THE HIGH COURT

[2017 No. 10965 P.]

BETWEEN

HAVBELL DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

MARIA (OTHERWISE MARIAH) ISABEL DIAS (OTHERWISE HARVEY)

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered on the 20th day of March , 2018

1. The plaintiff seeks an injunction restraining trespass to property and ancillary reliefs. The defendant is in occupation of the property and resists the applications and seeks to have the issues between the parties determined at a plenary hearing and that the injunctive relief sought should not be granted on an interlocutory basis.

The facts

2. On the 21st September, 2007 John Rooney of Windermere, Myrtleville, Crosshaven, County Cork entered into a loan agreement with Irish Life and Permanent Plc trading as Permanent TSB. It was an interest only commercial loan for a term of 20 years in the amount of €2.3 million. It was to be used to purchase a property known as 1-2 Phibsborough Road, Phibsborough, Dublin 7 ("the property") and Irish Life and Permanent Plc was to obtain a first legal charge over the property. At Clause 6 of the special conditions Mr. Rooney agreed:

> *"That no letting or renewal of letting of the property, the terms and conditions of which provide for a term of more than twelve months, be made without the prior consent of Permanent TSB in writing."*

The approval was subject inter alia to confirmation that the property had a minimum market value of €3.1 million and a rental income of €14,200 per month.

2. On the 10th January, 2008 Mr. Rooney granted Irish Life and Permanent Plc a legal charge over the lands comprised in Folio 77845F of the County of Dublin which were commonly described as 1-2 Phibsborough Road, Phibsborough, Dublin 7, the property. At Clause 5.11 Mr. Rooney covenanted:-

> *"Not without the prior written consent of Permanent TSB to make any disposition of the property subject to the mortgage nor create or purport to create any rent charge affecting it."*

Clause 9.1 of the mortgage provided:-

> *"The powers of leasing or agreeing to lease and of accepting surrenders of leases conferred on a mortgagor in possession by the Conveyancing Acts 1881 to 1911 or other statutory powers of leasing shall not apply to the mortgage and the mortgagor shall not otherwise grant or agree to grant any lease tenancy licence of part with or share possession or occupation of the property without the prior written consent of Permanent TSB."*

3. On the 18th March, 2008 Mr. Rooney was registered as full owner of the lands comprised of Folio 77845F and Irish Life and Permanent Plc was registered as the owner of a charge for present and future advances payable with interest on the 13th March, 2009.

4. On the 29th June, 2012 Irish Life and Permanent Plc changed its name to Permanent TSB Plc. On the 19th June, 2015 Permanent TSB Plc entered into a deed of transfer with Havbell Ltd. By the deed of transfer Permanent TSB Plc transferred to Havbell Ltd the charges set out in the schedule to the deed of transfer to include all the estate right title interest benefit and obligations of Permanent TSB Plc arising in, to or under the charges. The charge of Mr. John Rooney over the property was included in the schedule and was thereby transferred by Permanent TSB Plc to Havbell Ltd.

5. On the 15th July, 2015 Havbell Ltd was registered on Folio 77845F as the owner of the charge registered in favour of Irish Life and Permanent Plc on the 13th March, 2009.

6. On the 29th September, 2016 Havbell Ltd reregistered as Havbell Designated Activity Company, the plaintiff in these proceedings.

7. In 2015 Mr. Rooney was in default in respect of his obligations under the loan. He decided to surrender the property to Permanent TSB on a voluntary basis. On the 20th May, 2015 (prior to the sale of the charge to Havbell Ltd) he executed a voluntary surrender form in respect of the property. He voluntarily and unconditionally handed back vacant possession of the property to Permanent TSB. The form noted that the property was a residential property but he indicated that the property was held as an investment property. He indicated that the property was never his principal private residence. He said that the property was occupied by a tenant, Isabella (sic) Maria Dias (sic), the defendant in these proceedings. He informed Permanent TSB that there had been a tenant in the property for the last eighteen months and that he gave her notice to vacate the property four months prior to his surrender of the property to Permanent TSB. He said the tenant ignored his notice to vacate and had paid no rent in a number of months. He said the tenant signed a three year lease eighteen months ago but he no longer had a copy of the lease. This was the first notice that Permanent TSB had of the agreement between John Rooney and the defendant in relation to the property.

8. Originally the property comprised two separate properties which had been merged. The property had been let with the apparent knowledge of Irish Life and Permanent TSB to a company that ran a language school for a number of years but the company had gone into liquidation leaving unpaid rent due to Mr. Rooney. Mr. Rooney apparently then entered into an agreement with the defendant in September 2014. On one page the date is given as the 4th September and on another as the 1st September. Whatever may be the explanation for this inconsistency, it is stated to be an agreement for the letting of a business premises and the rent payable is €2,000 per month. The term is from the 1st August, 2014 to the 1st August, 2017. The letting is described as being a temporary convenience letting for the landlord/tenant but the rest of the Clause is left blank. Further conditions added in manuscript included:

"That any existing agreement with other parties (Mary) concerning this premises are ended. Any existing disputes between landlord and tenant are deemed ended.

Tenant to repair windows in lieu of rent outstanding at this time.

Tenant to have public liability and fire insurance on premises at all times.

Tenant to keep fire alarm working and to ensure fire exits are free.

In the event of a sale of the premises, tenant to be allowed a "viewing" at an agreed time once per week for required period,

Tenant to have an option to buy at market value at that time.

9. The agreement of September 2014 replaced an earlier agreement dated the 12th June, 2014. The agreement of 12th June, 2014 was between Mr. Rooney as landlord and Ms. Mary Lindon and Maria Isabel Diaz as the tenant. That agreement appears to be signed by the defendant but not by Ms. Mary Lindon. The added special condition 5 read "option to buy at €350,000". However Special condition 3 of the September 2014 agreement expressly stated that any existing agreement concerning the premises "are ended", so the June agreement has been superseded by the September agreement.

10. Following the acquisition of the charge, the plaintiff appointed Savills to manage the property and on the 10th July, 2015 a representative of Savills attended to inspect the premises. The keys furnished by Mr. Rooney to Permanent TSB would not work. It was not clear whether Mr. Rooney or the defendant had changed the locks. But the net effect was that the plaintiff had no access to the premises which had been surrendered to its predecessor in title. Savills conducted an inspection of the property in the presence of the son of the defendant. It was apparent that the property was being used as a guest house. It was being advertised on the website AirBnB. The representative from Savills was furnished with a schedule of booked guests who would stay at the premises up until 30th November, 2015.

11. On 17th August, 2015 solicitors then acting for the plaintiff wrote to the solicitors for the defendant pointing out that the tenancy agreement between Mr. Rooney and the defendant breached the terms of the mortgage between Mr. Rooney and the mortgagee. The letter pointed out that the mortgage provided that the mortgagor shall not grant or agree to grant any lease, tenancy, licence or part with possession or share possession or occupation of the property without the prior consent in writing of the Permanent TSB. The letter continued that the plaintiff was satisfied that Permanent TSB did not give its prior written consent to the creation of any lease or tenancy between the defendant and Mr. Rooney and that any tenancy agreement is absolutely void as against the plaintiff. The letter stated unambiguously that "*your client's continued occupation at the premises, without the consent of our client, is not on foot of a valid tenancy*." The letter asked for confirmation that the defendant would now be vacating the property.

12. The defendant's solicitors, F.H. O'Reilly & Co., replied on the 27th August, 2015 stating that the defendant held the premises under a tenancy agreement dated 1st September, 2014 for a period up to 1st August, 2017 and maintained that she was entitled to performance of the said tenancy agreement. They also referred to the fact that the tenancy agreement contained an option to purchase the premises. The letter called upon the plaintiff to furnish evidence of its title to the premises. The letter confirmed that the defendant was in a position to discharge any arrears of rent that may have arisen under the agreement.

13. Thereafter there were exchanges of letters from September 2015 through to April 2016 with the defendant maintaining that she was entitled to remain in occupation of the premises on foot of the tenancy agreement and the plaintiff maintaining that the tenancy agreement was not binding upon it as the lessor had not obtained the prior written consent of the mortgagee to enter into any tenancy agreement.

14. On the 25th April, 2016 the plaintiff issued an Ejectment Civil Bill Title Jurisdiction against the defendant and her husband Tom Harvey and all other persons concerned in respect of the property. The solicitors acting for the defendant were not authorised to accept service of the Civil Bill. The plaintiff attempted to serve the Civil Bill by registered post at the premises but the document was returned marked "never called for". Thus the Civil Bill was never in fact served upon the defendants.

15. The plaintiff believed that the solicitors it had instructed to issue the Civil Bill were progressing the proceedings. It was in frequent communication with the solicitors and was being told in detail of the difficulties with regard to service of the Civil Bill, contacts with the defendant's solicitors, obtaining a date for hearing, obtaining an order for possession with a stay of three months and "teeing up the sheriff" to obtain possession of the premises. These telephone calls, emails and letters were in fact a total fiction. For eighteen months the solicitors acting for the plaintiff took no steps in the matter after the unsuccessful attempt to serve the proceedings. In October 2017 the plaintiff believed that it had reached the end of the litigation and that the sheriff was about to secure possession of the premises on its behalf. This was not the case.

16. When this startling fact came to light, the plaintiff immediately instructed new solicitors. The plaintiff's new solicitors, Dillon Eustace, wrote on the 28th November, 2017 to the defendant explaining that they were now acting on behalf of the plaintiff in relation to the property and expressing the plaintiff's very serious concerns with regard to fire safety at the property. The letter called upon the defendant to cease immediately renting any room within the property and to make the property available for a fire safety inspection by 5pm on Thursday, 30th November, 2017. The letter confirmed that the plaintiff was advised that any purported lease of the property to the defendant is/was void for lack of consent by the mortgage holder. The letter stated:

"Insofar as you [are] currently purporting to occupy the Property under a lease, you have no lawful entitlement to do so. You are currently trespassing on the Property.

Therefore, independent to the outcome of a fire safety inspection which may necessitate you to immediately vacate the Property, we hereby call on you to deliver vacant possession of the Property on or before Wednesday 6th December, 2017…with all belongings removed."

17. A letter in identical terms was written to the occupants of the property. The letters were hand delivered to the property.

18. In response to the letters the defendant spoke to Mr. Ross Kavanagh of Wyse Property Management Ltd, the plaintiff's new property agent. She explained that she was currently out of the country with her sick husband and could not return within this short time frame to allow access to the property. She suggested that an inspection could take place in January 2018 because she had a

large family contingent coming to stay for the holidays.

19. The plaintiff believed that there was a degree of urgency and it could not postpone inspection of the property as requested to January 2018. The plaintiff's former solicitors had previously advised that it did not have any exposure in relation to fire safety issues at the property. However, its new solicitors now advised that there may be an exposure for the plaintiff under the Fire Services Acts, 1981 and 2003. It was for that reason that the plaintiff urgently sought inspection facilities. Mr. Kavanagh confirmed from a visual external inspection of the premises that it appeared to be in multiple occupation and there appeared to be bars over at least some of the windows. These could of themselves give rise to fire safety concerns. While previously the plaintiff had not treated this point as a matter of urgency, it now did so in light of the up to date limited information concerning the property and its new legal advice.

20. The plaintiff could not proceed with the degree of urgency required in the Circuit Court proceedings in view of the lapse of time since they had been issued and the failure to serve the proceedings. It therefore initiated High Court proceedings with a view to seeking an early order for inspection of the premises and an order restraining the continued trespass by the defendant of the premises.

21. Upon the return date for the notice of motion the defendant agreed to allow a representative of the plaintiff to inspect the property and she undertook that the property would not be used for rental purposes and would not be advertised on AirBnB. The inspection was to take place at a mutually agreeable time. In fact, Mr. Kevin Hollingsworth, building surveyor on behalf of the plaintiff, gained access to the property with the consent of the defendant's son but without having obtained the prior agreement from her solicitors as had been agreed. The defendant took very grave exception to the manner in which the plaintiff's in fact proceeded to enter the property and to conduct the inspection.

22. Mr. Hollingsworth inspected the premises on the 19th December, 2017. He said that he was met by the tenant's son, Mr. Marvin Harvey, and his fiancée, Chloe de La Chaise, the defendant and Thomas Harvey (her husband). Mr. Hollingsworth reported that he met "a Mexican gentleman …who stated he is studying in Dublin and has been living in this bedroom for the last three months". He also met an Italian gentleman and there were suitcases located in the adjacent kitchen which Mr. Hollingsworth took to be an indication that the room was in short term use. Mr. Hollingsworth met a French girl in the living room with two backpacks. She confirmed that she was leaving that day after a short stay. He also noted that two rooms on the ground floor appeared to be used for commercial purposes.

23. In her replying affidavit the defendant inferred but did not positively state that the men from Mexico and Italy on the premises were friends of her son who were staying in the house as their guests. She said that three French girls present on the premises were cousins of Ms. Chloe de La Chaise, Marvin Harvey's fiancée. She said that they were having a number of guests to stay in the house to celebrate her birthday the following week on the 24th December, 2017.

Preliminary issues

24. As a preliminary point counsel for the defendant argued that the plaintiff had not established sufficient evidence of its title to the charge or that it had been properly authorised to institute the proceedings against the defendant. The defendant's solicitor required proof that the power of attorney by which the deed of transfer of June 2015 was affected should be proved. He also said that it was necessary to establish that both the vendor, Irish Life and Permanent Plc and the purchaser, Havbell Ltd, had power to sell and purchase the loans and associated securities and that each company had been duly authorised to enter into the transaction. He said that the plaintiff should have adduced by way of evidence the resolutions of the boards of the two companies in order to confirm that the transaction had complied with the requirements of company law. He also submitted that likewise there should be evidence of the resolution of the board of the plaintiff authorising the plaintiff to institute these proceedings against the defendant.

25. The plaintiff has established that Mr. Rooney borrowed money from Irish Life and Permanent Plc upon certain terms. He granted Irish Life and Permanent Plc a charge over the property as security for those borrowings. Mr. Rooney was in default and he voluntarily surrendered possession of the property to Permanent TSB Plc in 2015. Permanent TSB Plc subsequently sold Mr. Rooney's loan and the associated security to the plaintiff. The plaintiff was entered on the Folio as the holder of the registered charge granted by Mr. Rooney to Irish Life and Permanent Plc.

26. Thus the plaintiff has established that it is the holder of the charge which was entered on the Folio on the 13th March, 2009.

27. I am satisfied that the proofs presented by the plaintiff to establish its title to the mortgage granted by Mr. Rooney to Irish Life and Permanent Plc are in order. Specifically, I do not believe that it is necessary in an action for trespass to require the plaintiff to prove firstly that Irish Life and Permanent Plc had capacity to sell the loans and related securities and secondly that the plaintiff had legal capacity to purchase the loans and legal securities. It is not necessary to prove that the appropriate board resolutions were passed in order to make out its title. If there were some facts upon which the defendant could rely which would tend to show that there may be a legal frailty in the transaction, that would be a different matter.

28. Furthermore, as was urged by the plaintiff, it has been registered on the Folio as the holder of the charge and that is conclusive evidence absent any evidence suggesting that the entry in the register ought to be deleted, varied or otherwise amended. No such fact was even suggested, never mind any evidence adduced.

29. Likewise, in the normal way, in the absence of any evidence suggesting that a company has not acted in accordance with its constitutional documents and the Companies Acts, it is not a requirement of a company who has instituted proceedings to prove that the proceedings have been duly authorised by the board of the company by exhibiting a resolution of the board to that effect.

30. I reject these preliminary arguments of the defendant as being without merit.

The defendant's title

31. The defendant claims that she is entitled to remain in occupation of the premises upon three grounds. Firstly she says she has an equitable interest in the property by reason of the fact that she expended monies repairing, maintaining and restoring the premises. These were valued at between €50,000 and €80,000. Secondly she says that she has a valid tenancy agreement and that she has been in occupation of the premises on foot of that tenancy agreement. She has lived there with her family since either June or August 2014 and she claims that she has rights as result under Part IV of the Private Rented Dwellings Act, 2004 as amended. Thirdly, she says that she has an option to purchase the premises as set out in special condition no. 6 of the tenancy agreement of September 2014.

Legal authorities

32. In *N17 Electrics Ltd (In Liquidation)* [2012] IEHC 228 Dunne J. held that the parties to a mortgage were entitled to exclude

entirely the statutory power of leasing created by s.18 of the Conveyancing Act, 1881 or alternatively to make the exercise of that power conditioned upon the mortgagor obtaining the prior consent of the mortgagee. She held that where the mortgagor was required to obtain the consent of the mortgagee before creating any lease in respect of the mortgaged property, a lease created without such consent would not generally be binding as against the mortgagee. There may be circumstances where the mortgagee might be bound by such a lease such as where the mortgagee required the tenant to pay the rent directly to him. She held that the onus of proving that a mortgagee had consented to a lease which contravened a mortgage lay on the party seeking to rely upon the terms of the lease.

Application of the principles
33. The letter of loan offer and the terms of the mortgage entered into between Mr. Rooney and Irish Life and Permanent Plc excluded the mortgagor's power of leasing under the Conveyancing Act, 1881. It was an express term of the mortgage that the mortgagor must obtain the consent of the mortgagee in writing prior to the granting of any such lease. In this case the plaintiff and his solicitors have consistently informed the defendant that there was no consent in writing by the mortgagee, Irish Life and Permanent Plc, to the tenancy agreement of September, 2014. Counsel for the defendant suggested that it was for the plaintiff to establish that there had been no prior written consent to the lease. This is incorrect. Dunne J. was quite clear that it is for the party who asserts that this consent was obtained to so prove. The defendant has known since August 2015 that the plaintiff maintained that the tenancy agreement upon which she relied was granted in breach of the terms of the mortgage and was not binding upon the mortgagee. In the two years four months since she was alerted to this fundamental difficulty with her entitlement to occupy the property, she has not obtained any evidence to show that the mortgagee consented to the tenancy agreement or was aware of the existence of the agreement and affirmed it by accepting rent directly from her.

34. On the contrary, the evidence establishes that the first time the mortgagee, Permanent TSB, became aware of the existence of this tenancy agreement, it was also informed by Mr. Rooney that he had given her notice to vacate the property.

35. It is clear that on a number of occasions in August, September and October 2015 the defendant offered to pay the rent directly to the plaintiff or its agent but that the plaintiff at no stage accepted rent from her or acknowledge the validity of the tenancy agreement.

36. It follows that, applying *N17 Electronics Ltd*, the business tenancy agreement upon which the defendant relies in this case is not binding on the plaintiff and cannot defeat its entitlement to possession of the property.

Alternative grounds of defence
37. Counsel for the defendant was asked to state the basis upon which the defendant claimed to be entitled to remain in possession of the premises. He said that she had an equitable interest in the premises based upon the fact that she had invested between €50,000 and €80,000 in restoring and renovating the property on the representation that she would be afforded an opportunity to purchase the property.

38. There was no evidence from either the plaintiff or the defendant that any such representation was made either by Irish Life and Permanent Plc or the plaintiff or any of their agents.

39. Insofar as Mr. Rooney made any representations to the defendant, which were not established in evidence, any equitable or other rights she may have acquired in reliance on his representations were always subject to the prior rights of the mortgagee as the holder of the registered charge over the Folio.

40. The same objection applies to the option to purchase. It was created in September, 2014 and thus subsequent to the registration of the charge in favour of Irish Life and Permanent Plc. Furthermore, any purported disposition of the property by Mr Rooney to the defendant by way of an option to purchase the property, could only bind the mortgagee, if Mr Rooney obtained the prior consent in writing to the proposed disposition form the mortgagee in accordance with Clause 9.1 of the mortgage. There was no prior written consent to the grant of an option to purchase of any kind to the defendant. It follows that the option cannot bind the plaintiff and therefore cannot provide a defence to the plaintiff's claim to possession of the property.

41. In summary, the plaintiff has established its rights to possession of the property. The defendant is unable to establish even an arguable case that she has an entitlement to occupy the property which could bind the plaintiff. It follows vis-à-vis the plaintiff the defendant is a trespasser on the property.

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

43. In *Kavanagh v. Lynch* [2011] IEHC 348 Laffoy J. considered an application by a receiver to restrain the defendants from remaining on or continuing in occupation of property over which he had been appointed receiver. She referred to the decision of Keane J. in *Keating & Co. Ltd v. Jervis Shopping Centre Ltd* [1997] 1 I.R. 512 where Keane J. held :-

> *"It is clear that a landowner, whose title is not in issue, is prima facie entitled to an injunction to restrain a trespass and that this is also the case where the claim is for an interlocutory injunction only."*

He noted that the principle was subject only to the qualification that the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass. If a defendant did so, the court must consider the application of the principles in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396.

44. In *Tyrrell v. Wright* [2017] IEHC 92 I followed the decision of Keane J. in *Keating & Co. Ltd v. Jervis Shopping Centre Ltd* and I held that prima facia the plaintiff was entitled to an injunction to restrain a trespass on an interlocutory basis unless the defendant puts in evidence to establish that he has a right to do what would otherwise be a trespass.

45. In this case the defendant has not put in evidence to establish that she is entitled to remain in possession of the property as against the plaintiff. On that basis, it is not necessary to consider the principles in *Campus Oil.* The plaintiff is entitled to the injunctive relief it seeks.

Campus Oil Principles
46. In the event that I am incorrect in this conclusion, I shall consider the plaintiff's application in the light of the *Campus Oil*

principles. I am satisfied that the plaintiff has in fact made out a very strong *prima facia* case such that it not only meets the threshold established in *Campus Oil* but also satisfies the test in *Maha Lingham v. Health Service Executive* [2006] E.L.R. 127.

47. On the question whether damages would be an adequate remedy for the plaintiff, I note that Laffoy J. observed in *Dwyer Nolan Developments Ltd v. Kingscroft Developments Ltd* [2007] IEHC 24 that it is not necessary to prove damage in the case of trespass. I cited this decision with approval in *Tyrrell v. Wright* and the decisions in *Metro International S.A. v. Independent News and Media Plc* [2006] 1 I.L.R.M 414; *McCann v. Morrissey* [2013] IEHC 288; *Westman Holdings Ltd. v. McCormack* [1992] 1 I.R. 151; *AIB p.l.c. v. Diamond* [2012] 3 I.R. 549 and *Dellway Investments Limited v. NAMA* [2011] 4 I.R. 1. In light of these authorities I concluded that there were two limbs to the adequacy of damages criterion. The first is whether in fact damages were an adequate remedy for a plaintiff and that in general as regards interests in land damages were not considered to be an adequate remedy. Secondly, and equally significantly, if an injunction is to be refused on the basis that damages would be an adequate remedy, the defendant liable to pay such damages must be able to do so.

48. In this case, there is no evidence at all that the defendant would be able to pay to the plaintiff the damages which it may sustain if it is not in a position to proceed to sell the property but must await the outcome of a trial of the action. The defendant has offered to purchase the property from the plaintiff with the assistance of monies she would be lent by a relative who lives abroad. The clear implication is that she does not have funds of her own which would enable her to purchase the property (which her valuer values at €475,000). This suggests that she would not be able to meet any award of damages in favour of the defendant, the second limb of the adequacy of damages criterion.

49. It must also be borne in mind that the defendant is not the borrower in this case and that any losses sustained by the plaintiff will ultimately be attributable to the borrower, Mr. Rooney. For all of these reasons I am not satisfied that damages would be an adequate remedy for the plaintiff.

50. The defendant argues that damages would not be an adequate remedy for her. If the injunction is granted at an interlocutory stage, effectively she will be made homeless. She will undoubtedly be required to vacate the property but that is not to say that she must thereby become homeless. On her case, she is a tenant of this property and there is no reason to believe that if she is in a position to pay rent in respect of the property that she could not rent an alternative property. Certainly no such evidence has been adduced to support this argument.

51. In addition, it is important to note that the tenancy agreement upon which she says she is entitled to occupy the property is a business letting agreement not a residential letting. The fact that she and her family reside in the premises does not make this a family home within the meaning of the Family Home Protection Act, 1976. The definition of a family home means any building or part of a building occupied as a separate dwelling … *"and is not being used or developed primarily for commercial purposes…"* In light of the fact that from 2015 to 2017 the premises operated as an AirBnB and her counsel accepts that there is a commercial aspect to the letting, it seems to me that the premises cannot be described as a family home within the meaning of the Act. Certainly, she has for a number of years profited from the use of the building as a guesthouse or hostel through the AirBnB website.

52. This conclusion does not mean that the property has not been her residence as well as her place of business. It is the home where she lives with her husband who suffers from ill health. However, she has known of the plaintiff's demand for possession since August 2015 and of the fact that the plaintiff has consistently maintained that it is not bound by the terms of the tenancy agreement between Mr. Rooney and the defendant. If she is now required to vacate the premises, she has had more than two years in which to seek alternative accommodation upon a proper legal basis.

Equitable grounds for refusing an injunction

53. The defendant argues that the plaintiff has been guilty of considerable delay in seeking injunctive relief to such a degree that the court should refuse an injunction and the issue of possession of the property should abide the outcome of the trial. It is true that the plaintiff has known since August 2015 that the defendant is occupying the property and refusing to vacate it on the basis that she has a right to remain in occupation on foot of her tenancy agreement with Mr. Rooney. At all times the plaintiff has insisted that the tenancy agreement is not binding upon it. It did not act unreasonably in engaging with the defendant's solicitors for some months to ascertain whether or not the defendant might be induced voluntarily to vacate the property. Once it became apparent that the defendant would not leave on a voluntary basis, the plaintiff instructed solicitors to commence proceedings to recover possession of the property. Quite properly, advices of counsel were obtained regarding the nature of the proceedings and ultimately Circuit Court proceedings issued in April 2016, as I have explained. What occurred thereafter was wholly unexpected and was not the fault of either party to these proceedings. Unquestionably the solicitors acting for the plaintiff were its agent and therefore they are responsible for the delay notwithstanding the fact that they were clearly mislead for a period of nearly two years as to the progress of the Circuit Court proceedings. If the defendant suffered any prejudice as a result of the delay in resolving the Circuit Court proceedings, then the plaintiff must bear responsibility for that prejudice. When counsel for the defendant was asked to identify the prejudice she had suffered by reason of the delay in the Circuit Court proceedings, he answered that there was a delay in resolving the issues in dispute between the parties and that had the matters progressed in the normal way, it was likely that the Circuit Court proceedings would have concluded by now. That of course applies equally to the plaintiff and I am not satisfied that it amounts to the prejudice suffered by the defendant. I agree with the submission of counsel for the plaintiff that it merely resulted in the plaintiff enjoying a continued occupation of the property at the expense of the plaintiff (and indeed, ultimately, Mr. Rooney). I do not accept that the delay in seeking the injunction in this case provides a ground for refusing the relief sought.

54. It was also argued that the institution of these High Court proceedings constituted an abuse of process and offended the rule in *Henderson v. Henderson* (1843) 3 Hare 100 in light of the continued existence of the Circuit Court proceedings. I do not accept this submission. The rule in *Henderson v. Henderson* is to prevent abuse of process. It requires parties to bring forward in the first set of proceedings all of the causes of action relevant to the dispute between the parties so that they may be disposed of in the first set of proceedings. The abuse lies in permitting the first set of proceedings to run their course and then advancing, in a second set of proceedings, claims or arguments which could properly have been advanced in the first set of proceedings.

55. This is far from what occurred in this case. The Circuit Court proceedings have been instituted but not served. It would be necessary for the plaintiff to seek an order of the Circuit Court extending time for the service of the proceedings. The defendant in effect has never been vexed by these proceedings as she has never been formally served with the proceedings and she has never entered an appearance. She has been put to no trouble whatsoever by the Circuit Court proceedings. In effect, her claim is that the mere existence of those proceedings, which would require an order of court to enable them even to be served upon her, ought to debar the plaintiff from instituting and progressing these High Court proceedings. The rule in *Henderson v. Henderson* is a discretionary one. Even if the facts of this case came within the ambit of the rule, in the exercise of my discretion in this case, I would not be prepared to hold that the institution and maintenance of these proceedings offends the rule.

56. The final ground upon which the defendant says that the plaintiff should be refused the relief it seeks is the fact that she has offered to purchase the property at a fair market value. She says that the plaintiff has refused to engage or negotiate with her in relation to the sale of the property to her. She says that this will inevitably result in the realisation of a lessor sum by the plaintiff when it ultimately sells the property with vacant possession. She has exhibited a report of Dougan FitzGerald, auctioneers, from Clonmel, dated 26th February, 2018 to support this argument. He was asked "*to comment on the impact to the market price if the tenants were compelled to vacate their home resulting from a court order*." In light of his instructions Mr FitzGerald stated that :-

> *"…[I]t is standard practice to advise that maximum (price/values) are unattainable where it is commonly known that a dispute arises and/or where tenants are reluctant to give up possession voluntarily and/or where vacant possession has been achieved in a hostile environment or following contested litigation….We would conservatively estimate that my aforesaid valuation of €475,000 is reduced by at least 20% in circumstances as outlined (if a willing purchaser could be sourced)."*

On the basis of this opinion she argues that the plaintiff is seeking to sell at a loss by its refusal to negotiate with her and by insisting on obtaining vacant possession before attempting to realise the security. She invites the court to refuse the relief on the equitable grounds that this amounts to an abuse by the plaintiff and that it is not acting *bona fide* in seeking the injunctive relief in this case.

57. This argument ignores the evidence of Savills who acted on behalf of the plaintiff. They advised that vacant possession of the property was required in order to realise the maximum value. It also ignores the evidence of Mr. Karl Smith, solicitor, who stated that the plaintiff was unable to solicit interest in the property or to market the property while the matters complained of persist. At an interlocutory hearing the court is not in a position to resolve conflicts of fact and I do not purport to do so. However, I am in a position to assess the *bona fides* of the plaintiff. I accept that the plaintiff is trying to maximise the return on the security for the loan and that it has advices that this is best achieved by selling the property on the open market with vacant possession, notwithstanding the fact that the defendant has evidence to suggest that this is not the case.

58. There is no legal obligation on the plaintiff negotiate with the defendant for the sale of the property. That is entirely a matter for the plaintiff. If, on the basis of professional advices, it wishes to sell the property on the open market with vacant possession, that is its entitlement. She is not the borrower and she has no right to argue a *jus tertii*. The argument she advances is one which it might be open to Mr. Rooney to advance but it is not one which is open to the defendant to raise. The fact that the occupier (who is not the borrower) is anxious to purchase the property prior to vacating it does not afford a reason to refuse the injunctive relief to which the plaintiff is otherwise entitled.

Conclusion

59. The plaintiff is entitled to possession of the property from the defendant and I will so order. I will hear the parties' submissions in relation to the terms of the order.