THE HIGH COURT

[2018 No. 6128 P.]

BETWEEN

KIERAN WALLACE

PLAINTIFF

AND

PHILIP KERSHAW

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 4th day of June, 2019

Introduction

1. This is an application by a receiver for an interlocutory injunction restraining trespass on a residential property over which he was appointed receiver in 2013.

The evidence

2. By agreement in writing dated 9th May, 2003 made between HSS Limited as vendor and John Meade as purchaser, HSS Limited agreed to sell, and Mr. Meade to purchase, a serviced site at 15 Coldwater Lakes, Saggart, Co. Dublin, for €317,434.52.

3. The sale and purchase was completed by deed of conveyance dated 14th July, 2003. Part or all of the money used by Mr. Meade to buy the site was borrowed from Anglo Irish Bank Corporation plc ("*Anglo*") and by deed of mortgage made 17th July, 2003 Mr. Meade mortgaged the site to Anglo to secure all sums then or at any time thereafter to become due or owing by Mr. Meade to Anglo.

4. Mr. Meade's facilities with Anglo were refinanced from time to time, most recently on 31st January, 2009 and 3rd September, 2009, when Anglo provided additional finance. It was then expressly agreed that the security for Mr. Meade's liabilities would include the bank's first legal charge over what was then described as a residential unit at Coldwater Lakes, Citywest, Co. Dublin.

5. Mr. Meade's loans and the security held for them were transferred to National Asset Loan Management Limited ("*NALM*"). By deed of appointment dated 31st May, 2013 Mr. Kieran Wallace was appointed as statutory receiver over a number of Mr. Meade's assets, including the house at Coldwater Lakes.

6. By a global assignment deed and a deed of conveyance and assignment, both dated 11th December, 2015, Mr. Meade's loans and the security held in connection with them were assigned and transferred to Promontoria (Arrow) Limited.

7. By deed of novation dated 11th December, 2015 made between NALM and Promontoria (Arrow) Limited and Mr. Wallace, Promontoria (Arrow) Limited was substituted in place of NALM, and Mr. Wallace agreed to perform and discharge all liabilities and obligations as if Promontoria (Arrow) Limited were the original party to the deed of appointment.

8. Upon his appointment by NALM, Mr. Wallace wrote to "*The tenant, 15 Coldwater Lakes, Saggart*" asking that the rent for the property be paid to him and for a copy of the most recent lease.

9. By letter dated 2nd September, 2013 O'Shea Legal solicitors replied on behalf of Mr. Philip Kershaw, the defendant, and his family. It was said that Mr. Kershaw was not in fact a tenant but a part owner of the property, having substantially financed the construction of the property with Mr. Meade. Mr. Kershaw was said to have invested in excess of €600,000 in the project and to have retained title to what was asserted to be his asset. It was said that Mr. Meade had agreed to sell his interest in the development to Mr. Kershaw and that O'Shea Legal were seeking further instructions as to the terms of that agreement.

10. Mr. Wallace instructed Byrne Wallace solicitors to correspond with O'Shea Legal. In a letter of 23rd April, 2014 O'Shea Legal, on behalf of Mr. Kershaw, repeated his claim to have spent in excess of €600,000 on the construction of the property and claimed that Mr. Kershaw had an agreement with Mr. Meade for a transfer of title "*in consideration of a sum of money to compensate him for the value of the site".* Enclosed with that letter was a list of payments to contractors amounting in all to €618,788.52, and a valuation report which put a value on the house as of 16th October, 2013 of €475,000. The list of payments did not show when or by whom the payments were allegedly made.

11. By letter dated 11th June, 2014, O'Shea Legal conveyed to Byrne Wallace an offer by the defendant to purchase the property for €255,000. There was no evidence of any response to that offer on behalf of Mr. Wallace and the correspondence petered out.

12. Following the novation of his appointment by Promontoria (Arrow) Limited, Mr. Wallace instructed O'Brien Lynham solicitors, who wrote to O'Shea Legal on 26th April, 2018 demanding that Mr. Kershaw deliver up possession. There appears to have been no answer to that letter and on 6th July, 2018 Mr. Wallace issued a plenary summons claiming an injunction restraining trespass. On the same day, a motion for an interlocutory relief was issued, originally returnable for the 15th October, 2018.

13. On 14th November, 2018 Mr. Kershaw filed the first of three affidavits in response to the claim. He then swore that his father, Mr. Alan Kershaw, had purchased the property from Mr. Meade and Mr. Gerry May. Mr. May was said to have been Mr. Meade's silent partner. Mr. Kershaw swore that the purchase price of the site was €380,000. There were no solicitors involved. Mr. Kershaw deposed that there had been no suggestion that the property was subject to a mortgage until 2013, when he first received correspondence from Mr. Wallace. Mr. Kershaw exhibited a copy of a bank draft for €190,000 made payable to Mr. May. That draft was dated 26th November, 2002 and so predated by some months Mr. Meade's contract to buy the site.

14. Mr. Kershaw, in his first affidavit, said that Mr. Meade's company began to build the house in 2004 and brought it to the point that it was ready for first fix, at which point Mr. Kershaw and his father took over completion of the house. Mr. Kershaw deposed that he had moved into what he described as his family home in 2005.

15. Mr. Kershaw deposed that his father had paid a total sum of €600,000 to Mr. Meade and exhibited statements which showed a debit for €500,000 in respect of a cheque on 30th March, 2006 and a copy of a directors' loan account (which Mr. Kershaw wrongly described as an EBS statement) showing a payment from the unidentified company to Mr. Meade of €100,000 on 15th February, 2006.

These payments of course, post-dated by fourteen and fifteen months the date on which Mr. Meade and his company were said to have brought the house to first fix, and the date on which Mr. Kershaw and his father were said to have taken over the house. The account which showed the debit for €500,000 was an EBS account in the name of "*Mr. Alan Kershaw and Manvik Plant GC*".

16. Mr. Kershaw deposed that he had agreed with his father that he would take out a mortgage of €1.25 million, €790,000 of which was to have been used to repay Mr. Alan Kershaw the money he had spent, and the balance of which was to have been used to complete the property. Mr. Kershaw exhibited an IIB Homeloans letter of 31st January, 2006. That, of course, post-dated by at least six months the date upon which Mr. Kershaw said that he had completed the construction of the property and moved in. Moreover, the €460,000 which would have been left after payment of €790,000 to Mr. Alan Kershaw was well short of the €618,788.52 which Mr. Kershaw had previously said that he had spent finishing the house.

17. Mr. Kershaw also exhibited a copy of an e-mail of 18th May, 2006 from IIB Homeloans to O'Shea Legal which was said to support his evidence that the mortgage cheque had been issued by IIB Homeloans but the transaction had not been completed. Mr. Kershaw did not then say why the purchase had not been completed but deposed that he was at all material times ready, willing and able to complete. The e-mail of 18th May, 2006 identified the borrowers as "*Philip Kershaw & Alan Kershaw*".

18. Mr. Kershaw deposed that he had been living in the house since 2005; that his now wife, Ms. Michelle Corcoran Kershaw, had moved in in 2007; and that they have a son, Kaleb, who was born in 2012.

19. In his first affidavit, Mr. Kershaw protested that he had never seen what he referred to as the "*alleged mortgage*" of 17th July, 2013. He suggested that Anglo knew full well that his father had paid for the house to be built and would have known that he, Mr. Kershaw, was living there, that it was owned by him, and that it had been purchased from Mr. Meade and Mr. May. Being as charitable as I can, this makes no sense. On Mr. Kershaw's own account, at the time of the mortgage the property was a vacant site. Anglo could not have well known of any agreement or purchase, other than the purchase by Mr. Meade of the site from HSS Limited, which Anglo had funded.

20. Mr. Kershaw went on to make a number of criticisms of the Anglo facility letters and the like but these all later evaporated and it is unnecessary to dwell on them. By the time this motion came on for hearing, Mr. Kershaw accepted, as he had to, that the paper title to the property was as had been described by Mr. Wallace.

21. Mr. Kershaw also asserted that at the time Mr. Meade's loans were refinanced in 2009 the Anglo bank manager, who wrote the facility letters (and who was also Mr. Alan Kershaw's bank manager) was aware that he, Mr. Kershaw, was living in the house.

22. In support of his claim to have been living in the house since, variously, the middle of 2005 and January, 2006, Mr. Kershaw exhibited a bundle of overdue utility bills and the like, addressed to him at the property.

23. In a second affidavit sworn on 7th December, 2018 Mr. Wallace highlighted a number of inconsistencies between Mr. Kershaw's affidavit and the position he had previously taken in correspondence. Not least, Mr. Wallace pointed out that the expenditure which Mr. Kershaw was relying on was not established to have been incurred in relation to the property. Moreover, he said, it appeared from Mr. Kershaw's affidavit that the expenditure, whatever it was for, was money paid out by Mr. Alan Kershaw or his company, Manvik, and not, as had previously been asserted, by Mr. Kershaw himself.

24. On 23rd January, 2019 Mr. Kershaw swore a second replying affidavit in which his position shifted again. Mr. Kershaw now accepted that the €500,000 payment on 30th March, 2006 was not in respect of the property. Rather, he said, that payment was a loan by Mr. Kershaw's father's company to Mr. Meade. Mr. Kershaw said that Mr. Meade had been paid approximately €400,000 for the build of the house by his, Mr. Kershaw's, father's company. In support of this, or in the hope that it would support it, Mr. Kershaw exhibited copies of bank drafts for €200,000 and €50,000 drawn in favour of Mr. Meade. The copies are very poor but they both appear to be dated 2006. This money, together with the €100,000 previously referred to and "*the said €380,000 for the site itself*" was said to bring the total paid to Mr. Meade, and Mr. May, to €730,000. But of course it did not. Mr. Kershaw's evidence was that €190,000 had been paid to Mr. May but that Mr. Meade, whatever else he had been paid for, had not been paid for the site.

25. The essential facts of the matter, said Mr. Kershaw in his second affidavit, were that his father had bought the property and paid for the building of the house "*through him and his company".* Variously, the property was said to have been intended to be Mr. Kershaw's when he raised a mortgage and repaid his father, and (although he had not raised a mortgage or repaid his father) that he was entitled to full ownership, and that he was ready, willing and able to complete the transaction. Variously, Mr. Kershaw and his father, Mr. Kershaw' father, and Mr. Kershaw's father's company, were said to have paid for the purchase of the site, the construction work, and the finishing work. Variously, Mr. Kershaw said that the proposed purchase in 2006 which was not completed could not be completed by reason of title issues, and that he did not know why the purchase could not be completed. Variously, Mr. Kershaw asserted he was entitled to the property, that he was ready, willing and able to complete, that the plaintiff was estopped by acquiescence, and that he had an equity in the property by virtue of his expenditure on an unspecified date or dates of unquantified considerable monies on it.

26. On 23rd January, 2019 Mr. Alan Kershaw swore an affidavit on behalf of his son, Mr. Kershaw. Mr. Alan Kershaw averred that his company, Ashleypark International Limited trading as Manvik Plant (in liquidation), purchased the property from John Meade and Gerry May. The purchase price, he said, was €380,000. There was never a suggestion that it was subject to a mortgage. There were no solicitors involved. Mr. Alan Kershaw averred that Mr. Meade's company, which was called May and Meade Construction, built the house to wall plate level and that he and his son took it over in July, 2004. Mr. Alan Kershaw said that he and his son received invoices from and paid the subcontractors, and set out a list of payments said to have been made on unspecified dates to Mr. Meade, Mr. May, and to various subcontractors. There was some overlap between Mr. Alan Kershaw's list of payments and Mr. Kershaw's list. Notwithstanding the earlier narrative in his affidavit, all of the payments identified by Mr. Alan Kershaw were shown to have been made by Manvik Limited, and not by either of the Messrs. Kershaw. The agreement for the purchase of the site, according to Mr. Alan Kershaw, was that Mr. May and Mr. Meade would each be paid €190,000. Mr. May was paid his €190,000 and Mr. Meade was to have been paid later.

27. In a third affidavit filed on 12th February, 2019 Mr. Wallace made a number of criticisms of the second affidavit of Mr. Kershaw, and of the affidavit of Mr. Alan Kershaw. There was, he said (and he was correct) still nothing to link the payments said to have been made to the property. Mr. Wallace also pointed to a number of significant inconsistencies in the affidavits, upon which it is unnecessary to dwell.

28. A number of affidavits by contractors and workmen were filed on behalf of the defendant in support, or at least in the hope that they support, Mr. Kershaw's position. Again it is not necessary to dwell on the details.

29. After the protracted exchange of affidavits which I have described, the plaintiff's application for interlocutory orders was listed for hearing on 16th May, 2019. On Friday 10th May, 2019 (after the case had been called on for hearing on the previous day) Mr. Kershaw swore a third affidavit.

30. In his third affidavit, Mr. Kershaw exhibited a further bundle of copy documents which were said to evidence ownership of the property but which did no such thing. They did go to show that the defendant was in occupation of the property from 2005. Included in this bundle of correspondence was a copy letter of 10th July, 2006 from IIB Homeloans to Mr. Kershaw and his father notifying them of a change in the interest rate applicable to a mortgage loan and enclosing a list of fixed rate options. This notification of a rate change is difficult to reconcile with the earlier evidence that the loan cheque was never presented and that the attempt to raise the IIB Homeloans mortgage failed in the Spring of that year. The letter of 10th July, 2006 carries the same account number as was shown on the IIB Homeloans letter of 31st January, 2006 and the email of 18th May, 2006, previously referred to. Also included in this bundle was a copy of the insurance policy schedule for the property which appears to have been printed in October, 2005 and which notes the interest of IIB Homeloans on the policy.

31. The principal purpose of the third replying affidavit of Philip Kershaw was to change tack, yet again, and to advance, for the first time, an entirely new case. Having reprised his assertion that the house was to have been owned by him and that this was to have been facilitated by his father, by his own efforts and through his (Mr. Alan Kershaw's) company, Mr. Kershaw deposed that when he took over construction in July, 2004, he treated the property as his own, and he says that he believed that he was full owner of the house. While Mr. Kershaw certainly appears to have treated the property as his own, his asserted belief that he was the full owner is utterly inconsistent with all of what he had previously said.

32. Mr. Kershaw then went on to depose that he had never at any stage acknowledged *"any superior title or claim"* and that his *"occupation has at all times been adverse to the legal title owners well in excess of the limitation period."*

The argument

33. Mr. Paul Fogarty, for the plaintiff, acknowledges, as he must, that there has been a very long delay between the time when the plaintiff was appointed, and indeed from the date of the deed of novation, and the application now before the court. That delay, he says, might very well be a very significant factor in the consideration of the court as to whether the interlocutory relief now sought should be granted, if the defendant could articulate any sensible, arguable defence: but it is submitted that there is no issue to be tried as to the defendant's entitlement to occupy the house. Reference is made to *Nolan Transport (Oaklands) Limited v. Halligan* (Unreported, High Court, Keane J., 23rd March, 1994).

34. In the first place, it is submitted, the defendant's possession of the house cannot, as a matter of law, have been adverse to the mortgagee, or the receiver. Reference is made to ss. 32(2)(a) and 33 of the Statute of Limitations, 1957 and to the decision of the Court of Appeal in England in *Ludbrook v. Ludbrook* [1901] 2 K.B. 96.

35. In any event, it is submitted, the belated plea of adverse possession is bad in law because, on his own case (or any of his cases) the defendant came to be in possession by reference to an agreement with the legal owner and so, by permission.

36. Mr. Patrick Butler S.C., for the defendant, makes much of the very long delay between the appointment of the plaintiff in 2013 and the institution of these proceedings in 2018. The matter, he urges, is not urgent and not appropriate for an interlocutory application.

37. Mr. Butler acknowledges that the factual matrix propounded by the defendant is improbable but argues that it is clear that he has been in possession since 2005 or 2006 and that *"facts may emerge at the trial of the action that may change the picture*". He does not contest Mr. Fogarty's submission as to the applicable principles of law.

38. Mr. Kershaw, it is submitted, wants to make his case. Mr. Butler urges that the risk of injustice will be minimised if the plaintiff's interlocutory application is refused.

39. This, says, Mr. Butler is a case which is clearly within the jurisdiction of the Circuit Court. It is not suggested that the High Court does not have jurisdiction to deal with it, but it is argued that the fact that it could have been dealt with in the Circuit Court is something that can be taken into account in deciding whether to make the order sought.

40. Finally, it is submitted that the order sought should not be made because Ms. Corcoran Kershaw has not been joined. It is submitted that whatever about the position of Mr. Kershaw, Ms. Kershaw had no involvement in the dealings in 2003 to 2006, so that even if Mr. Kershaw's possession was not adverse, Ms. Kershaw's possession after 2007 was.

The law

41. The principles to be applied on an application for an interlocutory injunction restraining trespass were set out a judgment of Keane J. (as he then was) in *Keating & Co. Limited v. Jervis Shopping Centre Ltd.* [1997] 1 I.R. 512. Keane J. said, at p. 518 of the report:-

> *"It is clear that a landowner, whose title is not in issue, is prima facie entitled to an injunction to restrain a trespass and that this is also the case where the claim is for an interlocutory injunction only. However, that principle is subject to the following qualification explained by Balcombe L.J. in the English Court of Appeal in Patel v. W.H. Smith (Eziot) Limited and Another [1987] 1 W.L.R. 853 at p. 859: -*
>
> > *'However, the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass. Then the court must consider the application of the principles set out in American Cyanamid Co v. Ethicon Ltd. [1975] 1 A.C. 396 in relation to the grant or refusal of an interlocutory injunction.'"*

42. The decision of Keane J. in *Keating & Co. Limited v. Jervis Shopping Centre Ltd*. was followed by Costello J. in *Tyrell v. Wright* [2017] IEHC 92 and *Havbell DAC v. Dias* [2018] IEHC 175.

43. The plaintiff, as I have said, relies on ss. 32(2)(a) and 33 of the Statute of Limitations, 1957. Section 32(2)(a) provides:-

> *"(2) The following provisions shall apply to an action by a person (other than a State authority) claiming the sale of land which is subject to a mortgage or charge:-*

(a) subject to paragraph (b) of this subsection, no such action shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it, or, if it first accrued to some person through whom he claims, to that person;"

44. Section 33 of the Act of 1957 provides:

"33. At the expiration of the period fixed by this Act for a mortgagee to bring an action claiming sale of the mortgaged land, the title of the mortgagee to the land shall be extinguished."

45. *Ludbrook v. Ludbrook* [1901] 2 K.B. 96 was a unanimous decision of the Court of Appeal in England as to the operation of the provision of the Real Property Limitation Act, 1837, equivalent to s. 32 of the Act of 1957, which has stood the test of time. The facts were rather complicated but the finding of law, as set out in the headnote, was that:-

"The Real Property Limitation Act, 1837 which provides that a person entitled or claiming under a mortgage of land may make an entry or bring an action at law or suit in equity to recover such land at any time within [twelve] years after the last payment of any part of the principal or interest secured by the mortgage applies, not only as against the mortgagor and persons claiming under him, but also as against a person who has acquired a good title by virtue of the Statute of Limitations as against the mortgagor and those claiming under him."

46. At p. 100 of the report, Romer L.J., for the court, said:-

"Lastly, it was said on behalf of the plaintiff that the statute 7 Will. 4 and 1 Vict. c.28, only applies to proceedings between mortgagor and mortgagee. But the statute is not in terms limited to such proceedings: and it has been said in several cases not to be so limited. If the mortgage be an existing one and was executed before the commencement of the possession of the person claiming to have acquired a title by such possession under the Statute of Limitations, then the statute 7 Will. 4 and 1 Vict. c. 28, undoubtedly applies in favour of the mortgagee, although the person in possession may have acquired a good title as against the mortgagor and those claiming under the mortgagor: see Thornton v. France [1897] 2 Q.B. 143, a decision of the Court of Appeal, where the earlier authorities are considered. In the present case the mortgages were executed before the commencement of the possession of the widow, and are valid and subsisting mortgages, and there are no circumstances existing which prevented the defendant from claiming the benefit of the statute as against the plaintiff."

47. In his decision in *Dunne v. Iarnród Éireann* [2016] 3 I.R. 167, at p. 186, Charleton J. recalled the explanation of the nature of adverse possession given by Kenny J. in *Murphy v. Murphy* [1980] I.R. 183, at 202:

"In s. 18 of the Act of 1957, adverse possession means possession of land which is inconsistent with the title of the true owner: this inconsistency necessarily involves an intention to exclude the true owner, and all other persons, from enjoyment of the estate or interest which is being acquired. Adverse possession requires that there should be a person in possession in whose favour time can run. Thus, it cannot run in favour of a licensee or a person in possession as servant or caretaker or a beneficiary under a trust: Hughes v Griffin [and Another [1969] 1 W.L.R. 23]".

48. In *Dunne v. Iarnród Éireann* at p. 188 of the report, Charleton J., citing *Ulster Bank Limited v Rockrohan Estate Limited [2015] IESC 17, (Unreported, Supreme Court, 26th February, 2015)* noted that lands that are overheld but where there is a mortgage of the land to another party are a particular circumstance.

Discussion

49. This is not a case in which the plaintiff argues that there is a *bona fide* issue to be tried as to his entitlement to an order, or even that he has made out a strong case. If it were so, I would have little difficulty in concluding that the balance of convenience was against the making of an order and that the plaintiff has not moved expeditiously to protect his rights.

50. As the recent authorities, not least the decision of the Supreme Court in *Charleton v. Scriven* [2019] IESC 28 (Unreported, Supreme Court, 8th May, 2019) show, the overall approach of the court must be to act to minimise the risk of injustice. The risk of injustice may be higher in a case where the plaintiff has not moved quickly. See *Nolan Transport (Oaklands) Limited v. Halligan* (Unreported, High Court, Keane J., 23rd March, 1994).

51. The risk of injustice lies in the recognition that it may transpire after the trial of the action that the interlocutory order ought not to have been made, or, as it is sometimes put, the risk that the court might have made the "*wrong*" order.

52. Not least in view of the delay in the commencement of these proceedings, the plaintiff accepts that the bar is high. But if, whether in law or in fact, or both, the defendant has no answer to the claim, there can be no risk of injustice in making the order sought. The plaintiff submits that there is no answer, whether in law or in fact.

53. In *Ludbrook v. Ludbrook* the mortgage had not gone unpaid for twelve years, so that the plaintiff's period of possession (on the premise that it was adverse) was not sufficiently long to extinguish the title of the mortgagee. In this case it is not clear when the last payment was made on the mortgage but Mr. Meade's loans were refinanced and acknowledged in 2009, within twelve years of the date of commencement of this action. On that authority, then, any possession adverse to the interest of Mr. Meade cannot, in law, have been adverse to the mortgagor.

54. If, as Mr. Butler concedes, the facts alleged by the defendant are improbable, it is no function of the court on an application such as this to attempt to anticipate the outcome of any contested issue of fact that needs to be determined. Rather, I must proceed on the assumption that the defendant will prove the facts (or one or more of the slightly different versions of the facts) as he has asserted them to be, or to have been.

55. On the hearing of this application, the defendant, unsurprisingly, retreated from, and abandoned, the positions that he had financed the construction of the property in partnership with Mr. Meade, or that he had financed the construction at all, or that he had an agreement with Mr. Meade, or that he had an equity in the property, and nailed his colours to the mast of adverse possession.

56. I am quite satisfied that the defendant has a case to make, which appears to me to be a strong case, that he has been in occupation of this house for upwards of twelve years prior to the commencement of these proceedings. But that possession was not in law adverse to the mortgagee, through whom the plaintiff claims.

57. Neither, in my view, has the defendant established that there is a *bona fide* issue to be tried as to whether his occupation of the property was adverse to the interest of Mr. Meade. Whether as Mr. Meade's partner, or as a putative sub-purchaser from Mr. Meade, or as an expectant purchaser or donee from his father (or his father's company), the defendant was in occupation of the property by the agreement or licence of Mr. Meade.

58. I cannot accept Mr. Butler's argument that the fact that the Circuit Court would have had jurisdiction to deal with this action is something which I can, or ought to, take into account in deciding whether to make the order sought. It is, however, a matter which may go to costs.

59. The evidence is that Ms. Corcoran Kershaw moved into the house in 2007. She has not been joined as a defendant but neither has she ever asserted any interest in the property. Mr. Butler suggested that she might make a claim to adverse possession, but she has not. It seems to me that in principle Ms. Corcoran Kershaw's position cannot be any different to that of Mr. Kershaw. Ms. Corcoran Kershaw has been in occupation of the property with the permission of Mr. Kershaw. If, technically, she has been in possession, that possession must have been a joint possession with Mr. Kershaw and cannot conceptually have been of any different character to the possession of her husband. In any event, Ms. Corcoran Kershaw's possession cannot, in law, have been adverse to the title of the mortgagee.

Conclusion

60. The property the subject of these proceedings is the subject of a mortgage in favour of Promontonia (Arrow) Limited. That mortgage is in arrears. The mortgagee, and the plaintiff on its behalf, is entitled to possession to realise the security. There is no issue to go to trial and the plaintiff is entitled to the order which he seeks, as of right.