Neutral Citation: [2013] IEHC 491

THE HIGH COURT

[2013 No. 10002 P]

BETWEEN

GYORGI SZABO

PLAINTIFF

AND

TOM KAVANAGH

DEFENDANT

JUDGMENT of Mr. Justice Keane delivered on the 31st day of October 2013

1. The plaintiff in this case seeks interlocutory injunctions against the defendant requiring him to deliver up possession of an apartment at the Bridge, Shankill, County Dublin, and restraining him from trespassing on the plaintiffs tenancy of that apartment, pending the determination of plenary proceedings in which the plaintiff seeks a number of reliefs against the defendant, including final injunctions to the same effect, as well as damages for trespass and for breach of the plaintiff's constitutional rights, to include aggravated, exemplary and/or punitive damages.

2. In the terse affidavit filed in support of her application, the plaintiff avers that she resided in the said apartment pursuant to a written lease dated the 24th September 2008, between herself, as tenant, and one Troy Cremin, as landlord. A copy of the said lease is exhibited to the plaintiff's affidavit, and it recites, amongst other things, that the tenancy is to be for a term of 10 years; that there is to be a deposit of €1,200; and that the rent payable is to be €600 per calendar month.

3. The plaintiff goes on to aver that she has paid, and continues to pay, her rent on time - presumably, to Mr. Cremin - and that the said apartment is her dwelling. The plaintiff's affidavit also contains the laconic averment that Mr. Cremin occupied the apartment with her, although this arrangement is nowhere reflected in the terms of the lease exhibited.

4. In one of the two affidavits filed in opposition to the plaintiffs application for interlocutory relief, the defendant avers that he is a chartered accountant and insolvency practitioner of the firm Kavanagh Fennell, duly appointed on the 22nd July 2013 as receiver over the said apartment, in respect of a deed of mortgage and charge between a lender named Dunbar Assets Ireland (formerly known as Zurich Bank) and the owners of that property, who are identified as two persons named Jackie Whelan and Anthony Gannon.

5. It is common case that, at some time after the plaintiff went out from the said apartment on the 14th September 2013, the defendant caused the apartment door to be removed and the locks to be changed so that, when the plaintiff returned to the apartment in the early hours of the 15th September 2013, she was not permitted to re-enter it and was, instead, provided by the defendant with two nights accommodation in a nearby hotel.

6. The plaintiff contends that she is a stranger to the details of the charge on the property in respect of which the receiver was appointed and, it emerged in the course of submissions made on her behalf in support of her application for interlocutory relief, having now been furnished with a copy of the relevant mortgage deed as an exhibit to the defendant's affidavit, wishes to challenge its validity by reference to the apparent absence upon its face of the common seal of Zurich Bank as mortgagee.

The history of the proceedings

7. On the 19th September 2013, the plaintiff applied for the injunctions now sought on an interim *ex parte* basis, which application was grounded on the affidavit of the plaintiff, sworn on an unspecified date though filed on the day of that application. The Court refused to grant orders *ex parte* on that date and instead gave liberty to the plaintiff to bring a motion returnable one week later so that the defendant might be represented and heard in answer to the plaintiffs claims.

8. The plaintiff issued her notice of motion that same day, grounded on the same short affidavit. By the time the motion was returned before the Court on the 26th September 2013, the defendant had filed two affidavits in reply: that of the defendant sworn on the 25th September 2013; and an affidavit of Kevin McGarry, sworn on the same date. The plaintiff did not avail of the opportunity to supplement her original grounding affidavit prior to the interlocutory hearing, nor did she seek an opportunity to reply to either of the affidavits filed on behalf of the defendant. In consequence, much of the evidence adduced on behalf of the defendant stands unchallenged for the purpose of the present application.

The evidence

9. The plaintiff avers that she first discovered that the defendant had taken possession of the apartment at issue when she returned from work in the early hours of Sunday, the 15th September 2013, although she does not provide any details whatsoever of her employment, income or means - an omission to which the Court will return below.

10. The plaintiff alleges that the defendant well knew that she was residing in the property when he took possession of it. The defendant acknowledges that a firm of private investigators retained by him had been watching the premises and accepts that the plaintiff was observed entering and leaving the apartment. However, the defendant contends that, in the circumstances more fully set out below, the identification of any person claiming lawful occupancy of the apartment (as opposed to the identification of persons entering and leaving it) had been made difficult, if not impossible.

11. The plaintiff avers that, having been excluded from the apartment, she contacted the gardaí, who informed her that any dispute concerning the lawful occupation of the apartment was a civil matter. In the next sentence of the same paragraph of her affidavit, the plaintiff further avers that:

> "...on the 17th of September 2013 I noticed that a window to my apartment was open and I re-entered my apartment. I say that it appears that the gardaí were called who arrested me, detained me in the garda station and then released me."

12. The plaintiff provides no further evidence concerning the manner in which she re-entered the apartment or the circumstances of her arrest by a member or members of An Garda Síochána. The plaintiff's affidavit is thus set up to imply that she has been unjustifiably subjected to inequitable treatment by An Garda Síochána *vis á vis* the defendant, presumably in order to support the contention that the intervention of the Court on the plaintiff's behalf on an interim *ex parte* basis is clearly warranted in this case.

13. However, the unchallenged evidence adduced on affidavit by the defendant tells a very different story. While the defendant himself avers that the plaintiff did indeed re-enter the apartment (although on the 16th rather than the 17th, September 2013), the uncontradicted averment of Mr. Kevin McGarry, a director of Ktech Security Limited, is that the said re-entry was effected by scaling the exterior of the building, climbing over the third-story balcony rail of the apartment and smashing a balcony window. Mr. McGarry's uncontradicted evidence is that, when he subsequently sought to enter the apartment through the front door, accompanied by members of An Garda Síochána, he discovered that an attempt had been made to barricade that door from the inside with large cabinets. On pushing those cabinets aside, the plaintiff was found inside the apartment holding a "machete-knife." The plaintiff was directed by a member of An Garda Síochána to put down the "machete-knife" and was only arrested when she failed or refused to do so.

14. When questioned concerning the omission of these facts from the plaintiffs affidavit grounding her application for both interim *ex parte* and interlocutory relief, Counsel for the plaintiff submitted that whether the plaintiff broke a window to re-enter the apartment is neither here nor there and that nothing turns on her possession of a "machete-knife" or, indeed, her refusal to relinquish it when called upon to do so by a member of An Garda Síochána.

15. The second of the two exhibits to the plaintiff's short affidavit is a copy of a letter dated the 14th September 2013, written by the defendant and addressed to one Michael Cremin at the apartment at issue. In exhibiting that letter, the plaintiff avers that Michael Cremin occupied the premises with her but does not explain the nature or duration of that arrangement nor how she came into possession of Mr. Cremin's post. In the said letter, the defendant informs Mr. Cremin of his appointment as receiver and asserts that no lease is in place with him or, indeed, with any other person conferring a right of residence in the property. The defendant goes on to assert in that letter that no rent has been paid in respect of the apartment since July 2008 and that, in consequence, insofar as Mr. Cremin had purported to recently occupy the property in the absence of any lease or payment of rent, he can only have done so as a trespasser. Peculiarly, the plaintiff asserts that this letter describes her as a trespasser, although it is plain on its face that it is not addressed to her and does not refer to her at all.

16. The plaintiff avers that she is currently homeless. It emerged at the interlocutory hearing that she is residing with friends. The plaintiff discloses nothing about her financial means or, in consequence, her ability to acquire alternative permanent accommodation. In the course of the interlocutory hearing it became clear that the evidence goes no further than that the plaintiff is currently deprived of the use of the specific apartment at issue as her home or dwelling. The plaintiff has not established that she lacks the ability or the means to obtain permanent accommodation elsewhere.

17. The plaintiff avers that she is destitute but, once again, it emerged at the hearing of the present motion that this averment was intended only to refer to the difficulties the plaintiff claims to face in consequence, as the plaintiff puts it, of being "locked out of my apartment with all of my worldly possessions inside."

18. On that point, the defendant has since exhibited copies both of e-mails exchanged directly between the parties and of correspondence exchanged between their solicitors. On the 19th September 2013, at 11 minutes to midnight, the plaintiff e-mailed the defendant to explain that important possessions belonging to her remained in the apartment, including her Hungarian passport and identification, her driving licence, her bank cards, her car keys and her clothes etc. The following day, the defendant replied to the plaintiffs e-mail through one of his colleagues, advising her that arrangements could be made to gather all of her belongings for collection at a time convenient for her, if she would provide a list of those items, but emphasising that she would not be permitted to enter the apartment in any circumstances.

19. Shortly afterwards, the plaintiff e-mailed the defendant again, stating, in substance, that she did not want anyone else to touch her private possessions (because of the possibility of theft) and that she could not compile a list of her possessions (because of the difficulty involved in remembering all of them). The plaintiff added that she was seeking the assistance of a Hungarian consular official.

20. In the meantime, the plaintiff's solicitors had written to the defendant's solicitors on the 19th September 2013, enclosing a copy of the plenary summons in this case, together with a copy of the motion papers in the present application. In that letter, the plaintiff's solicitors wrote that the plaintiff requires access to various small personal effects from her apartment as a matter of urgency, instancing her passport, i.d. and credit cards. The letter requests the defendant to arrange to permit the plaintiff to attend at the apartment to remove those items as soon as possible. The defendant's solicitors replied by letter dated the following day, with which they enclosed a copy of their exchange of e-mails with the plaintiff and in which they apprised the plaintiffs solicitors of the incident involving the machete-knife. That letter asserts that the defendant is "more than willing" to return the plaintiffs belongings to her but is not willing to permit her to re-enter the apartment. The letter proposes that, if the plaintiff wishes a representative of the Hungarian Embassy to attend at the apartment to collect the plaintiff's possessions, the defendant is happy to facilitate that.

21. On the basis of that unchallenged evidence, the Court cannot, and does not, accept that the plaintiff is rendered destitute by being deprived of her personal possessions by the defendant.

22. In his affidavit sworn on the 25th September 2013, the defendant avers .that the apartment complex in which the apartment at issue is located was developed a little over ten years ago by a company named Rittlestone Limited ("Rittlestone"), the beneficial owners of which were Jackie Whelan and Anthony Gannon. Messrs Whelan and Gannon subsequently acquired a number of apartments in the complex in their own right, including the apartment at issue, with funding provided by Dunbar Assets Ireland ("Dunbar"), which was formerly known as Zurich Bank. The title to the apartment comprises a 645-year lease, commencing on the 1st January 2005, although dated the 30th May 2008.

23. The defendant avers that Dunbar appointed a receiver to the apartment on the 8th December 2011, pursuant to the terms of the relevant mortgage deed, after the loans it had made to Messrs Whelan and Gannon fell into arrears. That receiver was discharged on the 22nd July 2013 and the defendant was appointed receiver in his place over, *inter alia*, the apartment at issue.

24. In support of the foregoing averments, the defendant has exhibited the Certificate of Incorporation of Rittlestone; a company report on Rittlestone; a copy of the lease of the apartment between Rittlestone and Messrs Whelan and Gannon; the mortgage between Messrs Whelan and Gannon, as mortgagors, and Dunbar, formerly Zurich Bank, as mortgagee; the deed of appointment of the former receiver; the deed of discharge of that receiver; and the deed of appointment of the defendant as receiver over the

apartment at issue.

25. The defendant avers to his belief that, in or around the month of June 2007, an agent on behalf of Messrs Whelan and Gannon entered into a lease agreement in respect of the apartment for a term of one year to commence on the 29th June 2007, whereby the tenant appears as "M. Cremin", followed by the words "Transworld Consortium Ltd". The single page document, which stipulates a rent of €1,300 "per Calendar Month Without deduction", is signed by one "M. T. Cremin for and on behalf of Transworld Consortium Limited".

26. The defendant avers that, while rent was paid in respect of that agreement until July 2008, no further payments were made at all. In October 2010, solicitors for the estate of Mr. Whelan (who died on the 21st November 2008) and Mr. Gannon wrote to Michael Cremin, providing notice of termination of the lease, on the ground that arrears of rent of €32,500, representing 25 months rent of €1,300 per month, had been sought in August 2010 but no payment had been received. The said notice, which was given under s. 4 of the Residential Tenancies Act 2004, expired on the 1st November 2010.

27. A High Court Summary Summons issued on the 5th April 2011 on behalf of Messrs Whelan and Gannon, naming "Michael (orse. Troy) Cremin" as one of the defendants, and seeking possession of the apartment, together with arrears of rent. Those proceedings bear the record number 1414S of 2011. In the course of those proceedings, Michael Cremin swore an affidavit on the 6th July 2011, in which he averred "I signed the lease agreement not in a personal capacity but "for and on behalf' of my company, Transworld Consorti Limited." Mr. Cremin went on to aver, in substance, that the said lease was terminated by the landlords' agent in or about September/October 2007, after which he dealt exclusively with Mr. Whelan, who- as already noted above - is since deceased. Mr. Cremin avers that between June and September.2008, he agreed to purchase the apartment from Mr. Whelan for €335,000 "on behalf of my company, Transworld Consortium Limited" on the basis that a down payment totalling €75,000 was to be made by September 2008, which Mr. Cremin claims was duly done. Mr. Cremin concluded his affidavit in those proceedings by asserting a *bona fide* defence to the plaintiffs' claim for arrears of rent by reference to the alleged termination of the relevant lease in or about September/October 2007 and his claim to recover the €75,000 that he purports to have paid to Mr. Whelan as a down-payment on the purchase of the apartment. It is, perhaps, noteworthy that Mr. Cremin makes no claim to any interest or title in the property beyond the assertion of a lien in respect of the sum of €75,000 that he claims to have paid on behalf of Transworld Consortium Limited to Mr. Whelan. By reference to Mr. Cremin's evidence in those proceedings, it is difficult to see how the lien contended for (if found to exist) could be exercisable by any person or entity other than Transworld Consortium Limited. It should also be noted- although the Court cannot and does not express any view on this point- that Mr. Cremin's assertions in relation to an alleged agreement to purchase the property and the payment of a deposit in that regard were roundly and trenchantly denied by the executor of Mr. Whelan's estate and by Mr. Gannon in an affidavit sworn in those proceedings by the former on behalf of both of those plaintiffs, which denial extends to an allegation that those assertions "are wholly fabricated."

28. Returning to the present proceedings, the defendant exhibits a letter dated the 8th October 2012 from the Dublin-based firm of solicitors now representing the plaintiff. It is addressed to the management company of the apartment complex in which the apartment at issue is situated. It is written on behalf of Michael Cremin, as the purported owner of the apartment at issue, and questions the validity of an Extraordinary General Meeting of that company that was evidently proposed at that time.

29. The defendant also exhibits a letter dated the 22nd November 2012 from a Cork-based firm of solicitors to a property management company. That letter is written on behalf of the plaintiff and asks the management company to retain any cctv footage in its possession concerning an attempt by a number of men to unlawfully gain entry to the apartment at issue on that date. The defendant further exhibits a letter in reply, dated the 10th December 2010, from the former receiver's solicitors (now the defendant's solicitors), the relevant correspondence having been passed to them by the property management company concerned. In that letter, the former receiver asserts his appointment as such by a deed of appointment dated the 8th December 2011 and points out that there is no lease in place between the receiver or his predecessor in title and the plaintiff or any other person and that no rent is being paid in return for the occupation of the property by the plaintiff or any other person. The former receiver confirms that, through his agents, he had attempted to effect what he asserts was a lawful re-entry to the apartment but that his agents, having been surprised by the presence of a person claiming to be in occupation of the premises, had immediately withdrawn.

30. The said letter goes on to inform the plaintiff through her then solicitors of the former receiver's position that any claim she might have to lawfully occupy the property is entirely wrong in fact and law. The plaintiffs then solicitors were requested to inform their client of her position as trespasser and to advise her that her best course was to immediately deliver up possession of the apartment to the receiver. The letter concludes by confirming that the receiver would co-operate with the plaintiff in arranging for her to vacate the apartment in an orderly and peaceable manner.

31. The defendant avers that no response was ever received to that correspondence and his evidence in that regard stands unchallenged for the purpose of the present application. It is striking that the plaintiff did not disclose to the Court the exchange of correspondence just described in making her application for interim *ex parte* relief.

32. The same Cork based firm of solicitors (who had acted for the plaintiff in 2012 as just described) wrote again on the 16th September 2013 but now acting on behalf of Mr. Troy Cremin. The said letter is exhibited to the defendant's affidavit. In that letter, those solicitors claim that Mr. Cremin is entitled to assert an equitable lien over the apartment in respect of the €75,000 that he claims to have given to Mr. Whelan (since deceased) in 2008 as a down-payment on the purchase of the apartment or that he is entitled to obtain "like value by use and occupation of the premises". This, then, seems to represent Mr. Cremin's claim of right to the use and occupation of the apartment from which any claim by the plaintiff to lawful occupation of the apartment (as Mr. Cremin's tenant) must by necessary implication derive.

33. A particularly striking feature of the present application is the plaintiff's failure to disclose the nature and extent of her involvement or interaction with Mr. Cremin. Mr. Cremin is the central actor in all of the alleged events that give rise to the plaintiffs claim to a right of occupation in the apartment as Mr. Cremin's tenant. The plaintiff avers only that Mr. Cremin has been her landlord in respect of the apartment at issue since the 24th September 2008 and that he "occupied" the apartment with her. The plaintiff's solicitors for the purpose of these proceedings (and of the present application) engaged in correspondence concerning the apartment at issue on Mr. Cremin's behalf in 2012, and the Cork based solicitors who had previously engaged in correspondence concerning the apartment on the plaintiffs behalf in November 2012, have, as recently as the 16th September 2013, been engaged in correspondence with the defendant on behalf of Mr. Cremin.

34. It is surprising that the plaintiff does not seek a remedy against Mr. Cremin, who she asserts is her landlord, in light of the landlord's statutory obligation under section 12(1)(a) of the Residential Tenancies Act 2003 to allow her, as tenant of the apartment at issue, to enjoy peaceful and exclusive occupation of it, or in light of the landlord's covenant, implied by s. 41 of Deasy's Act, *viz* that "the tenant shall have quiet and peaceable enjoyment of the said lands or tenements without the interruption of the landlord or

any other person whomsoever during the term contracted for, so long as the tenant shall pay the rent and perform the agreements contained in the lease to be observed on the part of the tenant."

35. Of course, the foregoing observation is only relevant to the Court's consideration of whether the plaintiff has complied with her obligation of candour in seeking interim *ex parte* relief, since it is plainly the plaintiffs perfect entitlement to pursue whatever remedy (or remedies) she chooses against whichever defendant (or defendants) she selects, and it is otherwise no concern of the Court that there may be another equally, if not more, obvious defendant against whom the plaintiff might bring an action.

The applicable law

36. In *Bambrick v. Cobley* [2006] 1 I.L.R.M. 81, the law on the obligation of candour when seeking interim *ex parte* relief was carefully considered in the High Court. At page 86 of the report, Clarke J. noted that, in *Tate Access Floors Inc. v. Boswell* [1991] Ch. 512, Sir Nicholas Brown-Wilkinson identified full and frank disclosure as being "the golden rule" when he said:

> "No rule is better established, and few more important, than the rule (the golden rule) that a plaintiff applying for *ex parte* relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the plaintiff, the court will discharge the *ex parte* order and may, to mark its displeasure, refuse the plaintiff further *inter partes* relief even though the circumstances would otherwise justify the grant of such relief."

37. On the question of what matters are relevant to the exercise of the court's discretion, Clarke J. took into consideration the fact that, as Lord O'Hagan L.C. put it in *Atkin v. Moran* (1871) I.R. 6 Eq. 79 (at 81):

> "The party applying is not to make himself the judge of whether a particular fact is material or not. If it is such as might in any way affect the mind of the court it is his duty to bring it forward".

38. Clarke J. concluded that the test by reference to which materiality should be judged is whether objectively speaking the facts could reasonably be regarded as material with materiality to be construed in a reasonable and not excessive manner. The approach adopted by Clarke J. in that regard has been widely followed, most recently by Cross J. in *Criminal Assets Bureau v. B.G.S. Ltd. & Ors* [2013] IEHC 302.

39. In *Balogun v. Minister for Justice*, unreported, High Court, Smyth J., March 19, 2002, the court expressly deprecated:

> "an *ex parte* application which had I been given the facts now on affidavit I would have viewed in a different manner. Either selective facts were made known to the legal advisors, or there was a complete failure before counsel was instructed to critically analyse instructions so that the duty and obligation to observe good faith with the Court on an *ex parte* basis could be observed".

40. The Court acknowledges- as did Peart J. in *European Paint Importers Ltd v. O'Callaghan*, unreported, High Court, August 10, 2005- that "[t]here will inevitably in applications for interim relief be some haste in the preparation of affidavits and exhibits", such that what must be considered in deciding on whether to discharge an interim order or to grant or withhold interlocutory relief is whether the process has "been abused to the extent of obtaining an order under false pretence." Of course, the plaintiff here did not obtain an interim order. However, she did apply for one and it is, therefore, necessary to consider whether that application amounted to an abuse of process by seeking such order under false pretences.

41. In this case, at both the interim *ex parte* and interlocutory stage, the plaintiff failed to disclose the following:

> a) That the plaintiffs arrest and detention occurred, not on the basis that An Garda Síochána had unfairly and unreasonably intervened in a civil dispute on behalf of the defendant having declined to do so earlier on behalf of the plaintiff, as the plaintiff plainly and unequivocally sought to imply in the affidavit sworn to ground her application for *ex parte* relief, but on the basis that the plaintiff was found to be in possession of an offensive weapon, which she refused to relinquish when called upon to do so by a member of An Garda Síochána.
>
> b) That the plaintiff had re-entered the apartment at issue by scaling an external wall and breaking a third-story balcony window and not by entering through an open window as she had originally claimed.
>
> c) That the plaintiff had engaged a firm of solicitors in Cork in 2012 in relation to her claim of lawful occupancy of the apartment at issue, which solicitors had received a reply from the former receiver's solicitors rejecting that claim, to which correspondence no reply on behalf of the plaintiff was ever forthcoming.
>
> d) Any information concerning her underlying income or means, while claiming - though only in the limited or very narrow sense described above - to be homeless and destitute.

42. The Court is satisfied that each of those facts was material to the application of the wide equitable and general principles that a court is required to consider in deciding whether to grant or withhold relief before permitting a defendant to be heard, and that there was, accordingly, a duty to bring those facts forward. The Court does not accept that the failure to bring those facts forward can be considered as an accidental oversight due to the haste with which the application was brought.

43. As Clarke J. noted in *Bambrick v. Cobley, supra*, the consequences of non disclosure are not automatic in the context of the discretion to grant or withhold interlocutory relief. This Court accepts the view expressed by Clarke J. that the court does have a discretion, in cases where failure to disclose has been established, to refuse to grant an interlocutory injunction sought, as well as to discharge any interim injunction that may have already been granted, but that it is not obliged to do so.

44. While the Court must have regard to all of the circumstances of the case, I accept Clarke J.'s summary of the factors most likely to weigh heavily in that consideration:

> 1) The materiality of the facts not disclosed.
>
> 2) The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose, bearing in mind that a deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the grant or continuance of an injunction than an innocent omission.

3) The overall circumstances of the case which lead to the application in the first place.

45. I am forced to the conclusion that the plaintiff deliberately misled the Court concerning the circumstances of her re-entry into the apartment and, more particularly, the circumstances of her subsequent arrest by An Garda Síochána. In that regard, the plaintiff deliberately sought to contrast her arrest at the apartment with the earlier refusal of An Garda Síochána to intervene in her dispute with the receiver concerning her exclusion from it. In doing so, the plaintiff chose to deliberately withhold from the court the reason for her arrest. The court cannot accept the proposition that the plaintiff was entitled to view the fact of her arrest at the apartment as sufficiently material to specifically depose to it in her short grounding affidavit, while now asserting through Counsel that the reason for that arrest is immaterial in the context of her obligation to make full and frank disclosure.

46. As regards the plaintiff's failure to disclose the earlier correspondence between the plaintiff's former solicitors and the those of the former receiver, and the plaintiff's failure to disclose any meaningful information whatsoever concerning her means and income in asserting that she is destitute, while the Court accepts that the evidence does not go so far as to establish an attempt to deliberately mislead the Court, there has nevertheless been a significant culpable failure to disclose those matters.

47. In all of the circumstances, the Court will exercise its discretion against granting an interlocutory order.

48. In case I am mistaken in that view, I propose to address the issue of whether the plaintiff is otherwise entitled to the interlocutory relief that she seeks. This, of course, requires a consideration of the principles laid down in the leading case of *Campus Oil Ltd v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88. In considering those principles, it is appropriate to beat in mind that the primary relief sought in the present application is a mandatory injunction, requiring the defendant to deliver up possession of the apartment at issue to the plaintiff.

49. I accept that the plaintiff has raised a fair *bona fide* question in these proceedings. The plaintiff asserts that she was in occupation of the apartment at issue as her home or dwelling at the time she was excluded from it by the action of the defendant in changing the locks while she was at work. The plaintiff is therefore, *prima facie*, entitled to claim damages for trespass and for breach of her constitutional right to the inviolability of her dwelling. The defendant's claims to good title over the property, to a true right of possession of it and to a lawful authority to enter it are, if made out, each potentially capable of amounting to a good defence to that action, but - in the words of O'Higgins C.J. in *Campus Oil* - it is not for the Court on an interlocutory application to determine that question.

50. I am not satisfied that the plaintiff has raised a fair *bona fide* question in these proceedings concerning her entitlement to a declaration that any charge the defendant is appointed pursuant to is subject to the plaintiffs tenancy. The plaintiff has adduced no evidence whatsoever for the purposes of this application concerning her landlord's title to the property, from which title her right of occupation as tenant pursuant to the alleged lease of the 24th September 2008 must necessarily derive. Nor has she adduced any evidence that her tenancy (as opposed to her occupation) of the apartment at issue was ever drawn to the attention of the defendant prior to her exclusion from it. In attempting to rely instead on matters averred to in the context of entirely separate proceedings involving the mortgagors of the apartment and Mr. Cremin, which proceedings were produced by the defendant for the assistance of the court, the plaintiff ignores Mr. Cremin's sworn averments in those proceedings that he was acting at all material times on behalf of a Northern Ireland registered company, Transworld Consortium Limited, and not on his own behalf. Mr. Cremin is not a party to the present proceedings and the plaintiff adduced no evidence from him for the purpose of the present application.

51. In *Westman Holdings Ltd v. McCormack* [1992] 1 I.R. 151, Finlay C.J. pointed out that, having reached the conclusion that the plaintiff has raised a fair issue to be tried, "the Court should not express any view on the strength of the contending submissions leading to the raising of such a fair and bona fide question." Accordingly, I do not propose to do so. Insofar as I have concluded that the plaintiff has failed to establish a fair bona fide question to be tried in respect of her application for a declaration that the defendant's charge, if valid, is subject to the plaintiffs tenancy, I have done so by reference to the very limited evidence presented for the purpose of the present application. The Court accepts, as Clarke J. did in *Collen Construction Limited v. Building and Allied Trades Union & Ors* [2006] IEHC 159, that at the trial of the action the plaintiff may be in a position to put before the court further evidence which would satisfy a court, by inference if necessary, that the facts required to warrant the making of the declaration sought have been established.

52. Turning to the question of the adequacy of damages, I find there is no evidence before the court that would allow it to conclude on the balance of the probabilities that the plaintiff could not be compensated by an award of damages for the trespass and breach of her constitutional rights that she alleges. While the Court notes the *dictum* of Laffoy J. in *Pasture Properties v. Evans, ex tempore*, High Court, February 5, 1999 (cited in Kirwan, *Injunctions: Law and Practice* (Dublin, 2008) at p. 190) that "it is axiomatic in trespass cases that damages are not an adequate remedy", I would not go quite so far, preferring the view that the court should look at the facts of each case. This was the approach adopted by Finlay Geoghegan J. in *Contech v. Walsh*, unreported, High Court, February 17, 2006, in respect of an application for an interlocutory injunction in a passing off action, notwithstanding the earlier dictum of Costello J. in *Mitchelstown Co-Operative Agricultural Society Ltd v. Golden Vale Products Ltd.*, unreported, High Court, December 12, 1985, that "it is axiomatic in most passing-off actions damages are an inadequate remedy for a successful plaintiff' (at p. 7).

53. On the particular facts of the present case, the Court is not satisfied that damages would not be an adequate remedy for the alleged trespass and breach of constitutional rights that the plaintiff complains of. I am strengthened in that conclusion by the decision of the High Court in *Fitzpatrick v. Commissioner of An Garda Síochána* [1996] E.L.R. 244, in which the court addressed, *inter alia*, the argument that a plaintiff seeking an interlocutory injunction could not be adequately compensated in damages for the damage to his reputation, character and good name that he alleged would occur if the defendant was not prohibited by injunction from repatriating him from U.N. policing duties abroad. Kelly J. stated (at page 254 of the report):

> "Insofar as [the plaintiff's] constitutional entitlement to his good name and reputation is concerned, I see no reason why they cannot be compensated for by an award of damages. Damage to reputation as a result of libel or slander is regularly compensated in these courts by an award of damages. Furthermore, since the decision of the Supreme Court in *Meskell v. Córas Iompair Éireann* [1973] IR 121, damages have on many occasions been awarded in constitutional litigation."

54. Turning next to the other side of the equation, I must consider whether the plaintiffs undertaking as to damages will adequately compensate the defendant, should he be successful at the trial, in respect of any loss suffered by him due to the injunctions now sought being in force pending the trial. It is common case that the plaintiff has paid no rent to the defendant and there is no suggestion on the evidence that, if granted the injunction she seeks, she proposes to do so pending the determination of her action. Accordingly, in the event that the plaintiff's action fails, the defendant will clearly have to rely on the plaintiffs undertaking in order to recover damages from her in respect of both lost rent and any diminution in the value of the property that may occur during that

period.

55. What is the value of that undertaking? As already noted above, the plaintiff has provided no detail whatsoever concerning her underlying means or income that would allow the court to assess whether that undertaking is realistic when balanced against the prospective losses of the defendant. Accordingly, this court takes the same view as the High Court did in *Martin v. Bord Pleanála* [2002] 2 I.R. 655; that an undertaking offered in the context of so little - indeed, no - evidence of means must be viewed "as little more than a *pro forma* compliance with the usual requirement of the court in this kind of application" (per O'Sullivan J. at p. 670 of the report). In consequence, the Court has reached the same conclusion as the one reached by O'Sullivan J. in that case, which is to say that the relief sought should be refused on that ground alone.

56. Finally, it is necessary to consider the balance of convenience. In this context, as Lord Diplock stated in *American Cyanamid Co v. Ethicon Ltd* [1975] A.C. 396 (at p. 406):

> "the plaintiff's need for [such] protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights, for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty was resolved in the defendant's favour at trial. The court must weigh one need against the other and determine where the "balance of convenience" lies."

57. By reference to all of the factors already identified above and, in addition, the well-established principle that, if all other matters are equally balanced, the court should preserve the *status quo* (while noting that, for the reasons already set out above, the balance of those matters in this case tilts in favour of the defendant), the Court concludes that the balance of convenience requires the refusal of the interlocutory relief sought.

Conclusion
58. The injunctions sought are refused.