[2018] IEHC 653

THE HIGH COURT

[2018 No. 5971 P.]

BETWEEN

CASTLETOWN FOUNDATION LIMITED

PLAINTIFF

AND

GEORGE MAGAN

DEFENDANT

Judgment of Mr. Justice Robert Haughton delivered on the 21st day of November, 2018

Introduction

1. This judgment relates to two applications in these proceedings which were commenced by plenary summons dated 3rd July, 2018, and admitted to the Commercial Court by my order made on 9th July, 2018. The proceedings concern a property known as Castletown Cox House and Estate, County Kilkenny. In the first application the plaintiff seeks summary judgment against the defendant in the sum of €571,893 together with interest pursuant to statute in respect of arrears of rent. In a cross motion issued on 20th July, 2018 the defendant seeks orders dismissing, or placing a permanent stay on, the proceedings pursuant to the inherent jurisdiction of the court, or pursuant to O. 19 r. 28 of the Rules of the Superior Courts, on the basis that there is no jurisdiction, or that they are frivolous and vexatious, or an abuse of the process and bound to fail.

2. At the outset counsel for the defendant confirmed that the defendant was not maintaining a claim that the High Court did not have jurisdiction to hear the plaintiff's claim for arrears of rent, but would argue that it had a *bona fide* defence by way of counterclaim and entitlement to equitable set off such that the application for summary judgment should be refused.

3. As there was significant overlap in terms of background, relevant facts and affidavit evidence, I determined that both motions should be heard together. Separate written legal submissions were filed in respect of each motion by both sides, and were considered along with the affidavit evidence. Oral argument in respect of both motions was heard on 25th October, 2018. The hearing of a third motion – the defendant's application for discovery – was postponed pending the delivery of this judgment.

Background Facts

4. In or about 1991 the defendant, who is a life peer, purchased Castletown House, also known as Castletown Cox, through Castletown Estates Ltd ("CEL"). Through the 1990s he purchased the surrounding farmlands resulting in a total acquisition, to include the house, of 513 acres, through a company Castle Farms Ltd. Castletown House is one of Ireland's few surviving great Georgian houses, having been built in or about 1776. Since 1999 significant sums have been spent on refurbishment and modernisation of Castletown House.

5. The defendant arranged for the transfer of Castletown House and Estate into a trust – Eaglehill Trust – for two of his children, Henrietta Black (nee Magan) and Edward Magan. The current trustee – having been appointed on 4th April, 2013 – is Yew Tree

Trustees Ltd (formerly DW Trustees Ltd). The trust is administered in Jersey. The plaintiff is a limited liability company registered in the British Virgin Islands, and is the actual owner of Castletown Cox House and Estate, but it is a company owned and controlled by the trustee, Yew Tree Trustees Ltd. CEL is a management company that manages Castletown Cox House on behalf of the Eaglehill Trust.

6. Of tangential relevance is that the same trustee operates a separate trust, which is settled by the defendant for the benefit of his third child, Patrick Magan. That trust is known as the Clonearl trust and has other holdings in the United Kingdom and elsewhere.

7. While the defendant has a place of residence in London, Castletown Cox has been a secondary home for the Magan family. The defendant also variously describes himself as Lord Magan of Castletown/Baron Magan of Castletown.

8. By Letting Agreement dated 15th December, 2010 the plaintiff let "Castletown House on lands consisting of 53.61 acres statute measure at Castletown Demesne in the County of Kilkenny as shown delineated on the map annexed hereto" for a term from 13th December, 2010 to 12th December, 2013 at a rent of €100,000 per annum together with VAT, payable by monthly instalments ("the Letting Agreement"). The Letting Agreement appears to have replaced an existing business tenancy concluded between the parties in 2004. The terms of the Letting Agreement are central to both applications, and certain clauses are particularly relevant:-

> • Under Clause 2.1 the defendant agreed "to pay the rent at the time and in the manner specified, the first payment being made on the date of this agreement."
>
> • In Clause 2.7 the defendant agreed "not to reduce any payment of rent by making any deductions from it or by setting any sum off against it."
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> • In Clause 2.17 the defendant agreed that "to use the property as a residence only for the named tenant and his dependants."
>
> • Clause 4, insofar as relevant reads:
>
> "4. The parties agree:
>
> 4.1 whenever the tenant:
>
> 4.1.1 is seven days late in paying any rent, even if it was not formally demanded:…
>
> 4.2 the landlord may end this tenancy. He must first give the Tenant not less than 4 weeks written notice ending on any day. This tenancy shall end on that day but this will not cancel any outstanding obligations which the Tenant owes the Landlord."
>
> • In Clause 3.2 the landlord agrees "to do the repairs to the property which the Housing (Standards for Rented Houses) Regulations, 1993 and Section 12(i)(b) of the Residential Tenancies Act, 2004 require."

Notwithstanding Clause 2.17, the plaintiff did not register the tenancy with the Residential Tenancy Board ("RTB") under the Residential Tenancies Act, 2004.

9. It is common case that on the expiry of the term of the Letting Agreement on 12th December, 2013 the defendant continued in occupation under the terms of the Letting Agreement on foot of a tenancy from year to year, arising by implication.

10. The last payment or contribution to rent made by the defendant was in July 2012, nothing has been paid since the plaintiff was appointed trustee in April 2013. The principal grounding affidavit sworn by Mr. Jonathan Richard Benford, director of the plaintiff, on 4th April, 2018 shows accumulated arrears of rent due at 12th April, 2018 in the total sum of €571,893 exclusive of interest. There is no express provision in the Letting Agreement in relation to the payment of interest on arrears of rent. These figures are not disputed by the defendant.

11. Castletown Cox also has a world class collection of fine art, paintings and furniture. Most of these are owned by a separate trust, the subject matter of a separate Chattels Agreement dated 9th March, 2011 between the plaintiff and the defendant which is a licence which provides for the safekeeping by the defendant in Castletown House subject to a fee from time to time. A sum of GBP £1,626,496.80 is claimed by the plaintiff to be due by the defendant under the Chattels Agreement, and is the subject matter of another dispute, and the plaintiff has a further claim against the defendant for GBP £1,996,124 in respect of loans granted by the plaintiff to the defendant to meet personal creditors and expenditure unrelated to Castletown Cox.

12. Against this background the running expenses of Castletown Cox are significant, being in the order of €500,000 per annum. The defendant asserts at para. 5 of his replying affidavit sworn on 31st August, 2018 that the parties entered into an agreement for the upkeep and maintenance of Castletown House in 2005. Mr. Benford in his second affidavit sworn on 21st September, 2018 describes it as "an understanding with Castletown Estates Ltd (a company controlled by the defendant) that both the plaintiff and the defendant would contribute to [CEL] for the upkeep and maintenance of the property", but Mr. Benford adds (at para. 15) that:

> "There was never any suggestion that the plaintiff was obliged to reimburse the defendant in relation to his contribution."

13. The defendant avers that the plaintiff has failed to pay any sum in respect of upkeep and maintenance from June 2017 onwards, whereas during that period he has paid €361,167.72, and he has raised a counterclaim for breach of contract in respect of this amount.

14. Due to the trustee's financial concerns, a process of consultation with the defendant and beneficiaries started in mid-2015. The backdrop was that the primary lender to the trust, Sancus, was, according to Mr. Benford, expressing serious concern in respect of accumulating debt, and indicated that unless a resolution was found, it would call in the security held, namely Castletown Cox estate.

15. Following these consultations, on 3rd October, 2016 the defendant in a letter addressed to the then trustees informed them that "arrangements are being progressed whereby the Castletown Estate would be acquired at fair market value out of the present Trust ownership; in most likelihood through a financing of the Irish Heritage Preservation Trust (IHPT)." He went on to state:

> "It is assumed that through these arrangements the assets of the IHPT would be available as collateral, namely the

Castletown Estate itself, the fine art collection of the IHPT, and the significant private equity investment held in the IHPT. It is the intention that these financing arrangements should be completed by Easter 2017, i.e. by Good Friday 14th April, 2017 – if not earlier.

If by Friday 14th April, 2017 the sale of the Castletown Estate on the basis outlined above has not been concluded, I recognise that in all probability, and in the absence of other more creative refinancing proposals, that the Trustees would need to seek a sale to a third party.

I also recognise that, if a sale of the Castletown Estate, by whatever means, has not been concluded by mid-April 2018, then in all probability the Trustees would need, as an alternative strategy, to secure a third party sale of the Ellesmeere Estate."

The Jersey Proceedings

16. The Easter 2017 deadline passed without refinancing, but the defendant and one of the beneficiaries, his son Edward Magan, wished the plaintiff to proceed with an alternative option of selling certain UK real estate instead of Castletown Cox. The plaintiff did not agree with this stance and, in the light of the foregoing, brought proceedings in the Royal Court of Jersey, Record No. 2017/164, seeking approval in principle for a sale of Castletown Cox. Those proceedings were heard on 4th July, 2017, and the defendant and Edward Magan were both represented. The court ordered as follows:

> "1. In respect of the Jurisdiction Challenge, declared that this Court has jurisdiction and is clearly the most convenient forum for Representations;
>
> 2. Approved the decision of Representor not to retire from both or either of the Clonearl Trust or the Eaglehill Trust;
>
> 3. Ordered that the Representor shall remain as trustee of the said trusts until further order of this Court;
>
> 4. Approved the decision of the Representor to market Castletown Cox ("the property");
>
> 5. Ordered that the Settlor and the Convened Beneficiaries shall take all reasonable steps within their power to facilitate the marketing of the property and to take all reasonable steps within their power to allow access to the property when reasonably required by the Representor and/or the appointed agents for that purpose;
>
> 6. Ordered that the Representor's costs of the proceedings shall be paid from the trust funds on the usual trustee indemnity basis, with payment apportioned at two/thirds from the Eaglehill Trust and one/third from the Clonearl Trust; and
>
> 7. Otherwise adjourned the said Representation with liberty to apply."

17. Two days later Mr. Edward Magan instituted proceedings in the Irish High Court seeking to restrain the marketing and sale of Castletown Cox, entitled *Magan v DW Trustees Ltd* [2017] No. 6369 P. Those proceedings were initially stayed pending mediation which took place in London, and led to a mediation agreement on 26th September, 2017. This allowed the plaintiff to continue marketing, but gave Mr. Edward Magan (and the defendant) the opportunity to put forward for consideration any refinancing proposal on the basis that the property would not be sold until any such proposal had been considered.

18. On the basis that no realistic refinancing proposal was forthcoming, in October 2017 the plaintiff again applied to the Royal Court of Jersey in proceedings 2017/164 to approve a sale. At that point in time the indebtedness charged on Castletown Cox was St£11,500,000 and was due for repayment on 21st December, 2017, and the running costs were in the order of St£500,000 per annum. Having satisfied itself that all appropriate parties were represented or on notice (all the adult beneficiaries were on notice; the settlor – the defendant herein – and his elder son were represented and opposed) the court made the following order on 31st October, 2017:

> "1. Blessed the decision of the Representor as recorded in its resolution dated the 25th October, 2017, and as amended on the 31st October, 2017, namely that:-
>
> (i) The said property be sold at a price not less than €19 million and;
>
> (ii) The Representor shall exercise its powers, as sole shareholder of Castletown Foundation Ltd, to procure that the Representor enters into an agreement to sell the property for the best price that the directors of the Representor considers obtainable, in excess of €19 million, upon an offer satisfying that condition being received;
>
> 2. Ordered that the Representor's costs of the proceedings shall be paid from the trust funds on the usual trustee indemnity basis, with payment apportioned at two/thirds from the Eaglehill Trust and one/third from the Clonearl Trust, and
>
> 3. Adjourned the hearing of the said Representation."

19. In November 2017 the plaintiff agreed to heads of term for a sale in principle to a third party for a price in excess of €19 million. Mr. Benford avers in his principal affidavit (para. 38) that "this was vital because Sancus had provided a final deadline of 21 December, 2017 for the repayment of the loan if a sale had not been agreed".

20. The injunction proceedings brought by Mr. Edward Magan were set for hearing on 6th December, 2017, but did not proceed, and have not advanced since then.

21. It should be noted that on 5th October, 2017 the Royal Court of Jersey delivered a full reasoned judgment on jurisdiction, explaining its order of 10th July, 2017, and rejecting the defendant's application for a stay. Commissioner Clyde-Smith held that the following factors justified the conclusion that "Jersey was the most appropriate forum":

- The trustee was resident in Jersey;

- The trust was administered in Jersey;
- Four out of five of the trustee's directors were resident in Jersey;
- The majority of beneficiaries and the settlor were U.K. domiciled;
- There were no assets in Bermuda;
- The relief sought by the Trustee was directions as to its own conduct;
- Requiring the Trustee to litigate in Bermuda at its own initial expense would impose an unfair additional cost burden;
- The only connection with Bermuda was the proper law of the trust.

The Bermuda Proceedings

22. Notwithstanding the order of the Jersey court of 10th July, later in July 2017 the defendant initiated proceedings in Bermuda seeking to remove the plaintiff as trustee, and seeking to set aside the decision by the plaintiff to sell Castletown Cox. The court had first to decide whether the Bermudian courts had jurisdiction and if so whether it was the appropriate forum. The Supreme Court of Bermuda in its ruling of 13th November, 2017 (Chief Justice Ian R.C. Kawaley) held that while it had jurisdiction to remove the trustee it would be an abuse of the process for the defendant to relitigate in Bermuda issues which had already been determined by the Jersey court following *inter partes* hearings, and inconsistent with comity for the Bermudian court to permit its processes to be used to undermine the exercise by the Jersey court of its lawful supervisory personal jurisdiction over trustee's resident within its jurisdiction. The chief justice stated at para. 24:

> "The [Magans] have identified no coherent (and legitimate) juridical advantages which they would gain from having the removal issue determined in Bermuda while it is obvious that the Trustee would be disadvantaged in costs terms. It is also obvious that keeping the Bermuda proceedings alive would potentially undermine the efficacy of the Jersey court's orders in relation to the Property by creating unfounded legal doubts as to the Trustee's authority to sell the Property under the proper law of the E Trust. In these circumstances I am bound to find that the further prosecution of the present action would be an abuse of the process of this Court. It follows that the Order of July 20, 2017 granting leave to serve out should be set aside as regards the removal of trustee head of relief as well and that the Writ should be struck out in its entirety."

23. Following this on 7th March, 2018 the plaintiff was authorised by the trustee to exchange contracts for the sale of Castletown Cox for a price in excess of €19 million. The contract for sale was not exhibited for commercially sensitive reasons, and this was not challenged in the present applications. Mr. Benford avers (para. 44 of his principle affidavit) that the plaintiff was obliged to complete and deliver up vacant possession of the property by August 2018.

Notices of Termination

24. By Notice of Termination dated 22nd December, 2017 served by the plaintiff on the defendant, the plaintiff gave notice that – "the tenancy of the dwelling at Castletown House, Carrick-on-Suir, Co. Kilkenny will terminate of 3 August, 2018. You must vacate and give up possession of the dwelling on or before the termination date."

25. The reason given for termination was "the fact that the landlord intends to enter into a binding contract for sale within three months of the termination of the tenancy". The notice ended – "Any issue as to the validity of this notice or the right of the landlord to serve it, must be referred to the Residential Tenancies Board under Part 6 of the Residential Tenancies Act, 2004 to 2016 within 28 days from the date of receipt of it." The defendant has not sought to challenge the validity of that notice before the RTB within the requisite 28 days or at all (the RTB has jurisdiction to extend time, but no application in that regard has been made).

26. On 21st March, 2018 the plaintiff served a notice headed "14 Day Warning Notice – Failure to Pay Rent – Notice served pursuant to Section 67(3) of the Residential Tenancies Act, 2004". This reminded the defendant of his failure to pay rent, stating that arrears were now €568,559.90 as of 13th March, 2018, and indicating that if he failed to pay the rent within fourteen days the landlord "is permitted to terminate the tenancy giving 28 days' notice and by serving a notice of termination on you".

27. The notice was served "entirely without prejudice to the Notice dated 22 December 2017 served on you pursuant to Section 34(4) of the Residential Tenancies Act, 2004…".

28. On 12th April, 2018 the plaintiff served a second Notice of Termination for "failure to pay rent". This stated:

> "Your tenancy …will terminate on Friday 11 May 2018.
>
> You must vacate and give up possession of the Property on or before the termination date.
>
> The reason for the termination of the tenancy is due to the breach of tenancy obligations in that you have failed to pay rent on the dates it fell due for payment.
>
> You have the whole of the 24 hours of the termination date to vacate and give up possession of the above dwelling.
>
> Any issue as to the validity of this notice or the right of the landlord to serve it, must be referred to the Residential Tenancies Board under Part 6 of the Residential Tenancies Acts 2004 to 2015 within 28 days from the date of receipt of it."

29. It is not contested that the arrears of rent as of 12th April, 2018 totalled €571,893. In a letter sent on 9th May, 2018 by the defendant's then solicitors Ivor Fitzpatrick & Co. to the plaintiff's solicitors A & L Goodbody, there is an acknowledgement that the defendant was "faced with a Notice of Termination expiring this Friday, 11th May, 2018".

30. The plaintiff makes the case that the Letting Agreement was validly terminated by the second Termination Notice on 11th May, 2018.

Reference to the Residential Tenancies Board
31. It subsequently transpired that the defendant's solicitors had, without notice to the plaintiff, referred a dispute concerning the validity of the second Termination Notice to the RTB on 10th May, 2018. Neither the defendant nor his solicitors nor the RTB put the plaintiff or its solicitors on notice of the referral of the dispute prior to 24th May, 2018. The referral notice alleges that the second notice of termination was invalid on a number of grounds including that –

- Rent was not due or there was a dispute as to the amount.

- Insufficient notice was given.

- Uncertainty of the notice because it was expressed to be without prejudice to the previous termination notice with a termination date of 3rd August, 2018.

- That the landlord has not paid substantial sums due, in respect of which the tenant is issuing separate High Court proceedings claiming damages in excess of €600,000.

32. In a letter dated 15th May, 2018 Ivor Fitzpatrick solicitors wrote on the defendant's behalf to the RTB referring to the dispute form lodged on the 10th May and stating –

> "Please note that the said dispute was lodged without prejudice to our client's assertion that the Landlord and Tenant Act, 1980 applies to our client and the subject property. We would request the RTB defer from further processing the dispute until such time as the Landlord and Tenant issues under the 1980 Act are resolved."

33. On the morning of Wednesday 23rd May, 2018 the plaintiff through its agents re-entered and recovered possession of Castletown Cox and the lands the subject of the Letting Agreement, at a time when there were no members of the Magan family in occupation. There is no evidence before the court to suggest that the plaintiff or its solicitors had any notice of the dispute referenced to the RTB at the time of repossession, and Mr. Benford's averments to the effect that the plaintiff had no notice are not contested. The defendant asserts that the repossession was unlawful, and further that under the Residential Tenancies Act, 2004 the plaintiff was precluded by the dispute referral from taking any further action pursuant to the second notice of termination until such time as the matter had been assessed and determined by the RTB.

34. When one considers the extent of the correspondence between the parties' respective solicitors during the period 10th May – 23rd May, including five letters from Ivor Fitzpatrick solicitors, albeit that most of this correspondence related to files and documents requested by them from A & L Goodbody, it is remarkable that not once is there any mention of the filing of the dispute reference in relation to the second Termination Notice with the RTB. Ivor Fitzpatrick did write promptly on 24th May, 2018 protesting on the defendant's behalf at the "unauthorised and unlawful entry by your servants or agents onto the Castletown Demesne and into Castletown House early yesterday morning". That letter asserts that the defendant's employee witnessed "a number of men using electronic cutting equipment to cut a metal chain which was securing the inner gate entrance to the property" to allow the ingress of vehicles and a group of men. The letter goes on to refer to the submission by them of the requisite form to the RTB dated 10th May, 2018 (submitted electronically on that date and followed by a letter to the RTB on 15th May, 2018). That letter called upon the plaintiff, its servants or agents, to leave the property, and requested an undertaking that the plaintiff would abide by the procedures of the RTB "in accordance with the Notice of Terminations heard on 11th April, 2018". The penultimate paragraph stated –

> "Should you refuse to grant the undertakings sought above in writing by 5pm today, 24 May 2018, our client will have no choice but to make an application to the High Court and we will rely on this letter to fix you with the costs of such an application."

35. On 25th May, 2018 A & L Goodbody responded at some length and asserted that the defendant was engaged in an abuse of process. Reserving its position as to the defendant's demand for an undertaking, A & L Goodbody on the plaintiff's behalf proposed that the defendant and his family be permitted to stay at Castletown Cox until 3rd August, 2018 on the basis of certain terms including a written acknowledgment of the termination of their Chattels Agreement and a return of all items, and "a written undertaking to refrain from entering the property after 3rd August, 2018".

36. This proposal was not accepted by the defendant. Further correspondence ensued, but the defendant did not bring proceedings seeking an injunction to restrain the alleged trespass by the plaintiff. The plaintiff asserts, through its solicitors and averments from Mr. Benford, that it was a peaceable re-entry and the steps that it took were appropriate and proportionate and undertaken in a manner to cause the least inconvenience.

37. By Notice of Intention to Claim Relief dated 14th June, 2018 the defendant served notice on the plaintiff of his intention to claim a new tenancy under Part II of the Landlord and Tenant (Amendment) Act, 1980 in respect of Castletown House and 53.61 acres, and in the alternative €10 million compensation for disturbance, and compensation for improvements. The Schedule in which details of improvements are to be set out states "details to be provided".

Proceedings under the Landlord and Tenant (Amendment) Act 1980
38. After the requisite period of at least 28 days had elapsed, the defendant issued proceedings by Landlord and Tenant Civil Bill dated 19th July, 2018 entitled "*The Circuit Court County of Kilkenny between George Magan Plaintiff and Castletown Foundation Ltd Defendant.*" This seeks an order "determining the matters to which the [Notice of Intention to Claim Reliefs] relate", an Order declaring that the plaintiff is entitled to a new tenancy in the property and fixing the terms of same, and alternatively compensation for improvements and/or disturbance, and consequential orders. The Indorsement of Claim at para. 3 pleads that the plaintiff has occupied the premises "continuously since 1991 and continuously since 1996 when the premises were demised to the plaintiff by Castletown Estates Ltd". The following further pleas are then made:-

> "4. Title to the Premises was subsequently transferred to the Defendant in 2004 and at the request of the Defendant, the Plaintiff executed a lease of the premises from the Defendant by way of "business letting agreement" dated 24th December, 2004.
>
> 5. By Lease dated 15th December 2010 ("the Lease") the Plaintiff [*this is clearly intended to refer to Castletown Foundation Ltd*] herein demised the Premises to the Defendant [*this is a further error and clearly refers to George Magan*], together with the furniture and equipment thereon covered by the insurance policy arranged for the parties hereto ("the Tenement").

> 6. The Plaintiff now holds the Premises under a yearly tenancy (still subsisting) at an annual rent of €100,000 arising on the expiry of a fixed term tenancy created by the Lease.
>
> 7. The Tenement is a tenement within the meaning of section 5 of the Landlord and Tenant (Amendment) Act of 1980 (as amended) ("the Act").
>
> 8. The Premises has been continuously in the occupation of the Plaintiff within the meaning of the Landlord and Tenant Amendment Act of 1980 (as amended) and further, the Premises has *bona fide* been used, partly for the purpose of carrying on a business within the meaning of the Act.
>
> 9. By notice dated the 22nd December, 2017 the Defendant purported to terminate the tenancy held by the Plaintiff in the Premises as of 3rd August, 2018. By a further notice dated 12th April, 2018 expressly stated to be served pursuant to s. 67(2)(b)(ii) of the Residential Tenancies Act, 2004 the Defendant purported to terminate the tenancy held by the Plaintiff in the Premises upon the expiry of a notice period of one month pursuant to the provisions of the 2004 Act. It is expressly pleaded that the said notices are wholly invalid and have no lawful effect.
>
> 10. On or about 23rd May 2018, the Defendant its servants or agents unlawfully and in breach of the terms of the tenancy under which the Premises is held forcibly re-entered the Premises.
>
> 11. By Notice of Intention to Claim Relief dated 14th June 2018 …duly served on the Defendant the Plaintiff sought relief pursuant to the provisions of the Act.
>
> 12. The Plaintiff is entitled to a new tenancy in the Premises in accordance with the provisions of Part II of the Act and in particular s. 13 thereof."

39. Section 13 of the Landlord and Tenant (Amendment) Act, 1980 as amended ("the 1980 Act") provides for the right to a new tenancy in respect of a "tenement" in three situations – the first is a new business tenancy based on five years bona fide use wholly or partly for the purposes of carrying on a business, secondly a long occupation tenancy where there has been continuous occupation for a period of twenty years, and thirdly where there have been improvements such that not less than one half of the letting value of the tenement is attributable to the improvements. At hearing, counsel for the defendant clarified that his claim is not based on long possession or improvements, but is based on the first limb i.e. business user. Although not particularised in the Circuit Court proceedings, counsel indicated that the business user relied upon is touched on in para. 9 of the affidavit of the defendant where he states –

> "9. Throughout, I carried out extensive refurbishment of the Property, the surrounding properties and the estate gardens. Castletown House and Estate is one of Ireland's few surviving great houses and estates and has been used as a residence for our family since 1991. I regularly hold events for international Georgian Societies and Horticultural Societies at Castletown House & Estate such is the quality and standard of the refurbishment work carried out. …"

Counsel pointed out that s. 3 of the 1980 Act defines "business" to mean "any trade, profession or business, whether or not it is carried on for gain or reward, any activity for providing *cultural, charitable, educational, social or sporting services*…" (emphasis added). Castletown Foundation Ltd has yet to raise particulars or deliver a defence in respect of the Landlord and Tenant Civil Bill.

40. It will be noted that there is a tension between the claim for a new business tenancy, and the covenant at Clause 2.17 of the Letting Agreement "to use the property as a residence only for the named tenant and his dependants."

41. By letter dated 24th September, 2018 sent by the trustee to *inter alia* the defendant, notification of a change in the sale contract was given in the following terms:

> "As you may know, last Friday (September 21) was the deadline for repayment of the Sancus loans. Sancus had formally warned that enforcement would follow in the event of non-payment. The effect of default with Sancus would have been to cause the loans from Barclays Bank and Falcon to fall into default also, under the cross – default provisions in the security documents, as well as raising the prospect of Sancus instructing an insolvency practitioner to realise trust assets.
>
> I am therefore pleased to report that Sancus was paid this afternoon with a loan at 0% interest from the purchaser of the property. The loan is subject to retrospective repricing if the sale of Castletown does not complete in a timely manner."

This was followed up with a letter of 2nd October, 2018 from A&L Goodbody solicitors for the plaintiff to Ivor Fitzpatrick explaining that "…there was a very real risk that Sancus would enforce its security to the severe detriment of the beneficiaries interests…" if this new agreement had not been reached. They further advised that these proceedings would be pursued "with vigour", and that the purchaser had taken security over Castletown Cox "…and is in a position to exercise control over the asset upon short notice".

Plaintiff's Motion for Summary Judgment in Respect of Arrears of Rent

42. The principles to be applied by the court in determining whether or not to grant summary judgment, or refer on the issue to plenary hearing, were not in dispute. Per Ackner L.J. in *Banque de Paris v de Naray* [1984] 1 Lloyd's Law Reports 21, at p. 23, approved by Murphy J. in *First National Commercial Bank Plc v Anglin* [1996] 1 I.R. 75, at p. 79, the essence of the test is: "Is there a fair or reasonable probability of the defendants having a real or *bona fide* defence?".

43. This test was endorsed by the Supreme Court by Hardiman J. in *Aer Rianta cpt v Ryanair Limited* [2001] 4 I.R. 607 where he stated at p. 623:-

> "In my view, the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

44. The principles to be applied by the court in determining whether to grant judgment or give leave to defend were subsequently addressed by McKechnie J. in the High Court in *Harrisgrange Limited v Michael Duncan* [2003] 4 I.R. 1, at p. 7.

> "9. From these cases it seems to me that the following is a summary of the present position:-

(i) the power to grant summary judgment should be exercised with discernible caution;

(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;

(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;

(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;

(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the defendant says credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;

(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

45. Counsel for the defendant emphasised the first of these principles, arguing that the court should proceed with particular caution because of the consequences that summary judgment would have on possibly affording the plaintiff a defence to the defendant's claim for a new tenancy, by reason of s. 17(1)(a)(i) of the 1980 Act, which provides:-

"A tenant shall not be entitled to a new tenancy under this Part if—

(i) the tenancy has been terminated because of non-payment of rent, whether the proceedings were framed as an ejectment for non-payment of rent, an ejectment for overholding or an ejectment on the title based on a forfeiture…"

It was pointed out that Mr. Fanning, counsel for the plaintiff, had frankly stated the plaintiff's real concern in seeking summary judgment was to deliver a "knock out blow" to the defendant's claim to be entitled to a new tenancy, thus facilitating the completion of the sale.

46. While having regard to this submission in principle it seems to me that the court should not have regard to the consequences for a particular defendant of granting summary judgment where such is the plaintiff's entitlement. Nor can I see why harbouring another motive for seeking summary judgment, provided it is not unlawful, could afford a reason in itself for refusing summary judgment in respect of a proven liquidated debt where it is clear that no *bona fide* defence is shown. These factors might however have a bearing on whether, in the exercise of the court's discretion, a stay on the judgment should be granted. It is also noteworthy that in a submission made by the defendant's other senior counsel in support of the motion to dismiss, counsel argued that the plaintiff is not in any event entitled to rely on s. 17(1)(a)(i) because there are no ejectment proceedings in being.

47. In para. 5 of his replying affidavit, the defendant raises three suggested *bona fides* defences. Two of these were not pursued and may be dealt with summarily.

48. The first was that the High Court has no jurisdiction to consider the arrears of rent in claim because it was "currently the subject of a referral to the [RTB]." This is a reference to the referral dated 10th May, 2018 mentioned above. However, this jurisdictional point is disposed of by s. 182(1) of the Residential Tenancy Act, 2004, which provides: -

"On and from the commencement of Part 6, proceedings may not be instituted in any court in respect of a dispute that may be referred to the Board for resolution under that Part unless one or more of the following reliefs is being claimed in the proceedings—

(a) damages of an amount of more than €20,000,

(b) recovery of arrears of rent or other charges, or both, due under a tenancy of an amount, or an aggregate amount, of more than €60,000 or such lesser amount as would be applicable in the circumstances concerned by virtue of section 115(3)(b) or (c)(ii)."

49. Assuming for present purposes – and this is also the subject of contention – that the 2004 Act applies to the Letting Agreement, it is quite clear that the High Court has jurisdiction by virtue of s. 182(1)(b) to hear and determine the claim for rent, which far exceeds the threshold of €60,000.

50. Secondly the defendant asserted that where rents were paid directly to a person whose usual place of abode is outside of Ireland (and the plaintiff is a BBI registered company) the claimant is obliged to deduct income tax at the standard rate from the payment (s. 104 of the Taxes Consolidation Act, 1997) (as amended) – the standard rate of withholding taxes is currently 20%. Although withholding tax is payable, this was withdrawn as a "*bona fide* defence" in the defendant's written submissions.

51. The defendant relied on two further matters:-

> (1) The "agreement" for the upkeep and maintenance of Castletown House reached in 2005, and payments which he avers that he expended in the sum of €361,167.72 in the period June, 2017 to date, which he counterclaims.
>
> (2) The claims for damages, including aggravated/exemplary damages, for trespass/ "forcible entry" on and since 23rd May, 2018.

Counterclaim for Maintenance/Upkeep

52. The factual basis for this is dealt with at paras. 12 – 21 in the defendant's replying affidavit. He relies on an exhibited document "Castletown Estates Split of Irish expenses year ended 31st December, 2005" which he asserts sets out the percentages that each of the "parties hereto" were to make towards the maintenance and upkeep of Castletown Estate since 2005. It is far from clear precisely what agreement this affected, or between whom. However, there is other evidence to support an agreement such as the defendant suggests existed. In his second affidavit Mr. Benford states –

> "15. As the Defendant himself concedes, the Plaintiff had an understanding with Castletown Estates Limited (a company controlled by the Defendant) that both the Plaintiff and the Defendant would contribute to Castletown Estates Limited … for the upkeep and maintenance of the property. There was never any suggestion that the Plaintiff was obliged to reimburse the Defendant in relation to his contribution."

53. Notwithstanding this response, the defendant did not file any further affidavits to suggest that he, as opposed to CEL, has a counterclaim under this heading against the plaintiff.

54. At para. 14 of his affidavit, the defendant avers to certain payments that he made towards some maintenance and upkeep of Castletown -since 2010 (€56,201.59 plus VAT), and further contributions of €265,397.97 plus VAT since 2004. It is not clear whether these were the defendant's payments, or in fact meant to refer to payments by the plaintiff, because two paragraphs further on the defendant states: "16. I am advised that payments made by me towards the upkeep and maintenance of Castletown House from 2010 to date amount to the sum of €1,612,563.65."

55. None of these payments are broken down by subject matter or date, nor is there any vouching exhibited.

56. Mr. Benford at para. 82 of his principal affidavit accepted that the trustee had an agreement with the defendant and that it would contribute to CEL to help him in the maintenance and preservation of Castletown Cox, including the payment of wages of staff connected with the property. This suggests some form of collateral agreement such that the defendant *may* be entitled in law to sue/counterclaim directly against the plaintiff (or perhaps the trustee, who is not a party to the proceedings) in respect of breach of contractual commitment to CEL.

57. However, Mr. Benford indicates that the defendant's annual contribution was to be in order of €475,000, made up of €100,000 rent and €375,000 to the related costs of running Castletown Cox. In an exhibited 'Schedule of Payments', the plaintiff claims that it has spent in excess of €22.5 million in acquisitions and significant refurbishments in assembling, modernising and improving Castletown Cox since 1999. At para. 84(c) Mr. Benford avers –

> "From April, 2008 to April, 2017, the defendant's proportion of the expenses owed to Castletown Estates Limited for distribution to staff and other third parties who provided services was €3,646,847. The Trustee's records indicate that the Defendant has only made contributions of €1,121,564 for this period although it is acknowledged that it is unclear to the Trustee whether any payments were made by the Defendant in 2008 and 2009."

58. Returning to this theme in para. 17 of his second affidavit, Mr. Benford notes that the defendant did not refute this in his replying affidavit, and he adds –

> "17.1.2 the defendant has substantially failed to cover his share of expenses. In my previous affidavit I pointed out that the defendant had only paid €1,121,564 of a total of €3,646,847. The Defendant has not meaningfully refuted this. Rather according to paras. 14 and 16 of his affidavit, he has contributed a total of €1,934,163.20. Even if it is accepted that the defendant did make a contribution in the sum claimed (and that is denied by the plaintiff) it is still substantially short of the €3,646,847 total due from the defendant.
>
> 17.1.3 The Plaintiff has made contributions to [CEL] (in the manner particularised in my grounding Affidavit in para. 83) in *excess* of what the plaintiff's obligation was pursuant to the understanding between the plaintiff and CEL by an amount of €872,696 as at 5th April, 2017. That is a sum which CEL, controlled by the defendant, owed to the plaintiff at that date (and I refer to para. 84 of my grounding affidavit in that regard).
>
> 17.1.4 Rents were paid by the owners of cottages and other premises in Castletown Cox to CEL in the amount of €527,310 for the period 2008-2017 that should have been remitted to the plaintiff as the owner of Castletown Cox – but were not."

59. It is significant that the defendant has not filed any further affidavit refuting Mr. Benford's averments. This is surprising because it seems inevitable that if the counterclaim in respect of these contributions went to plenary hearing, the court would be required to consider evidence covering contributions made, not just since June 2017, but going back to 2008 and possibly further to 2005, in order to determine the dispute.

60. While the court should not encourage trial by affidavit, and must be mindful of the limitations inherent in the exchange of affidavits, it cannot ignore the significance of Mr. Benford's evidence in two affidavits, and the absence of any coherent or persuasive response. The Court is left with uncontested evidence of contributions by the plaintiff towards maintenance that far exceed those that may have been made by the defendant over time. In the absence of any meaningful response by the defendant the averments in

his affidavit as to his contributions carry little weight and are reduced to the point of being "mere assertions". Thus while it is arguable the defendant could rely on a collateral contract as the legal basis for a counterclaim against the plaintiff (as opposed to CEL or the trustee), I am not satisfied that there is any evidential basis for any *bona fide* defence or counterclaim under this heading.

61. There is a second and separate reason for coming to this view, even if the defendant could show a *bona fide* counterclaim for maintenance payments. The defendant claims that such a counterclaim would entitle him to an equitable set off. In written submissions Counsel refers to *McGrath v O'Driscoll* [2007] 1 ILRM 203 in which Clarke J. (as he then was) held –

> "Two separate questions appear to arise. The first is as to whether the counterclaim can be said to amount to a defence. It is clear from *Prendergast v Biddle* and also from *Axel Johnson Petroleum A.B. v Mineral Grou*p [1992] 1 WLR 270, that where a counterclaim arises out of circumstances which are sufficiently connected to a claim, a set off in equity arises because it would be inequitable to allow the plaintiff's claim without taking the defendant's cross claim into account."

In *Moohan v S.& R. Motors (Donegal) Ltd* [2008] 3 I.R. 650, at para. 4.6, Clarke J. elaborated on the approach the court should take:

> "4.6 On that basis the overall approach to a case such as this (involving, as it does, a cross-claim) seems to me to be the following: –
>
> (a) it is firstly necessary to determine whether the defendant has established a defence as such to the plaintiff's claim. In order for the asserted cross-claim to amount to a defence as such, it must arguably give rise to a set off in equity and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendant's case, it would not be inequitable to allow the asserted set off;
>
> (b) if and to the extent that a *prima facie* case for such a set off arises, the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate proportion of) the claim (or have same, in a case such as that with which I am concerned, referred to arbitration);
>
> (c) if the cross-claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in *Prendergast v Biddle."*

A question arose in that case as to whether equitable set off was excluded by the terms of the contract between the parties. A similar question arises in the present case. Clarke J. approached this as follows: –

> "5.6 it seems to me, therefore, that the overall test is as to whether, as a matter of construction of the contract taken as whole, it can properly be said that the parties have agreed that there can be no set off."

62. First, I am not satisfied that the asserted counterclaim arises out of "the same set of circumstances as give rise to the claim", or that it is "sufficiently connected" (per Clarke J. in *McGrath v O'Driscoll*). The claim to arrears of rent, which is in effect not disputed, arises under the Letting Agreement agreed between the parties in 2010. By contrast the counterclaim for maintenance and upkeep arises under an agreement pleaded as being entered into in 2005. Moreover, the uncontested affidavit evidence from Mr Benford indicates that such "arrangement" was not made directly between the defendant and the plaintiff or the trustee, but rather was made between the defendant and CEL.

63. Secondly clause 2.7 of the Letting Agreement contains an agreement by the tenant "not to reduce any payment of rent by making any deductions from it or by setting any sum off against it."

64. Counsel for the defendant argued that equitable set off of the counterclaim is not expressly excluded by clause 2.7, and reliance was placed on a passage from *Wylie's Landlord and Tenant Law*, 3rd Edition (2014) where the author, after drawing the distinction between a counterclaim which is "in substance a separate action" and a right to deductions or set off, states "It is, therefore, wise for a landlord seeking to exclude such rights so far as possible in law to refer to all categories, e.g. by having the tenant covenant to pay all rent "without any set/off, counterclaim or deductions whatsoever".

Professor Wylie in a footnote to this sentence references Laffoy J., *Irish Conveyancing Precedents*. While it may be prudent to adopt such wording, this does not assist the court in construing clause 2.7.

In the next sentence Prof Wylie states: "The courts have made it clear that if a lease refers only to "deductions" this does not include a right of set-off." The footnoted authorities for this are *Irish Life Assurance Plc. v Quinn* [2009] IEHC 153; *Westpark Investments Limited v Leisureworld Limited* [2012] IEHC 343; *Connaught Restaurants Limited v Indoor Leisure Limited* [1994] 4 ALL ER 934 and *Sheridan Millennium Limited v Village Theatres Limited* [2008] NI Ch 9.

65. These authorities were not opened to the court, but having checked all except *Sheridan*, I find that they are concerned only with express clauses preventing a tenant from making "deductions". In *Irish Life Assurance Plc*, Dunne J. was concerned with the deduction of service charges by a tenant, and stated (at pg 7): "I do not accept that the phrase "without any deductions" means that the defendant contracted out of the right to an equitable set-off."

In *Westpark*, Hogan J. was concerned with alleged breach by the plaintiff of car park arrangements in respect of which the defendant raised a counterclaim, and he held that the phrase "without any deductions" was not necessarily inconsistent with the right to equitable set-off. Similarly in *Connaught*, the UK court was asked to construe a clause containing the words "without any deductions", and found that it was ambiguous and insufficient to exclude a right to claim set off.

These authorities do not assist the defendant because they did not concern any clauses expressly excluding "set – off".

66. The first rule of contractual construction requires that –"the words of a contract should be interpreted in their grammatical and ordinary sense in context, except to the extent that some modification is necessary to avoid absurdity, inconsistency or a pregnancy."(See *Bywater Properties Investments LLP v Oswestry Town Council* [2014] EWHC 310 (Ch)).

67. In my view the words "by setting any sum off against it" in clause 2.7 by their plain and ordinary meaning clearly refer to any set – off, and are unambiguous. In this context I cannot discern any material difference between a set-off that a defendant is entitled to make at law e.g. under an express contract term, and a right to equitable set- off arising from a cross-claim. If they are to be

differentiated it may be said that the defendant with a contractual right to set off should be in a stronger position than the defendant relying on an equitable set – off. Moreover, use of the word "any" shows the intention of the parties was that the tenant would not be entitled to rely on any set – off, regardless of the basis for such set – off. It must therefore be concluded that clause 2.7 precludes the defendant from equitable set off in respect of his cross-claim for maintenance/upkeep contributions.

Counterclaim for Damages/Aggravated Damages
68. I am satisfied that this also does not give rise to any *bone fide* defence to the claim for arrears of rent for a number of reasons.

69. First, insofar as the claim to damages might give rise to an equitable set – off, as with the claim for maintenance/upkeep contributions, this is expressly precluded by clause 2.7. It can only be raised as an independent counterclaim.

70. Secondly the Particulars pleaded in the Counterclaim base the claim on a wrongful taking of possession occurring at a time when the defendant had referred the validity of the second Termination Notice to the RTB. However the plaintiff was not put on notice of the referral until 24th May, 2018, one day *after* the repossession.

71. Thirdly the defendant has not particularised in the Defence/Counterclaim, or on affidavit, any special damages or losses said to have been caused by the alleged trespass, and no attempt has been made to quantify the claim to damages. This may not be that surprising as none of the Magan family were in occupation at the time of repossession, and the defendant has a residence in London.

72. I also bear in mind the open offer made by the plaintiff's solicitors on 25th May 2018 allowing the defendant and his family to stay at Castletown Cox from then until 3rd August 2018, albeit on the basis that they would then vacate in order to allow the sale of the property to be completed, and on foot of certain related undertakings. Acceptance of this would have minimised the defendant's losses (if any), and arguably would not have prevented or prejudiced the claim subsequently made by the defendant for a new tenancy under the 1980 Act.

Conclusion on Application for Summary Judgment
73. For the reasons given above the plaintiff is entitled to summary judgment against the defendant in respect of the arrears of rent up to and including 12th April 2018 in the sum of €571,893. I will hear counsel further in relation to –

(a) the framing of the order to reflect the obligation of the defendant to withhold and remit to the Collector General 20% by way of Withholding Tax;

(b) the claim to interest pursuant to the Courts Act 1981;

(c) whether there should be any stay on the judgment.

The Defendant's Application to Dismiss
74. The defendant seeks to have dismissed all of the plaintiff's claim as pleaded in the general indorsement of claim on the plenary summons (and as similarly pleaded in the Statement of Claim), with the exception of two reliefs sought (which will be addressed shortly), as follows:-

"General Indorsement of Claim

1. A declaration that the tenancy entered into between the Plaintiff and the Defendant dated 15 December 2010 (the Letting Agreement) in relation to the Property (more particularly described in the schedule hereto) has been validly terminated for, *inter alia*, the failure of the Defendant to pay rent due and owing thereunder.

2. A declaration that the Defendant is not entitled to seek a new tenancy or other relief pursuant to Part Il of the Landlord and Tenant Act, 1980 as amended by virtue of section 17 thereof including, but without limitation, because the Letting Agreement has been terminated because of non-payment of rent and/or breach of covenant

3. A declaration that the Defendants intended application to court for relief for a new tenancy pursuant to Part II of the Landlord and Tenant Act 1980 (as amended) is an abuse of process.

4. An injunction restraining the Defendant from applying to the Court to seek relief in relation to a new tenancy of the Premises pursuant to sections 20 and 21 of the Landlord and Tenant Act 1980 (as amended) on the grounds that same constitutes an abuse of process.

5. An injunction restraining the Defendant, his servants or agents, from entering the Property without the consent of the Plaintiffs and/or otherwise interfering with, obstructing, hindering or frustrating the sale of the Property and/or in dealing with same.

6. If necessary, an injunction, pending the arbitration of a dispute between the parties, restraining the Defendant, his servants or agents, from interfering with, obstructing, hindering or frustrating the Plaintiff in dealing with the objects and chattels at or in the Property.

7. Judgment in the sum of €571,1393, not including interest, representing arrears of rent due and owing prior to the termination of the Letting Agreement.

8. Damages for breach of contract.

9. Damages for unlawful interference with the Plaintiffs economic interests and contractual relations.

10. Damages for the tort of abuse of process.

11. Interest pursuant to the provisions of the Courts Act 1981, as amended.

12. Such further or other orders as this Honourable Court may deem fit.

13. Costs."

75. The defendant did not pursue the relief sought at 7 above, accepting that the High Court had jurisdiction to hear and determine the claim in respect of rent. Counsel also did not seek to dismiss the relief sought at 6 above, which relates to matters pleaded at paras. 26 – 30 of the Statement of Claim in relation to the "Chattels Agreement". In essence, the plaintiff claims that the defendant is in arrears in respect of monies due under the Chattels Agreement, and the dispute in relation to that, and whether the Chattels Agreement is valid, has been referred to arbitration, and the continued pursuit of this relief is dependent on the outcome of that arbitration.

76. The essence of the defendant's argument in respect of the balance of the claim is, first, that the issue in relation to the validity of the second Termination Notice has been referred to the RTB and is a matter for it to decide, and, secondly, as the Circuit Court has exclusive jurisdiction to determine the defendant's entitlement to a new tenancy pursuant to Part II of the Landlord and Tenant Act 1980, that is not a matter for the High Court – and the defendant argues that all these claims (and related reliefs) are, therefore, an abuse of the process.

77. In further support of this legal contention, counsel relies on what it asserts was a "forcible entry" in the "dawn raid" by the plaintiff's agents on 23rd May, 2018, which it is suggested amounted to a criminal offence, and the continuing refusal to restore possession. It also relies on the failure of the plaintiff to register the defendant's tenancy under the 2004 Act; that the trustee is in breach of fiduciary duty by enhancing the power of the purchaser to the detriment of the defendant and beneficiaries in allowing the purchaser to take over the Sancus security; and the absence of any replying affidavit to the grounding affidavit of Mr. Ivor Fitzpatrick sworn on 20th July, 2018.

78. This last point is *nihil ad rem*, because the plaintiff's solicitor in a letter dated 5th September, 2018, indicated that the plaintiff would be relying on Mr. Benford's affidavit sworn on 4th July, 2018, and the other affidavits sworn in the context of the plaintiff's application for summary judgment, the pleadings and legal submissions. I am satisfied that this was an appropriate approach to take, being efficient and cost saving, and that the plaintiff can rely on those affidavits sworn, as they are, within the same proceedings.

79. As to the failure of the plaintiff to register the Letting Agreement as a residential tenancy – and assuming that it was indeed a residential tenancy for the purposes of the 2004 Act (a matter that is disputed) – pursuant to the obligation to register it arising under s. 134 of the 2004 Act, this would seem to have no real relevance. It has the effect, so far as a landlord is concerned, that s. 83(2) of the 2004 Act applies, and this simply provides that "…the Board shall not deal with a dispute in relation to a tenancy referred to it under this Part by the landlord of the dwelling concerned if the tenancy is not registered under Part 7". However, no dispute between the parties has ever been referred by the plaintiff to the RTB.

80. As to the purchaser discharging the Sancus debt and acquiring the security, on a consideration of the evidence as a whole, including the judgment and orders of the Royal Court of Jersey where the defendant had an opportunity to be heard, I accept the plaintiff's evidence that this arrangement had a legitimate objective namely to preserve the trust assets. In particular it was reasonable, having regard to the expressed concern that Sancus would foreclose, that the sale would be lost and the trust assets would have been at risk of being diminished if a "fire sale" ensued. For the purposes of this application I find that this new arrangement was properly undertaken for the preservation of the trust assets and with the best interests of the beneficiaries in mind.

Validity of Second Termination Notice

81. With regard to the defendant's contention that the RTB is seised of the dispute over the validity of the second Termination Notice, the issue is whether, from the plaintiff's perspective, it is arguable that this is not so, leaving it open to the High Court to determine the validity of the purported termination.

82. I am satisfied that *if* the second Termination Notice dispute has been properly referred to the RTB and falls within its jurisdiction, section 86(1)(c) of the 2004 Act has the effect that "a termination of the tenancy concerned may not be effected". While subsection (2) does disapply s.86(1)(c) in certain circumstances, it in turn does not apply to a s.86(3) "dispute relating to the validity of the notice of termination", which is therefore covered by s.86(1)(c).

83. The plaintiff however argues that this dispute has not been validly referred to the RTB, or that the RTB cannot adjudicate on it. The plaintiff relies on s.3 of the 2004 Act, which is concerned with the application of that Act. The basic provision is s.3(1):

> "(1) Subject to subsection (2), this Act applies to every dwelling, the subject of a tenancy (including a tenancy created before the passing of this Act)."

Subsection (2) then lists tenancies to which the 2004 Act does not apply, and so far as relevant provides:

> "(2) Subject to section 4(2), this Act does not apply to any of the following dwellings:
>
> (a) a dwelling that is used wholly or partly for the purpose of carrying on a business, such that the occupier could, after the tenancy has lasted 5 years, make an application under section 13(1)(a) of the Landlord and Tenant (Amendment) Act 1980 in respect of it,
>
> …
>
> (i) a dwelling the subject of a tenancy granted under Part II of the Landlord and Tenant (Amendment) Act 1980 or under Part III of the Landlord and Tenant Act 1931 or which is the subject of an application made under section 21 of the Landlord and Tenant (Amendment) Act 1980 and the court has yet to make its determination in the matter."

84. Notwithstanding that the Letting Agreement has an express user covenant providing that Castletown House be used as a residence only for the defendant and his dependants, the defendant's claim to new tenancy is firmly based on a business user and qualification under section 13(1)(a) of the 1980 Act. If that claim is established it follows that the 2004 Act simply does not apply, and the High Court has jurisdiction to determine the issue of validity of the second Termination Notice.

85. But if there is any doubt about that, it is arguable that the dis-application of the 2004 Act is put beyond dispute by section 3(2)(i). In particular the second limb of that provision, from the word "or" onwards, arguably has the effect that the moment the defendant filed the Landlord and Tenant Civil Bill dated 18 July 2018 bringing an application under Part II of the 1980 Act for a new tenancy in the property, the 2004 Act ceased to apply to his tenancy.

86. While a determination on this is a matter for the trial judge, the plaintiff has made out an arguable case. It follows therefore, and I so determine, that the plaintiff's claims in these proceedings related to the purported termination of the letting agreement, and related reliefs such as those sought at no's 1 and 5 in the Plenary Summons, should not be struck out or dismissed on any of the grounds raised by the defendant.

The Claim for a Declaration that the Defendant is Not Entitled to a New Tenancy

87. Turning to the defendant's second jurisdictional point, this is of more substance. Section 3 of the Landlord and Tenant (Amendment) Act 1980 designates the Circuit Court as the court having statutory jurisdiction to determine the right to a new tenancy to which a tenant may be entitled under Part II of the Act. It is not disputed that the defendant's Notice of Intention to Claim Relief was served under s. 20 of the Act, and that the application for relief in the form of the Landlord and Tenant Civil Bill has been properly served "not less than one month" after the Notice of Intention to Claim Relief. These provisions all fall within Part II of the 1980 Act and it is not disputed that the Circuit Court has exclusive jurisdiction to grant relief under that Act in the form of a new tenancy, or compensation, such as compensation for improvements or for disturbance. Moreover, only the Circuit Court can fix the terms of any new tenancy in the absence of agreement.

88. It was confirmed at hearing that the defendant's application in the Landlord and Tenant Civil Bill is for a new business tenancy arising under s. 13(1)(a) of the 1980 Act. This requires that the defendant must establish that – "the tenement was, during the whole of the period of five years ending at that time, continuously in the occupation of the person who was a tenant immediately before that time or of his predecessors in title and *bona fide* used wholly or partly for the purposes of carrying on a business…".

89. It is no surprise that the defendant relies on a business equity because s.192(2) of the 2004 Act provides that "…on and from the fifth anniversary of the relevant date, Part II of the Act of 1980 shall not apply to a dwelling to which this Act applies." This means that from 1st September, 2009 i.e. five years on from the commencement of the 2004 Act under S.I. No. 505 of 2004, residential tenancies to which the 2004 Act applies could no longer qualify for a new tenancy under Part II of the 1980 Act, whether on the basis of business use or long possession (20 years occupation). Only if the tenancy falls outside the 2004 Act can there be an entitlement. This does mean that any arguments that the defendant pursued before this court based on a valid and subsisting reference to the RTB of the dispute as to validity of the second Termination Notice are fundamentally inconsistent with the defendant's claim to be entitled to a new business tenancy.

90. While no particulars are given in the Landlord and Tenant Civil Bill, and no Notice for Particulars has yet been raised, counsel for the defendant indicated that the business user relied upon by the defendant is that summarised in para. 9 of the affidavit which he swore on 31st August, 2018, namely the regular holding of "events for International Georgian Societies and Horticultural Societies at Castletown House & Estate…".

91. It will be recalled that the second relief sought by the plaintiff in these proceedings is:-

> "A declaration that the defendant is not entitled to seek a new tenancy or other relief pursuant to Part II of the Landlord and Tenant Act 1980, as amended by virtue of s. 17 thereof including, but without limitation, because the Letting Agreement has been terminated because of non-payment of rent and/or breach of contract."

The third, fourth and fifth reliefs seek related declarations and an injunction. These four reliefs are replicated at paragraphs 32 – 35 of the Statement of Claim.

92. Section 17, which falls within Part II of the 1980 Act, so far as it is relevant provides:-

> "(1)(a) A tenant shall not be entitled to a new tenancy under this Part if—
>
> (i) the tenancy has been terminated because of non-payment of rent, whether the proceedings were framed as an ejectment for non-payment of rent, an ejectment for overholding or an ejectment on the title based on a forfeiture, or
>
> (ii) the tenancy has been terminated by ejectment, notice to quit or otherwise on account of a breach by the tenant of a covenant of the tenancy, or
>
> (iii) the tenant has terminated the tenancy by notice of surrender or otherwise, or
>
> (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, or
>
> (iiib) if section 13(1)(b) applies to the tenement (and the tenement is one to which the Residential Tenancies Act 2004 applies), the tenant had completed and signed, whether for or without valuable consideration, a renunciation of his or her entitlement to a new tenancy in the tenement and has received independent legal advice in relation to such renunciation, or
>
> (iv) the tenancy has been terminated by notice to quit given by the landlord for good and sufficient reason, or
>
> (v) the tenancy terminated otherwise than by notice to quit and the landlord either refused for good and sufficient reason to renew it or would, if he had been asked to renew it, have had good and sufficient reason for refusing.
>
> (b) In this subsection 'good and sufficient reason' means a reason which emanates from or is the result of or is traceable to some action or conduct of the tenant and which, having regard to all the circumstances of the case, is in the opinion of the Court a good and sufficient reason for terminating or refusing to renew (as the case may be) the tenancy.
>
> (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, or

(ii) the landlord requires vacant possession for the purpose of carrying out a scheme of development of property which includes the tenement and has planning permission for the scheme, or

(iii) the landlord being a planning authority, the tenement or any part thereof is situate in an area in respect of which the development plan indicates objectives for its development or renewal as being an obsolete area, or

(iv) the landlord, being a local authority for the purposes of the Local Government Act, 1941, will require possession, within a period of five years after the termination of the existing tenancy, for any purpose for which the local authority are entitled to acquire property compulsorily, or

(v) for any reason the creation of a new tenancy would not be consistent with good estate management.

(b) In the case of certain dwellings and business premises to which this subsection applies the tenant is entitled to compensation for disturbance under Part IV."

93. It should be noted that the plaintiff in its pleadings does not limit its claim that the defendant is disentitled under s.17(1)(a) (termination for non-payment of rent). Disentitlement is pleaded based on s.17 "without limitation". It may transpire, for instance, that s.17(2)(a) (creation of new tenancy not consistent with good estate management) may have relevance in circumstances where the Royal Court of Jersey was persuaded to order a sale because of financial prudence (it took into account the "commercial realities faced by the [trustee]") and in the best interests of the beneficiaries. At paragraph 54 of its Judgment dated 9th November, 2017 that court stated:

> "54. In the view of the Court, the [trustee] was acting responsibly in very difficult circumstances. Its decision that the country house should be sold was both rational and honest and one which any reasonable trustee properly instructed could have arrived at. It was a decision that merited the support of the Court."

94. Both counsel addressed jurisprudence which suggests that in certain circumstances the High Court may determine whether a tenant could be entitled to a new tenancy under the 1980 Act. Counsel for the defendant argued that this only applied to a case where there was urgency, and then only in respect of a clear-cut failure by a tenant to qualify for a "threshold" statutory requirement such as 'five years business user'.

95. Counsel for the plaintiff on the other hand argued that under its residual jurisdiction the High Court *could* determine, at least in a clear case, exclusions under section 17, and contended that this could be viewed as an urgent case.

96. In *Kenny Homes Co Ltd v Leonard and Lecorn Limited* (unreported High Court, Costello P., and unreported Supreme Court, 18 June, 1998), Costello P. on a preliminary issue held that the exclusive jurisdiction of the Circuit Court did not deprive the High Court of the jurisdiction to grant an injunction against the defendant trespasser who was occupying a filling station/garage on foot of an expired license agreement from Shell, even though the occupier had claimed entitlement to a new tenancy under the 1980 Act. Reference to this preliminary issue appears in the subsequent judgment of Costello P. ([1997] IEHC 230) where he states:

> "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 of the 1 October, 1994 constituted a "tenancy" and (ii) the site constituted a "tenement" within the meaning of the Act then section 28 of the Act applied and Lecorn would be entitled to retain possession pending the determination in the Circuit Court of the application for a new tenancy, and I would accordingly dismiss these proceedings. I therefore decided to hear oral evidence and determine these two issues. Should I decide them in Lecorn's favour, the Circuit Court would then be required to determine whether or not a new tenancy should be granted in light of the plaintiff's intended use of the site and perhaps the issue of compensation."

97. Costello P., having heard the evidence, determined that Mr Leonard did not hold the site under a lease or contract of tenancy, and accordingly that neither he nor Lecorn had the right to a new tenancy under the 1980 Act. He further held that the premises was not a "tenement" in circumstances where a portion of the land was not covered by buildings and he was unconvinced by the defendant's assertion that "the parking area is ancillary and subsidiary to the buildings associated with the filling station building".

98. The Supreme Court (Lynch J.) affirmed Costello P. in respect of the preliminary issue, stating: –

> "I agree with these views and in doing so I have regard to Articles 34 Section 3(1) of the Constitution, the decision of the former Supreme Court in the case of *Walpoles (Ireland) Ltd v Dixon* [1935] 69 I LTR 232 and the decisions of the High Court in *R v R* [1984] IR 296 and *O'R v O'R* [1985] IR 367. Accordingly the appeal insofar as it relates to the preliminary issue fails and must be dismissed."

The Supreme Court also affirmed the High Court in respect of its substantive findings.

99. In *Walpoles* (a decision affirmed by the Supreme Court) the landlord had sought ejectment in the High Court in circumstances where the tenant had made an application for a new tenancy to the Circuit Court under the Landlord and Tenant Act 1931. In rejecting an application for the High Court proceedings to be adjourned pending the outcome of the circuit court proceedings, O'Byrne J. stated (*at* p.233): "I would certainly take that course of action if I thought there was any substantial grounds on which such application might be granted, but in my opinion, having regard to the facts of the case… Such an application could not possibly succeed."

In the penultimate paragraph of his judgment O'Byrne J. stated: "The difficulty which arises on the threshold of this case, from the point of view of [the tenant]… Is that the premises with which we are concerned do not seem to me to come within the definition of a tenement."

Both *Kenny Homes* and *Walpole* were cases where the court decided that the threshold for entitlement to a new tenancy was not

met.

100. It is also worth noting the submissions of counsel in *Kenny Homes* as to the urgency of the High Court/Supreme Court determining the issue of entitlement in that case. These were first, that his clients "were not insured in respect of the risks inherent in the presence of a filling station on the premises"; and second, "time limits that applied to the premises regarding their status as part of a designated area, the Respondents stood to incur very substantial losses if they were unable to avail within those time limits of the planning permission which they had obtained for the development of the premises."

101. *Kenny Homes* was recently considered by Barrett J. in *Cuprum Properties Limited (Acting by its Joint Receivers and Managers) v Murray* [2017] IEHC 699. There, a publican sought to exercise his rights to seek a new tenancy under the 1980 Act. The plaintiff receivers brought proceedings to restrain the publican from exercising his rights in circumstances where he had in fact executed a deed of renunciation of his right to a new tenancy and was therefore not entitled to a new tenancy by virtue of section 17(1)(a)(iiia). The plaintiffs asserted that delay to a proposed development caused by the publican exercising his rights under the 1980 Act would result in losses amounting to millions of Euro, and that the High Court should therefore accept and exercise jurisdiction.

102. Barrett J. seems to have regarded *Kenny Homes* as meaning that the High Court could only in urgent cases determine the threshold for entitlement under the 1980 Act. At paragraph 26 he states: –

> "26. To paraphrase what Costello P. is a saying in the last-quoted text is "If I decide that Lecorn is a tenant and if I decide that I am confronted with a tenement, then I have no jurisdiction to go any further". There is, with every respect, no intellectually respectable argument which could persuade the court that *Kenny Homes* means anything other than that."

Barrett J. also rejected the idea that simply because a case has been admitted into the Commercial Court that there is some "free-standing urgency" ground on which the comprehensive provisions of the Act of 1980 can in effect be side-stepped in proceedings such as those now presenting "fast – track" through the Commercial Court" (para. 25). He concluded that "having particular regard to the decision of the Supreme Court in *Kenny Homes*, the court is coerced as a matter of law into concluding that the within proceedings must now be dismissed for want of jurisdiction." (Para. 28).

103. The other recent decision is that of *Emo Oil Limited v Oil Rig Supplies* [2017] IEHC 594, where McDermott J. was content to proceed to determine an interlocutory injunction application as to whether the plaintiff should be entitled to vacant possession notwithstanding that the defendant had issued a claim for statutory relief for a new tenancy in the Circuit Court. That was also the case in which the plaintiff relied, *inter alia*, on a deed of renunciation executed by the tenant. However, unlike *Kenny Homes* which Costello P. treated as the trial of the action, it was only an interlocutory hearing. No question appears to have arisen as to the High Court's jurisdiction to grant an interlocutory injunction, which was granted but stayed so long as the defendant paid a monthly equivalent of the rent. The possibility of the High Court not having jurisdiction because of the existence of Circuit Court proceedings it is not considered in the judgment.

Discussion

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 under the 1980 Act. 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". The definition of "tenement" is contained in section 5(1) of the 1980 Act, and it is worthwhile reproducing this because it indicates the extent of the conditions that must be satisfied: –

> "5. (1) In this Act "tenement" means –
>
> (a) premises complying with the following conditions:
>
> (i) they consist either of land covered wholly or partly by buildings or of a defined portion of a building;
>
> (ii) if they consist of land covered in part only by buildings, the portion of the land not so covered is subsidiary and ancillary to the building;
>
> (iii) they are held by the occupier thereof under a lease or other contract of tenancy express or implied or arising by statute;
>
> (iv) such contract of tenancy is not a letting which is made and expressed to be made for the temporary convenience of the lessor or lessee and (if made after the passing of the Act of 1931) stating the nature of the temporary convenience; and
>
> (v) such contract of tenancy is not a letting made for or dependent on the continuance in any office, employment or appointment of the person taking the letting;
>
> or
>
> (b) premises to which section 14 or 15 applies."

Section 14 relates to premises which, prior to 1960, were subject to the Rent Restrictions Act 1946 provided they were not letting for temporary convenience, or dependent on the continuance of the tenant in any office or employment.

Section 15 relates to "a dwelling, being a house or a separate and self-contained flat, which immediately before the passing of the Rent Restrictions (Amendment) Act, 1967, was a controlled dwelling" subject to certain rateable valuation requirements of some complexity.

106. These provisions raise many potential issues which *Kenny Homes* suggests can be determined by the High Court in an appropriate case. It is notable that in that case 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 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.

Urgency
109. In my view the case for urgency is not made out by the plaintiff, or at any rate does not survive either or both of (1) the purchaser taking over the Sancus debt and security, and (2) this court's decision to grant summary judgment in respect of the arrears of rent.

110. So far as the court and the parties have been informed, the trustee's loan interest obligations have now reduced to 0%, although "the loan is subject to retrospective repricing if the sale of Castletown does not complete in a timely manner." (Trustees letter by email of 24th September, 2018). Although the purchaser "is in a position to exercise control over the asset upon short notice" (A & L Goodbody letter of 2nd October, 2018), there is no evidence to suggest that this is imminent or will even happen in the medium term or within an agreed timeframe. Nor is there any evidence that the plaintiff and purchaser cannot await the determination of the defendant's claim to a new tenancy in the Circuit Court, or that the plaintiff or trustee are not in a position to preserve and maintain Castletown Cox over the period of time within which it may be anticipated the Circuit Court will determine the Landlord and Tenant Civil Bill – in respect of which the plaintiff herein has yet to seek particulars or deliver a defence. By comparison there was real urgency in *Kenny Homes* (lack of public liability insurance and the running of "designated area" time limits).

111. However while the issue of entitlement to a new tenancy should proceed in the normal way in the Circuit Court, I am of the view that the plaintiff should not be precluded from litigating section 17 issues in the High Court if, before a trial is reached in the Circuit Court, there is genuine and supervening urgency that justifies the High Court exercising its jurisdiction. This is not to be taken as a licence for the plaintiff to prompt the purchaser into actions that bring matters to a head, and should the High Court be asked to try the section 17 issues "as a matter of urgency" it will be incumbent on this court to scrutinise the relationship and correspondence between the plaintiff and the purchaser in its entirety before acceding to any such request.

Conclusion
112. Accordingly rather than striking out the reliefs sought at numbers 2, 3, 4 and 5 in the Plenary Summons - being the reliefs at numbers 32 – 35 inclusive in the Statement of Claim, and related pleas - I will grant a stay on the plaintiff pursuing those reliefs pending the final determination of the Landlord and Tenant Civil Bill, but I will grant the plaintiff liberty to apply.

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 Civil Bill proceedings. While I will hear the parties further in relation to this, I propose to apply the stay to this issue also.

Summary
114. There will be summary judgment against the defendant in respect of the arrears of rent up to and including 12th April, 2018 in the sum of €571,893. I will hear counsel further in relation to –

(a) the framing of the order to reflect the obligation of the defendant to withhold and remit to the Collector General 20% by way of Withholding Tax;

(b) the claim to interest pursuant to the Courts Act 1981;

(c) whether there should be any stay on the judgment.

115. The court declines to strike out or dismiss the plaintiff's claims in these proceedings related to the purported termination of the Letting Agreement dated 15th December, 2010, and related reliefs such as those sought at no.s 1 and 5 in the Plenary Summons, on any of the grounds raised by the defendant. I will hear the parties further in relation to staying the plaintiff's claims to these reliefs in these proceedings pending the determination in the Circuit Court of issues that may arise as to the validity of the purported termination of the Letting Agreement.

116. The court declines to strike out the reliefs sought at numbers 2, 3, 4 and 5 in the Plenary Summons - being the reliefs at numbers 32 – 35 inclusive in the Statement of Claim, and related pleas, on any of the grounds raised by the defendant.

However, a stay will be granted on the plaintiff pursuing those reliefs in these proceedings pending the final determination of the defendant's application for a new tenancy in the Landlord and Tenant Civil Bill proceedings, but in respect of this stay the plaintiff will have liberty to apply.