of the plaintiff's firm, Deloitte, attended the property with someone, or more than one person, from Ktech Security. In an affidavit sworn on 27th March, 2018 Mr. Byrne described what happened. Again this evidence is un-contradicted.

27. Mr. Byrne arrived at the property at about 8.00 am and met Messrs. Frank Murphy and Simon Kavanagh who said that they were there on behalf of the defendant who was unwell. It is not contested that Messrs. Murphy and Kavanagh were the defendant's agents and they were confirmed in later correspondence to be his advisers, along with Ben Gilroy and Darragh McCarthy. Mr. Kavanagh, when asked, said that the defendant was not is a position to comply with the order of 16th March, 2017 which, Mr. Kavanagh asserted, was "*all wrong*".

28. There followed a protracted and desultory correspondence between the plaintiff and the defendant. The defendant sought a meeting with the plaintiff. The plaintiff was quite willing to facilitate a meeting to discuss the practicalities of the defendant's compliance with the order but the defendant wanted to meet to discuss the validity of the plaintiff's appointment and, so, inferentially, the validity of the High Court order.

29. By letter dated 7th December, 2017 the plaintiff's solicitors wrote to the defendant to ask for confirmation that he would give up possession and warning him that if he refused he would be in breach of the order of 16th March, 2017 and that an application would be made for attachment and committal. The defendant's reply on 13th December, 2017 was that he would not comply. He advanced reasons for that in fifteen numbered paragraphs asserting that the plaintiff was invalidly appointed; that he had not been served with the order; that the order had "*not been collected and therefore not issued, per the court file*"; that no affidavits of service of the order had been filed; and making a number of nonsensical points about the plaintiff's solicitors' correspondence.

30. While in his letter of 13th December, 2017 the defendant alleged that he had not been served with the order, there was no issue on this application that the order had been properly served.

31. By letter dated 13th December, 2017 the plaintiff's solicitors wrote a letter addressed to the occupant of one of the houses on the property enclosing a copy of the order and calling for possession and on the same day a Mr. John Madden went to the property to deliver it. Mr. Madden found a number of signs, headed "*No trespass*", one of which threatened violators with prosecution and the other of which warned that that "*trespassers shall be shot*".

32. Against that background, the application now before the court was made by notice of motion issued on 28th March, 2018.

33. On 26th April, 2018, the defendant swore and filed an affidavit in answer to the plaintiff's application and in support of a motion which he issued on the same day, to which I shall come. The affidavit is littered with nonsense but does make a number of arguments.

34. The defendant's first argument is that the order of 16th March, 2017, fails to state the time, or the time after service of the order, in which the act is to be done: as is said to be required by O. 41, r. 8 of the Rules of the Superior Courts. This argument is misplaced. The order of 16th March, 2017, is a prohibitive order to which O. 41, r. 8 has no application. If authority were required for this proposition it is to be found in *Murphy v. Willcocks* [1911] 1 I.R. 402.

35. The defendant's affidavit of 26th April, 2018, expressly refers back to his affidavit of January 2017 and largely covers the same ground.

36. The defendant challenges the devolution of the loan and security from Bank of Scotland (Ireland) Limited to Bank of Scotland plc and from Bank of Scotland plc to Ennis Property Finance Limited. This argument was advanced to, and ruled upon, by Gilligan J.

37. The defendant challenges the appointment of the plaintiff, again specifically on the ground that the power in clause 9 of the deed of charge did not permit the appointment of a receiver but only of a receiver and manager or receivers and managers. This argument was also advanced to and ruled upon by Gilligan J.

38. The defendant says that there was never an entity by the name of "*Kavanagh Fennel*" on the CRO register, whether as a company or business name. He does not suggest how this might be relevant to anything and it is not.

39. The defendant objects that the plaintiff has not "*shown proof of a bond or liquid assets lodged in court*", in the event that he personally has been invalidly appointed and declared a trespasser, or that Ennis Property Finance DAC is found to be enforcing a mortgage by deceit, and with no legal standing. The defendant does not suggest that the plaintiff was obliged to provide a bond or to lodge money in court and the plaintiff was not so obliged.

40. At para. 30 of his affidavit, the defendant appears to apprehend that if he complies with the order, the plaintiff might *"get some semblance of…consent…as proof of [his] consent to novate"* and goes on to say that the plaintiff would still have to surmount clause 25.4 of the deed of charge, which requires that any amendment, supplement or novation of any provision of the deed be in writing. The defendant here, as elsewhere, confuses and conflates his obligations under the deed of charge and his obligations under the High Court order. Compliance by the defendant with the order of the High Court will not in any way effect or undermine any argument he wishes to make at the trial of the action.

41. At para. 31 of his affidavit the defendant suggests that the Plaintiff and Ennis Property Finance DAC are seeking to obtain "… *possession of my properties, which they will have gotten without the rule of law, and I will not let this ever happen as owner, as holder/possessor, nor as man."*

42. At para. 32, the defendant protests that the plaintiff has not delivered a statement of claim and that the plaintiff has refused to meet him to discuss the validity of the deed of appointment he relies upon.

43. As to the plaintiff's refusal to meet the defendant to discuss the validity of his appointment, in my view, the plaintiff was entirely correct to decline to do so. The defendant's object in seeking to agitate any issue as to the validity of the plaintiff's appointment was plainly to seek to undermine the High Court order and that was not a proper object.

44. As to the plaintiff's failure to deliver a statement of claim, I am bound to say that the defendant had a point, up to a point. The order of 16th March, 2017, required delivery of a statement of claim within 28 days and that should have been done. That said, the first complaint by the defendant that a statement of claim had not been delivered was in his affidavit of 26th April, 2018, and the omission was remedied by the delivery of a statement of claim on 9th May, 2018, since when the defendant has not delivered a defence. Critically, however, the order was not conditional upon or subject to delivery of a statement of claim and the defendant's obligation to comply with it was not limited, postponed, or absolved by the failure of the plaintiff to deliver a statement of claim in the time limited.

45. The defendant argues that if the statement of claim had been delivered when it should have been delivered the substantive action would have been heard and disposed of by now. Given that six months have elapsed since the statement of claim was delivered and the defendant has not delivered a defence, I very much doubt that: but even if it were so, if the defendant had complied with the order he would have been out of possession by no later than 4th May, 2017 when the plaintiff's agents went to the property to secure it. In circumstances in which the defendant has remained in occupation of the lands he was not prejudiced by the delay in delivery of the statement of claim.

46. At para. 33 to 43 of his affidavit, the defendant elaborates on his challenge to the effectiveness of the devolution of the loan and charge. That issue, although in less detail, had been put before Gilligan J. in the defendant's affidavit of 16th January, 2017 and was decided by him.

47. At paras. 44 and 45 of his affidavit, the defendant charges the plaintiff with abuse of process by reason of the plaintiff's failure to deliver a statement of claim and argues that the plaintiff is seeking to "*unlawfully grab and gain possession, without the substantive plenary matter being heard*". I am satisfied that there is no substance to the defendant's argument that the order of 16th March, 2017, or the defendant's obligation to comply with it, was in any way conditional upon delivery of the statement of claim. The effect of the order is, as the defendant clearly understands, to enjoin the defendant from interfering with the plaintiff taking possession of the property pending a full trial.

48. At paras. 46 - 56 of his affidavit, the defendant seeks to impugn the validity of the order of 16th March, 2017. He is not entitled to do so. The defendant seeks to characterise the order, variously, as "*seemingly good*" and "*questionable*". The order is an interlocutory order. It does not finally determine the issues raised by the defendant as to the devolution of the loan and charge or the validity of the appointment of the plaintiff but pending a full trial, it is binding on the defendant and it must be obeyed.

49. At para. 56 of his affidavit, the defendant moves from answering the plaintiff's motion to grounding his cross motion. The cross motion was to dismiss the action by reason of the plaintiff's failure to deliver a statement of claim; to stay the proceedings "*pursuant to the issued private and confidential official contractual offer*" sent by the defendant to Ennis Property Finance DAC; to stay the proceedings by reason of "*the unproven standing of the plaintiff's/claimant's receivership appointment(s)";* and for the attachment and committal of the plaintiff by reason of his failure to deliver a statement of claim.

50. In the following 38 paragraphs over seven pages, the defendant largely repeats what he has previously said but he makes a number of additional points.

51. At para. 61, the defendant suggests that the order was "*infected*" by the placing of penal endorsement elsewhere than behind the lined margin: although he does not suggest what the alleged consequence of that was. The penal endorsement is customarily written in the margin of the order but there is no requirement as to where the endorsement should be written. If the suggestion is that the writing of the penal endorsement than elsewhere than in the margin meant that it was insufficient or that it undermined or invalidated the order or excuses the defendant's non-compliance, there is no merit in that.

52. At para. 73 of his affidavit, the defendant argues that by reason of his failure to deliver a statement of claim, the plaintiff does not come to equity with clean hands. I reject that argument. The plaintiff's failure to deliver a statement of claim has no bearing on the defendant's obligation to comply with the order and the plaintiff is entitled to move the court to compel him to do so.

53. On the morning of 2nd November, 2018 the defendant swore and filed another affidavit, which was said to further support his cross motion and defend the plaintiff's motion. In this affidavit the defendant largely repeated what he had said in his earlier affidavits but he added the proposition that the State owned the assets of Bank of Scotland (Ireland) Ltd from the time it ceased to exist on 31st December, 2010.

The affidavit quoted extensively from the judgment of McDonald J. in *McCarthy v. Moroney* [2018] IEHC 379.

54. When this application first came before me on 2nd November, 2018, the defendant handed in a written submission which was obviously prepared by someone else for him.

55. The submission offered by the defendant was that the appointment of the plaintiff was null and void so that he had no *locus standi* before the court. The submission referred to the decision of Gilligan J. in *The Merrow Limited v. Bank of Scotland* [2013] IEHC 130, and quoted extensively from it and the authorities there referred to.

56. The written submission also referred to and quoted extensively from the judgment of McDonald J. delivered on 29th June, 2018 in *McCarthy v. Moroney* [2018] IEHC 379. In that judgment, McDonald J. dealt with six applications, one of which was an application on behalf of a receiver for interlocutory injunctions. The deed of charge in that case was, as it is in this case, made in favour of Bank of Scotland (Ireland) Limited and it appears to have been in the same printed form. Having set out and analysed the relevant provisions of the deed of charge and the arguments made to him, McDonald J. was not persuaded that the receiver's case was sufficiently strong to satisfy the threshold for the granting of a mandatory interlocutory order laid down by the Supreme Court in *Maha Lingam v. Health Service Executive* [2005] IESC 89.

57. Counsel for the plaintiff referred the court to a statement of the law in relation to contempt in the judgment of Ryan J. (as he then was) in *Reynolds v. McDermott* [2014] IEHC 219 in which, at p. 10, the court said:-

> *"An allegation of contempt of court must be proved beyond reasonable doubt. The court's jurisdiction is usually employed to enforce a court order which is actually being breached at the time of the motion. A defendant or other person who is aware of the terms of the court order, very often an injunction, is required to obey according to the court's direction or prohibition. Where there is a proven breach, the court acts to ensure that its order is complied with and that may give rise to the imprisonment of the party refusing to comply."*

58. Counsel for the plaintiff in opening, in closing, and from time to time along the way emphasised that the plaintiff did not want to see the defendant sent to prison but was applying to the court, as a last resort, to achieve the defendant's compliance with the order of 16th March, 2017. He referred to the judgment of Barniville J. in *Application of Beumer* [2018] IEHC 332 where the court said:-

> *"The main purpose of civil contempt is coercive, namely, its object is to compel the person to comply with the order than has been allegedly breached. The period of committal for such contempt is generally until such time as the order in question is complied with. (see: Keegan v. de Burca [1971] I.R.223.)*

59. The court was also referred to an important passage in the judgment of Peart J. in the Court of Appeal in McCann v. Malone (Unreported, Court of Appeal, 21st June, 2018) in which, at para. 22, having said that the committal jurisdiction of the court in relation to civil contempt should be coercive in the first instance, added:-

> *"A person should be given a reasonable opportunity to comply with the order in question before being committed to prison for contempt."*

60. The plaintiff's position was that the defendant had been afforded abundant opportunity to comply and had repeatedly and steadfastly refused: but he was not against the defendant being afforded a final opportunity to comply.

61. Having heard counsel for the plaintiff and the defendant and having carefully read all of the affidavits and written submissions and having listened to oral argument I asked the defendant whether he would obey the order of Gilligan J. He said that he could not. I asked him whether he had discussed with his wife what might happen if he were to be found to be in contempt, and he said that he had not. I am quite sure that the defendant fully understood the peril in which he was. With the acquiescence of counsel for the plaintiff, I offered the defendant the opportunity to further reflect on his position and to discuss it with his wife. The defendant availed of that invitation and I adjourned the motion to the following Wednesday, 7th November, 2018.

62. On 7th November, 2018 the defendant appeared, again accompanied by Mr. Kavanagh. He said that he had discussed his position with his wife. He said that he was not prepared to obey the order of Gilligan J. but did not want to go to prison. He said that he was concerned about his father, who walked on the land daily, and his children. He said that he had other financial issues and had his head in the sand for some time. He had appointed a mediator, he said, "*to mediate on his behalf*". He suggested that the judgment of Gilligan J. was unsafe and that he had a conclusive judgment to the contrary. He argued that to enforce the judgment of Gilligan J. would fly in the face of equality before the law. He asked the court to permit him time "*to mediate with his mediator*". He repeated that he would not comply with the order.

63. The defendant handed in to court a further written submission of five pages. This substance of this submission was that Gilligan J., in this case, and McDonald J. in *McCarthy v. Moroney* had come to different conclusions on the same facts, or at least on the same deed of mortgage. It said that the defendant's assets exceeded his liabilities; that to grant the relief sought would be wholly unfair and impractical pending a trial at which there was a fair issue to be tried; and that one citizen of the State was granted reliefs to which the court ruled he was entitled as a matter of law, while he as a citizen who had equal rights in identical circumstances was not afforded the status of equality.

64. In his further written submission, the defendant cited a decision of the European Court of Human Rights in *Rousk v. Sweden* (Application No. 27183/04). That was a case in which the applicant complained of a disproportionate interference by the Swedish authorities with his right to the peaceful enjoyment of his home. It appears to have turned on the fact that the applicant's home was sold while he had appeals pending against the sale. This is not such a case. The defendant could have asked for a stay on the order of Gilligan J. but did not. He was entitled to appeal against the order of Gilligan J. but did not.

65. The defendant's argument is that the court should not enforce the order of 16th March, 2017 on the ground that it is inconsistent with a later decision of the High Court. It would fundamentally undermine the administration of justice if a litigant were to be permitted to attempt to go behind an order which is plain on its face or to seek to argue that the order should not have been made. So formulated, the defendant's argument is fundamentally unsound.

66. The defendant is unrepresented. The order of 16th March, 2017 was an interlocutory order. Given the seriousness of the application I have carefully considered whether the defendant might be permitted to move to vary the order.

67. It is well established that the court has jurisdiction to alter or vary interlocutory orders, even orders made by consent.

68. *Irish Commercial Society Ltd. v. Plunkett* [1986] I.L.R.M. 624 was an action for the aggregation of the assets of the defendant companies with the plaintiff companies, in which the liquidator of the plaintiffs had consented to an order for security for costs. At the time he gave his consent the liquidator's investigations were incomplete. He applied to set aside the order for security for costs on the grounds that if, at the time he gave his consent he had had the information which later came into his possession he would not have done so. Costello J. said, at p. 625 of the report:-

> *"The first issue for decision is whether the court has jurisdiction to make an order pursuant to the present interlocutory motion to set aside the consent order of the 22 May 1984, the defendants submitting that such an order could only be made by a substantive action brought to set aside the contract into which the parties entered. This submission, it seems to me, fails to take account of the distinction between final orders made on consent and interlocutory orders so made (see Ainsworth v Wilding [1896] 1 Ch 673, 677). As pointed out by Lord Denning MR in Purcell v Trigell Ltd [1971] 1 QB 358 at p. 364 the court always has control over interlocutory orders and may in its discretion vary or alter them even though made originally by consent (see also in this connection Jessel MR in Mullins v Howell (1879) 11 ChD 763). Whether or not it should exercise it in a given case will largely depend on the circumstances in which the consent order was made and the reasons advanced for its discharge. In this case it seems to me that it would fly in the face of common sense as well as involve a considerable injustice to require a substantive action to be mounted to determine issues that can reasonably be disposed of by means of an interlocutory motion."*

69. *Irish Commercial Society Ltd. v. Plunkett* was approved by the Court of Appeal in *Irish Bank Resolution Corporation Ltd. v. Quinn* [2015] IECA 84.

70. In *Lismore Homes Ltd. V. Bank of Ireland Finance Ltd* [2006] IEHC 212 Quirke J. confirmed that the court has jurisdiction to vary its earlier orders and directions as to mode of trial and issues to be tried in the event of a change of circumstances or where the interests of the parties or the administration of justice might require. Quirke J, adopted the observations of Brook L.C. in *Woodhouse v. Consignia plc* [2002] 1 W.L.R. 2558, at p. 2575:-

> *"There is a public interest in discouraging a party who makes an unsuccessful interlocutory application from making a subsequent application for the same relief, based on material which was not, but could have been, deployed in support of the first application."*

71. It seems to me that this s not a case in which the court might exercise its jurisdiction to vary or set aside the order of 16th March, 2017. That order was made following a hearing in which the defendant was given every opportunity to participate but did not. Although not present in court, the defendant had put the case he wished to make on affidavit, which was before the court. The defendant's answer to the injunction application was, as far as is material for present purposes, precisely the same as the argument he now offers as to why the injunction should not be enforced. He argued then and would argue now that the power to appoint a receiver and manager did not permit the appointment of a receiver. Central to the argument now made is the decision in *McCarthy v. Moroney*.

72. The demonstrable objective fact is that the decision in *McCarthy v. Moroney*, upon which the defendant's complaints of unfairness and inequality are founded, was not decided until fifteen months after the making of the order the subject of this application, and fifteen months after that order ought to have been obeyed.

73. There has been no change in circumstances. This is not even a case in which the defendant would make any other argument than

that which was made previously. The decision in *McCarthy v. Moroney* is not, as the defendant contends, a conclusive judgment. That decision was also made on an interlocutory motion. It is perfectly clear from the judgment that McDonald J. contemplated that at a trial of the action the court might come to a contrary view. Neither, as the defendant submits, was the decision in *McCarthy v. Moroney* made in identical circumstances to his. In that case both parties appeared at the hearing and argued their case. I accept that Gilligan J. and McDonald J. reached different provisional conclusions on the strength of the same argument based on the same document but it does not necessarily follow that either was wrong. Even if, for the sake of argument, one or other of the decisions were said to be wrong, I see no warrant for concluding that it was the earlier, rather than the later.

74. It seems to me that the public interest in discouraging multiple applications for orders which have been refused applies equally to applications to set aside interlocutory orders by reference to new material that might have been but was not deployed on the earlier application. That public interest applies a *fortiori* where it is not suggested that there is any new material. Moreover, there is a strong public interest in ensuring that orders are obeyed.

75. I am satisfied that the decision in *McCarthy v. Moroney*, made in another case and long after the order of Gilligan J. ought to have been obeyed could not amount to a good reason to reopen the issue in this case. In my view, it would undermine the administration of justice to do so.

76. Because of the seriousness of the consequences for the defendant, I have in this judgment dealt exhaustively with all he has had to say but in truth it is a straightforward application. The law is clear and there is no dispute as to the facts.

1. An order was made by the High Court on 16th March, 2017 enjoining the defendant from interfering with the exercise by the receiver of his powers.

2. That order was duly served on the defendant with the required penal endorsement.

3. The defendant has repeatedly refused to comply with it.

4. The defendant has been given every opportunity, up to and including immediately before I delivered this judgment to comply with the order but has refused to do so.

77. I am satisfied beyond reasonable doubt that the defendant is and since 4th May, 2017 has been in breach of paras. 1, 2, 3 and 4 of the order, and in contempt of this court, by:-

1. Impeding and/or obstructing the plaintiff from taking possession of the receivership property, as described in the schedule thereto;

2. Interfering with the functions and office of the receiver in respect of the receivership property;

3. Impeding and/or obstructing the plaintiff in changing the locks on buildings on the receivership property and/or otherwise taking steps to secure the said property;

4. Trespassing on or entering upon or otherwise interfering with the receivership property.

78. I think that as a matter of probability the defendant has been collecting rent or other money from the occupier of the house on the lands but I do not have sufficient evidence to be satisfied of that beyond reasonable doubt.

79. There will be an order that the plaintiff be at liberty to issue an order of committal directed to the Commissioner and members of the Garda Síochána against the defendant to arrest him and thereupon to lodge him in Mountjoy prison there to be detained until he purge his said contempt and is discharged pursuant to further order of this court.