Neutral Citation Number [2009] IEHC 122

THE HIGH COURT

2007 7804P

IN THE MATTER OF SECTION 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003

BETWEEN

PATRICIA BYRNE

APPLICANT

AND

DUBLIN CITY COUNCIL

RESPONDENT

AND

THE ATTORNEY GENERAL

NOTICE PARTY

JUDGMENT of Mr Justice Roderick Murphy delivered 18th day of March, 2009

1. The applicant's case
The applicant in this motion seeks an interlocutory injunction to restrain Dublin City Council, the respondent and also her landlord, from evicting her from her residence at 19 Belcamp Crescent, Priorswood, Dublin 17.

2. Facts pleaded
The applicant averred that she had resided at 19 Belcamp Crescent for approximately five years and had been a tenant of the respondent for more than 20 years. Seven of her ten children resided with her when these proceedings were instituted on 22nd October, 2007.

On 28th November 2006 she received from the respondent a Notice to Quit and Demand for Possession requiring her to vacate the premises on or before 15th January, 2007 on the grounds of alleged improper and anti-social behaviour of members of her family. Having no alternative accommodation available for her family, she did not comply. A summons dated 14th March, 2007 was served on her pursuant to s. 62 (1) of the Housing Act, 1966 ("the 1966 Act"), as amended by s. 13 of the Housing Act, 1970. The summons required her to appear at Dublin District Court on 3rd May, 2007 in relation to the matter. The District Court granted a warrant for her eviction on 10th May 2007, but imposed a stay on its execution until 4th October, 2007. The applicant made it clear at that point that she was prepared to seek a barring order against two members of her family, being her sons Michael and Edward Byrne, if such a step were necessary to avoid eviction. There had been complaints made about them in the past, and the applicant accepts that their behaviour posed a problem.

The applicant averred, based on assurances she claims to have received, that an agreement had been reached to the effect that she would not be evicted if she applied for such an order in respect of Michael Byrne before 4th October, 2007. She applied for that order before 4th October, 2007 and it was granted on 11th October, 2007. The respondent denied any such agreement was reached, and intended to enforce the warrant. By Notice of Motion dated 7th November, 2007 the applicant indicated her intention to seek an interlocutory injunction on 19th November, 2007 restraining the respondent from proceeding with the eviction.

In her affidavit the applicant asserted that, since she was given no opportunity to confront her accusers, accordingly a violation of the European Convention on Human Rights, in particular Article 6 thereof, has occurred. In addition, she claimed that the respondent had failed to respect her rights under Article 8 in respect of her private and family life and her home. She relies also on Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination).

As appears from the plenary summons and statement of claim herein, the applicant intends to seek the following reliefs at the trial of this action: a declaration pursuant to the European Convention on Human Rights Act 2003 ('the 2003 Act') that s. 62 is incompatible with the State's obligations under those Articles of the Convention; a declaration that the respondent has failed to perform its functions in a manner compatible with the State's obligations under the Convention; an injunction restraining the respondent from taking any further steps to evict her from her home; and, if appropriate, damages under s. 3 of the 2003 Act.

3. Relevant legislation
Section 62 of the Housing Act, 1966, as amended by s. 13 of the Housing Act, 1970, provides so far as material:

> "(1) In case,
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> (*a*) there is no tenancy in—
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> (i) a dwelling provided by a housing authority under this Act,
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> (ii) …
>
> (iii) …
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> whether by reason of the termination of a tenancy or otherwise, and
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> (*b*) there is an occupier of the dwelling or building or any part thereof who neglects or refuses to deliver up

possession of the dwelling or building or part thereof on a demand being made therefore by the authority or Agency, as the case may be, and

(*c*) there is a statement in the demand of the intention of the authority or Agency to make application under this subsection in the event of the requirements of the demand not being complied with,

the authority or Agency may (without prejudice to any other method of recovering possession) apply to the justice of the District Court having jurisdiction in the district court district in which the dwelling or building is situate for the issue of a warrant under this section.

(2) …

(3) Upon the hearing of an application duly made under subsection (1) of this section, the justice of the District Court hearing the application shall, in case he is satisfied that the demand mentioned in the said subsection (1) has been duly made, issue the warrant.

(4)…

(5) In any proceedings for the recovery of possession of a dwelling or building or part thereof mentioned in subsection (1) of this section, a document purporting to be the relevant tenancy agreement produced by the body by whom the proceedings are brought shall be *prima facie* evidence of the agreement and it shall not be necessary to prove any signature on the document and in case there is no tenancy in the premises to which the proceedings relate by reason of the termination of a tenancy by notice to quit and the person to whom such notice was given is the person against whom the proceedings are brought, the following additional provisions shall apply:

(*a*) any demand or requirement contained in such notice that the person deliver up possession of the said premises to the authority or the Agency, shall be a sufficient demand for the purposes of paragraph (*b)* of the said subsection (1); and

(*b*) any statement in the said notice of the intention of the authority or the Agency to make application under subsection (1) of this section in respect of the premises shall be a sufficient statement for the purposes of paragraph (*c*) of the said subsection (1)."

Section 1 of the European Convention on Human Rights Act 2003 provides, so far as material:

> "'functions" includes powers and duties and references to the performance of functions includes, as respects powers and duties, references to the exercise of the powers and the performance of the duties;
>
> […]
>
> 'organ of the State' includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised;
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> 'rule of law' includes common law;
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> 'statutory provision' means any provision of an Act of the Oireachtas or of any order, regulation, rule, licence, bye-law or other like document made, issued or otherwise created thereunder or any statute, order, regulation, rule, licence, bye-law or other like document made, issued or otherwise created under a statute which continued in force by virtue of Article 50 of the Constitution."

Section 3(1) states:

> "Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

For convenience, throughout this judgment the Court will refer to the portion of s. 3(1) that reads "Subject to any statutory provision (other than this Act) or rule of law" as 'the limitation clause', in that it limits the ambit of the duty imposed by that section.

Section 3(2) provides:

> "A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate."

Section 5, so far as material to these proceedings, provides:

> "(1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as "a declaration of incompatibility") that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.
>
> (2) A declaration of incompatibility—
>
> (a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made"

4. Delay

The respondent asserts that the applicant's case must fail on the ground of delay. The decision of this Court in *Gifford v. Dublin City Council* (Unreported, High Court, Smyth J., 20th November 2007) offers some ground for this submission. There the plaintiffs had

instituted proceedings seeking a declaration that s. 62 of the 1966 Act was incompatible with the State's obligations under the Convention, together with a declaration that the respondent had breached its duty under s. 3 of the 2003 Act to perform its functions in a manner compatible with those obligations. The Court held that notwithstanding the manner in which the action was formulated, it was *ex relatione* seeking relief by way of judicial review, so that the time limits prescribed by O. 84 RSC would apply by analogy. This conclusion followed from the decision in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301.

In the present case it was submitted that (a) time began to run for the purposes of these time periods upon service of the notice to quit; (b) these proceedings had not been instituted within the time permitted and no sufficient explanation had been advanced for this failure; (c) accordingly, the proceedings would be dismissed on the ground of delay at the full hearing; (d) consequently, this Court should not grant the interlocutory injunction sought.

It should be noted, however, that in *O'Donnell* the plaintiffs' action sought both declaratory relief and non-declaratory relief in the form of damages. Costello J. held the action for declaratory relief time-barred but reached no such conclusion in relation to the claim in damages. Indeed, in the present case it should be observed that s. 3(5) of the 2003 Act prescribes a limitation period of one year in respect of an action in damages for its breach, subject to a discretion to extend that period in the interests of justice. Even apart from that express limitation period, it must be recalled that the applicant's action is not merely one for declaratory relief but is, at least in large part if not primarily, an action for breach of statutory duty, that is to say the duty imposed by s. 3 of the 2003 Act (hereafter 'the s. 3 duty'). The proceedings are thus framed in tort rather than being akin to a judicial review action.

Insofar as the applicant seeks declaratory relief the decisions in *Gifford* and *O'Donnell* would appear to establish that the time limits set out in O. 84 apply by analogy. Consequently, her claim to these reliefs may be excluded depending, firstly, on whether the applicant's explanation for her delay is accepted at the hearing of this action and secondly on whether the respondent is correct in asserting that time begins to run, for this purpose, from the date on which the Notice to Quit is served. The Court need not decide this point since, insofar as the proceedings go beyond seeking declaratory relief but rather relief in private law for the tort of breach of statutory duty, they are not akin to judicial review proceedings and are not subject to the limitation periods set out in O. 84.

Since the applicant is not debarred by delay from proceeding with the action (although she may be prevented from pursuing her claim for declaratory relief for the reasons noted), delay in the context of O.84 cannot afford a ground for the refusal of this interlocutory application.

The respondent also invokes the equitable doctrine of laches, contending that the applicant has delayed in seeking an interlocutory injunction. Mere delay, however, is not sufficient to bar a claim for equitable relief. The criteria required to sustain the defence of laches were laid down in *JH v. WJH* (Unreported, High Court, Keane J., 20th December 1979) at p. 35 of the judgment:

> "I have no doubt that the interval of time which elapsed before the proceedings were issued in the present case could properly be described as substantial. That, however, is not sufficient…there must also be circumstances which render it inequitable to enforce the claim after such a lapse of time. I must accordingly consider the circumstances in which the defendant will now find himself if the plaintiff's claim is allowed, as contrasted with the circumstances in which he would have found himself if the plaintiff had successfully prosecuted proceedings in 1973 or earlier."

In the present case no circumstances have been raised which are such as to render the enforcement of the claim inequitable after the lapse of time. Accordingly, the defence of delay or laches fails.

5. Jurisdiction to grant perpetual injunction
One of the reliefs sought in the plenary summons is a perpetual injunction restraining the Council from evicting the applicant from her residence on the ground that such a step would constitute a violation of her Convention rights and of the s. 3 duty. The respondent and the notice party submit that in any event the Court has no express power under the 2003 Act to grant the injunction sought. Further, it is submitted, in reliance on the decision of this Court in *Gifford*, that the Court has no jurisdiction to grant an interlocutory injunction to restrain the implementation of the warrant for possession.

It is necessary for the Court to consider this matter in some detail (pages 10 – 52 below).

5.1 Gifford v. Dublin City Council
Although the delay in instituting the proceedings was the principal ground for the refusal of the injunction sought in *Gifford*, Smyth J. preferred not to rely solely on that ground. He went on to examine the question from the perspective of the 2003 Act. Considering the possible grant of a declaration of incompatibility, he noted (at p. 5):

> "Even if in the instant case the Plaintiffs were successful in obtaining a declaration of incompatibility their entitlement is to a payment of compensation (see subsections (4) and (5) of S.5)."

He went on to quote a passage from the judgment of the Supreme Court delivered by Kearns J. (with which the other members of the Court agreed) in *Dublin City Council v. Fennell* [2005] 1 I.R. 604 at p. 614. That passage raised the prospect that s. 62 of the 1966 Act might infringe Articles 6, 8 and 13 of the Convention, together with Article 1 of its First Protocol. Smyth J. continued (at pp. 6-7):

> "Altogether from the obiter nature of this passage relied upon by the Defendants and even assuming at trial a declaration of incompatibility were pronounced such separately or in combination do not provide a basis for granting the interlocutory relief now sought. Indeed when invited to consider treating the motion as the hearing of the action the Plaintiffs withheld consent on the basis of some unspecified need for discovery. There is an abundance of case law adverse to granting injunctive relief which determines the issues properly determinable at trial. I find no warrant in the passage cited from Fennell's case to grant the interlocutory relief sought.
>
> I accept as correct the submissions of the Defendants so cogently put by Mr. Connolly that even if the Plaintiffs were ultimately successful in obtaining a declaration that S.62 is incompatible with the State's obligations under the Convention provisions, the declaration will not affect the validity, continuing operation or enforcement of S.62 or the validity and enforcement of the warrant for possession obtained by the Council. In the circumstances the granting of the interlocutory relief sought by the Court would be futile."

He concluded (at p. 8):

> "If there is a serious issue to be tried it should have been raised timeously in judicial review proceedings (although

proceedings in plenary form are permissible). The Act of 2003 even in the case of a declaration of incompatibility gives rise (in an appropriate case) to an award of compensation therefore damages are the adequate and appropriate remedy. The balance in the instant case lies in favour of declining the relief sought, accordingly I refuse the application for interlocutory relief."

The respondent and the notice party submitted that *Gifford* was determinative of the present application, unless the Court was satisfied that, for one of a range of reasons enumerated in *Irish Trust Bank v. Central Bank of Ireland* [1976-77] I.L.R.M. 50, that case was incorrectly decided. The Court is not satisfied that the decision in *Gifford* was incorrect. There, apart from the issue of delay, it would appear that the interlocutory injunction sought was refused on a number of grounds. The first was that its grant would be futile, since, even if the declaration of incompatibility sought by the plaintiffs were obtained, it could only result in an award of compensation and could not prevent the enforcement of the warrant for possession. The second was grounded on an application of the test applicable to applications for interlocutory injunctions laid down in *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88. The serious question to be tried should have been raised within the period permitted for seeking declaratory relief, either in plenary proceedings or, preferably, by way of judicial review. The Court also noted that an award of compensation was all that the plaintiffs might obtain, so that damages were an adequate remedy. Finally, in the circumstances with which the Court was faced, the balance of convenience favoured the refusal of the injunction.

For the reasons noted above in relation to the issue of delay, the reference to raising a serious question to be tried within the requisite period of time is inapplicable to the present application. Excluding the balance of convenience, the remaining reasons for the refusal of injunctive relief can be accounted for by reference to the remedies the plaintiffs intended to seek at trial. Because their claim was confined to declaratory relief, they could obtain no order preventing their eviction from proceeding. As Smyth J noted, the declaration of incompatibility sought could not, even if granted, bring about that result. It is understandable that the Court did not consider the effect of the other declaration sought, namely a declaration that the defendant had breached its obligations pursuant to s. 3 of the 2003 Act. That declaration was not even accompanied by a claim for damages under s. 3(2) in *Gifford*, and in any event there could be no doubt but that such a declaration was likewise incapable of preventing the proposed eviction from proceeding. In such circumstances the Court's conclusion that the grant of the interlocutory injunction sought would be futile is unsurprising. Since neither of the remedies that would be sought at trial could replicate the effect of the interlocutory order, such relief would have served only to prolong the inevitable.

Similar considerations apply to the conclusion that the injunction should be refused on the ground that damages were the adequate and appropriate remedy for the alleged breach. In light of the reliefs to be sought at the trial of the action, monetary compensation was all that would be available to the plaintiffs even if they were to succeed in their declaratory action. The Court reached no conclusion on the general question of jurisdiction to grant an injunction to restrain a breach of the s. 3 duty. Indeed, the issue was not mentioned as a ground for declining the injunction sought despite the fact that several other grounds were invoked expressly. It would be strange then if the Court were to be taken to have determined the jurisdictional question without even referring to it, particularly when, as the submissions and authorities referred to below make clear, the issue is strongly contested. Instead, the reasons for the refusal of the injunction sought in *Gifford* are stated clearly therein: they are delay, futility, the adequacy and appropriateness of damages and an application of the balance of convenience test, rather than any want of jurisdiction.

The position may be different where, as in the instant case, the applicant intends to seek at the trial of the action a perpetual injunction capable of achieving the same effect as that sought at the interlocutory stage. In such a case it cannot be said that the grant of the interlocutory relief would be futile, nor can it necessarily be said that damages would be the adequate and appropriate remedy. In this regard the jurisdiction to grant a perpetual injunction in a case such as the present must be considered.

5.2 Can the s. 3 duty be enforced by means of a perpetual injunction?

5.2.1 Relationship between the perpetual and interlocutory jurisdictions

In support of their submission that interlocutory relief should be refused, the respondent and the notice party asserted that no perpetual injunction could be granted to restrain a breach of the s. 3 duty. The refusal of interlocutory relief was said to follow from this as a matter of law. They relied on the decisions in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* [1993] A.C. 334, *Smith v. Inner London Education Authority* [1978] 1 All E.R. 411 and *Siskina v. Distos Compania Naviera S.A.* [1979] A.C. 210. In the context of a claim under the 2003 Act this submission appears to be correct, for the reasons stated in *Gifford*. In light of the reliefs obtainable at trial, only the availability of a perpetual injunction could merit the conclusion that the interlocutory relief sought would not be futile, and that damages would not be the adequate and appropriate remedy. Accordingly, if this Court is clearly justified in determining, at this stage of the proceedings, that the trial Court would have no jurisdiction to grant the perpetual injunction sought, the interlocutory order should also be refused.

It must be clear to the Court that no such jurisdiction exists before it can refuse relief on this basis. This is because, unless the answer to the question posed is clear, the Court would, in reaching such a conclusion, usurp the role of the Court presiding over the full hearing by determining at the interlocutory stage the applicant's entitlement to the principal form of relief she intends to seek at that hearing. This proposition follows from the firmly established jurisprudence of our Courts, for it is trite law that no complex question of law should be determined at the interlocutory stage of the proceedings. That principle has been established at least since the decision of the Supreme Court in *Campus Oil*, and it is common case that the test there laid down for the grant of an interlocutory injunction is applicable to the instant case. The principle is well stated by the Supreme Court in *Ferris v. Ward* [1998] 2 I.R. 194. There Blayney J. (with whose judgment the other members of the Court agreed) stated (at p. 200):

> "while there is undoubtedly great force in the submission [advanced on behalf of the respondent], it is not appropriate that the Court should reach a final conclusion on it since this is an application for an interlocutory injunction only and not the trial of the action. It is well settled that on such an application the court should not attempt to decide any disputed questions of fact or any difficult issue of law. In *Irish Shell v. Elm Motors* [1984] I.R. 200, McCarthy J. cited with approval the well-known observation of Lord Diplock in *American Cyanamid v. Ethicon Ltd.* [1975] A.C. 396 at p. 407:-
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> > 'It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, *viz.* abstaining from expressing any opinion upon the merits of the case until the hearing': *Wakefield v. Duke of Buccleugh* (1865) 12 L.T. 628, 629. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of

granting or refusing the interlocutory relief that is sought."'

It need hardly be stated that the judgment in *Ferris* and the principles laid down therein bind this Court and constrain it from determining any complex questions of law, for such matters are properly for the determination of the Court which presides over the full hearing of this action.

Of course, the corollary is that, if there is no serious question to be tried or no real prospect of obtaining a perpetual injunction at the trial of the action, the matter is sufficiently clear to be resolved by the Court on the interlocutory application without thereby trespassing on the prerogatives of the Court presiding over the full hearing. The parties to the present action have each urged on the Court the conclusion that the legal position on the question of jurisdiction clearly lies in their favour, which if true would allow this Court to determine the matter at this stage of the proceedings, for if its answer were clear it would not be a complex question of law.

Whether the question of jurisdiction to grant a perpetual injunction is thus capable of resolution is of some importance at this stage of the proceedings, because it is bound up inextricably with the jurisdiction to grant interlocutory relief. The interlocutory injunction now sought cannot be refused on the ground of absence of jurisdiction without first determining that there is no jurisdiction to grant its perpetual equivalent at trial. This is because if even interlocutory relief cannot be obtained it necessarily follows that its more far-reaching and long-lived equivalent in the form of a perpetual injunction cannot. It is therefore necessary to consider the submissions of the parties to determine whether the solution of the question of jurisdiction to grant a perpetual injunction is so clear as to be determinable at this stage of the proceedings. If it is not, the only course open to the Court is to grant the interlocutory injunction sought, provided that the criteria generally applicable to the grant of interlocutory relief are satisfied.

It would appear that the principles enumerated in *Campus Oil* and *Ferris* are sufficient to establish that this approach is correct. In addition, the Court is fortified in its conclusion that the matter should be approached in this way by the decision in *Controller of Patents v. Ireland* [2001] 4 I.R. 229. There the plaintiff sought an interlocutory injunction to restrain the Minister for Enterprise from bringing into effect ss. 4 and 5 of the Intellectual Property (Miscellaneous Provisions) Act, 1998. Kelly J. observed at p. 235:

> "In the course of argument, the defendants raised, but did not press in a strong fashion, an argument that the court has no jurisdiction to entertain this application. This point was made by reference to Article 25.4.1 of the Constitution, and the inability of the court to interfere with the President in signing a Bill into law. It was said that the court could not enjoin the Minister from making an order under s. 6 of the Act by analogy with the constitutional provisions concerning the signing of a Bill into law by the President. I am not persuaded that the defendants have demonstrated with the degree of clarity required to justify an *in limine* dismissal of this application that the court is devoid of jurisdiction to interfere. I am fortified in this view by the judgment of Barron J. in the High Court and by the judgment of the Supreme Court in the case of *Ó Cléirigh v. Minister for Agriculture* [1996] 2 I.L.R.M. 12 (H.C.); [1984] 4 I.R. 15 (S.C.). I am therefore, for the purpose of this application, prepared to assume that there is jurisdiction to grant the reliefs sought, although I do not purport to decide that interesting question at this stage. In any event, as I have already said, the issue, whilst raised, was not pressed strongly by the defendants and, therefore I propose to assume jurisdiction, although without deciding that issue in a final or definitive way."

Kelly J. went on to apply the test laid down in *Campus Oil*. Although he refused the interlocutory injunction sought, he did so on the basis that that test was not satisfied. It seems clear from the passage just quoted that, had the criteria identified in that case been fulfilled, the Court would have granted the interlocutory order notwithstanding the presence of some doubt in relation to the jurisdictional question.

5.2.2 General Jurisdiction
The applicant relies on the full original jurisdiction of the High Court in the administration of justice. It was submitted on her behalf that statute law presumes the existence of the equitable jurisdiction to grant injunctive relief, and nothing in the 2003 Act displaces that presumption. Reference was made in addition to a series of statutory provisions which conferred a broad jurisdiction on the courts in respect of the range of reliefs they may grant. Section 27(7) of the Supreme Court of Judicature (Ireland) Act, 1877, provides that the courts:

> "shall have power to grant and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled in respect of any legal or equitable claim…"

Section 28(8) provides:

> "A mandamus or injunction may be granted…by interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such an order should be made…"

Section 17 of the Courts of Justice Act, 1924, and s. 8(2)(a) of the Courts (Supplemental Provisions) Act, 1961, confirmed and maintained the jurisdiction originally conferred by those provisions of the 1877 Act in respect of the High Court. Finally, O. 50 r. 6(1) RSC, 1986, provides:

> "The Court may grant a mandamus or an injunction or appoint a receiver, by an interlocutory order in all cases in which it appears to the Court to be just or convenient so to do."

The difficulty with this submission however is that the provisions cited cannot be read in such a way as to confer so broad a jurisdiction as a literal interpretation of their terms might invite. If they could be so interpreted the Supreme Court would not have held in *Mahon v. Butler* [1997] 3 I.R. 369 that the provision of a particular form of injunction by statute precluded the invocation of the general equitable jurisdiction to grant injunctive relief. Indeed, a purely literal interpretation would also permit the courts to grant an injunction where no interference with legal or equitable rights or duties had occurred and no such interference was contemplated.

In the neighbouring jurisdiction, where similarly worded provisions prevail, it has been held that where a remedy is provided by a statute for a breach of its terms, the question of whether the jurisdiction to grant injunctive relief has been excluded by statute depends on the proper construction of that statute. This point will be discussed in detail in section 5.2.5 of this judgment.

The decision in *Mahon* would appear to support this view, although, for the reasons to be noted later in this judgment, the situation in *Mahon* differs widely from that in the present case.

5.2.3 *Dublin City Council v. McGrath* [2004] 1 I.R. 216

In this case, the plaintiff gave the defendant notice to quit her accommodation in a tower in Ballymun which had become a hive of anti-social activity and was due to be demolished. She was offered alternative accommodation in Ballymun. The defendant did not wish to accept this offer as she wanted accommodation in Finglas, which was not available at that time but would become available in the future.

Carroll J. granted an injunction to restrain trespass by the defendant, subject to her being granted a temporary tenancy in Ballymun. She accepted the defendant's submission that the European Convention on Human Rights must be taken into account by the Court in determining an application for an interlocutory injunction pursuant to the *Campus Oil* principles. Carroll J. referred to ss. 2 and 3 of the European Convention on Human Rights Act, 2003 and stated:

> "The court being a body through which the judicial powers of the State are exercised is, according to the definition section, an 'organ of the State.'"

As is clear from section 1 courts are expressly excluded from the definition of organs of the State in s. 1 of the Act. Section 1 of the Act defines an organ of the State as follows:

> "'organ of the State' includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint committee of both such Houses or a **court**) (*emphasis added*) which is established by law or though which any of the legislative, executive or judicial powers of the State are exercised."

However, the substantive conclusion in *McGrath* may be correct, in light of s. 2. Courts do not fall within the scope of s. 3, but have a duty under s. 2 of the Act, in so far as is possible and subject to the rules of interpretation, to interpret legislation and rules of law in a manner compatible with the State's obligations under the Convention.

Therefore, a finding that Article 8 of the Convention must be taken into account in determining whether an interlocutory injunction should be granted in applying the *Campus Oil* test appears to be in keeping with the 2003 Act, though the duty flows from s. 2, not s. 3, of the Act. This is not to say that the *Campus Oil* principles are modified in any way: rather, the convention right may be of relevance in establishing if there is a fair question to be tried, whether damages would be an adequate remedy and where the balance of convenience lies.

Nevertheless, that statement of principle was made in the context of deciding whether to grant or refuse an injunction which, rather than being sought to uphold Convention rights, might itself have infringed them. A jurisdiction to grant interlocutory relief cannot necessarily be extrapolated from this, particularly in circumstances where, as appears from the submissions of the parties in this case and the authorities they cite, the question remains strongly contested.

For completeness it should be noted that the exclusion of courts from the ambit of s. 3 is of purely domestic effect: judges can and have been the subject of applications made against the Irish State to the Strasbourg Court under the Convention (cf *Doran v. Ireland*, 31st July, 2003).

5.2.4 Article 13 of the Convention

In the context of effective remedy an issue was also raised as to the application of Article 13 of the Convention. Article 13 provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Court is required to take judicial notice of judgments of the European Court of Human Rights (hereinafter 'ECtHR'), and to "take due account", in interpreting and applying Convention provisions, of the principles they lay down (s. 4 of the 2003 Act), though it follows from this formulation of the obligation imposed by s. 4 that the Court is not bound by those judgments or principles.

In *Plattform Arzte fur das Leben v. Austria* (1991) 13 E.H.R.R. 204 the ECtHR held that Article 13 secures an effective remedy before a national authority to anyone claiming, on arguable grounds, that he is the victim of a violation of the Convention. The applicant also relied on *Klass and others v. Federal Republic of Germany* (1980) 2 E.H.R.R. 214, which established that Article 13 is capable of violation independently of other Convention provisions. There the Court held that the provision imposes an obligation on Contracting States to ensure that, where an individual has been the victim of a measure he contends was in breach of the Convention, he should have an adequate remedy before a national court in order that his claim may be decided, and redress granted if appropriate.

In response the respondent argued that Irish law already provides, by means of the remedies expressly provided for in the 2003 Act, together with the availability of judicial review, the effective remedies required to satisfy Article 13. That provision, it is said, does not confer a right to any specific remedy, the Contracting States being free to determine for themselves the form of remedies available. Reliance was placed on *Leander v. Sweden* (1987) 9 E.H.R.R. 433. There the ECtHR stated (at para. 77):

> "For the interpretation of Article 13 (art. 13), the following general principles are of relevance:
>
> (a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (see, inter alia, the above-mentioned Silver and Others judgment, Series A no. 61, p. 42, § 113);
>
> (b) the authority referred to in Article 13 (art. 13) need not be a judicial authority but, if it is not, the powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective (ibid.);
>
> (c) although no single remedy may itself entirely satisfy the requirements of Article 13 (art. 13), the aggregate of remedies provided for under domestic law may do so (ibid.);
>
> (d) Article 13 (art. 13) does not guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or equivalent domestic norms (see *James and Others v. United Kingdom* [1986] 8. E.H.R.R. 123)."

The notice party was of the same view, citing *Krasuski v. Poland* (Application no. 61444/00, Judgment of the ECtHR of 14th June

2005). In that case the Court stated (at para. 65):

> "Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law (see, among other authorities, *Kud³a*, cited above, § 157)."

In *Kudla v. Poland* (2002) 35 E.H.R.R. 198, a decision of the Grand Chamber, the Court held that the object of Article 13 is to provide a means at national level for individuals to obtain relief for violations of their Convention rights. It was contended that Article 13 merely requires the provision of a process whereby a remedy for a violation can be provided (Jacobs and White, *The European Convention on Human Rights* 4th ed., 2006, at p. 460).

It is clear from the authorities noted, particularly *James and others v. United Kingdom* (1986) 8 E.H.R.R. 123, referred to in *Leander*, that Article 13 does not require the provision of a remedy whose effect is to suspend or invalidate domestic law. Jacobs and White summarise the position as follows at pp. 470-471:

> "What is, however, clear is that Article 13 is not concerned with challenges to legislation. Where the source of the grievance is the legislation itself, requiring an effective remedy would be tantamount to allowing judicial review of legislation. The Commission [of Human Rights] has consistently held that Article 13 has no application in such situations and the Court has not dissented from that view. To read such a requirement into Article 13 would effectively require the incorporation of the Convention, but where the Convention has been incorporated, there will usually be some process by which the compatibility of legislation can be tested against the requirements of the Convention."

Even if Article 13 did require judicial review of legislation by reference to a Convention yardstick however, it would be of no assistance to the applicant. Neither Article 13 nor any other provision of the Convention can be invoked before the Irish courts to bring about a result contrary to the intention of the Oireachtas as expressed in the 2003 Act (*Dublin City Council v. Gallagher* (Unreported, High Court, O'Neill J, 11th November 2008). Since that Act makes clear that Irish law continues to operate even where it is incompatible with the Convention, clearly no injunction can issue to restrain the operation of domestic law. However, for reasons the Court will endeavour to make clear later in this judgment, that is not to say that administrative as distinct from legislative action is immune from the application of the Convention.

Article 13 appears to make such a distinction too, in that although it does not and cannot demand judicial review of legislation, the position is different where the enforcement of particular measures by the authorities is concerned. In *Conka v. Belgium* (2002) 34 E.H.R.R. 1298 the Third Section of the ECtHR stated (at para. 79):

> "The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible (see, *mutatis mutandis*, *Jabari*, cited above, § 50). Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Chahal*, cited above, p. 1870, § 145)."

Article 13 may therefore require the provision of relief which is such as to prevent a potentially irreversible violation of Convention rights, provided that such a violation flows from the execution of a particular measure rather than from the law itself.

The applicant noted that, in contrast to its counterpart in the United Kingdom (the Human Rights Act, 1998), the 2003 Act includes Article 13 in its remit. It may be noted that its exclusion in the neighbouring jurisdiction was motivated by concerns that it might lead the courts to develop a new range of remedies previously unknown to the law, together with a sense that it was unnecessary in view of the range of remedies available under the 1998 Act (Lord Irvine, Hansard, House of Lords col 475, 18th November 1997). Instead, s. 8 of the 1998 Act empowers the courts to grant the remedies traditionally available to them in respect of breaches of the statutory duty to act in accordance with Convention obligations. That section was deemed sufficient to comply with Article 13.

While Article 13 has been included in the text of the 2003 Act, the Court accepts the submission of counsel for the respondent that it is not correct to say that the Convention has been directly incorporated into Irish law. The Supreme Court has made this clear (*Dublin City Council v. Fennell* [2005] 1 I.R. 604 at p. 608). The long title to the Act expresses an intention to give further effect to the Convention rather than to make it part of the domestic law of the State as such.

With this in mind, the Court must consider what effect (if any) Article 13 may have in the present case. Since it has not been incorporated directly it cannot have effect as a basis for jurisdiction in the same way as, for example, O. 50 r. 6 RSC. It is argued however that it may lead to an interpretation pursuant to s. 2 of the 2003 Act (by which is presumably meant an interpretation of s. 3 of the 2003 Act) to the effect that injunctive relief is available: an alternative interpretation, it is submitted, would run contrary to Article 13. A potential difficulty with this submission is to be found in the terms of s. 2(2) of the 2003 Act, which provides:

> "This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

This form of words may exclude the provisions of the 2003 Act itself from the scope of the interpretative obligation laid down by s. 2(1), if the word "thereafter" refers only to provisions coming into force after the 2003 Act. Accordingly, if the applicant contends for a particular interpretation, pursuant to s. 2, of s. 3 of the 2003 Act rather than a provision outside that Act, difficulties may arise. However, because the Act entered into force some time after it was passed by the Oireachtas, the form of words just quoted appears apt to embrace the provisions of the 2003 Act itself within the scope of the interpretative obligation. It is unnecessary to decide this question of construction in the context of the present application.

However, there is another sense in which the requirements of Article 13 may be relevant in determining the jurisdictional question. In Bennion, *Statutory Interpretation*, 4th ed., 2002, reference is made (at p. 54) to the decision of the Court of Appeal in *Rickless v. United Artists Corporation* [1988] Q.B. 40. There it was held that an injunction could be granted to restrain a breach of a statutory provision, partly on the ground that the international convention implemented by the amending statute required the provision of such a remedy. Sir Nicholas Browne-Wilkinson V-C, with whose judgment Stephen Brown and Bingham L.L.J. agreed, said (at pp. 52-53):

> "Two things seem to be clear. First, under the Convention the performer himself was to have "rights." Secondly, the performer's rights were to include something which, in some circumstances, would make it possible to *prevent* unauthorised reproduction, i.e., a *quia timet* injunction. Therefore, compliance with the Rome Convention required that there should be an English Act of Parliament which enabled the performer to obtain an injunction to prevent unauthorised reproduction on records. The Performers' Protection Act 1963 was passed expressly "to enable effect to be given to" the Rome Convention. The Act of 1963 merely altered the class of acts which infringe sections 1 and 2 of the Act, i.e., the Act continued on its face as one imposing criminal sanctions only. In my judgment Parliament must have considered that the Performers' Protection Act 1963 gave rise to civil rights to obtain an injunction, since otherwise Parliament would not have been carrying out its declared intention of giving effect to the Convention."

The situation in *Rickless* was of course quite different from that with which this Court is presently confronted. Whether this passage represents the law in this jurisdiction either generally or in respect of the 2003 Act is open to argument, and the issue was not canvassed before this Court. However, it discloses some basis for the contention that injunctive relief should be available in respect of a breach of the s. 3 duty by way of administrative action (as opposed to a breach of Convention rights flowing from the law itself), if Article 13 can be said to require the provision of an injunctive remedy. Its effect (if any) on the present case is, as with all of the arguments referred to in considering whether the Court has jurisdiction to grant a perpetual injunction to restrain a breach of the s. 3 duty, a matter for resolution at the trial of this action.

5.2.5 Does the provision of a statutory remedy generally exclude injunctive relief?
There are a number of authorities relevant to this question, though they are not always easily reconcilable. *Craies on Statute Law* (7th ed., 1971) addresses the issue in some depth. The following observations appear at p. 230. The judgment from which the author quotes is that of Wright J. in *Clegg Parkinson & Co. v. Earby Gas Co.* [1896] 1 Q.B. 592 at p. 595:

> '"The general rule of law" (or rather of construction) "is that where a general obligation is created by statute and a specific statutory remedy is provided, that statutory remedy is the only remedy." The scope and language of the statute and considerations of policy and convenience may, however, create an exception showing that the legislature did not intend the remedy (e.g. a penalty) to be exclusive."

With specific reference to the availability of equitable remedies where a specific statutory remedy is provided for, Craies notes at p. 234:

> "The High Court of Justice, in the exercise of its equitable jurisdiction, will in some cases interfere by mandatory or other injunction to restrain the breach or compel the performance of a statutory duty. The rule as stated by Farwell J. in *Stevens* v. *Chown* is that "there was nothing to prevent the Court of Chancery from granting an injunction to restrain the infringement of a newly created statutory right, unless the Act of Parliament creating the right provided a remedy which it enacted should be the only remedy, subject only to this, that the right was such a right as the court under its original jurisdiction would take cognisance of." Although a statute may provide a penalty for acts done in breach of it, if it is a matter of public right the Attorney-General is entitled, on behalf of the public, to apply for an injunction but the remedy by injunction exists only if a right has been infringed and the mere fact that an illegality has been committed because the provisions of a statute have been broken is not of itself enough."

He goes on, at p. 237, to quote from the judgment of Willes J. in *Wolverhampton New Waterworks Co. v. Hawkesford* (1859) 6 C.B. (N.S.) 336 at p. 356, where the learned Judge said:

> "There are three classes of cases in which liability may be established by statute:….The third class is where a statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it….With respect to that class it has always been held that the party must adopt the form of remedy given by the statute."

At p. 247, Craies states as follows:

> "If a statute creates a new duty or imposes a new liability, and prescribes a specific remedy in case of neglect to perform the duty or discharge the liability, the general rule is "that no remedy can be taken but the particular remedy prescribed by the statute." [citing *Stevens v. Evans* (1761) 2 Burr. 1152 at p. 1157]. "Where an Act creates an obligation," said the court in *Doe* d. *Bishop of Rochester* v. *Bridges*, "and enforces the performance in a specific manner, we take it to be a general rule that performance cannot be enforced in any other manner." And in *Stevens v. Jeacocke*, the court said: 'It is a rule of law that an action will not lie for the infringement of a right created by statute, where another specific remedy for infringement is provided by the same statute'. And in *R.* v. *County Court Judge of Essex*, Lord Esher M.R. said: 'The ordinary rule of construction applies to this case, that where the legislature has passed a new statute giving a new remedy, that remedy is the only one which can be pursued."'

In concluding his analysis of the matter, Craies notes at pp. 248-249:

> "The true rule for ascertaining whether the special remedy does or does not include a right of action is laid down in *Vallance v. Falle*, where Stephen J. said: "The general rule…seems in substance to be, that the provisions and object of the particular enactment must be looked at in order to discover whether it was intended to confer a general right which might be the subject of an action, or to create a duty sanctioned only by a particular penalty, in which case the only remedy for breach of the duty would be by proceedings for the penalty." It was held that the Merchant Shipping Act 1854 was exclusive. The court sometimes decides the question in one way and sometimes in another."

Later, at p. 346, Craies goes on to say:

> "In the absence of a special and exclusive statutory remedy, common law and equitable remedies apply to enforce statutory rights or liabilities. This rule is well stated by Lord Eldon in *Weal v. West Middlesex Waterworks*: 'Where an Act of Parliament as this (46 Geo. 3, c. 11) directs things to be done, or to be forborne to be done, the legislature either provides the means for compelling such acts to be done, or restraints to prevent these being done which are to be forborne to be done, or if the Act contains no provision of either kind, the legislature acts upon the supposition that the enactments are complete so far as they go, and that the laws of the courts of common law and equity are sufficient to enforce the rights which the King's subjects have under the Act. But if it turns out that the courts of law can give nothing but damages and that the courts of equity cannot interfere to compel a specific performance…it is a defect which, whether it proceeded from a mistake of the legislature, or, if I may so, from its negligent inattention, no court can supply."'

On the other hand, the views expressed in Spry, *Equitable Remedies* (5th ed., 1997) are more specifically concerned with the question of whether the express provision of a particular statutory remedy or procedure should be treated as excluding injunctive remedies, as distinct from remedies more generally. Spry observes at p. 366:

> "In the second place, a different position arises when the precise right that it is sought to establish by injunction did not exist before the passage of the material statutory instrument and it appears that that instrument has both created the material right and also set out a remedy or procedure by which it may be established. If it is sought, not to rely on the statutory procedure that has been set out, but rather to obtain the issue of an injunction, it must first be shown that the new right created by the statute is sufficiently similar to other rights that are enforced by injunctions for it to be possible to regard that new right as susceptible of equitable protection. However prima facie any statutory right should be regarded as susceptible of equitable protection or enforcement unless it has a special characteristic that on recognised principles induces a court with equitable jurisdiction to relegate plaintiffs to legal remedies, such as where they merely seek to enforce an obligation for which damages are an adequate remedy. Secondly, if it is shown that the right asserted is otherwise susceptible of protection by injunction, it must be asked whether, as a matter of statutory intention, the right to an injunction is excluded. There have been suggestions that, whatever may be the position as to other remedies, the remedy of injunction is merely prospective and ancillary, so that hence it should never be regarded as excluded. Nonetheless these suggestions are too general, and the proper question is one of construction, that is, whether or not the intention has been shown that the material statutory remedy or procedure should be exclusive in this respect."

He continues at p. 367:

> "Accordingly, although it has sometimes been suggested that provisions creating a special statutory remedy in respect of a new statutory right should ordinarily be regarded as exclusive, the better view now is that, where the right in question is of such a nature as to be inherently susceptible of enforcement by injunction, the statutory remedy is not exclusive unless there is a clear indication that it should be so regarded. Although generally no such indication is found, nonetheless exceptional cases sometimes arise. When it is sought to establish that a statutory remedy or procedure is exclusive in this sense, important matters that may provide indicia of intention are the nature of the right that has been created by the statutory instrument in question, the probable efficacy of the penalty or remedy set out if it were an exclusive procedure, the nature of the tribunal before which the material statutory proceedings are to be taken and the extent to which it, or the person entitled to institute those proceedings, may be obliged to take into account administrative or other special considerations, any restriction of the class of persons who are entitled to avail themselves of the statutory procedure and the appropriateness of that procedure effectively to prevent future breaches, as opposed to the mere provision of compensation for past breaches; and generally account is taken of any other matter by which it may appear that that procedure is or is not intended to be exclusive in the sense that no right should exist to the obtaining of the injunction."

At p. 368 the following passage appears:

> "it is important to note that although it is often asked generally whether the statutory procedure that is in question is exclusive, it is in truth necessary to ask more precisely whether there has been an exclusion or denial of the particular remedy that is sought. It may be that some remedies are, whilst others are not, left open. So it was said by Channell J., "I think this case comes within the rule that, where there is a statutory enactment in favour of a person, and there is a penalty for the breach of the statutory enactment which goes to the person aggrieved, in such a case the penalty is the only remedy for the breach. That principle, however, only applies to remedies for the breach that has been committed, and an injunction is not a remedy for the past breach, but is a means for preventing further breaches." Further, it may be found that a particular statutory provision sets out a remedy which is exclusive so far as one possible plaintiff is concerned, but which is not exclusive so far as a different plaintiff is concerned, such as the Attorney-General. Nonetheless it should be stressed generally that when once a plaintiff is able to establish a statutory right of a kind that is ordinarily regarded as appropriate for protection by injunction, it is only very rarely found that there is a statutory intention to deny a right to injunctive relief that is otherwise appropriate."

These texts and the authorities cited therein were not referred to in argument. Their relevance and application to a jurisdictional question such as that raised by these proceedings has not been canvassed, nor has the question whether or not they represent Irish law. The Court draws attention to them because of the possibility that they may be of assistance in determining the jurisdictional question at the full hearing.

5.2.6 Academic Commentary

Professors Byrne and Binchy, in their Annual Review of Irish Law for the year 2003, also address the question (at pp. 276-277). On an examination of the terms of s. 3 they appear to take the view that the correct interpretation is that other remedies for breach of the s. 3 duty are available, in addition to the remedy in damages provided for therein. They draw support for this interpretation particularly from s. 3(4), which provides that nothing in s. 3 is to be construed as creating a criminal offence. As to this subsection, they observe at p. 277:

> "If it was considered necessary to clarify that the remit of the section did not run to creating a criminal offence, one may infer that the legislature proceeded on the basis that s. 3(1) established a duty with a broad sanction implication not necessarily determined definitively by s. 3(2)."

The point is arguable, although, with respect to the learned authors, it is at least equally possible that s. 3(4) was merely intended to clarify that, in rendering a breach of the s. 3 duty unlawful, s. 3(1) did not mean to suggest that such a breach would be unlawful in the sense of infringing the criminal law. By the same token, insofar as the learned authors rely on an extra-judicial statement by Fennelly J., that statement went no further than indicating that the jurisdictional point was open to argument: Fennelly J. did not state that in his view an injunctive remedy could be granted. The authors go on to quote the following statement, cited therein, from the former Minister for Justice, Mr McDowell:

> "If a person wants to injunct an organ of the State from carrying out a function of one kind or another, one does that in the High Court by means of judicial review and through injunctions. There is no need to duplicate separately these remedies for Convention-based cases."

Nevertheless, it is for the courts to assess the meaning of legislation by reference to the intention of the Oireachtas as a whole rather than the intention or understanding of a particular Government Minister: *Crilly v. T and J Farrington Ltd.* [2001] 3 I.R. 251.

The applicant pointed to further academic commentary concerning the jurisdictional issue. Collins and O'Reilly (*Civil Proceedings and*

the State (2nd ed., 2004)) suggest (at para. 11-25):

> "Notwithstanding that s. 3(2) expressly refers to damages only, it is intended to compliment other remedies available to combat a contravention of the Convention's provisions such as injunctions and declarations."

In support of this proposition the learned authors refer to a Select Committee Report dated 19th February, 2003 at p. 178.

Dr. Oran Doyle, in a paper entitled "Procedures, Remedies and the Place of the ECHR Act within the Existing Constitutional System" delivered on the 20th November 2007 to the Irish Centre for European Law, also considered the jurisdictional issue. In the context of s. 3 he noted:

> "However remedies are also available in the general law. In particular section 3 represents a limitation on '*vires*' no different from limitations existing elsewhere in the law. As such breaches of section 3 may be remedied in the same way as breaches of any other legal obligation on a public body: by way of a declaration, an order of *certiorari*, *mandamus* or injunction. Obviously, the circumstances in which a mandatory order may be granted will be limited as they are in law generally. However, it is an order that remains – in principle – open to a court. The nub of the point is as follows: some have read the Act as excluding remedies other than the damages claim under section 5. In my view this is incorrect. The Act provides for a specific remedy in section 3, presumably to avoid any doubt as to whether an action for breach of statutory duty could lie in respect of a human rights obligation owed to all persons. The Act provides a specific "remedy" in section 5 presumably because the situation in section 5 has no counterpart in the general law. These two specific incidences cannot be interpreted in such a way as to exclude the other remedies that would normally be available under the general administrative law of the State."

The points noted above do tend to support the theory that injunctive relief is available, but they do not establish the existence of that jurisdiction with sufficient clarity to enable this Court to pre-empt the Court which presides over the full hearing by determining at this early stage that the requisite jurisdiction to grant a perpetual injunction exists.

5.2.7 *Donegan v. Dublin City Council* (Unreported, High Court, Laffoy J., 8th May 2008)
By the same token, the authorities and submissions available do not establish the contrary with sufficient clarity to merit a conclusion at the interlocutory stage. Reliance was placed on the decision of this Court in *Donegan v. Dublin City Council* (Unreported, High Court, Laffoy J., 8th May 2008). In that case the defendant instituted proceedings seeking a s. 62 warrant for possession against the plaintiff for breach of his tenancy agreement. Materials had been found in the plaintiff's son's bedroom which were alleged to indicate that he was engaged in drug dealing. The defendant had concluded that the plaintiff was consequently in breach. The plaintiff asserted that his son was not a drug dealer but a recovering addict and that the tenancy agreement had not been breached.

The proceedings before the District Court were adjourned and the plaintiff instituted an action under the 2003 Act. He sought a declaration of incompatibility in respect of s. 62 of the 1966 Act and a declaration that the defendant had breached its s. 3 duty, in addition to damages for the alleged breach of duty and an injunction to restrain the defendant from taking any further steps to evict him. Laffoy J. granted a declaration of incompatibility with respect to s. 62 but did not accept that the defendant had acted in breach of its s. 3 duty. The injunction was refused. The respondent asserts that it follows from this decision that the injunction to be sought at trial in this case will not be granted. However, this submission appears to be founded on a misinterpretation of the decision in *Donegan*.

Donegan does establish clearly that no injunction can be granted merely on the basis that the law itself is incompatible with the Convention. It does not follow from this however that, in performing its statutory powers, a local authority is freed from the duty which devolves on it in respect of its actions. That much is clear from s. 3 and the definition in s. 1 of the 'functions' to which it refers.

The rationale for the refusal of the injunction in *Donegan* seems to be this: the grant of that injunction would, in the circumstances of that case, have meant the suspension of the operation of s. 62 itself. The plaintiff's complaint in that case appears to have been formulated on the basis that the law itself violated the Convention: in denying him the opportunity of a full merits-based review of the decision to evict him, a review capable of resolving disputed questions of fact, s. 62 infringed his Convention rights. Laffoy J. summarised his complaint as follows (at p. 11):

> "The plaintiff makes the case which was anticipated in the last sentence of the passage from the judgment in *Fennell* last quoted. His principal contention is that the process embodied in s. 62, which enables him to be evicted by an organ of the State without the burden of giving reasons liable to be examined on the merits by an independent tribunal, does not contain the requisite procedural safeguards so as to afford to him the right to respect for his private and family life and his home guaranteed by Article 8 of the Convention."

Laffoy J. went on to observe (at p. 44 of her judgment):

> "Fourthly, I cannot see how s. 3 of the Act of 2003 is an answer to the plaintiff's contention that Article 13 is infringed on the ground that the plaintiff does not have an effective remedy under domestic law. For the entitlement to damages under s. 3(2) to come into play, the plaintiff would have to establish that either the Council or the District Court has contravened s. 3(1) by not performing its functions in a manner compatible with the State's obligations under the Convention. As I understand it, these proceedings are being defended on the basis that neither of those organs of the State is acting in a manner which is not consistent with the State's obligations under the Convention. In fairness to each, it must be acknowledged that each is acting in accordance with domestic law as interpreted prior to the Act of 2003 and as it will continue to be enforced notwithstanding a declaration of incompatibility (s. 5(2)(a) of the Act of 2003), unless amended. If the application of s. 62 to the plaintiff's case by the District Court would contravene the Convention, it is because the law is defective."

She continued (at p. 48):

> "In my view, it is reasonable to conclude that, like *Connors*, this is an exceptional case. There is no procedural safeguard built in to s. 62 under which the plaintiff's contention that he is not in breach of his tenancy agreement can be adjudicated on independently on the merits nor is there any other means available to him under Irish law by which he can achieve that objective and, if his contention that he is not in breach is correct, stave off eviction from his home. In short, it is the law that is defective vis-à-vis Article 8."

These passages furnish additional grounds for concluding that *Donegan* was concerned with the breach of Convention rights inherent in the law itself, in particular the obligation of the District Court to grant the warrant for possession without any inquiry into the merits, rather than a breach flowing from discretionary administrative action. The following passage (at p. 51) dealing with the reliefs sought by the plaintiff also supports this conclusion:

> "(1) The plaintiff is not entitled to a declaration that the Council has failed to perform its functions in a manner in [sic] compatible with the obligations of the State under the Articles of the Convention invoked by him.
>
> (2) I have already addressed the issue of the plaintiff's entitlement to damages under s. 3(2) of the Act of 2003 as an answer to the Article 13 challenge. Thus far, on its own case and as a matter of fact, the Council has acted in accordance with the law. Aside from that, as the plaintiff has remained in possession of the house, he cannot show that he has suffered any injury, loss or damage, so that no entitlement to damages arises at this juncture.
>
> (3) The plaintiff is not entitled to a stay on the District Court proceedings or an injunction in the terms sought.
>
> (4) The plaintiff may have a remedy under s. 5(4) of the Act of 2003, which provides for payment by the Government of a discretionary *ex gratia* payment of compensation, in the future, but that does not arise at this juncture and is for another forum."

Even if an injunction can be obtained under or by virtue of the 2003 Act, it can be granted only to restrain a breach of the s. 3 duty. It is not sufficient to show a breach of Convention rights which is inherent in the statutory provision or rule of law itself.

This is because what must be established is a breach of the s. 3 duty, which is itself subject to other statutory provisions (exclusive of the 2003 Act itself) and rules of law. Accordingly, the plaintiff in *Donegan* could not possibly have succeeded merely on the basis that the procedure provided for in s. 62 infringed his Convention rights. Laffoy J. found that the defendant had not yet breached the s. 3 duty or the obligations of the State under the relevant Convention provisions. Equally, she did not express an acceptance of the plaintiff's version of events nor did she find that the proposed eviction would amount to a breach of the s. 3 duty. She noted that damages could not yet be granted because the plaintiff had not yet suffered loss. It might be argued that this suggests that damages would be available following the eviction and thus that the eviction would entail a breach of s. 3. Nevertheless, no injunction was granted, from which it might be inferred that the Court had no jurisdiction to grant an injunction to restrain a breach of the s. 3 duty.

However, this interpretation is not borne out by the passage from the judgment of Laffoy J. just quoted. There she found that no breach of the s. 3 duty had yet occurred, and there is nothing in the judgment in that case to indicate a finding that, in the circumstances of that case, the taking of further steps before the District Court or thereafter which would ultimately lead to the plaintiff's eviction would in the circumstances constitute a breach of the s. 3 duty. Furthermore, Laffoy J. may have been influenced, as the applicant submitted, by the fact the injunction was sought before the issue of the warrant for possession, while the District Court proceedings remained live. She does not appear to have regarded the continuation of the proceedings as constituting a breach of the s. 3 duty, since she noted at p. 42:

> "it is the enforcement of an order for possession, the eviction, not the termination of the tenancy, which infringes a tenant's Article 8 rights."

This may have been a further ground on which the Court in *Donegan* concluded that the plaintiff was "not entitled to…an injunction in the terms sought" rather than stating that a court would in no case have jurisdiction to grant an injunction to restrain an eviction in breach of the s. 3 duty, since the injunction sought would have had the effect not only of preventing the breach of Article 8 rights in the form of the eviction, but also of preventing the continuation of the District Court proceedings. However, that point may be somewhat peripheral: irrespective of whether it suggests that an injunction could only be granted after the issue of the warrant for possession (and it is not entirely clear from the judgment that this is what is suggested), it remains the case that the judgment proceeded, in line with the nature of the plaintiff's complaint, on the basis of the alleged incompatibility of s. 62 with the plaintiff's Convention rights rather than on the basis of any substantive violation of Convention rights which might amount to a breach of s. 3.

In view of the detailed submissions put forward in the present case as to the availability or otherwise of injunctive relief to restrain a breach of the s. 3 duty, and the strong arguments favouring each side of the debate, it cannot be that Laffoy J. would have determined that question without any discussion of the matter.

In noting that a breach of Convention rights inherent in the law itself cannot warrant injunctive relief, the Court does not ignore any considerations that may arise from the decision in *Pullen v. Dublin City Council* (Unreported, High Court, Irvine J., 12th December 2008) to the effect that, in certain circumstances, it may be unlawful for a local authority to avail of the s. 62 procedure, because such resort to s. 62 may breach the s. 3 duty in a particular case. The Court in *Pullen* determined that there had been a breach of the s. 3 duty by reason of the actions of the defendant in making use of the s. 62 procedure, not by reason of s. 62 itself. In circumstances which it noted were very similar to those in *Donegan*, in which no breach of the s. 3 duty was found to have occurred, the Court in *Pullen* found that the defendant had breached its s. 3 duty by pursuing s. 62 proceedings in circumstances where the plaintiffs denied the accusations of anti-social behaviour which had formed the basis for the decision to evict them.

The reason underlying the different conclusion in this regard in *Pullen* appears to be that in that case, the plaintiff drew attention to the availability of an alternative procedure to s. 62, provided for in s. 14 of the Conveyancing Act, 1881, which afforded the defendant a Convention-compliant means of carrying out its functions in this regard. *Pullen* makes it clear that the s. 3 duty can limit the right of a local authority to resort to a particular procedure notwithstanding that it is one provided for by statute, at least insofar as there is another means of attaining the legitimate objective being pursued.

5.2.8 Separation of Powers

The Attorney General submitted that the grant of an injunction in the present case would infringe the separation of powers. He cited *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 I.R. 97, in which the applicant sought leave to seek an order of *certiorari* in respect of his conviction by the Special Criminal Court. The UN Human Rights Committee had concluded that the decision to prosecute him in that Court violated his right to equality under Article 26 of the International Covenant on Civil and Political Rights. In addition to an order of *certiorari*, the applicant also wished to seek a declaration that s. 47(2) of the Offences Against the State Act, 1939, was repugnant to Article 29.2 and 29.3 of the Constitution on the ground that it was contrary to the International Covenant. The Supreme Court dismissed the applicant's appeal from the decision of the High Court, holding that to allow his claim would entail an infringement of Articles 15.2.1°, 29.6 and 34.1 of the Constitution. In the instant case the Attorney General referred to the following passage from the judgment of Fennelly J. (with whose judgment the other members of the Court agreed) at p. 129:

> "I am prepared to assume that the State may, by entering into an international agreement, create a legitimate expectation that its agencies will respect its terms. However, it could not accept such an obligation so as to affect either the provisions of a statute or the judgment of a court without coming into conflict with the Constitution."

It was submitted that the s. 3 duty must be subject to the Constitution, and that if an interlocutory injunction were granted in the present case it would "affect the provisions of a statute" in the sense indicated by Fennelly J. The Court has no power to do so except by reference to the Constitution.

Kavanagh, however, concerned an international treaty which had not been given effect in domestic law. The passage quoted above conveys that the Executive branch cannot, by entering into an international agreement, affect the provisions of a statute or a judgment of a court. That conclusion was based on the divide between the legislative and executive powers: the Covenant had not been incorporated into or given effect in domestic law, and the Government was not competent to give it any such effect as the applicant contended for because to have done so would have entailed an obvious usurpation of the legislative power of the Oireachtas. This rationale underpinning the passage quoted above is apparent from the passage immediately preceding it:

> "To accept that the applicant has an arguable case under any heading of his claim would imply that the court may be able to disregard the clear and unambiguous provisions of the Constitution in their relations with international agreements. The Constitution establishes an unmistakable distinction between domestic and international law. The Government has the exclusive prerogative of entering into agreements with other states. It may accept obligations under such agreements which are binding in international law. The Oireachtas, on the other hand, has the exclusive function of making laws for the State. These two exclusive competences are not incompatible. Where the Government wishes the terms of an international agreement to have effect in domestic law, it may ask the Oireachtas to pass the necessary legislation. If this does not happen, Article 29.6 applies."

The Convention, in contrast, although not directly incorporated into Irish law, has been given effect in domestic law in terms of the 2003 Act. That Act was passed by the Oireachtas, from which it follows that no question of constitutionally impermissible action on the part of the Executive arises, as would have been the case in *Kavanagh* had the ratification of the Convention gone so far as the applicant contended.

However, the Attorney General also pointed to the following passage from the judgment of this Court (Barrington J.) in *McGimpsey v. Ireland* [1988] I.R. 567 at p. 581:

> **"**our system of constitutional government is based on a separation of powers between the legislative, executive and judicial organs of government, each of which is supreme within its own domain and all of which are subject to the Constitution."

It was submitted that it is not open to the courts to set aside or strike down legislation, save in the case of constitutional invalidity. This latter variety of case represents the sole exception to the exclusive legislative power of the Oireachtas. As O'Flaherty J. observed in *McDonnell v. Ireland* [1998] 1 I.R. 134 at p. 143:

> "The correct rule must be that laws should be observed until they are struck down as unconstitutional."

In reliance on these authorities, it was submitted that the giving of further effect to the Convention by means of the 2003 Act had left untouched the supremacy of the Constitution in all matters. The Court accepts this submission unreservedly. The Act in its long title is described as "An Act to enable further effect to be given, *subject to the Constitution*, to certain provisions of the Convention" (emphasis added). Quite apart from this however, and irrespective of anything contained in the Act itself, it was and is not open to the Oireachtas to release itself or any other body, including an 'organ of the State' as defined in s. 1 of the 2003 Act, from the duties and constraints imposed by the Constitution. It should be observed that the Oireachtas has not, through the medium of the 2003 Act, purported to empower the courts to disapply any statutory provision or rule of law by reference to the Convention: see s. 5(2)(a). It is at least highly questionable whether it could have done so without thereby effecting an impermissible delegation of the legislative powers vested in it by Article 15.2.1°.

However, these submissions do not necessarily warrant the conclusion for which the respondent and the Attorney General contend. It was submitted that the grant of the interlocutory injunction as requested by the applicant would effectively amount to an invalidation of s. 62 of the 1966 Act and the order made thereunder solely on the basis of incompatibility with the Convention. As the Court has already indicated in relation to *Donegan*, insofar as the applicant seeks an injunction based on the alleged procedural violation of her Convention rights inherent in s. 62 of the 1966 Act, her claim must be rejected. No injunction can be granted based on a violation of her Convention rights inherent in the statutory provision itself.

However, only the procedural violation is inherent in s. 62 itself. The applicant also alleges that her eviction would not be justified in the changed circumstances now prevailing. The Court will return to this point later in the present judgment.

5.2.9 *Mahon v. Butler* [1997] 3 I.R. 369

Reliance was also placed on the decision of the Supreme Court in *Mahon*. The notice party submitted that the judgment of the Court in that case established that the provision of a particular statutory remedy precluded the invocation of the general equitable jurisdiction to grant injunctive relief. However, the situation in *Mahon* differs widely from that currently before this Court. In that case the plaintiffs had sought an order in the High Court pursuant to s. 27 of the Local Government (Planning and Development) Act, 1976 (as amended), to restrain the defendant from holding certain concerts, which were alleged to entail a material change of use for the purposes of the Local Government (Planning and Development) Act, 1963. Costello J. noted that only breaches of the planning legislation that had occurred or were occurring at the time of the application fell within the ambit of s. 27. However, he concluded that, unless the statute expressly excluded the exercise of the general equitable jurisdiction to grant injunctive relief, the Court could rely on that general jurisdiction to grant an injunction. The respondents, however, contended that this approach was mistaken: the remedy under s. 27 was a precise statutory injunction distinct from the general equitable jurisdiction of the High Court, which had no jurisdiction to expand the statute by relying on that general jurisdiction. The Supreme Court (per Denham J.) accepted this argument, holding (at p. 377):

> "I am satisfied that this is correct. Section 27 provides a precise statutory remedy. In making an order under that section, the court cannot exceed the jurisdiction conferred by that section. It is a clear and comprehensive code which should be construed strictly. The court has a discretion to exercise in a s. 27 application but that is *within* the ambit of the section and is not to extend the jurisdiction."

However, *Mahon* can be distinguished from the present case, principally on the ground that the relevant provision provided for the grant of an injunction and went on to prescribe limits to its invocation. In contrast, s. 3 of the 2003 Act is silent as to the availability of an injunctive remedy, leaving the intention of the Oireachtas on the matter less clear. It may nevertheless be the case that the provision of a particular remedy in s. 3 excludes other remedies more generally available at law or in equity. The 2003 Act arguably creates an exhaustive regime of remedies, at least insofar as plenary proceedings are concerned: it is apparent that s. 3 does not exclude the availability of *certiorari* in judicial review proceedings for breach of the s. 3 duty on the ground that a statutory discretion was exercised in such a way as to breach the s. 3 duty (see for example *Oguekwe v. Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 1st May 2008, at p. 16)). The question, however, is not one for the determination of this Court because the authorities do not make the position in relation to s. 3 sufficiently clear to permit of resolution at the interlocutory stage.

5.2.10 Conclusion on jurisdictional issue

It follows from a consideration of the arguments advanced by the parties that the answer to the jurisdictional question involves a somewhat complex question of law which is thus, by definition, for determination at the full hearing of this action. It is apparent that the applicant has a real prospect of securing a perpetual injunction at trial, which is a sufficient basis for this Court to exercise its general jurisdiction in respect of interlocutory relief, subject of course to the ordinary principles applicable to the grant of interlocutory relief. It is common case that the principles applicable are those stated in *Campus Oil*, together with any special factors that may arise (*Foley v. Sunday Newspapers Ltd.* [2005] 1 I.R. 88). The criteria laid down in *Campus Oil* are the existence of a serious question to be tried, the adequacy or otherwise of damages to compensate for the potential loss to either party and the balance of convenience.

For the avoidance of doubt, it should be emphasised that the Court has considered the arguments outlined above in order to determine whether they afford a clear answer to the jurisdictional question and whether there is a real prospect of the applicant securing at trial the perpetual injunction sought. Views have been expressed in relation to those arguments only insofar as necessary to ascertain whether they disclose a sufficiently clear basis for the resolution of the jurisdictional issue. The Court is not to be taken as determining that the submissions advanced by either side on the question of whether there exists a jurisdiction to grant injunctive relief to restrain a breach of the s. 3 duty should or should not be accepted at the full hearing: the difficulty with those submissions is simply that they do not make the resolution of the jurisdictional question sufficiently clear to allow this Court to determine the matter at the interlocutory stage.

6. Serious question to be tried

It must of course be recalled that, even if the Court enjoys jurisdiction to restrain by injunction a threatened breach of the s. 3 duty, there would be no real prospect of obtaining such an order if there were no serious question to be tried. The applicant invokes the jurisprudence of the ECtHR to illustrate that there is a serious question to be tried as to whether s. 62 is compatible with her Convention rights. She relies in particular on the decisions in *McCann v. United Kingdom* (Application no. 19009/04 Judgment of the ECtHR of 13th May 2008) and *Connors v. United Kingdom* (2005) 40 E.H.R.R. 189. These authorities were examined comprehensively in *Donegan* and in *Gallagher*. In those cases the High Court issued declarations to the effect that s. 62 is incompatible with the obligations of the State under the Convention. That said, in *Leonard v. Dublin City Council* (Unreported, High Court, Dunne J, 31st March 2008) a declaration was refused. Laffoy J. in *Donegan* distinguished that case on the ground that there was no dispute in *Leonard* as to whether the tenancy agreement had been breached. Since there was no dispute of fact, judicial review offered sufficient protection of the plaintiff's rights.

In this case a number of the complaints made against the applicant both before and after the service of the notice to quit are disputed. The Court therefore considers that there may be a serious question to be tried to the effect that s. 62 infringes the applicant's Convention rights. That, however, is not sufficient to justify the grant of an interlocutory injunction. If a perpetual injunction can be granted at all it can be granted only to prevent or restrain a breach of the duty imposed by s. 3, which is itself subject to any statutory provision or rule of law. It follows that it cannot be granted on the basis of a violation of Convention rights which is inherent in the statutory provision or rule of law itself. Quite apart from the limitation clause in s. 3, to grant a perpetual injunction so as to disapply or suspend the statutory provision or rule of law in question would run contrary to the clear intention of the Oireachtas as expressed, in particular, in s. 5(2)(a) of the 2003 Act.

Equally, to grant an interlocutory injunction on the basis of a violation of Convention rights inherent in the law itself would be to ignore both s. 5(2)(a) and the limitation clause in s. 3: to justify the grant of an injunction it is necessary to establish that there is a serious question to be tried not merely as to whether a breach of Convention rights is threatened, but rather as to whether the threatened action would be unlawful as constituting a breach of s. 3 itself, bearing in mind the effect of the limitation clause. Finally, since no perpetual injunction could be obtained on this basis an interlocutory injunction could not be granted so as to disapply or suspend the operation of the statutory provision or rule of law itself because no such relief could be obtained at trial. Accordingly, an interlocutory injunction sought on this basis would also be refused for the reasons noted in *Gifford*: its grant would be futile and damages would be the adequate and appropriate remedy.

The applicant is correct in asserting that the object of the Act, taken as a whole, is to rectify any incompatibility with the Convention. However, it does not follow that the availability of an injunctive remedy to restrain the operation of a statutory provision would coincide with this objective in such a way as to compliment any declaration of incompatibility that might be granted. It is clear from the provisions of s. 5(2) referred to above that the power to rectify such incompatibilities is expressly reserved to the Oireachtas. The courts are empowered to draw the attention of the Oireachtas to the problem, but it is then for the Oireachtas to determine both whether it will amend the impugned provision and, if it does, the content of that amendment. As Lord Steyn, considering the UK equivalent of the 2003 Act, noted in *R v. DPP (ex parte Kebilene)* [1999] 3 W.L.R. 972 at p. 981:

> "It is crystal clear that the carefully and subtly drafted Human Rights Act 1998 preserves the principle of Parliamentary sovereignty. In a case of incompatibility, which cannot be avoided by interpretation under section 3(1), the courts may not disapply the legislation. The court may merely issue a declaration of incompatibility which then gives rise to a power to take remedial action".

That power is vested in the Oireachtas. Far from complimenting the remedy of a declaration, the grant of an injunction suspending the operation of a statutory provision would place the resolution of the incompatibility in the hands of the courts rather than the Oireachtas.

Again, where the organ of the State concerned has available to it a Convention-compliant procedure for achieving the objective pursued, it may be obliged to elect in favour of that procedure in preference to one which does not comply with the Convention (Pullen). In such a case it can be said that, if the latter procedure is chosen, there is a breach of the s. 3 duty by way of a violation of Convention rights going beyond that which is inherent in the statutory provision itself.

Similarly, in the present case the contemplated eviction may entail a violation of Convention rights beyond the procedural violation inherent in the law itself. This is because if the proposed eviction is not justified from a Convention perspective in the circumstances, it represents a substantive breach of Convention rights. In this regard, it is submitted on behalf of the applicant that the circumstances in which the respondent decided to issue a notice to quit and seek a warrant for possession have changed to such an extent that the rights and wrongs of the proposed eviction have fundamentally altered.

As a consequence, it may be that, were the eviction to proceed, it would constitute a breach of the applicant's Convention rights, and consequently of the State's obligations under the Convention, independently of any question concerning s. 62 itself.

The respondent submitted that the State's obligations under the Convention, and thus for the purposes of s. 3, did not go beyond the obligation to implement judgments against it. However, Article 1 of the Convention imposes an obligation on each Contracting State to secure the rights and freedoms contained in Section I of the Convention to each person within its jurisdiction. While Article 1 is not among the Convention provisions as defined in s. 1 of the 2003 Act, it defines the obligations of the State under those provisions, including the Articles invoked by the applicant in the present case. Jacobs and White observe at p. 18:

> "Section I of the Convention contains, in Articles 2 to 18, a list of the rights and freedoms guaranteed....The whole of Section I, however, does not in terms impose any obligations on States; it takes the form of a declaration of rights. It is Article 1 which transforms this declaration of rights into a set of obligations for the States which ratify the Convention."

It follows that the obligations of the State under the Convention provisions as defined in s. 1 of the Act are contained in provisions of the Convention, including Article 1, which are outside the ambit of s. 1: if it were otherwise the reference in s. 3 to the obligations of the State under the Convention provisions would be meaningless insofar as Section I of the Convention is concerned, for the Section I provisions impose obligations only in conjunction with other provisions of the Convention. Even apart from this however, O'Donnell and Pullen furnish examples of cases in which a breach of the s. 3 duty has been found notwithstanding the absence of relevant judgments against the State. Accordingly, the obligations of the State under the Convention provisions, and thus for the purposes of s. 3, go beyond the implementation of judgments against it.

The following requirements emerge from Article 8 of the Convention, and the decisions of the European Court of Human Rights in Connors and in Blecic v. Croatia (2006) 43 E.H.R.R. 1038 in respect of an interference with the right to respect for one's private life, family life and home:

> (1) The interference must be in accordance with law
>
> (2) It must pursue a legitimate aim
>
> (3) It must be "necessary in a democratic society", that is to say it must be justified by a pressing social need and be proportionate to the legitimate aim pursued.

The meaning of the third criterion was explored further in Pullen at p. 60, where Irvine J. derived the following principles from the judgment of the ECtHR in Handyside v. United Kingdom (1979-80) 1 E.H.R.R. 737:

> "In assessing whether or not an interference is "necessary in a democratic society", the courts must apply the principle of proportionality to assess whether a particular measure can be justified. A public authority seeking to show that an interference is proportionate must, on the authorities, satisfy the Court regarding four matters namely:-
>
> > (a) That the objective of restricting the right is so pressing and substantial that it is sufficiently important to justify interfering with a fundamental right;
> >
> > (b) That the restriction is suitable: it must be rationally connected to the objective in mind so that the limitation is not arbitrary, unfair or based on irrational considerations;
> >
> > (c) That the restriction is necessary to accomplish the objective intended. In this respect the public authority must adopt the least drastic means of attaining the objective in mind, provided the means suggested are not fanciful; and
> >
> > (d) That the restriction is not disproportionate. The restriction must not impose burdens or cause harm which is excessive when compared to the importance of the objective to be achieved."

It is difficult to see how the requirement that the interference with the right to respect for the home should be "necessary in a democratic society" could be satisfied if the respondent were to proceed with the eviction in circumstances where, as it is now aware as a result of these proceedings, the primary source of the difficulty said to justify termination of the tenancy is now absent. While the list of complaints of anti-social behaviour in this case discloses a range of grossly unacceptable conduct, the great majority (and the most serious) of those complaints relate to two of the applicant's sons, Michael and Edward Byrne, and to a lesser extent their brother Patrick. The latter has since moved into alternative accommodation. The applicant has obtained orders in respect of Michael and Edward excluding them from the family home. In addition, it appears that Michael and Edward may currently be serving sentences of imprisonment. They were to be sentenced on 17th October 2008 and, in light of her knowledge of the offences involved, the applicant expected that they would receive custodial sentences. However, the Court has not been advised of the sentences imposed. In any event however, Michael and Edward no longer reside at 19 Belcamp Crescent.

In these circumstances the respondent's statutory duties in respect of estate management may not provide a justification for the eviction such as to displace the obligation imposed on the respondent by s. 3. There is a serious question to be tried as to whether the proposed eviction would be contrary to s. 3 and consequently unlawful.

The Court appreciates that the s. 3 duty is expressed to be "[s]ubject to any statutory provision (other than [the 2003 Act]) or rule of law". However, s. 62 does not impose any duty on the respondent which conflicts with that imposed by s. 3. Section 62 merely obliges the District Court, on proof of certain formal steps having been taken, to issue a warrant for possession. That obligation subsists even after the enactment of the 2003 Act for two reasons. The first is that, as noted above, the courts are expressly excluded from the definition of 'organs of the State' by s. 1(1) of the 2003 Act: the s. 3 duty is therefore inapplicable to the courts (see Carmody v. Minister for Justice, Equality and Law Reform (Unreported, High Court, Laffoy J, 21st January 2005)). The second is that, by virtue of the limitation clause in s. 3, the duty that provision imposes must always yield to any obligation imposed by a statutory provision or rule of law to act contrary to that duty.

In this connection the respondent relies on the following passage contained in Collins and O'Reilly, Civil Proceedings and the State (2nd ed., Dublin, 2004) at para. 11-23:

> "The proviso that this obligation applies "subject to any statutory provision or rule of law" is intended to deal with a situation where no possible interpretation of the legislation or rule of law is capable of rendering it compatible with the Convention. In that case, the organ of the State concerned is obliged to carry out its functions in accordance with the legislation or rule of law concerned, rather than with the Convention, an aggrieved litigant being then required to seek a declaration of incompatibility."

Again, without purporting to determine the question of the construction of the limitation clause at this stage of the proceedings, it may be appropriate to note that the passage just quoted does not necessarily go further than to suggest, as the Court has already observed, that the limitation clause displaces the s. 3 duty to the extent that there is another duty competing with it. Section 62 does not impose such a competing duty. The s. 62 warrant does not direct or require that the eviction should proceed. It merely confers a statutory power to evict, and in the exercise of its statutory powers, where it has discretion, the respondent is bound to abide by the obligations of the State under the Convention.

In this context, it may be noted that the applicant could have sought *certiorari* of the decision to serve the Notice to Quit on the ground that that decision infringed the s. 3 duty, a possibility adverted to by Smyth J. in *Gifford*. Although her prospects of securing that remedy in the circumstances prevailing at that time might have been slim, they would have been far stronger had the current circumstances prevailed at that time. The grant of such a remedy would have prevented the respondent from invoking the s. 62 procedure against the applicant at all, to say nothing of preventing it from enforcing a warrant for possession. In this regard the injunctive remedy sought in the present case, at least insofar as it is sought on the basis of an alleged anticipated breach of the s. 3 duty, appears less drastic than the respondent and the Attorney General contended. To restrain administrative action which would infringe the obligations of the State under the Convention and for which no statutory or other legal justification appears cannot be equated with the suspension of s. 62. Section 62 is a procedural provision which does not require or justify an eviction which may appear to the Court presiding over the full hearing of this action to breach the applicant's Article 8 rights and thus also the obligations of the State under that provision.

There are additional points to consider concerning the limitation clause. Insofar as the s. 3 duty may be subject to s. 62, so too is it subject to every statutory provision conferring power on the Minister for Justice, Equality and Law Reform to make and to execute deportation orders. The Minister is nevertheless required to respect Convention rights in exercising such powers (*Oguekwe* at p. 16) and may even be obliged to revoke rather than to implement a deportation order owing to a breach of this obligation (*Kozhukarov v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Clarke J., 14th December 2005) at para. 2.6). In *Makumbi v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Finlay Geoghegan J., 15th November 2005) the Court held that the statutory regime applicable to transfer orders permitted the respondent a discretion not to implement such an order where to do so would breach the obligations of the State under Article 2 of the Convention. He was bound to consider and determine, in view of the applicant's rights under Article 40.3.2º of the Constitution and Article 2 of the Convention, whether the transfer order should be implemented. The Court held that by necessary implication the Minister had power to revoke a transfer order. Of course, there can be no question of an obligation to revoke the order in the present case as it was made by a court, which is not subject to the s. 3 duty. That said however, it is conceivable that the respondent could be obliged by reason of a change in circumstances to refrain from enforcing the order. It appears at the very least arguable that it is not sufficient for the respondent simply to point to the existence of the warrant for possession in order to override the duty to abide by the obligations of the State under the Convention.

Ultimately, the present case turns on matters of statutory construction, and principally on the proper construction of the limitation clause. It may be that, in order to override the duty to act in accordance with the obligations of the State under the Convention, the statutory provision or rule of law relied upon must require the relevant authority to act otherwise. Alternatively, it may be sufficient that it might be said to justify the authority in acting inconsistently with the Convention, though it may be doubted whether s. 62 can be said to justify an eviction which is otherwise unwarranted, for it is merely a procedural provision. Particularly in view of the respondent's statutory duties relating to the provision of housing and the severity of the consequences of an eviction, s. 62 is unlikely to have been intended to bring about evictions which are, on the facts, unjustified. Clearly the mere fact that the authority is exercising a particular statutory power cannot displace the duty entirely. *Kozhukarov* and *Makumbi* establish this much, and indeed if it were otherwise the scope of s. 3 would be very limited.

However, it may be that an alternative construction of the limitation clause is the correct one. The correct construction is very much open to argument, and that being the case it is inappropriate for the Court to reach a conclusion on the matter at this stage. It is sufficient to say that, because it may be that the limitation clause goes no further than to excuse breaches of the Convention which result from statutory provisions or rules of law themselves, and because the respondent is not required to proceed with that eviction, there is a serious question to be tried as to whether the eviction of the applicant and those of her children who continue to reside with her would constitute a breach of the s. 3 duty. In any event, as the decision of the Supreme Court in *Ferris* makes clear, the presence of forceful arguments to the effect that a litigant will be found at trial not to be entitled to a perpetual injunction does not justify a refusal of interlocutory relief: if there exists a serious question to be tried, the presence of forceful arguments in favour of the respondent cannot negate it.

In addition, the recent decision of this Court (Irvine J.) in *Pullen* may disclose the existence of a serious question to be tried on an alternative ground. As outlined in section 5.2.7 of the present judgment, in that case the Court held that the defendant had breached its duty under s. 3 by availing of the s. 62 procedure in circumstances where the plaintiffs disputed the allegations of anti-social behaviour against them. Judicial review could not provide an adequate procedural safeguard in such circumstances because it could not afford the plaintiffs the benefit of an inquiry as to the true facts in the presence of a genuine dispute as to those facts. Irvine J. noted at pp. 95-96:

> "The defendant, in its decision to evict the plaintiffs based upon a finding of anti-social behaviour, was destined to interfere with the plaintiffs' rights under Article 8 of the Convention. In this regard the Act of 2003 placed new obligations on the defendant as to the circumstances in which it might, in a Convention compliant manner, avail of the procedure for eviction provided for in s. 62 of the Act of 1966."

She continued at p. 96:

> "Having regard to the magnitude of the right with which the defendant intended to interfere and the consequences of such interference, the defendant was obliged to justify such interference as being not only in pursuit of the legitimate aims identified in Article 8(2) but also as being necessary in a democratic society."

Of course, this case differs somewhat from *Pullen* in that many of the allegations of anti-social behaviour are not denied. However, it is clear that the applicant disputes the veracity of some of the complaints made against members of her family. Of particular significance in this regard is the fact that she challenges the truth of certain complaints made between the issue of the final warning and the service of the Notice to Quit. In such circumstances it seems likely that the disputed complaints were in fact those which ultimately led to the service of the Notice to Quit. It seems reasonable to suggest that, in view of the gravity of the interference with the applicant's Article 8 rights contemplated by the respondent, the dispute as to the veracity of these complaints either was known to the respondent prior to the service of the Notice to Quit or should have become known to the respondent through the investigations it was incumbent on it to undertake.

The availability of judicial review cannot afford the applicant a full hearing on the merits capable of resolving disputes of fact. While the procedural deficiency in the circumstances of this case is not as acute as in *Pullen*, in that it is conceded that the behaviour of two of the applicant's sons posed a problem prior to the service of the Notice to Quit, nonetheless there would appear to be grounds on which it might be suggested that the proposition advanced in *Pullen* is applicable to the present case also. Accordingly, it may be that the respondent should have proceeded under s. 14 of the Conveyancing Act, 1881, rather than by way of s. 62. In seeking a warrant for possession pursuant to the latter provision the respondent may have acted in breach of section 3.

If that is the case then the warrant for possession was sought and obtained unlawfully. The Court does not say granted unlawfully, for again the District Court was not subject to the s. 3 duty and was obliged to grant the warrant for possession sought provided certain formal proofs were established. If however the warrant was sought and obtained unlawfully it is arguable that it could not be implemented lawfully in accordance with s. 3. However, in view of the Court's conclusion that there is a serious question to be tried in the present case on a different basis, it is unnecessary to decide whether the principles laid down in *Pullen* also give rise to the existence of a serious question to be tried.

The Attorney General submitted that there are no further steps in law to be taken in the proposed eviction of the applicant, and consequently no injunctive remedy lies. While the former proposition is correct, the latter does not follow from it. Injunctions are routinely granted to restrain actions that are not matters of legal procedure. The question is not whether the execution of the warrant for possession would amount to a further legal step but whether its implementation would breach the s. 3 duty. This view is borne out by the above case law concerning judicial review: since s. 3 can impose an obligation to revoke a valid deportation order, it must be the case that it can impose an obligation to refrain from implementing that order, notwithstanding that such implementation is not a step forming part of a legal procedure.

7. Adequacy of damages
If the eviction were to proceed the applicant would be rendered homeless, with no apparent prospect of obtaining alternative accommodation. In contrast, there is no indication of any loss to the respondent in the exercise of its estate management functions, particularly in that the source of the great majority of the anti-social behaviour problems complained of is now absent. However, on the basis that there is some doubt as to the adequacy of damages for the respondent, the Court will proceed to consider where the balance of convenience lies.

8. Balance of convenience
The consequences of the proposed eviction for the applicant would appear to be severe. It is submitted on her behalf that no alternative accommodation is open to her and the children who continue to reside with her. As a result of an eviction for anti-social behaviour she would be deemed to have deliberately rendered herself homeless and would not be entitled to be re-housed. In addition, it is said that she is currently unemployed and might be precluded and/or prevented from obtaining social welfare supplementary allowance under s. 16 of the Housing (Miscellaneous Provisions) Act, 1997 if evicted. This would adversely affect her ability to secure private rented accommodation, rendering her situation still more difficult. Although the issue was not argued before this Court, it may be appropriate to note that in such circumstances, the loss of such welfare support might, by reason of its impact on the right of the applicant and her children to respect for family life, entail an infringement of the Convention (*Anufrijeva v Southwark London B.C.* [2004] 1 All E.R. 833 at para. 43).

In addition, the respondent continues to receive rent from the applicant, and, as noted above, the complaints of anti-social behaviour related principally to Michael and Edward, who are now absent from the home. It appears clear that the applicant intends to prevent them from residing there, in view of the fact she has sought and obtained orders to achieve that purpose. According to the submissions advanced on her behalf, she currently resides at the premises with which these proceedings are concerned with five of her children, not including Michael or Edward. In these circumstances the balance of convenience lies in favour of granting the interlocutory injunction in the terms sought.

However, if either Michael or Edward were to resume residing at the applicant's house, the gravity of their behaviour, involving persistent and very serious crime and intimidation, is such that the balance of convenience would no longer lie in favour of the interlocutory injunction sought. The Court must have regard to the legitimate interest of the respondent in the performance of its statutory functions, including those in respect of estate management, and its responsibilities toward its other tenants. The performance of these functions and adherence to these responsibilities would be significantly impeded if either Michael or Edward were to take up residence in the applicant's home again. In addition, if they were to do so they would be acting in breach of existing orders. In such circumstances the respondent's concerns in relation to the exercise of its functions could not be met by means less prejudicial to the applicant, for example by the obtaining of an order excluding Michael or Edward from the home pursuant to s. 197 of the Residential Tenancies Act, 2004. O. 50 r. 6(2) RSC offers a means of resolving this difficulty. It provides:

> "Any such [interlocutory] order may be made either unconditionally or upon such terms and conditions as the Court thinks just."

No special factor which might otherwise influence the Court in determining this application has been raised.

9. Constitutional Validity
In addition to the Convention grounds relied on, the applicant submitted that an interlocutory injunction should be granted on the ground that doubts continue to surround the constitutionality of s. 62. However, the applicant does not seek a declaration that s. 62 is repugnant to the Constitution, and this action is instead framed in terms of the Convention. While some of the reliefs claimed in the plenary summons do not refer expressly to the Convention, others do so, and, as the respondent points out, the plenary summons is headed "In the matter of section 3 of the European Convention on Human Rights Act 2003". In addition, the possible invalidity of s. 62 having regard to the provisions of the Constitution was not argued in detail.

In the present case, in view of the nature of the action as formulated, and considering that no declaration of constitutional invalidity is sought, it appears proper to grant an injunction on the basis of the Convention rather than the Constitution. The Court is not to be

taken as holding that, had it concluded that an injunction should not be granted on the basis of the Convention, the possibility of an injunction on the basis of the Constitution would not have been considered because the action was essentially framed in terms of the Convention. To refuse an injunction sought to restrain the application of legislation which violates the Constitution on the basis of a point of pleading might not be consonant with the protection of constitutional rights.

10. Conclusion

Insofar as it concerns injunctive relief, the present case resolves itself into two questions of law: whether it is possible to obtain a perpetual injunction to restrain a breach of the s. 3 duty and whether the implementation of the warrant for possession would amount to a breach of that duty. As there exists a reasonable prospect of the perpetual injunction sought being obtained, and because there is a serious question to be tried as to whether the implementation of the warrant for possession would amount to such a breach, the Court proposes to grant the interlocutory injunction sought, the balance of convenience favouring such a course.

Accordingly, the Court proposes to grant the injunction sought subject to the condition that neither Michael nor Edward return to reside at 19 Belcamp Crescent. The respondent will be granted liberty to apply to the Court for the discharge of the interlocutory order if such an event occurs.