[2017] IEHC 92

THE HIGH COURT

[2016 No. 9072 P.]

[2016 No. 130 COM]

BETWEEN

KEN TYRRELL

PLAINTIFF

AND

DAVID WRIGHT AND ROPE WALK CAR PARK LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on the 17th day of February 2017

1. The plaintiff is the receiver appointed to three properties on 22nd August, 2016. He seeks vacant possession of the three properties with a view to selling the properties. He brought two motions which are for determination by the court. The first seeks interlocutory injunctions against the defendants requiring them to surrender vacant possession of the charged properties. In the second notice of motion, he seeks the vacation of *lites pendentes* pursuant to s. 123 of the Land and Law Reform Conveyancing Act 2009, registered against the properties by the mother and partner of the first named defendant. The two motions were heard together and this judgment deals with both motions.

The Properties

2. The first named defendant is a builder and developer. His parents, Mr. Michael Wright and Mrs. Bernadette Wright owned certain lands at Summer Cove, Rosslare, Co. Wexford. In 2004, Mr. and Mrs. Wright and the first named defendant decided to develop four houses on these lands. The house which was ultimately developed as 1 Summer Cove ("*Summer Cove*") was fitted out to a high specification as it was the show house for the remaining houses on the development.

3. The site at Summer Cove comprised Folios 11763 and 142F (part), Co. Wexford and Mr. and Mrs. Wright were registered as full owners. AIB Bank plc had a registered charge over the lands from 2005.

4. By deed of transfer dated 23rdJanuary, 2006, Mr. and Mrs. Wright transferred the freehold interest in the site of No. 1 Summer Cove to the first named defendant in consideration of the sum of €200,000. The deed recited that they acknowledge receipt of this consideration, though it subsequently emerged that the first named defendant and Mrs. Wright agreed, in fact, no such consideration was ever paid.

5. By statutory declaration made on 23rd of January, 2006, Mr. and Mrs. Wright declared: -

> *"The property is not subject to any trust, licence or proprietary interest in favour of me this Declarant or any other person or body corporate arising by virtue of any arrangement, agreement or contract entered into by me, or by operation of law or otherwise, or any direct or indirect financial or other contribution to the purchase thereof and the property is held free from encumbrances and no other person is in adverse possession thereof."*

6. In 2006, the first named defendant decided to acquire and develop a property then known as 1B Swan Lake, Chapelizod, Co. Dublin. He proposed to develop two luxury houses on the site to be known as 1A and 1B Swan Lake, Chapelizod, Co. Dublin ("Swan Lake"). He required substantial finance in order to both acquire and develop the property.

7. On the 3rd November, 2006, the first named defendant accepted a loan facility offered by Anglo Irish Bank Corporation p.l.c. ("*Anglo*") in the sum of €1,820,000 and comprised of two facilities. The first was to enable a borrower to fund the acquisition of a 0.08 acre site at 1A Chapelizod Road, Islandbridge, Dublin 8 with full planning permission for the construction of two residential units together with stamp duty and associated costs. The facility was also to fund the construction of two residential units on the site and to provide twelve months interest roll up together with equity release in the amount of €100,000. The security was to be a first legal mortgage over Swan Lake together with all work in progress and a first legal mortgage over Summer Cove. The facilities were repayable on demand and without prejudice to the demand nature of the facilities were to be reviewed on or before the 31st October, 2007. The security was to secure all sums due by the first named defendant to Anglo.

8. On the same day he certified that none of the provisions of the Consumer Credit Act 1995 or the European Communities (Unfair Terms and Consumer Contracts) Regulations 1995 applied to the facilities and that he was not a consumer within the meaning of either the Act or the Regulations.

9. On 18th December, 2006, the first named defendant as beneficial owner granted Anglo a first legal mortgage and charge over the premises: -

> *"ALL THAT AND THOSE the hereditaments and premises known as "Swan Lake", 1A Chapelizod Road, Islandbridge, Dublin 8 as more particularly described in a deed of conveyance dated 18th December 1984 between Molly Butler of the one part and Andrew Irvine & Bridget Irvine of the other part and delineated on the map annexed thereto and thereon edged red.*
>
> *ALL THAT AND THOSE the hereditaments and premises known as 1 Summer Cove, Rosslare, County Wexford being part of the property comprised in Folio 11763 and 142F County Wexford as more particularly described in a Deed of Transfer dated 23rd January 2006 between Michael Wright & Bernie Wright of the one part and David Wright of the other part and delineated on the map annexed thereto and thereon edged red and marked with the letter "D"."*

10. The mortgage defined "encumbrance" as *inter alia* "any lease agreement". Clause 6 provided:

> *"[T]his deed is security to the bank for the payment by the mortgagor to the bank of all the secured liabilities. The mortgagor is not entitled, without the prior consent of the bank which maybe granted or withheld at the bank's absolute discretion, to create or permit to subsist any encumbrance on or affecting any part of the mortgaged properties".*

Clause 19.1 provided

> *"[T]he statutory powers of leasing and accepting surrenders of leases of the mortgaged properties shall not be exercised by the mortgagor without the prior consent in writing of the bank and the mortgagor shall not create or purport to create any lease or tenancy or accept any surrender thereof otherwise than under the said powers."*

Clause 8 provided that upon the occurrence of a termination event the security shall become enforceable. Clause 10 granted the bank the power to appoint a receiver and at Clause 13.5 the first named defendant represented and warranted to the bank that

> *"save as disclosed in writing to the bank prior to the execution hereof, there are no encumbrances of any nature or kind affecting all or any part of the mortgaged properties."*

11. On the 18th of December, 2006, the first named defendant made a statutorydeclaration for the benefit of Anglo, its heirs and assigns in respect of Swan Lake that the property was not a family home and that:-

> *"the property is not subject to any trust licence tenancy or proprietary interest in favour of [the first named defendant] or of any other person or body corporate arising by virtue of any arrangement, agreement or contract entered into by me, or by operation of law or otherwise, or to any direct or indirect financial or other contribution to the purchase thereof and the property is held free from encumbrances and no person is in adverse possession thereof."*

12. He made an identical statutory declaration in respect of the property on 20th June, 2008, (though the property was described as 1 and 1A Swan Lake).

He made an identical Family Home Protection Act declaration on 18th December, 2006 in respect of Summer Cove for the benefit of Anglo. In addition, on the same day he made a section 72 statutory declaration in respect of Summer Cove stating: -

> *"to the best of my knowledge information and belief none of the burdens set out in s. 72 of the Registration of Title Act, 1964, and therein stated to be capable of affecting registered land without registration, affect land in the above mentioned Folios.*
>
> *That before making this declaration the full effect, meaning and purport of such burdens were explained to me by my solicitor and I understood same."*

13. Anglo advanced the monies to the first named defendant in accordance with the terms of the facility letter of October 2006. He purchased and mortgaged 1A Swan Lake on 18th December, 2006. The mortgage was registered in the registry of deeds on 26th March, 2007.

14. A new folio was created out of Folio 11763 in respect of Summer Cove. On 30th May, 2007, Folio 48025F was created and the first named defendant was registered as the full owner of the lands, Anglo was registered as the owner of the first legal charge on the lands and the charge in favour of AIB Bank plc was discharged in respect of these lands.

15. The 2006 facility was replaced twice by facilities dated 28rd September, 2008, and 17th February, 2012. The facilities remained demand facilities and the security remained the same. The facility of 17th February, 2012, expired on 31st December, 2012. The first named defendant executed a statutory declaration in respect of Summer Cove in identical terms to that declared in respect of Swan Lake on 18th December, 2006, to the effect that the property was free from encumbrances on 20th June, 2008. On 27th November, 2008, and 12th January, 2012, he again certified that the facilities of 23rd September, 2008, and 17th February, 2012, were for the purposes of his trade, business or profession and he was not a consumer within the meaning of the relevant legislation.

Ms. Mary Moore

16. The first named defendant has been in a long-term relationship with Ms. Mary Moore and they have four children who are now aged 18, 12, 11 and 9. Prior to the events the subject matter of these proceedings the first named defendant and Ms. Moore had lived with her parents in a house she inherited at 61 Connolly Avenue, Inchicore. In 2005 the first named defendant purchased the next door property, 62 Connolly Avenue, Inchicore and the first named defendant, Ms. Moore and their then three children moved in to reside at 62 Connolly Avenue.

17. The first named defendant purchased Summer Cove from his parents as described above and the house was prepared as a show house for the remaining properties to be developed at the site. The first named defendant, Ms. Moore and their children moved into Summer Cove in 2009 and lived there until April, 2015.

18. In April, 2015 they decided for personal reasons to move back to Dublin. They did not move into 61 Connolly Avenue. 62 Connolly Avenue was rented as was 1A Swan Lake. They moved into 1B Swan Lake and continued to reside there. Both the first named defendant and Ms. Moore maintain that 1B Swan Lake is their principal private dwelling.

Difficulties at Swan Lake

19. The development plans of the first named defendant ran into grave difficulties when the economic crisis hit in 2008 and he was unable to borrow further monies from Anglo to complete the development at Swan Lake. Thereafter, he struggled to complete the development of the two houses. They were also subject to flooding from the River Liffey on two occasions. The first named defendant was unable to sell either of the properties or to complete the development fully in accordance with the original plans.

Launceston Property Finance Limited

20. On 14th October, 2011, Anglo changed its name to Irish Bank Resolution Corporation Limited ("IBRC") and on 7th February, 2013, IBRC was placed in special receivership pursuant to s. 4 of the Irish Bank Resolution Corporation Act 2013, and Mr. Kieran Wallace and Mr. Eamonn Richardson were appointed the special liquidators of the bank.

21. Launceston Property Finance Limited ("Launceston") acquired the interest of Anglo under the facility letters and all related security pursuant to a loan sale deed dated 28th March, 2014, made between IBRC of the first part, the special liquidators of the second part and Launceston of the third part and pursuant to a deed of conveyance and assignment dated 23rd May, 2014, and a transfer dated 23rd May, 2014, made between the same parties.

22. On 30th September, 2014 Launceston was registered as the owner of the charge registered in favour of Anglo on 30th May, 2007.

23. On 29th September, 2016, Launceston converted to a designated activity company under the Companies Act 2014.

The second named defendant
24. The first named defendant and Ms. Moore are directors of the second named defendant. Ms. Moore is the sole shareholder. On 31st March, 2011, the first named defendant granted the second named defendant a lease of Summer Cove. The first named defendant said that he specifically agreed with representatives of Anglo that the lease would be granted to the second named defendant. No prior written consent to the grant of the lease was furnished by Anglo. At the request of IBRC, the second named defendant set up a standing order to make direct payments to IBRC of the rent due under the lease. The lease of 31st March, 2011, expired on 31st December, 2015.

25. A new lease was granted on 1st April, 2016, by the first named defendant to the second named defendant from 1st April, 2016, to 30th March, 2021. The second named defendant said that it is entitled to remain in occupation of the demised premises, Summer Cove, on the basis that Launceston and the receiver appointed by Launceston are bound by the tenancy agreement of 1st April, 2016.

Launceston and the first named defendant
26. By letter dated 26th June, 2014, the first named defendant was notified that Launceston had acquired Anglo's interest in the facilities letters and the mortgage and that the loan was being serviced by its agent, Pepper Finance Corporation (Ireland) Limited ("*Pepper*").

27. The first named defendant engaged with representatives of Anglo, then IBRC and the special liquidators in relation to his loans. The first named defendant believed that the value of the two properties at Swan Lake could be greatly enhanced if he could obtain a fresh planning permission which would permit the addition of a third storey to each property and he could then complete that planning permission. He discussed this plan with representatives of IBRC. From June, 2014 he engaged with representatives of Pepper in relation to the possible resolution of his financial difficulties and his plan to redevelop the two Swan Lake properties.

28. At paras. 24 and 25 of his affidavit of 9th November, 2016, the first named defendant stated: —

> *"During the course of this engagement with Pepper, I was dealing with a number of individuals in Pepper, including Ian Wigglesworth and Niall O'Reilly. I say that it was explained to me by Pepper that its investor (i.e. Launceston) would be remaining in the Irish market for a number of years and that an immediate asset sale would not be required. Accordingly, I discussed with Pepper the prospect of obtaining planning permission in relation to the [Swan Lake] properties in order to add an additional (third) floor above each of the properties. This had been discussed with Rennee Duggan and Anne Bardon of IBRC. It was clear to me, (and I do not understand at this point to be seriously contented by Launceston) that the addition of a third floor with extra bedroom space would add considerable value to the properties, which in their present state had very small bedroom space …"*
>
> *25. I say that this proposal was made to Pepper in the clear understanding on all sides that it was my intention to add value to the [Swan Lake] properties in order to (a) bring about a feasible route by which I could repay all or a significant proportion of the debt assigned to Launceston and (b) enable me to retain one of the [Swan Lake] properties as my PPR. The representatives of Pepper, as agent for Launceston, made clear to me that this was a course of action that they were agreeable to and that it was not in any way inconsistent with the objectives or planned asset sale of Launceston. In particular, employees of Pepper made enquiries of me during our regular meetings from 2015 onwards enquiring as to the progress of the application for planning permission."*

30. On 26th May, 2015, he emailed Mr. Ian Wigglesworth of Pepper as follows: —

> *"Subject: Forward: 1B Swan Lake, Chapelizod Road, Islandbridge, Dublin 8*
>
> *Hi Ian,*
>
> *Further to our phone conversation please see attached letter from Hunter's. As you can see the current values are not great. The difference with the bedrooms is to my mind well worth the spend.*
>
> *I have been at Swan Lake for the last few months. I expect to have planning lodged in the next week or so. I expect to spend €60 – 70 k [on] the properties which will increase their value substantially. I am working on Summer Cove, as discussed the price mentioned is higher than the market value which makes it difficult to bank. Can you come back to a reasonable figure taking into account the above and I should have this sorted by September/October…"*

31. In reliance on the representations and assurances made by Launceston and Pepper as its agent he expended in the region of €12,000 plus VAT in relation to an application for planning permission at Swan Lake. The application was made on 15th July, 2015 and the notification of the decision to grant planning permission was made on 8th September, 2015. That decision was not appealed. The works authorised involved the addition of a third floor to both 1A and 1B Swan Lake, so it was necessary to carry out the work to both properties at the same time. This meant that it was necessary to obtain vacant possession of 1A Swan Lake and for the first named defendant, Ms. Moore and their children to vacate 1B Swan Lake for the duration of the building works. A notice of termination was served on the tenant in 1A Swan Lake in June, 2016 which expired on the 30th September, 2016.

32. There was no evidence as to what occurred between the grant of planning permission in September, 2015 and an e-mail sent by Niall O'Reilly of Pepper to the first named defendant on 9th March, 2016. The e-mail was short: —

> *"Dear David,*
>
> *Can you contact us in relation to a proposal in respect of liabilities outstanding to Launceston Property Finance (c €2.5 m).*
>
> *Assuming you are not in a position to refinance the loans, we request that the following secured be placed on the market for sale, with any potential shortfall on loan balance to be discussed thereafter.*
>
> *—1A Chapelizod*
>
> *—1 Summer Cove, Rosslare*

Many thanks in advance,

Niall"

This e-mail caused significant distress to Ms. Moore which I shall consider below. The initial response of the first named defendant was to negotiate with the representatives of Pepper in relation to the outstanding loans and the three secured properties.

Engagement in 2016

33. There was significant engagement between solicitors acting for the first named defendant and Pepper. In a letter dated 6th May, 2016, FitzGerald & Company Solicitors referred to a meeting they had with two representatives of Pepper on 21st April, 2016. The letter is headed "Subject to agreement/ Agreement denied". In the first paragraph they state: —

> *"The information is in order to facilitate the Proposal that we are making below in the hope that both parties can come to a mutually beneficial solution to the situation."*

The letter included a proposal which was ultimately declined by Launceston's credit committee on 20th May, 2016.

34. A further meeting between the parties took place on 4th July, 2016, and the first named defendant's solicitors made a second proposal by letter dated 15th July, 2016. This letter was also headed "Subject to agreement/ Agreement denied". The second proposal was also rejected.

35. In the letter of 6th May, 2016, the first named defendant's solicitors indicated that the first named defendant would not be able to surrender up vacant possession of any of the three secured properties to Launceston. They said that there were three valid claims in relation to Summer Cove which the first named defendant had acknowledged. The first was a claim by his mother, Mrs. Bernadette Wright to the consideration for the transfer of the lands at Summer Cove to the first named defendant in 2006. She claimed that she had never been paid the €200,000 and the first named defendant acknowledged that he owed the money to the estate of his late father and to his mother for the site.

36. Secondly, his partner, Ms. Moore claimed an interest in Summer Cove on the basis of her relationship to the first named defendant and the fact that she had invested extensively in the property since its acquisition. The letter stated: —

> *"I am further instructed by [the first named defendant] that he has assured Ms. Moore over the last number of years of her interest in that property and the fact that it was not in any jeopardy. In essence, [the first named defendant] instructs me that he has acknowledged that she has an interest in that property also."*

37. The letter stated that the solicitor understood that Ms. Moore would be making a claim in relation to one of the properties at Swan Lake on the basis that the family live there and it is their principal dwelling house. The letter indicated that this claim would be in respect of 1A and her instructions were that there was to be no challenge to 1B Swan Lake but the first named defendant's solicitor reserved her position as she had not heard from the legal representatives of Ms. Moore at the time of writing.

38. Significant arrears had accrued on the first named defendant's accounts, the loans facilities had expired and had not been repaid. Pepper had been in receipt of two proposals both of which had been rejected by Launceston. In addition, solicitors acting for the first named defendant disclosed that the first named defendant had acknowledged the interests of Ms. Moore and Mrs. Wright in some or all of the secured properties. A final letter of demand issued to the first named defendant on 22nd July, 2016 calling for immediate repayment of the sum of €2,603,732.40 plus interest due and owing to Launceston. The first named defendant was unable to pay the sum demanded and accordingly Launceston appointed the plaintiff to be receiver and manager over the lands at Swan Lake and Summer Cove. The deed of appointment was executed on 18th August, 2016 and accepted by the plaintiff on 22nd August, 2016.

39. The first named defendant responded through his solicitors by letter dated 24th August, 2016, by stating that the demand of 22nd July, 2016, was not valid and that therefore the right to appoint a receiver had not arisen and he disputed the validity of the appointment of the plaintiff as receiver.

40. The letter stated: —

> *"… the Proposal outlined in our offer of 15th July, 2016 still remains the option that offers the best possible outcome for the parties in this case."*

41. The plaintiff's solicitors replied by letter dated 26th August, 2016. They denied that the letter of demand of 22nd July, 2016, was invalid and stated that the appointment of the plaintiff as receiver and manager was valid. They stated that the first named defendant through his conduct and behaviour had placed the properties "*in very significant jeopardy*". This was due to separate proceedings brought by Mrs. Bernadette Wright and Ms. Mary Moore in the High Court against the first named defendant resulting in *lites pendentes* being registered by both Mrs. Wright and Ms. Moore against Summer Cove.

42. Mrs. Wright issued proceedings against the first named defendant claiming an interest in Summer Cove on 9th June, 2016. She registered a *lis pendens* on the lands pursuant to s. 123 of the Land and Conveyancing Law Reform Act 2009 on the 10th June, 2016.

43. Ms. Moore instituted proceedings against the first named defendant on 24th May, 2016, claiming *inter alia* a declaration as to the respective beneficial interests of Ms. Moore and the first named defendant in Summer Cove and 1A and 1B Swan Lake, an order pursuant to s. 31 of the Land and Conveyancing Law Reform Act 2009 for sale in lieu of partition of the properties and ancillary orders. She entered a *lis pendens* against Summer Cove on 5th July, 2016, her first application having been rejected on 21st June, 2016.

44. In light of these two proceedings and the acknowledgement of the claims by the first named defendant, the plaintiff's solicitors stated that the first named defendant had: —

> *"… given various warranties and representations in the loan and security documents to preserve the security that he has provided as collateral for his indebtedness. Quite clearly your client has contributed to the claims that are now being made against the Properties, which, for the avoidance of any doubt, clearly constitute 'termination events' within the meaning of that term as set out at Schedule 2 of the Mortgage and particularly clause 2 therein.*
>
> *The issues that have recently arisen in respect of the Properties constitute yet another breach on the part of your*

client in relation to his obligations and responsibilities as borrower and mortgagor."

45. The letter concluded by requiring the first named defendant (including his servants or agents) to provide written undertakings within 7 days that he would immediately deliver up peaceable possession of the properties and various associated undertakings.

46. Further correspondence was exchanged between the solicitors between 1st and 23rd September, 2016, but no resolution of matters in dispute was achieved.

47. In addition, the plaintiff learnt for the first time that the second named defendant claimed to be a tenant of Summer Cove and that he was bound by the tenancy agreement.

The proceedings
48. The plaintiff instituted these proceedings on 12th October, 2016, and claims orders similar to the undertakings previously sought in the letter of 26th August, 2016, from the first named defendant together with damages for trespass and other reliefs. He seeks an order for possession of Summer Cove against the second named defendant.

49. There was an application to admit the proceedings into the commercial list of the High Court which was made by consent on 17th October, 2017.

50. The parties to the proceedings, Mrs. Wright and Ms. Moore attempted mediation but unfortunately it was unsuccessful.

51. The plaintiff therefore sought to proceed with his application for injunctive relief which he had sought when he instituted the proceedings on 12th October, 2016. He seeks the following reliefs: —

> *"(1) An order requiring the first named defendant, its servants and/or agents and all other persons having notice of the said order forthwith to surrender vacant possession of the property known as 1B Chapelizod Road, Islandbridge, Dublin 8 ("1B Chapelizod Road") to the plaintiff.*
>
> *(2) An order requiring the second named defendant, its servants and/or agents and all other persons having notice of the said order forthwith to surrender vacant possession of the property known as 1 Summer Cove, Rosslare, Co. Wexford ("1 Summer Cove") to the plaintiff.*
>
> *(3) An order prohibiting the first and second named defendants, their servants and/or agents and all other persons having notice of the said order from interfering with, impeding and/or obstructing the plaintiff, his servants and/or agents in the conduct of the receivership and/or their efforts to take possession of, and sell, the properties.*
>
> *(4) An order prohibiting the first named defendant his servants and/or agents and all other persons having notice of the said order from interfering with, impeding and/or obstructing the plaintiff, his servants and/or agents in the conduct of the receivership in respect of the property known as 1A Chapelizod Road, Islandbridge, Dublin 8 ("1A Chapelizod Road") by actually or implicitly harassing, intimidating, threatening or interfering with the occupier thereof or otherwise.*
>
> *(5) An order prohibiting the first named defendant, his servants and/or agents and all other persons having notice of the said order from trespassing or entering upon or otherwise interfering with the properties without the prior written consent of the plaintiff.*
>
> *(6) An order requiring the first named defendant, his servants and/or agents and all other persons having notice of the said order forthwith to deliver up to the plaintiff all keys, alarm codes and/or other security and access devices pertaining to the properties.*
>
> *(7) An order requiring the first named defendant, his servants and/or agents and all other persons having notice of the said order forthwith to provide details to the plaintiff, including all relevant documentation, of all purported leases, licenses or other arrangements providing for occupation of the parties by any property in the period since 21st December, 2006."*

52. In addition the plaintiff issued a notice of motion on 9th November, 2006, directed towards Mrs. Wright and Ms. Moore seeking orders pursuant to s. 123 of the Land & Conveyancing Law Reform Act 2009, and/or pursuant to the inherent jurisdiction of the Court vacating the lites pendentes registered by Mrs. Wright and Ms. Moore on folio WX 48025F on the Register of Freeholders, Co. Wexford and any *lis pendens* that may purportedly by registered and/or asserted by Ms. Moore on the properties known as 1A and 1B Swan Lake, Chapelizod Road, Islandbridge, Dublin 8.

53. A number of affidavits were exchanged between the parties to each of the two motions and the matter was listed for hearing on 18th January, 2017.

54. On that occasion, counsel for Mrs. Wright indicated that she had compromised her proceedings with the first named defendant on the basis that he consented to judgment in the sum of €200,000. She undertook to vacate the *lis pendens* registered both in the Central Office of the High Court and in respect of folio WX 48025F on the Register of Freeholders, Co. Wexford.

The claim for an injunction against the first named defendant
Has the Plaintiff a strong case that will succeed at the trial of action?

55. It was accepted by the plaintiff that the primary relief sought against the first named defendant in respect of the three secured properties was arguably mandatory and that the threshold test which the Court ought to apply was that set out in the case of *Maha Lingham v. Health Service Executive* [2006] E.L.R. 127 and *Bank of Ireland v. O'Donnell* [2015] IECA 73. He must establish "a strong case that [he is] likely to succeed at the hearing of the action."

56. The decision of Keane J. in *Keating & Co. Limited v. Jervis Shopping Centre* [1997] I.R. 512 is relevant to my decision. At p. 518 of the report Keane J. states:

> *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 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) Ltd [1987] 1*

W.L.R 853AT 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 set out in American Cyanamid Co. v Ethicon Ltd. [1957] A.C. 396 in relation to the grant or refusal of an interlocutory injunction."*

See also *Kavanagh v. Lynch* [2011] IEHC 348 where this dictum was followed by Laffoy J.

The plaintiff's title to the secured properties.

57. The following facts are not in dispute in this case. The plaintiff entered into a loan agreement with Anglo in 2006. The facilities were renewed and ultimately expired on 31st December, 2012 without having been repaid. Demand for repayment of the sum claimed due and owing was made on 22nd July, 2016, and it has not been repaid. As a condition of the advance of the monies, the first named defendant granted Anglo a first legal mortgage and charge over the secured properties. The mortgage was registered in the Registry of Deeds and the charge was registered on folio WX 48025F. The title to the loans and securities has passed to Launceston and it is the registered owner of the charge on the folio. On 22nd August, 2016, Launceston appointed the plaintiff as the receiver and manager over the secured properties. At the hearing of the motion the validity of his appointment was not disputed. In the circumstances, the plaintiff has established title to the lands.

58. Thus, *prima facie* the plaintiff is entitled to an injunction to restrain a trespass on an interlocutory basis unless the defendant puts in evidence to establish that he has a right to do what would otherwise be a trespass.

59. The first named defendant advanced two arguments which he says establishes that he is entitled to remain in possession of the lands at Swan Lake. Neither proposition is advanced in relation to Summer Cove. It follows therefore that he has advanced no defence to the plaintiff's *prima facie* entitlement to an injunction restraining his trespass at Summer Cove.

60. *Estoppel*

The first named defendant argues that the plaintiff is estopped from seeking possession of both properties at Swan Lake on the basis of representations made and assurances given by Launceston and/or Pepper upon which he relied. In his second affidavit sworn on 9th December, 2016, at para. 5 he stated that he progressed at his own expense an application for planning permission: —

> *"on the basis of a common understanding which had originally been planned with IBRC and then subsequently Pepper (as agent for Launceston) that I would be permitted to develop the property in order to maximise the realisable value on a subsequent sale and retain one as my PPR."*

61. He quantified the expense of applying for the planning permission as €12,000 plus VAT. On the basis of the representations and assurances and the time and money spent by him in reliance on these representations and assurances, he says that the plaintiff (and Launceston) are estopped from purporting to rely on any security in contravention with those representations and assurances.

62. The first named defendant says that in 2015 the representatives of Pepper, the agent of Launceston, had discussions with him in relation to applying for planning permission for the two Swan Lake properties. He said it was "the clear understanding on all sides that it was my intention to add value to the [Swan Lake] properties in order to (a) bring about a feasible route by which I could repay all or a significant portion of the debt assigned to Launceston and (b) enable me to retain one of the [Swan Lake] properties as my PPR."

63. He does not say that any representative of Launceston agreed that he would be permitted to retain one of the Swan Lake properties as his principal private residence or that they agreed to accept a particular lesser sum in full satisfaction of the outstanding loans. He does not identify which property he was to retain. He makes no reference to being permitted to retain Summer Cove.

64. Planning permission was obtained on 8th September, 2015. The first named defendant gives no evidence in relation to any actions taken by him thereafter save that in June, 2016, he served a notice to quit upon the tenant of 1A Swan Lake which expired on 31st October, 2016. His evidence was that development could not commence until he had possession of both premises.

65. On 30th March, 2016, Mr. Niall O'Reilly of Pepper e-mailed the first named defendant calling upon him to sell 1A Swan Lake and Summer Cove.

66. It is common case that this e-mail is inconsistent with the intentions of the first named defendant as discussed with the representatives of Pepper in 2015 as the planning permission applied to both properties. A sale of 1A Swan Lake would preclude the implementation of the planning permission.

67. The first named defendant did not respond to this e-mail by asserting the case he now advances in affidavit in defence of the plaintiff's application for an injunction. He instructed his solicitor and he and his solicitor each engaged with the representatives of Pepper. Negotiations took place and a detailed proposal in writing headed "Subject to agreement/Agreement denied" was sent on 6th May, 2016. The proposal made no reference to the estoppel now claimed. No reference is made to it in any of the subsequent correspondence including the correspondence with the solicitors for the plaintiff following his appointment. The proposal involved the first named defendant implementing the planning permission, Launceston accepting a figure less than the sum due in full and final settlement of the liabilities of the first named defendant and discharging its security over 1B Swan Lake and Summer Cove. 1A Swan Lake was to be sold. The final payment to Launceston was to be on or before 31st December, 2017. The proposal was conditional upon the agreement of Mrs. Wright and Ms. Moore.

68. Does this evidence establish that he is entitled to remain in possession of the Swan Lake properties? Both parties relied upon the decision of the Supreme Court in *Doran v. Thompson & Sons Limited* [1978] I.R. 223 in relation to the law on estoppel. Griffin J. stated at p. 230 of the report: —

> *"Where one party has, by his own words, or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance. The representation, promise, or assurance must be clear and unambiguous to found such an estoppel …*

> *In addition, the party relying on the representation must show that the representation was reasonably understood by him in a sense materially inconsistent with the allegation against which the estoppel is attempted to be set up …"*

69. The first named defendant has not identified a clear and unambiguous promise or assurance made by the representatives of Pepper to him. He has not identified that the discussions and understandings he refers to were intended to affect the legal relationships between Launceston and the first named defendant. It is of course true that documentary evidence is not required to support a case for promissory estoppel however, it is significant that none of the documentation from 2016 adverts to or supports the promise or representation contended by the first named defendant. Furthermore, some of this documentation emanates from the first named defendant's own solicitors and is indeed inconsistent with the case he now advances. It does not raise the issue of an estoppel.

70. The evidence which the first named defendant has put before the Court does not establish that it was reasonably understood by him that he would develop the two properties at Swan Lake so that he could "*repay all or a significant portion of the debt*" and "*retain one of the [Swan Lake] properties as my PPR*".

71. It is well established that at the hearing of an interlocutory injunction the Court cannot determine factual matters in dispute between the parties. It follows that I cannot resolve the dispute between the plaintiff and Mr. Wigglesworth on behalf of Pepper on the one hand and the first named defendant on the other hand. I must decide whether or not the first named defendant has adduced evidence which could establish that he has a right to do what would otherwise be a trespass otherwise than on the basis of resolving this dispute on the facts. I do so by assessing whether he has done so on the basis of the undisputed facts and taking his evidence at its height.

72. I must apply the test identified in *Doran v. Thompson* to these undisputed facts and the evidence of the first named defendant taken at its height to assess whether the first named defendant has adduced evidence seeking to establish that he is entitled to do what would otherwise be a trespass. The evidence must be more than simply directed to that end. It must at least be capable of achieving that end. In the absence of such evidence, the plaintiff *prima facie* is entitled to an order for possession of the properties at Swan Lake.

73. In my opinion the evidence adduced is not sufficient to meet the test set out at *Doran v. Thompson*. It follows that this defence to the plaintiff's claim cannot displace the strong case made out by the plaintiff that he is likely to succeed at the hearing of the action.

74. If I am incorrect in this conclusion, nonetheless it seems to me clear that the estoppel contended for, is of a temporary nature only. It was thus open to the promisor, Launceston, to resile from its promise on giving reasonable notice. See *Emmanuelle Ayodeji Ajayi v. R.T. Brisco (Nigeria) Limited* [1964] 3 All E.R. 556 where the Privy Council held: —

> *"when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity would be raised in favour of the other party. This equity is, however, subject to the qualification: (1) that the other party had altered his position; (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position; and (3) the promise only became final and irrevocable if the promisee cannot resume his position."*

75. This authority was cited by Keane J. in "Equity and the law of trusts in the Republic of Ireland" (2nd Ed.). At para. 27.25 the former Chief Justice stated: —

> *"It was always open to the representor to give notice to the representee that he was withdrawing the concession and, provided the notice was reasonable, the concession was then legally withdrawn. Generally speaking, therefore, the estoppel is not permanent in its effects. Thus, an agreement by a creditor to accept a smaller sum in discharge of a debt remains unenforceable; under the decision in Foakes v. Beer, the creditor is not estopped from claiming the full amount by his promise to accept a smaller one. It is, however, generally accepted that there is a category of cases in which a temporary estoppel may become permanent where events make it impossible to restore the parties to their previous positions."*

76. The e-mail of the 30th March, 2016, made clear that Pepper and Launceston would no longer afford the first named defendant the opportunity to carry out the works in respect of which he obtained planning permission on 8th September, 2015. Thereafter negotiations took place between the parties and the first named defendant presented two different proposals to Pepper for acceptance by Launceston. It was only when it became clear that Launceston's security over the three properties was potentially jeopardised by the claims of Mrs. Wright and Ms. Moore that Launceston demanded repayment of the loan and, in default of repayment, appointed the plaintiff receiver and manager over the properties.

77. It seems to me therefore that even on the first named defendant's own case, even if there had been an estoppel created by representations and assurances in 2015 as he alleges, they were of necessity temporary in nature and thus it was always open to Launceston upon giving him reasonable notice to resile from those representations. He was afforded reasonable notice in that it was clear from 30th March, 2015, that Launceston was no longer prepared to allow time to implement the planning permission. He was afforded time to respond with alternative proposals. These were considered but then rejected. Launceston was then entitled to treat its concession as legally withdrawn. Indeed, the behaviour of the first named defendant suggests that he accepted that this was so at a time when he had the benefit of legal advice. So, for this reason, I conclude that by the time the plaintiff sought possession of Swan Lake the concession had effectively and validly been withdrawn. Therefore, the defence of the first named defendant based upon estoppel to the plaintiff's case does not entitle the first named defendant to withhold possession of Swan Lake from the plaintiff.

Mortgage Arrears Resolution Process ("MARP")

78. The first named defendant's second argument is based upon his contention that since April, 2015 1B Swan Lake has been his primary residence. It is not advanced in relation to 1A Swan Lake. He says that as 1B Swan Lake is his primary residence, he is entitled to the benefit of the Code of Conduct for Mortgage Arrears. Neither Launceston nor Pepper (on its behalf) have complied with the provisions of the Code and therefore the plaintiff is not entitled to recover possession of his primary residence unless and until the MARP process has been complied with.

79. The Code of Conduct on Mortgage Arrears, 2013 was issued under s. 117 of the Central Bank Act 1989. The Code sets out how mortgage lenders must treat borrowers in or facing mortgage arrears. It applies to the mortgage lending activities of all regulated entities, except credit unions, operating in the State including a financial service provider authorised, registered or licensed by the

Central Bank of Ireland; and a financial service provider authorised, registered or licensed in another EU or EEA Member State and which has provided, or is providing mortgage lending activities in the State. The Code applies to the mortgage loan of a borrower which is secured by his/her primary residence. "Primary residence" means a property which is: —

> *"(a) the residential property which the borrower occupies as his/her primary residence in this State, or*
>
> *(b) a residential property which is the only residential property in this State owned by the borrower."*

80. The Code sets out a detailed mortgage arrears resolution process. Provisions 56 and 57 of the Code provide as follows: —

> *"56. Where a borrower is in mortgage arrears a lender may only commence legal proceedings for repossession of a borrower's primary residence, where:*
>
> *a) the lender has made every reasonable effort under this Code to agree an alternative arrangement with the borrower or his/her nominated representative; and*
> *b)*
>
> *(i) the period referred to in Provision 45 d) or Provision 47 d), as applicable, has expired; or*
>
> *(ii) the borrower has been classified as not co-operating and the lender has issued the notification required in Provision 29.*
>
> *57. Notwithstanding Provisions 56, where a borrower is in mortgage arrears the lender may apply to the courts to commence legal proceedings for repossession of a borrower's primary residence:*
>
> *a) in the case of a fraud perpetrated on the lender by the borrower; or*
>
> *b) in the case of breach of contract by the borrower other than the existence of arrears."*

81. The plaintiff rejects the first named defendant's claim that he is entitled to call the MARP process in aide of his refusal to surrender possession of 1B Swan Lake. Firstly, he argues that it is uncontested that the facilities were commercial facilities entered into in December, 2006. On the first named defendant's own case he, Ms. Moore and their four children moved into 1B Swan Lake in April, 2015, more than 8 years after the loan had been granted and indeed more than two years after the demand loan had expired. He submits that MARP has no application in the circumstances and relies upon the decisions of *ACC v. Quinn* [2014] IEHC 677 and *Fennell v. Creedon* [2015] IEHC 711.

82. Secondly he submits that the Code only applies to regulated entities. The plaintiff is not a regulated entity (and indeed neither is Launceston) and therefore the Code does not apply to the plaintiff.

83. Thirdly he submits that the first named defendant has breached other terms of his contract, as well as being in arrears in respect of the loan, and thus, even if MARP applied, the plaintiff is entitled to maintain these proceedings by virtue of Provision 57 of the Code.

84. Fourthly the plaintiff also submits that the first named defendant has had in substance the benefit of the MARP process. He was afforded a period of two years in which to negotiate with Launceston and present two proposals. He failed to reach agreement with Pepper on behalf of Launceston. Therefore, the receiver is now entitled to seek an injunction restraining trespass against the first named defendant.

85. The first named defendant argues that 1B Swan Lake is a residential property which he, as a borrower, occupies as his primary residence in the State. Thus it comes within the scope of the code of conduct and he is entitled to the benefit of the MARP process. He denies that he has been afforded the benefit of that process and his distinguishes the facts of his case from the facts in *ACC v. Quinn* and *Fennell v. Creedon*.

86. Even if the first named defendant is correct in his argument that he is entitled to the benefit of the MARP process, if he has been guilty of breach of contract (other than arrears) then there is no basis for his claim that Launceston or the plaintiff may not seek to recover possession of the premises on the basis of the failure to apply the MARP process.

87. At clause 13.5 of the deed of mortgage the first named defendant represented and warranted to Anglo that save as disclosed in writing to Anglo prior to the execution of the mortgage deed there were no encumbrances of any nature or kind affecting all or any part of the mortgaged properties. At clause 6 there was a negative pledge whereby the mortgagor was not entitled without the prior consent of Anglo to create or permit to subsist any encumbrance on or affecting any part of the mortgaged parties. Schedule 2 to the deed lists termination events including if default is made by the mortgagor in the due performance or observations of any covenant, undertaking, condition or provision binding on the mortgagor; if any of the warranties or representations on the part of the mortgagor is or becomes untrue or false or is breached.

88. Under the facilities of October, 2006, September 2008, and February, 2012, the security for the loans was to comprise the first legal mortgage over Swan Lake and first legal charge over Summer Cove.

89. On the case advanced by the first named defendant, he was at all times in breach of his contractual obligations to provide Anglo with a first legal charge and mortgage over the three properties free from any prior encumbrances.

90. The first named defendant maintained in correspondence and subsequently in his affidavits sworn in the proceedings that he had not discharged the consideration of €200,000 for the site of Summer Cove to his parents Mr. and Mrs. Wright. He therefore agreed that Mrs. Wright had a prior interest in Summer Cove and that the security obtained by Anglo and subsequently Launceston was subject to her prior claim. In 2016 he acknowledged his mother's claim in respect of Summer Cove.

91. Ms. Moore asserts that she is entitled to an interest in each of the secured properties on the basis of her contributions to the fitting out and completion of the three properties. In relation to Summer Cove, she asserts that this was prior to the grant of the loan and the grant of the mortgage over Summer Cove in December 2006. The first named defendant has accepted that this is correct.

92. Each of these acknowledgments by the first named defendant is inconsistent with his express representations and warranties and

negative pledge in the mortgage deed. Furthermore, as part of the transaction granting Anglo a first legal charge over Summer Cove, the first named defendant swore statutory declarations as set out above to the effect that there were no burdens capable of affecting the lands at Summer Cove pursuant to s. 72 of the Registration of Title. Each of these claims is inconsistent with the statutory declarations.

93. The first named defendant purchased the Swan Lake lands with the proceeds of the 2006 facility. Ms. Moore cannot have contributed towards the acquisition of an interest in the lands prior to the grant of the mortgage. She has asserted that she is entitled to an interest in each of the Swan Lake properties on the basis of her time and financial contributions after the first named defendant acquired the lands. The first named defendant has accepted and acknowledged these claims. Indeed, he states that he did so over a period of time. It follows on this case that he was in breach of the negative pledge cause in the deed of mortgage.

94. Each of these breaches constitutes a termination event of the mortgage deed.

95. Both Mrs. Wright and Ms. Moore instituted proceedings against the first named defendant seeking to enforce their respective claims. They each registered *lites pendentes* against Summer Cove (in respect of both of them) and against Swan Lake (in the case of Ms. Moore).

96. The first named defendant's solicitors pointed out in the correspondence of May and July, 2016, that the existence of these claims and the registration of the *lites pendentes* created obstacles to the realisation by Launceston (and subsequently the plaintiff) of the security in respect of each of the properties.

97. Mr. Ian Wigglesworth of Pepper swore in his affidavit of 25th November, 2016 that: —

> *"The demand letters and enforcement action that was commenced by Launceston in July and August of this year took place in light of the very serious concerns that the secured assets were in jeopardy arising from Mr. Wright's conduct, and in particular the assurances that it appears he gave to Ms. Moore and Mrs. Wright without the consent or knowledge of Anglo/IBRC or for that matter Launceston."*

98. Neither the actions nor the documents referred to have been disputed by the first named defendant. There is no conflict of evidence in relation to these matters. I am satisfied that they constitute breaches of contract within the meaning of Provision 57 of the Code of Conduct of Mortgage Arrears 2013. That being so, there was no prohibition on the plaintiff (or Launceston) from instituting these proceedings on the basis of a failure to comply with the MARP process. It follows therefore that the second argument advanced by the first named defendant cannot be an answer to the plaintiff's claim to possession of 1B Swan Lake or to put it another way, it cannot entitle the first named defendant to do what would otherwise be a trespass.

99. Because of this conclusion I have not found it necessary to consider whether the Code applies to a receiver or an entity, such as Launceston, which is not a regulated entity. Likewise, I have not found it necessary to decide whether or not this case can be distinguished from the decisions in *ACC v. Quinn* and *Fennell v. Creedon*, as was argued by counsel for the first named defendant.

100. For these reasons I am satisfied that the plaintiff has made out a strong case that he is likely to obtain orders for possession of Summer Cove, 1A and 1B Swan Lake at the hearing of the action.

Damages an adequate remedy?

101. I turn then to consider whether damages are an adequate remedy for the plaintiff or, if not, for the first named defendant.

102. The plaintiff says that damages are not an adequate remedy for him. As was observed by Laffoy J. in *Dwyer Nolan Developments Limited v. Kingscroft Developments Limited* [2007] IEHC 24 it is not necessary to prove damage in the case of trespass.

103. In *Metro International SA v. Independent News and Media p.l.c.* [2006] 1 I.L.R.M. 414 Clarke J. stated at p. 424: —

> *"I am nonetheless of the view that in assessing the adequacy or otherwise of such damages as a remedy the court can and should have regard to the question of whether the right sought to be enforced or protected by interlocutory injunction is one which is of a type which the court will normally protect by injunction even though it might, in one sense, be possible to value the extinguishment or diminution of that right in monetary terms."*

104. In *McCann v. Morrissey* [2013] IEHC 288 Laffoy J. followed the case of *Westman Holdings Ltd. v. McCormack* [1992] 1 I.R. 151 (at p. 158), where Finlay C.J. identified two limbs in the adequacy of damages criterion in relation to whether an interlocutory injunction should be granted: whether in fact damages were an adequate remedy for the plaintiff; and whether "*there is a defendant liable to pay such damages who is able to do so, and thus the appropriate compensation could be actually realised* ". She stated: —

> *"The reality of the situation in this case is that there is no evidence before the Court that if an interlocutory injunction is refused, and following the hearing of the substantive action, the Receiver is found to be entitled to compensation for the period over which he has been deprived of possession and receipt of the rents and profits of the Premises, such compensation could be actually realised against any of the defendants. On the other hand, again by analogy to the decision of Lynch J. in ICC Plc v Verling, if the interlocutory relief sought by the Receiver is granted and it subsequently transpires that it should not have been granted, then the Receiver's undertaking as to damages will be capable of compensating each of the defendants who is able to establish that he or it suffered damage as a result of the grant of an interlocutory injunction."*

105. I also have regard to *AIB p.l.c. v. Diamond* [2012] 3 I.R. 549, where of Clarke J. stated: —

> *"Even though there may be a sense in which it may be possible to measure the value of property lost, declining to enforce property rights on the basis that the party who has lost its property can be compensated in damages would amount to a form of implicit compulsory acquisition. If someone could take over my house and avoid an injunction on the basis that my house can readily be valued and he is in a position to pay compensation to that value (even together with any consequential losses), then it would follow that that person would be entitled, in substance, to compulsorily acquire my house. The mere fact that it may, therefore, be possible to put a value on property rights lost does not, of itself, mean that damages are necessarily an adequate remedy for the party concerned is entitled to its property rights instead of their value." (Emphasis added)*

See also *Dellway Investments Limited v. NAMA* [2011] 4 I.R. 1 Finnegan J.: —

> *"The courts regard interests in land differently to interests in personalty and, in general, damages are not considered to be an adequate remedy."*

106. On the basis of these authorities and the fact that the first named defendant is unable to pay a very significant debt due to Launceston and therefore would be unable to pay damages to the plaintiff, I am satisfied that damages would not adequately compensate the plaintiff for any loss he may suffer if an injunction is not granted prior to the date of trial.

107. The plaintiff has given the usual undertaking as to damages. Are damages an adequate remedy for the first named defendant if he proves to be successful in his claims to be entitled to withhold possession of the properties from the plaintiff?

108. In my judgment, in respect of investment properties (absent special circumstances) an undertaking as to damages will normally be capable of compensating a defendant who ultimately establishes at trial that he suffered damage as a result of the grant of an interlocutory injunction to a plaintiff to which, it turns out after the trial of the action, he was not entitled. Thus damages would provide an adequate remedy to the first named defendant in relation to the application for possession of Summer Cove and 1A Swan Lake as these on his own case are investment properties. The loss the first named defendant may sustain could be measured as the difference between the sum realised from the sale of the property by the plaintiff in its current condition as opposed to the amount which might have been realised had the first named defendant been in a position to implement the planning permission (taking account of any increases in the outstanding sums due and the costs associated in carrying out the planning permission and the subsequent sale of the property).

109. Is the situation different in relation to 1B Swan Lake? This is the premises where the first named defendant, his partner and four children have resided since April, 2015. He submits that the focus of the Court should be on the damages which might be sustained by either party in the interval between the decision on the application for interlocutory injunctions and the decision on the substantive hearing of the action. In view of the fact that the case is listed in the commercial list of the High Court, it is to be presumed that this will take place relatively quickly. If he were to be successful at the trial his victory in respect of 1B Swan Lake would be pyrrhic indeed as he would have lost his home in the interval. On this basis he says that damages are not an adequate remedy in respect of 1B Swan Lake.

110. 1B Swan Lake was never acquired or built as a family home. All of the facilities were commercial facilities repayable on demand. The purpose for which the monies were lent was to enable a commercial development to take place. Eight years after the purchase of the lands and the first facility was accepted by the first named defendant he chose to move his family home to 1B Swan Lake in April, 2015. He chose to do so for his own personal reasons. This differentiates his situation from the mortgagor who enters into an agreement to borrow monies for the purposes of acquiring a family home. The terms upon which monies are advanced to carry out a commercial development are very different to the terms upon which monies are advanced to purchase a principal private residence. The loan in this case was repayable on demand. Anglo did not enter into a twenty year facility with the first named defendant as would be typical where monies were advanced for the purpose of acquiring a principal private residence. The loan (which had already been extended) expired on 31st December, 2012. The first named defendant cannot unilaterally by his actions alter the nature of the transaction and the contracts he entered into in December 2006 and subsequently in 2008 and 2012.

111. Thus, 1B Swan Lake was at all times and remains an investment property and I therefore conclude that there is no reason to distinguish between it and 1A Swan Lake. It follows that damages would be an adequate remedy for the first named defendant if I were to grant the injunction sought by the plaintiff and the first named defendant ultimately succeeded at the trial of the action.

Balance of convenience

112. The plaintiff is *prima facie* entitled to orders for possession of the lands. He cannot perform his function of realising the security without securing vacant possession of the lands. The refusal of an injunction would deprive him of the ability to carry out his function until the ultimate conclusion of the action. This seriously undermines the security granted by the first named defendant to Anglo as a condition of the advance of very considerable monies to him by that bank.

113. As against this, the grant of the injunctions would have the effect of substantially determining the action as the plaintiff would normally be in a position to proceed to sell the properties. That of itself is no reason to refuse the relief sought where, as here, the plaintiff is *prima facie* entitled to the injunctions; they are orders requiring the surrender of possession of land to the person entitled to possession such as are normally granted by the courts to protect rights to land.

114. The strongest arguments in the favour of the first named defendant are all based upon the fact that he lives with his family at 1B Swan Lake and he has nowhere else to live: i.e. upon his actions or inactions.

115. Swan Lake was acquired on foot of a commercial loan. He unilaterally chose to move into 1B Swan Lake eight years after the loan was advanced. He did so after the facility expired on 31st December, 2012. As I have said, this did not change the nature of the contract between the first named defendant and his lender, nor the fact that the property remained a secured investment property. Both the first named defendant and Ms. Moore have striven to retain the three properties and to service the loans. They twice restored the Swan Lake properties after they were badly damaged by flooding. Whilst fully acknowledging this, nonetheless I must uphold the agreements and security freely granted and not facilitate the frustration of those agreements. The first named defendant has created the dilemma the family now faces.

116. It is important to note that he has options available to him, unlike many others who face orders to restrain trespass or indeed orders for possession. The first named defendant is still the owner of 62 Connolly Avenue, which is currently rented to a tenant. The first named defendant has not served a notice to quit on his tenant with a view to recovering possession of this property for his family to live in. He offered no real explanation for this omission even though he was prepared to serve notice to quit on the tenant of 1A Swan Lake. He has had ample notice of the fact that Launceston rejected his proposals and were seeking to realise their security. The plaintiff has been appointed since August, 2016. The first named defendant cannot seek to resist the plaintiff's application on the basis that he has nowhere else to live when he has not taken any steps to avail of this possible solution to his dilemma. It is noteworthy that when it suited his ends he was prepared to serve a notice to quit on the tenant of 1A Swan Lake but he has refrained to date from serving a notice to quit on the tenant of 62 Connolly Avenue.

117. The specific arguments advanced in relation to 1B Swan Lake do not apply to 1A Swan Lake which was, until recently, let to a third party who has since vacated the property pursuant to the notice to quit served in June 2016.

118. I conclude that the balance of convenience does not lie in favour of refusing the injunctions sought. I find that the balance of convenience lies in favour of granting the reliefs sought in respect of both properties at Swan Lake.

119. The first named defendant did not acquire Summer Cove with monies advanced by Anglo. Mr. and Mrs. Wright owned the lands and transferred them to him in January 2006. It would appear that he did not pay the consideration of €200,000 referred to in the deed of transfer. He and Ms. Moore built the house on Summer Cove out of their own resources. The first named defendant charged the land when he accepted the facility in December 2006. At that time, he and Ms. Moore and their children resided in 62 Connolly Avenue, Inchicore, Dublin 8. There was no indication that the security offered to Anglo would be used as a family home, though Ms. Moore states that it was their intention that the family would reside there. Thus the property was offered as security on the basis that it was not a family home in respect of a commercial loan. The fact that three years later for their own personal reasons the first named defendant and Ms. Moore moved out of their home in Dublin to reside in Summer Cove does not alter this fact, particularly as they voluntarily moved out again in April, 2015, though they still retain the property as a holiday home.

120. This property is not the principal residence of the first named defendant's family. They currently use it as their holiday home, though it is simultaneously let to the second named defendant. That being so, for the reasons outlined above, the balance of convenience lies in favour of granting the plaintiff he seeks in respect of this property also.

Injunction against the second named defendant

121. The central issue for resolution in relation to the plaintiff's claim for an injunction against the second named defendant is whether or not either or both of the leases granted by the first named defendant to the second named defendant of Summer Cove are binding upon Launceston and/or the plaintiff. If they are not, then *prima facie* the plaintiff is entitled to the relief he seeks.

122. The plaintiff relies upon the decision of Dunne J. in *Fennell v. N17 Electrics Limited* [2012] 4 I.R. 634. At para. 30 of the judgment she stated: —

> *"I think, first of all, that it is clear that a mortgagor and mortgagee can expressly agree to exclude the power conferred by s. 18 of the 1881 Act. If the power is excluded, it may be done in a way that permits the mortgagor to grant a lease subject to the prior consent of the mortgagee. If such prior written consent is not obtained by the mortgagor and the mortgagor proceeds to enter into a lease with a tenant, the lease will be binding on the mortgagor as lessor, but as against the mortgagee, the lease will not be binding. It is also clear that in certain circumstances, the lease may be binding on the mortgagee in circumstances such as those described in the authorities referred, where, for example, the mortgagee "serves a notice on the tenant to pay the rent to him". It is also clear from the authorities referred to above, that the mere fact that the mortgagee is aware of the existence of a tenancy and that a tenant is paying rent to the mortgagor which is being used to pay the obligations of the mortgagor to the mortgagee, is not, of itself, sufficient to create a relationship between the mortgagor's tenant and the mortgagee."*

123. It will be recalled that clause 19 of the mortgage deed provided that the statutory powers of leasing of the mortgage properties "*shall not be exercised by the mortgagor without the prior consent in writing of the bank and the mortgagor shall not create or purport to create any lease or tenancy … otherwise than under the said powers*."

124. The second named defendant asserts that the first named defendant orally agreed with representatives of Anglo and/or IBRC to the tenancy agreement he entered into with the second named defendant on 31st March, 2011. The second named defendant set up a standing order to pay IBRC directly the rent due in respect of this tenancy agreement. It says this was done with the agreement and at the request of IBRC. The second named defendant does not assert that there was any written consent by either Anglo or IBRC to the tenancy agreement.

125. On the basis of well established authority, most recently expressed in *Fennell v. N17 Electric Limited (in liquidation)*, it is clear that, in the absence of the prior written consent of the bank (be it Anglo or IBRC), the tenancy originally granted by the first named defendant to the second named defendant of Summer Cove was not binding upon the mortgagee.

126. But that is not the end of the matter. Such a lease may become binding upon a mortgagee. Mere notice and acquiescence in a state of affairs is insufficient. However, if the mortgagee "*serves a notice on the tenant to pay the rent to him*" then the mortgagee will be bound by the tenancy agreement.

127. On the basis that IBRC was in receipt of the rent directly from the tenant on foot of a standing order set up at its request I am satisfied that the original lease of 31st March, 2011, was binding upon IBRC.

128. The term of this lease was 31st March, 2011 — 31st December, 2015. A new lease was granted by the first named defendant to the second named defendant on 1st April, 2016. The first named defendant explains that this is because the second named defendant had a statutory entitlement to a new lease.

129. This new lease was granted when Launceston had acquired the loans and securities. The second named defendant did not pay rent directly to Launceston or its agent Pepper. On the contrary, the evidence establishes that the rent was paid to the first named defendant as the landlord. The landlord, the first named defendant, may well have used the rent so received to make the repayments due by him to Launceston and Launceston's agent Pepper may indeed have directly been aware that this was so. It is a very different situation to a tenant paying rent directly to a mortgagee.

130. It is quite clear from the decision of Dunne J. in *Fennell* quoted above that the mere fact that the mortgagee is aware of the existence of a tenancy and that a tenant is paying rent to the mortgagor which is being used to pay the obligations of the mortgagor to the mortgagee is not, of itself, sufficient to create a relationship between the mortgagor's tenant and the mortgagee. The tenancy is not binding on the mortgagee and it is void as against the mortgagee.

131. It is important to quote the observations of Dunne J. at para. 47 of her judgment: —

> *"It is essential from a lender's point of view that the secured property is available as security in the event of default by the borrower. It is therefore important to ensure from the lender's point of view that any impediment to the realisation of its security by reason of a lease binding on the mortgagee should be one in respect of which the mortgagee had furnished its consent. That is the importance and the function of the negative pledge clause contained in the various mortgages/charges. From the bank's point of view in this case, there was no commercial reality apparent in the business lease agreement. It is inconceivable that the bank would ever have consented to a lease in the terms of the business lease agreement had it been asked to do so."*

132. The second named defendant has advanced no basis upon which it can be said that Launceston, and by extension, the plaintiff is bound by the new lease of 1st April, 2016. The onus is upon it to do so. It was granted some months after the prior lease had expired. There was no evidence of any claim to a new lease, of any negotiations or any notification given to Pepper or Launceston. This is not surprising as the lease was granted after Pepper had called upon the first named defendant to sell Summer Cove. It follows that the lease must be regarded as void as against the plaintiff. No arguments based upon the inadequacy of damages on the balance of conveyance were advanced by the second named defendant. In view of the fact that the lease is void as against the plaintiff, he is entitled to the relief he seeks against the second named defendant.

Application to vacate lis pendens registered by Ms. Moore

133. This application is brought by the plaintiff pursuant to s. 123 of the Land and Conveyancing Law Reform Act 2009. The section provides as follows: —

> *Subject to section 124, a court may make an order to vacate a lis pendens on application by—*
>
> *(a) the person on whose application it was registered, or*
>
> *(b) any person affected by it, on notice to the person on whose application it was registered—*
>
> *(i) where the action to which it relates has been discontinued or determined, or*
>
> *(ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action or the action is not being prosecuted bona fide.*

134. Section 121 of the Act provides that "*any action in … the High Court in which a claim is made to an estate or interest in land …*" may be registered as a *lis pendens*. It follows that a *lis pendens* can only be registered in proceedings in which the registrant bona fide claims an estate or interest in land.

135. In *Gannon v. Young* [2009] IEHC 511 Laffoy J. concluded that, where proceedings were bound to fail, they were not being prosecuted bona fide for the purposes of determining whether or not the *lis pendens* registered should be vacated.

136. Ms. Moore's case is that she has an equitable interest in Summer Cove on the basis of her contributions to the construction, fit-out and furnishing of the house at Summer Cove. She says that this was completed before December, 2006, when the first named defendant granted the mortgage to Anglo. She says that she paid €79,344.75 in May, 2006 to the first named defendant's company, Creative Concrete Limited, which was constructing the house. She estimates the total value of her contributions to be c. €160,000.

137. It is common case between the parties that her interest in Summer Cove was not registered on either folio WX11763 or the new folio created in May, 2007, 48025F.

138. Section 72(1)(j) of the Registration of Title Act 1964 provides that the rights of every person in actual occupation of the land or in receipt of rents and profits thereof, save where, upon enquiry made of such person, the rights are not disclosed, are burdens which affect registered land without registration.

139. If Ms. Moore can establish that she comes within this provision, then her claimed equitable interest in Summer Cove is a burden which binds the land without registration. That being so her claim would rank in priority to that of Anglo and therefore ultimately of the plaintiff.

140. On the basis of the evidence before the Court I cannot say that her case is "*doomed to failure*" in the words of Laffoy J. She may have been in actual occupation of Summer Cove within the meaning of the Act prior to the grant of the mortgage, despite the statutory declaration of Mr. and Mrs. Wright referred to at para. 5 above and by the first named defendant on 18th December, 2006. She has said that Anglo was aware of her interest in Summer Cove through the insurance policy which was in the joint names of herself and the first named defendant. This is not a matter that can be resolved on a motion pursuant to s. 123 of the Act of 2009. If Anglo had notice, whether actual or constructive, of her claimed interest in Summer Cove, it was for Anglo to make enquiries of her and not for her to ensure that Anglo was aware of her interest in the property. It was only if enquiry was made of her and she failed to disclose such an interest that it would not be binding upon Anglo.

141. In order to grant the plaintiff, the relief he seeks in relation to Summer Cove, I would have to be satisfied that Ms. Moore's claim to an interest in the land in priority to the plaintiff is bound to fail. I would also have to be satisfied that her claim was not being prosecuted bona fide. Based on the evidence before me I am not so satisfied and therefore I refuse to vacate the *lis pendens* registered by Ms. Moore in relation to Summer Cove.

142. The situation is very different as regards the two properties at Swan Lake. The first named defendant mortgaged the freehold to Anglo the day he purchased the lands. He avers that he built the two properties now known as 1A and 1B, Swan Lake Properties in 2007 — 2009 (though originally the entire property was referred to as "Swan Lake", 1A Chapelizod Road). At this stage the land on which the properties were built had already been mortgaged to Anglo. The first named defendant could not as a matter of law confer, assign or convey any interest in those properties to a third party without the prior written consent of the mortgagee. See *In re H.S.S. (in receivership)* [2011] IEHC 497.

143. It follows that all of Ms. Moore's extensive efforts in relation to Swan Lake and her investment in fixtures and fittings cannot give her an interest in either of the properties in priority to the mortgagor. Thus insofar as she claims an interest in priority to the plaintiff this is doomed to failure and the continuance of the *lis pendens* is therefore as a matter of law not bona fide. This is in no way to diminish or ignore the extraordinary efforts made by both Ms. Moore and the first named defendant to complete the build of the two houses and to restore them to habitable condition after they were extensively damaged by floods not once, but twice. The court acknowledges their tremendous efforts to save their investment and, latterly, their home. However, these efforts do not assist in her claim to an interest in either Swan Lake property in priority to the mortgagee and the receiver it has appointed to the properties.

Conclusion

144. The plaintiff is entitled to the injunctions he seeks against the first named defendant in relation to all three secured properties and to the ancillary injunctive reliefs. He is entitled to an injunction as sought against the second named defendant in relation to Summer Cove. The plaintiff is entitled to an order pursuant to s. 123 of the Land and Conveyancing Law Reform Act 2009 vacating any *lis pendens* that may purportedly be registered and/or asserted by Mary Moore on the properties known as 1A and 1B Swan Lake, Chapelizod Road, Islandbridge, Dublin 8, but not in relation to Summer Cove.