

THE HIGH COURT

2008 1277P

BETWEEN

DUBLIN CITY COUNCIL

PLAINTIFF

AND

MARTIN GAVIN AND OTHERS

DEFENDANTS

Judgment of Mr Justice Michael Peart delivered on the 19th day of December 2008

1. In these proceedings the plaintiff seeks a number of injunctive reliefs to require the defendants, who are members of the traveller community, to vacate and cease their occupation of certain of the plaintiff's lands at the junction of Oscar Traynor Road/Coolock Lane and the M1 Motorway ("the lands"), and to remove all items of property belonging to them, and further to require the defendants to restore those lands to the condition they were in prior to the commencement of that occupation. The plaintiff pleads in its Statement of Claim that the defendants are trespassers on these lands and are in unlawful occupation of same since in or about the 9th or 10th February 2008, when approximately 30 caravans were wrongfully brought onto the lands. Since that time repeated requests to the defendants to vacate the lands have been unsuccessful, and it is alleged that since that unlawful entry upon the lands, the defendants have brought additional materials onto the lands as well as other members of their extended family.
2. The plaintiffs state that they require possession of these lands, particularly since they have entered into a contract for sale dated 7th March 2007 of these lands with named parties and that the completion of that contract is dependant upon being able to give vacant possession to the purchasers. The plaintiff is also concerned that these lands adjoin a busy roundabout at the M1/Colock Lane junction and that the presence of the defendants there constitutes a public nuisance and a hazard to persons using this roundabout.
3. The plaintiff states that it has offered to consider the suitability of a site at St. Dominick's for the accommodation of the defendant extended family, which I will hereafter refer to for convenience as "the Gavins", but that the Gavins have failed to engage either reasonably or at all with the plaintiff other than to attempt to impose upon the plaintiff unreasonable conditions and/or guarantees as to their safety (which the plaintiff says it cannot or ought not properly guarantee) having regard to the legal status and the relationship which the defendants have with other members of the travelling community with whom they are in dispute. This other traveller family has been referred to as the Quinn/McDonagh family to whom I will for convenience refer to as "the McDonaghs". The history and nature of that relationship will be relevant to a *defence of necessity* which is put forward by the defendants so as to justify their present occupation of the plaintiff's lands, and some of the evidence which I have heard relates to this defence rather than the trespass itself.
4. The defence delivered by the defendants on the 18th June, 2008 contains the expected traverses of the allegations of trespass and related matters contained in the plaintiff's Statement of Claim. There is however a Counterclaim made therein. That Counterclaim sets out much of the history of the defendants' previous occupation of the site at St. Dominick's over a period of some 25 years and the reasons for their departure therefrom in February 2005. It recites their exodus to Belfast and their return to lands in Fingal in November 2005, and their vacating of these lands following the making of this Court's order requiring them to do so. They plead that they wish to remain in the functional area of the plaintiff council which they regard as their home, being indigenous to that area. These historical events will be referred to in more detail in due course herein.
5. It is pleaded that the plaintiff is under a statutory duty to assess and make provision for "the group housing need of the defendants" in its Traveller Accommodation Programme 2005-2008 and its new Plan for 2009-2012. It is pleaded that as there are no transient sites available in the functional area of the plaintiff, and as the plaintiff has not offered the defendants any temporary sites with limited facilities, they have no other place to go but the side of the road, which itself will seriously jeopardise the life, health, bodily integrity, education and family life of the defendants in breach of their fundamental constitutional rights as well as rights under the European Convention on Human Rights.
6. It is pleaded also that the provisions of s. 13 of the Housing Act 1988 must be interpreted in a rational, reasonable and proportionate manner, and that any temporary site which is provided by the plaintiff must be one which the defendants can reasonably occupy, and/or it must be appropriate and/or adequate and *suitable* to their needs, and that it must not be a place where the defendants are in fear of their lives, and/or where a real threat exists to their lives and/or health and/or safety. In that regard it is pleaded that while the plaintiff has indicated that it will consider assessing the St. Dominick's site, that site is currently unfit for habitation, and in any event it is located adjacent to the site on which the McDonaghs reside, and who are hostile to the defendants, and that if they return there violence will ensue, and that they are fearful in that regard. For these reasons that site cannot be regarded as suitable, adequate or appropriate to their needs.
7. In their said Counterclaim, the defendants seek certain declarations related to some of the statutory duties upon the plaintiff council and the suitability of the site at St. Dominick's.
8. The plaintiff has delivered a Reply and Defence to Counterclaim in which much of what is pleaded by the defendants is traversed, and there is no need to particularise those matters in detail. But it is specifically denied that the plaintiff is under statutory duty to assess and make provision for the *group housing* need of the defendants in its draft Traveller Accommodation Programme for 2009-2012, and further that if there is such a duty, then the plea in that regard is premature since that Programme is still in the course of preparation, and can provide no present cause of action for the defendants to seek the declaratory reliefs which they seek in that regard. It is pleaded also that should the defendants return to the site at St. Dominick's they will have accommodation, and their children's educational needs can continue to be met, as well as the other rights identified by the defendants. In so far as the plaintiff has a statutory duty to provide the defendants with temporary accommodation, which is denied, it pleads that such a duty is not an open-ended or general one, and is dependent upon facilities being available to the plaintiff, and its Traveller Accommodation Programme, and which at present is limited to the site at St. Dominick's. The plaintiff denies that any temporary site which is made available to the defendants must be one which the defendants could reasonably occupy and/or it must be appropriate and/or adequate and suitable to their needs, and/or that it should be where the defendants are not in fear of their lives and/or where there exists a real threat to their lives, health and safety as alleged. It is pleaded that the manner in which the provisions of s. 13 of the Housing Act 1988 fall to be interpreted is a matter of law.
9. While admitting that the plaintiff would consider assessing the suitability of the site at St. Dominick's, it is pleaded that the defendants have refused to accept the plaintiff's offer in this regard, and have attempted to wrongfully impose a condition upon the plaintiff regarding their acceptance, namely that the plaintiff would guarantee their security (which the plaintiff is unable to

guarantee) and nor does the plaintiff have to comply with such a condition imposed by the defendants.

10. It is pleaded also that the defendants are well aware that the plaintiff offered on the 28th February 2008 to clean up the St. Dominick's site in order to make it available as a temporary/emergency site for the defendants, and again on the 12th March 2008, and that had the defendants agreed to this offer, that site could have been made fit for habitation within a reasonable period of time had the defendants been willing to return there.

11. The plaintiff denies that it would be unreasonable, irrational, or disproportionate for the plaintiff to now accommodate the defendants on that site while the McDonagh families are living in the adjacent and neighbouring sites.

12. The final pleading delivered is the Reply to the plaintiff's Defence to Counterclaim, which apart from traversing the pleas therein, makes particular reference in paragraph 8 thereof to the contention that by reason of the plaintiff's failure to discharge its statutory obligation, the defendants are compelled by necessity to remain on the site at the Coolock Lane/M1 junction pending the provision of suitable alternative temporary accommodation.

Background history

13. There has been a relevant history to the present occupation of the plaintiff's lands at Coolock Lane junction with the M1. Much of that history is contained in a judgment delivered by me on the 14th December, 2007 in proceedings brought against the Gavins by Fingal County Council, on whose lands the Gavins were at that time. Following the making of an order by this Court which required the Gavins to vacate those lands, they left in compliance with that order, and immediately thereafter occupied the lands the subject of the present proceedings. From that judgment it can be seen that since about 1980 the Gavins had been tenants of the plaintiff at the St. Dominick's site, within the plaintiff's functional area. They left that site in February 2005 because, according to them, they were forced to leave because of a level of violence directed at them by the Quinn/McDonagh families living close by. They left St. Dominick's and went to Belfast where they occupied a condemned derelict site there, and where they remained until November 2005 when they encamped on lands within the functional area of Fingal County Council.

14. The defendants have given evidence of their fears of a recurrence of the previous violence at the hands of the McDonaghs if they were to agree to the plaintiff's offer to be accommodated again at St. Dominick's following any reconsideration of the suitability of St. Dominick's.

15. I have heard evidence given on behalf of the plaintiff that apart from the site at St. Dominick's there is no other site available within the functional area of the plaintiff council where the Gavins could be accommodated on a single site. There are currently two other sites, one at Dunsink Lane and the other at St. Mary's Park, but neither is large enough to accommodate the entire Gavin extended family. The Gavin extended family presently located at the Coolock Lane junction comprises about 30 families, including many women and children of all ages. They wish, for their safety, to be accommodated in a single unit or site, and not to be split up among a number of smaller sites, as had been proposed for them as a solution to their accommodation needs by Fingal County Council previously, and which they rejected at that time.

16. I have heard evidence from a number of officials of the plaintiff council. Breda Lane, an administrative officer gave evidence of having visited the lands at the Coolock Lane/M1 junction on the 14th February, 2008 and having seen that the lock securing an entrance gate to these lands had been removed and some thirty caravans were present, as well as trucks which were blocking the entrance. She also saw a large number of men, women and children located on the lands. She confirmed that those present had no permission to be on these lands, and that they refused to leave when requested to do so, and that they had no permission to have cars and other property there. She gave evidence also that the lands have been sold to other parties for development purposes, and she agreed under cross-examination that no planning permission was yet in place for that development to commence. She agreed that it could be some time before any development could commence, since it will take some further time for planning permission to be finally in place. She stated that the council is concerned for the safety of persons entering and leaving the site given its proximity to a busy junction. She confirmed that the St. Dominick's site to which I have referred is the only site within the plaintiff's functional area which might be suitable for the Gavins to be accommodated, and that any assessment of that suitability would take between eight and ten weeks to complete once it was undertaken. In other words, even if the Gavins were prepared to move from the present lands to St. Dominick's it would be at least three months before St. Dominick's would be ready for occupation. It appears that in the years since the Gavins left that site in 2005, the site has deteriorated with the accumulation of rubble and other rubbish which would need to be cleared and the site would have to be generally cleaned up.

17. Bernard Leslie, a senior executive engineer in the Traffic Section, who has worked for the council for about eleven years, gave evidence as to the plaintiff's concerns about the Gavins' occupation of these lands from a traffic hazard point of view, although under cross-examination he accepted that to date there had been no incident of which he was aware.

18. Kieran Dunne who in the past was manager of the plaintiff's housing department gave evidence that while he was not familiar with the lands presently being occupied by the Gavins, he is nevertheless familiar with the difficulties which existed in relation to the Gavins' occupation of the site at St. Dominick's up to February 2005. He had inspected the latter site in March 2005 and found it strewn with rubble and other refuse and detritus of all kinds. He is unable to say now that this site is properly serviced given the amount of debris thereon, and stated that this is why the council refers to the proposed site at St. Dominick's as an unserved site. It will apparently now have to be reassessed before it can be confirmed that services are still available there, and he stated that the council are now prepared to carry out that assessment, clear the debris and estimate the cost of restoring it to a state where it can be made available for accommodation for the Gavin extended family.

19. He also stated that work was underway for the preparation of the new Traveller Accommodation Programme for 2009-2012, but that this site at St. Dominick's is the only site available to accommodate the defendants. While he presumed that the St. Dominick's site would be considered in this way, he could not prejudge what the outcome of the assessment might be. He went on to say that in the event that the plaintiff council was not able to provide accommodation for the defendants at St. Dominick's, the Health Service Executive would be the appropriate body to provide the defendants with emergency accommodation, just as it is required to provide emergency accommodation for members of the settled community who apply for and require such accommodation.

20. Under cross-examination he stated that he had heard rumours in 2005 about the incidents of violence which the Gavins state precipitated their departure to Belfast in February 2005, but was not specifically aware that these attacks had included attacks with petrol bombs, although he had heard that shots may have been fired, and that some members of the Quinn/McDonagh family had been convicted in relation to this violence.

21. He agreed when asked that if a site was an unsafe site it would not be a suitable site, and that a site known to be unsafe would not be offered as accommodation to a traveller family, and that it would be wrong to do so. He reiterated that there was no other

site potentially available other than that at St. Dominick's, and that if the Gavins are not accommodated there, then there is no other site available within the plaintiff's area which is suitable to accommodate them in a single unit.

22. Mr Dunne confirmed also that at the moment the best the plaintiff can do is offer a proposal for a site, and that before anything further could be done, the St. Dominick's site would need to be assessed and cleaned up and that this could take up to twelve weeks. It is currently uninhabitable and it is unclear at the moment if adequate services are still available given the amount of debris covering the area of the site. He made the point also that given the sheer size of the Gavin family unit, it was not possible for the plaintiff council at short notice to be expected to immediately have available a suitable site of sufficient size. He was asked if it was not sensible that they be permitted to remain on the present site until such time as the St. Dominick's site was assessed and put into a habitable condition, since it was admitted that there was nowhere else for them to move to, but he stated that this was not a question which was appropriate for him to answer.

23. Mr Dunne was also at pains to explain that when he spoke of suitability he was speaking mainly of physical suitability, i.e. the availability of suitable services, rather than as being free of dangers from violence from others, such as the Quinn/McDonaghs. His view is that such matters are matters for the Gardaí to deal with in order to ensure that the occupants' enjoyment of the site is free of violent attacks from outside, and, therefore safe in that sense.

24. It was put to him that in a 2003 Report on the Prevention and Combating Anti-Social Behaviour, the author states that it is good practice to obtain as much information as possible in relation to persons being considered for placement in accommodation, including the characteristics of victims and complainants, and that it would be good practice to follow such guidelines. He agreed that where possible this should be done. He agreed that on the basis of adopting a sensitive allocations policy the council would not knowingly create a problem by making an allocation of accommodation which was known or likely to cause a problem of the kind anticipated in this case at St. Dominick's. It was therefore put to him that, given the fact that the plaintiff council is aware of the history of violence between the Gavin family and the Quinn/McDonagh family at St. Dominick's which had caused the Gavins to depart for Belfast in February 2005, it would be contrary to guidelines to now offer that site for the alleviation of their present needs. Mr Dunne stated in reply that while that difficulty was known to have existed in 2005 it could not be presumed that it was still the case.

25. He agreed also, when it was put to him, that there would be great difficulty for the Health Service Executive in finding sufficient emergency accommodation, such as bed and breakfast accommodation, for such a large number of the Gavin extended family if it were called upon to do so at short notice.

26. I heard evidence also from Inspector Waters of Coolock Garda Station who is aware of the past feuding, including by shots being fired, which has taken place at St. Dominick's between these two traveller families. It appears that at least one member of the Gavin family was injured by shots being fired, and that another incident had involved petrol bombs. It appears that some members of the McDonagh family were prosecuted for these violent acts but that no convictions were achieved, even though some of the McDonaghs had given evidence. He believed that it was after this that the Gavins decided to leave the site.

27. He stated that the Gardaí had been instrumental in negotiating a truce between the families, and that all had shaken hands on that agreement at the time, but that it had later broken down, leading to further violence and the sudden departure of the Gavins for Belfast in February 2005. It appears that after this agreement was reached, the Gardaí put in place a 24 hour Garda presence at the location. He was asked what steps the Gardaí may be able to take in the event of the Gavins returning to this site in the future, to which he responded that he would arrange for the Crime Service Officer for the area to do a report to see what might be done to secure the safety of all concerned, and he agreed that the erection of a wall would assist, and that the Gardaí, as they had done in the past, would be in a position to meet with the representatives of both families and try and reason with them to try and broker an agreement. He stated that it was not right simply to move people to another accommodation because they did not get on with their neighbours, and that this did not happen with other families, by which he meant settled families.

28. Inspector Waters believes that the Gavins have a good relationship with both the Gardaí and the Housing Authority, and while he agrees with the latter's policy regarding the sensitive allocation of housing, he does not believe that segregation is the entire solution to these difficulties. However, when asked under cross-examination where he thought that the Gavins might be housed safely, he stated that this was a matter outside his remit though he would be glad to offer advice if consulted.

29. Further evidence was given for the plaintiff council by Kieran Cunningham, a senior executive officer who has been working in the plaintiff's Traveller Section since about January 2006. He has a familiarity with the background to the present situation, and states that after the violence in February 2005 both the Gavins and the McDonagh families left the St. Dominick's site, and that the accommodation there was destroyed. It appears from his evidence that while the Gavins removed themselves to Belfast, the McDonaghs dispersed to various areas within the plaintiff's functional area. He is not in a position to say which of the families was responsible for the acts of violence which have been referred to.

30. He also gave evidence of having received applications for housing from the Gavins while they had been on the Fingal property which had led to the previous proceedings already referred to. These applications had been returned to the applicants' solicitors as they were incomplete, since they had not been accompanied by certificates of income signed by the Revenue Commissioners. These have never been provided since that date. Such certificates are a requirement before an allocation of housing can be made.

31. Mr Cunningham stated that the only offer of accommodation which could be made to the Gavins was of a temporary unserviced site at St. Dominick's because it could not be stated with certainty what services were still available at that location, given the destruction of that site in the past. He feared that perhaps water and sewerage facilities may have collapsed, and that the rubble and other debris would have to be removed before the position could be ascertained. He went on to state that if services were found to be available they could be provided immediately, but if not, the cost of reinstatement would have to be ascertained before any decision could be made to carry out the work. The site is not suitable at the present time, but if it was cleared and services were in place, then Mr Cunningham would regard the site as eminently suitable as temporary accommodation.

32. He gave evidence also in relation to the ongoing preparation of the new 2009-2012 Traveller Accommodation Programme. This process involves a survey of traveller families currently occupying both official and unauthorised sites in the functional area, and to identify the wishes and needs of these families which will be taken into account as far as possible and practicable. He stated that the question of suitability would embrace both physical and other safety considerations, and he agreed that in principle a suitable site would also have to be a safe site. In relation to the site at St. Dominick's an assessment of suitability would have to be made after it had been cleaned up following its destruction, and that this work could cost in the region of €150,000, and all necessary works could take up to fourteen weeks to complete, and that in the meantime the Health Service Executive would have to try and accommodate the extended Gavin family in the event that they are not permitted to remain at the Coolock Lane site which they currently occupy, although he agreed that this would not enable the family to be accommodated in a single unit as they wish. He agreed that it would

be desirable to avoid a situation whereby the Gavins would again become victims of violence, but that there is no other site currently available. They would be included in any assessment of needs for the purpose of the new 2009-2012 Traveller Accommodation Plan, but that it is unlikely that there would be further sites which could be made available under the new plan due to the shortage of available land for such purposes.

33. In addition to evidence given on behalf of the plaintiff I have heard evidence from Martin Gavin, who acts as a spokesperson for all the defendants and the extended Gavin family generally. I have heard evidence also from his wife, Helen Gavin, as well as from Liam O'Brien who is Chairman of the Belcamp Steering Committee which attempts to assist the relationship between the Traveller families located near the Belcamp housing estate and the local settled community. He liaises on behalf of the traveller families there and the council. I heard evidence also from Patrick Nevin who heads up a group called Travellers for Travellers which was set up about two or three years ago because of the feuding situation which existed among families, and which they felt was not being taken seriously by the plaintiff council. Finally I heard evidence from Ciaran Forde who is a local council representative with an interest in traveller issues in this area. He expressed in very graphic terms his fear that violence would inevitably break out once more should the Gavin family move back into the Site at St. Dominick's.

34. Martin Gavin outlined the history of violent feuding between his extended family and the Quinn/McDonagh families over the years culminating in the events of February 2005 which motivated the family to leave and go to Belfast. There is no need to set that history out again, as it has been referred to already in these proceedings, as well in my judgment in the previous proceedings to which I have referred. He explained why the offers of accommodation made to them by Fingal County Council had been rejected on the basis that it meant the splitting of his family over three separate sites, each of which was considered as unsuitable for various reasons, including that each site would be too proximate to where members of the Quinn/McDonagh families were living.

35. Mr Gavin has stated that he and his extended family are very concerned about their safety in relation to the McDonaghs, and that this was the only reason why they left St. Dominick's in 2005, and that in the absence of guarantees being given to them by the council and the Gardaí that they will be given appropriate and effective protection from violence they cannot agree to be returned to that location. He also stated that the land which they presently occupy at the Coolock Lane junction comprises waste ground and was traditionally a traveller site until the plaintiff council began to use it for the storage of plant and equipment required in connection with the construction of the Dublin Port Tunnel in recent years. He denies that their occupation of the site causes a hazard or danger for traffic at this junction, and states that there have been no such incidents to his knowledge. He also states that he and his family enjoy very good relations with the Gardaí in the area.

36. When cross-examined, he was asked why, if he regarded the site at St. Dominick's as being so unsafe and unsuitable, he had sworn an affidavit in 2006 in the Fingal proceedings stating that his family was seeking group housing from Dublin City Council at that site. He could only respond by saying that it had been their wish to bring those proceedings on for hearing, and that he believed that if that occurred something would be done for his family by way of the provision of housing somewhere, but he was never of the view that St. Dominick's was suitable for them. He said that the families would be prepared to go there provided that their safety there could be guaranteed, but not otherwise. He is not satisfied that the Gardaí did enough to reasonably address their fears while at St. Dominick's before their departure for Belfast, and has no confidence, as a result, that in the future their safety would be reasonably guaranteed in the event that they return there. He does not believe that the erection of a wall between the Gavin families and the Quinn/McDonagh families at St. Dominick's would be sufficient to remove the danger to his family, stating that *"if people want to do something they will"*.

37. He accepted that they had trespassed onto the Fingal lands in 2005 but does not accept that they have trespassed onto the present lands since it was waste land traditionally used as a traveller site, and that in any event they had nowhere else to go. This latter statement obviously feeds into the defence of necessity which is being argued on the defendants' behalf.

38. Liam O'Brien of the Belcamp Steering Committee gave evidence. He was familiar with the feuding which had taken place between these two families at the end of 2004 and up to February 2005. He had written to various public representatives at the time to try and get something about the situation which then existed, warning that a situation was developing where families might be driven off the site. After the Gavins left the site he liaised to an extent between the Gavins and the council, but while he had nothing against the Gavins themselves, he did not favour their return to St. Dominick's because the residents of Belcamp were not anxious to see the feuding situation start up again. He gave evidence also of one of the attacks on the Gavins which took place at his own office when members of the McDonagh family while in pursuit of the Gavins attempted to get into his office by breaking the door down with machetes. Mr O'Brien is of the view that, at that time, the service provided to the travellers in that area was not as good as it might have been, and he is not confident that if the Gavins return to this site, the Gardaí would be able to deal effectively with future difficulties between these families should they arise. Mr O'Brien would like to assist if he can in enabling the Gavin families to be housed elsewhere in the interests of the settled neighbourhood whom he represents as well as in the interests of the traveller families concerned, with whom he has no axe to grind, as it were.

39. Helen Gavin stated in her evidence that she and her family felt secure and safe where they are presently living on the lands at the Coolock Lane/M1 junction and wishes to be permitted to remain there until some alternative safe location can be provided by the plaintiff council. She stated that she and other members of the family were terrorised at St. Dominick's in 2005, particularly by the shootings and petrol-bombing incidents, and that if they had to return to that site they would be unable to protect themselves against a repeat of these attacks, and she agrees that the Gardaí would not be able to provide the necessary protection. She says that some of the children of the families are settled into the local school and have made friends there.

40. The evidence given by both Patrick Nevin of the Travellers for Travellers group, as well as that of Ciaran Forde, a local councillor is to the effect that it would be entirely inappropriate to relocate the Gavin families in proximity to the McDonaghs on account of the history of serious feuding between them. They both favour the defendants being permitted by the Council to remain where they are until such time as an alternative site becomes available under the new 2009-2012 Traveller Accommodation Programme. Neither believes that the emergency accommodation available to the Health Service Executive at any given time is capable of addressing the emergency needs of such a large grouping as the extended Gavin families, and that there is no reality in so suggesting. Both believe that a return to the site at St. Dominick's by the Gavins will lead inevitably to renewed violence within a matter of weeks, and that it is likely that some person or persons will end up being killed. They each believe that if such a dangerous situation is to be avoided the Gardaí would need to put in place 24 hour armed protection at the site.

Legal submissions

41. The principal issue arising for determination is whether the defence of common law necessity is available to the defendants in answer to the reliefs being claimed by the plaintiff. While Martin Gavin was unable to admit that the family had trespassed onto these lands, the evidence of Ms. Lane is conclusive in establishing that the plaintiff council owns the land, that this occupation of them by the defendants is unauthorised, and that prior to that occupation commencing the entrance had been secured and that the

defendants made a forced entrance to the lands by breaking whatever locks were in place to secure it. I accept that evidence.

42. John O'Donnell SC has made submissions in support of the defence of necessity on behalf of the defendants, and the other issues raised in these proceedings, and I will come to those.

Plaintiff's legal submissions

43. Conleth Bradley SC has made submissions on behalf of the plaintiff.

He submits that the evidence has established that the defendants have trespassed onto these lands, and that an injunction to require their removal together with their property should be made. He submits that if the Court was to refuse to grant such an injunction it would effectively sanction the behaviour of the defendants, allow it to continue, and interfere with the reserved function of the plaintiff council to dispose of its land pursuant to the contract for sale which has been entered into. In effect, it is submitted, the refusal of an injunction would create a court-sanctioned emergency housing site for the defendants.

44. Mr Bradley submits that the behaviour of the defendants must be taken into consideration by the Court. In that regard, he refers to the fact that the current trespass onto the plaintiff's lands followed hot on the heels of the previous trespass upon the lands of Fingal County Council, which resulted in the granting of an injunction requiring them to leave those lands. He refers also to the fact that in those proceedings the defendants had maintained that they were seeking group housing at St. Dominick's, whereas in the present proceedings they say they are not looking for group housing there. In the present proceedings, the defendants say that they will accept a site with limited services at St. Dominick's with limited services, but only subject to certain guarantees as to their safety, given the adjacent presence of the McDonaghs.

45. It is submitted also that the defendants cannot be permitted to have a veto over where the plaintiff council might provide suitable accommodation on the basis that they would be at risk of violent threats and attacks from a neighbouring family, and that the Court should not interfere with the statutory function of the plaintiff council to allocate accommodation according to the resources available to it. Mr Bradley submits that such issues as arise in relation to the safety of the defendants is a matter for An Garda Síochána, just as it is in relation to settled families experiencing such difficulties.

46. Mr Bradley submits that the plaintiff has acted reasonably by offering to clear up, and assess what services are available on, the St. Dominick's site, and to offer it to the defendants, and that any declaration that, before the plaintiff council removes the defendants from the Coolock Lane/M1 site, it has a duty under s. 13 of the Housing Act, 1988 and the other instruments referred to in relief 2 in the Counterclaim, to provide the defendants with a temporary site with limited facilities which they can reasonably occupy and which is appropriate to their needs pending the provision of permanent accommodation, would be inappropriate in all the circumstances.

47. In so far as the defendants in their Counterclaim seek a declaration that "*the plaintiff, if it has not already done so, has a duty to assess the long-term need of the defendants and make provision for this need in its draft and ultimate Traveller Accommodation Programme 2009-2012*", Mr Bradley submits that any such declaration would be premature given that this new Plan is presently under consideration and preparation.

48. Mr Bradley has submitted that the defence of necessity put forward by the defendants is not available as a defence to a trespass such as has been committed by the defendants.

Defendants' legal submissions

49. Mr O'Donnell has submitted that the circumstances in which the defendants were forced to enter upon the plaintiff's lands, and particularly the fact that the plaintiff admits that there is presently no other site within the plaintiff's functional area which is available to accommodate them, mean that the defence of necessity at common law is available to them, that they are not therefore trespassers, and accordingly that the Court ought not to grant an injunction.

50. It is submitted that if the Court grants the injunctive sought, and the defendants leave the lands in obedience to that order, there is no other place that they can go, except the side of the road. He submits also that it is established clearly by the evidence adduced on this application that by virtue of the large number of families and family members including many young children involved, there is no reality in the position adopted by the plaintiff that the defendants should seek emergency accommodation from the Health Service Executive. He urges that the appropriate course is for the Court not to make the order sought and to allow the defendants remain where they are until such time as the plaintiff council is in a position to fulfil its statutory duty by providing suitable, adequate and appropriate accommodation for the defendants, either in St. Dominick's if the defendants' safety can be guaranteed, or at some alternative suitable location within its functional area.

51. He submits also that the evidence shows that the proposed site at St. Dominick's cannot be regarded as "suitable", since that term must not be confined simply to physical suitability, but must include a consideration of whether the site provides *safety from the violence* which they have reason to believe, from past experiences, will be visited upon them by the McDonaghs should they again be accommodated there. He submits that to accommodate the defendants at St. Dominick's, after it has been cleared and assessed for suitability in the physical sense, and ignoring the safety aspect of suitability, constitutes a breach of the plaintiff's statutory duties.

52. In support of his submissions that the defendants are not trespassers because they have nowhere else to go and come within the defence of necessity, Mr O'Donnell has referred to a number of authorities, such as *R v. Martin* [1989] 1 All E.R. 652. He has referred also to a passage from Winfield and Jolowicz on *Tort*, 17th ed. (2006) at p. 722 where it is stated:

"[Necessity] negatives liability in tort, provided, of course, that the occasion of necessity does not arise from the defendant's own negligence, though the authority on it is scanty... Its basis is a mixture of charity, the maintenance of public good and self-protection, and it is probably limited to cases involving an urgent situation of imminent peril."

53. Mr O'Donnell referred also to a passage from McMahon and Binchy's *Law of Torts*, 3rd ed. (2000) at p. 672 where in relation to the defence of necessity in claims of trespass, the learned authors state:

"It seems that necessity will afford a good defence to trespass where there was an emergency (not caused by the prior negligent conduct of the defendant himself) of such a nature as would justify a person reasonably to take the action that the defendant took, even where, in the light of hindsight, the action was not necessary."

54. In the case of *R. v. Martin* referred to above, the Court of Appeal per Simon-Browne J. stated:

"First, the law does in extreme circumstances recognise a defence of necessity. It can arise from objective dangers threatening the accused or others in which case it is conveniently called 'duress of circumstances'. Secondly, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury. Thirdly, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: (1) Was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious injury would result? (2) If so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted?"

55. In his submissions, Mr O'Donnell has referred also to the judgment of Devlin J. in a civil case of *Esso Petroleum v. Southport Corporation* [1956] AC 218. In that case where an oil tanker was stranded in a river estuary because of faulty steering gear, and to prevent her breaking her back thereby endangering the crew, the ship and cargo, the master jettisoned 400 tonnes of oil cargo, which the tide then carried to a foreshore causing damage, it was accepted by Devlin J. that the defence of necessity was a good defence to the claim, *inter alia*, of trespass by the owners of the foreshore against the defendant. In so finding, he stated:

"The defence of necessity would therefore have called for close examination if in fact it had been based solely on the saving of property and if in law I had thought that the plaintiff's rights of ownership in the foreshore were unqualified by their proximity to the sea. But apart from the law, on which I have already expressed my view, the facts of this case, when examined, show that the peril said to justify the discharge of the cargo is that the ship was in imminent danger of breaking her back. The consequence of that would be not merely that the ship herself would become a total loss, but that in the circumstances of this case the lives of the crew would have been endangered. The safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary upon another's property. I think, therefore, that if I am wrong in the application of the principle which I have taken from Lord Blackburn, the defence in this case can equally well be put on the ground of necessity."

56. Mr O'Donnell has referred also to the judgment of Lord Denning MR in *Southwark London Borough Council v. Williams* [1971] Ch. 734, where the defendants who were in dire need of housing accommodation entered empty houses owned by the plaintiff local authority as squatters. It was held that the defence of necessity did not apply to the facts of that case. That case was against a legislative background where the local authority was under a duty to provide temporary accommodation for any person requiring same in its functional area. The defendants were in need of accommodation and 'squatted' in empty houses in the ownership of the plaintiff council and which had been boarded up. Given that section 36 of the National Assistance Act, 1948 provided a remedy in a situation where a local authority might be considered by the Minister to have failed to discharge any of its functions, namely that the Minister may make an order declaring the authority to be in default, Lord Denning was of the view, based on authority, that no other remedy was available, and that *"it cannot have been intended by Parliament that every person who was in need of temporary accommodation should be able to sue the local authority for it, or to take the law into his own hands for the purpose"*. Mr O'Donnell has not referred to that particular passage, but to a later passage which considered the defence of necessity, as follows:

"The doctrine so enunciated must, however, be carefully circumscribed. Else necessity would open the door to many an excuse The reason is because, if hunger were once allowed to be an excuse for stealing, it would open the way through which all kinds of disorder and lawlessness would pass. So here. If homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door which no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine that they were in need, or would invent a need, so as to gain entry. Each man would say his need was greater than the next man's. The plea would be an excuse for all sorts of wrongdoing. So the courts must, for the sake of law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless, and trust that their distress will be relieved by the charitable and the good."

57. Mr O'Donnell has referred to a passage in Smith and Hogan's *Criminal Law*, 1996 at p. 253 where in more recent times the defence has been seen as available to claims of trespass, and where having referred to these remarks of Lord Denning MR in *Southwark*, the authors state:

"Probably it is now the law that if the taking or the entry was necessary to prevent death or serious injury through starvation or cold there would be a defence of duress of circumstances; but if it were merely to prevent hunger, or the discomforts of cold or homelessness, there would be no defence."

58. Finally, Mr O'Donnell refers to *People (DPP) v. Delaney* [1997] 3 I.R. 453 where a sergeant entered a dwelling without a search warrant and without the consent of the owner, in circumstances where he believed that there was a real threat to the lives of people inside from a crowd of people outside the house who were threatening to burn it down. In his judgment in the Supreme Court, (Keane J. (as he then was) and Murphy J. concurring) stated:

"The sergeant was entitled to enter the premises to safeguard the life and limbs of a woman who was there as well as the children. The fact that he may have thought that he was relying on some common law power is neither here nor there. He was entitled to make the choice that he did and such choice, far from being a breach of the Constitution, was in fulfilment of the obligation that devolves on all citizens to observe and implement the requirements of the Constitution because the safeguarding of life and limb must be more important than the inviolability of the dwelling of a citizen, especially when it is under attack in any event."

59. Mr O'Donnell submits that accordingly it is clear that the circumstances of the Gavin family are such as to permit the defence of necessity, since if they are required to return to the only alternative site being proposed by the plaintiff council, inevitable violence and bloodshed will follow, both of which have occurred there in the past. Further it is submitted that the defendants must be permitted to remain where they currently are until such time as the plaintiff council is in a position to comply with its statutory obligation to provide the defendants with a suitable and safe site, safe in the sense of being free of the risk of violence and harm at the hands of the McDonagh family, and in circumstances where the plaintiff council accepts that there is no other site under consideration or available at the present time other than that at St. Dominick's.

Conclusions

60. It is clearly established by the evidence that the plaintiff owns the land which the defendants entered without its consent, and onto which they brought, vehicles, caravans and other belongings, and where they currently remain. Unless they can avail of the defence of necessity there is no difficulty in concluding that they are there as trespassers.

61. The defendants have submitted that their necessity arose partly because the plaintiff council into whose functional area they came and to which they are indigenous, have failed to provide them with any suitable, or indeed any, accommodation, temporary or otherwise, after they complied with the order of this Court to vacate the Fingal lands in February 2008; and partly because the only site to which the plaintiff is prepared to consider providing them with limited facilities for their accommodation is the site at St. Dominick's from which they were forced to depart in November 2005 after there had been serious incidents of violence towards them by the McDonagh family as already described, and they fear for their lives if they are to return unless the plaintiff can guarantee their safety by, if necessary, 24 hour armed Garda protection.

62. I accept that the evidence has demonstrated that the plaintiff council has no available site with limited facilities within its functional area at this particular moment, or at least when this case came on for hearing before me, which is large enough to accommodate the Gavin extended family in a single site. Neither had they one available at the time the defendants were required to vacate the Fingal lands pursuant to this Court's order. For these reasons, it seems clear that the defendants cannot occupy any lands in the plaintiff's functional area, whether belonging to the plaintiff council or other landowners, without doing so as trespassers, unless they have the permission of any landowner concerned. In other words, it must be accepted that the defendants have nowhere to go if they are to remain in one unit which is their wish, and which they say is inherent in their tradition.

63. I am also satisfied that there is no reality in the suggestion that in order to alleviate their homelessness and to accommodate themselves somewhere other than as trespassers, this extended family amounting to some eighty persons including many women and young children, should simply visit themselves upon the Health Service Executive so that this body would provide them all with emergency housing accommodation dispersed among the bed and breakfast facilities of the city of Dublin.

64. On one view it would be reasonable to conclude that their occupation of these lands, as would be the case with any other lands in the present circumstances, is a necessity given that the alternative would be to reside *en masse* on the side of a road, along with their caravans, vehicles and other belongings. That is simply not realistic.

65. But that is not in itself sufficient to bring into play the defence of necessity to the claim of trespass. Were it so, then it would indeed condone and tolerate what is unlawful, leading to social and environmental chaos, and an unrestrainable trampling on the property rights of others in the future. It would undoubtedly risk the outbreak of violence, as those owners in turn, being unable thereafter to access a remedy through the courts, might resort to their own equally unlawful methods of removing those who have taken the law into their own hands and trespassed upon their lands. One can easily and quickly see how the social order would break down.

66. The defence of necessity, as, and in so far as, it has come to exist, and as discussed in the cases to which this Court has been referred, was never, and never could be, intended to permit an uncontrolled and uncontrollable regime whereby persons, be they travellers or any other grouping in search of accommodation, could simply enter upon the lands of others and claim an entitlement to be there until such time as the local authority for the area provides them with accommodation, and in respect of which they would claim a right of veto should it not be to their liking, or which they consider to be unsuitable by whatever definition suitability be judged.

67. The emergency situations giving rise to necessity as a defence can be seen as according due respect to the rights of others, albeit that betimes those rights have to yield temporarily to a higher right to life and limb, given a particular emergency. In the classic example of a person passing a house and seeing that it is ablaze forcibly entering that house without the consent of the owner in order to attempt a rescue of this inside, it can be seen that that it is not the interests of the trespasser which are being protected but those of the owner of the property. As stated in Clerk and Lindsell on *Torts*, Sweet & Maxwell 18th ed. 2003 at para. 18-64 "trespass can be justified by showing that it was necessary to enter upon the land to preserve life or property".

68. In a footnote to that comment the authors state that "*it has been questioned whether necessity can be a valid defence in case of a deliberate tort*" and that "*the defence of necessity is not favoured by the courts, especially where the defendant acted to protect a private rather than a public interest*".

69. McMahon & Binchy in *Law of Torts*, Butterworths, 3rd ed. 2000 state at para. 23.50 state that "*it seems that necessity will afford a good defence where there is an emergency (not caused by the prior negligent conduct of the defendant himself) of such a nature as would justify a person reasonably to take action that the defendant took, even where, in the light of hindsight, the action was not necessary*" (my emphasis).

70. It seems clear that where a person enters, without consent, the land of another person in furtherance of his own interests rather than the interests of the owner or others thereon, the defence of necessity ought not to be available, even where the entry is for the purpose of relieving what is perceived as an emergency for those so entering.

71. It follows that a person who through extreme poverty is unable to buy food cannot be absolved from a trespass into a shop where his purpose was to obtain food for himself and/or his family without paying for it, even though such a situation would constitute an emergency or necessity in order to protect life. Equally, persons such as the defendants who are homeless in the sense of having nowhere to lawfully park their caravans, cannot be absolved from trespass where they forcibly enter the lands of another without consent. Such an extension of the law of necessity as a defence would lead to a breakdown of society and law and order, and could not be permissible. Those forms of emergency are not those which have traditionally been seen as justifying the defence. The defendants did not trespass in order to relieve a situation of emergency threatening the lives of others, but rather their own. The law does not extend that far.

72. Instead, the Oireachtas has put in place a statutory scheme to cater for the accommodation of members of the traveller community whose tradition is to move from place to place as they choose, and, as stated by these defendants, to remain in a single unit as members of a particular family group. The number making up that group is in the case of the Gavins very large indeed, and in all probability will continue to increase. They are indigenous to the plaintiff's functional area, and are present in that functional area. As such they are entitled to be assessed, considered and included in any Traveller Accommodation Programme put in place by the plaintiff council. They were considered and their needs were assessed in so far as they were known for the purposes of the 2005-2008 Plan. But the events of February 2005 which led to their departure from this functional area to Belfast created uncertainty for the plaintiff as to their future intentions. They returned to the Fingal area in November 2005, and I have dealt with the consequences of that return in my judgment in the Fingal proceedings. But it has to be said, as I found in that judgment, that an offer of accommodation was in fact made by Fingal County Council, albeit by means of an offer to provide accommodation in three separate but reasonably proximate locations. For reasons of their own they refused that offer, but I have found that it was a reasonable attempt by that local authority to meet their needs at that time.

73. Having been required to leave the Fingal lands by order of this Court they moved into the present lands as trespassers, and now seek to remain there on the grounds of necessity. The good order of society requires that they seek and be accommodated by means of the statutory scheme. That cannot mean that at all times, and at short notice, the plaintiff council must be in a position to have available to them a site of sufficient size to provide facilities for such a large group, whose movements are uncertain from time to time.

74. The plaintiff council has a limited amount of land at any particular time which they can make available for members of the traveller community, and they are obliged to manage this supply in a manner which is provided for in the statutory scheme. They must prepare a plan every three years. In preparing that plan they must assess the numbers of families likely to require accommodation in any forthcoming period. The declaratory reliefs sought by the defendants in their Counterclaim seek declarations in relation to how the 2008-2012 might be prepared. That is to anticipate what will or will not be included in the Plan. Such declarations are unnecessary.

75. I am satisfied from the evidence which I have heard that the defendants as a family will be considered for the purposes of the upcoming Plan. That consideration will inevitably require relevant consultation with the defendants or their representative, in order to become aware of exactly what those needs are, and these will have to be taken into account in so far as they can be. At present the only site which the plaintiff council has available and which it considers adequate and suitable for the needs of the defendants is the site at St. Dominick's. They are willing to assess what is needed in order to make that site available again to the defendants. A very relevant consideration will have to be the existence close by of another traveller family which, on the evidence before me, has shown violent hostility towards the defendants. I am satisfied that it is reasonable for the defendants to be in fear for their safety if they are to move back into that site without some reasonable steps being taken to address those real fears. But that cannot mean that the defendants have a veto on what provision is made for them by the plaintiff council. But their fears ought not to be ignored, and I have no reason to believe that they would be, as otherwise there will in all likelihood be further incidents of a violent nature. I have no doubt that if this aspect of the site is reasonably considered, some safeguards short of a 24 hour armed watch can be put in place. I am impressed by the willingness of An Garda Síochána to intervene and mediate between these families in the past, even if the defendants themselves feel that in the past more could have been done. I am impressed also by the activity of the Belcamp Residents Group led by Mr O'Brien who have done Trojan work in the past in order to assist in the relationship between the traveller families at St. Dominick's and the residents in the Belcamp estate.

76. But having said that, I am satisfied that the plaintiff council is not the organ of state with day to day responsibility for the maintenance of law and order at the site should it be decided that it is the appropriate site for the accommodation of the defendants. That responsibility falls upon An Garda Síochána, as it does for all sections of society. Much work will have to be done to assist in the maintenance of good order at St. Dominick's should it be decided that the defendants be accommodated again at St. Dominick's. This Court cannot interfere in these matters.

77. But whatever is to happen in the future, it will require the reasonable cooperation of the defendants who cannot simply stand by and remain passive participants in the process by which their accommodation needs are addressed. They cannot simply sit back and wait for a solution which meets with their approval, and thereby maintain some sort of veto in relation to their accommodation provision. It is in their interests to participate in a meaningful way in the process.

78. What remains for decision is what, if anything, this Court should do in the present circumstances, in view of the finding that the defendants are trespassers. Normally such a finding should lead to an injunction being granted once more requiring the defendants to remove themselves, their vehicle and caravans and other belongings from the site and to restore the lands to the state they were in prior to their trespass upon them. However, the relief which the plaintiff seeks is equitable in nature. The Court retains a discretion as to whether or not to make an order even where the plaintiff's claim is made out.

79. It is axiomatic that the Court will not act in vain. In the present case it seems to me that it would be an utterly futile exercise to grant an injunction for the removal of the defendants and their property from the lands they are in occupation of. It is accepted by the plaintiff council that there is literally nowhere to which the defendants can move themselves lawfully. If they remove themselves from the site in compliance with the Court's order, and I am satisfied that they would do so given that they did so in response to the previous order, they would have no alternative but to trespass yet again onto some other land, owned either by the plaintiff or some other unfortunate owner, leading inevitably to yet further proceedings. That is undesirable, and would be an exercise in futility.

80. I have no evidence that the defendants' presence on the present lands has caused or is currently causing a public danger, or public nuisance. Such evidence as I have heard suggests that at that time at least, no such difficulties had occurred. The defendants as of that time had not come to the adverse attention of An Garda Síochána. There is always a risk that such a situation may change, and if it does other remedies will be available.

81. The evidence before me thus far is that while the council has entered into a legally binding contract of these lands to a developer, it will be a significant length of time before that sale can be completed since procedures for obtaining planning permission have not concluded. I am unsure whether there is as yet any application pending. It would appear therefore that the need to have vacant possession of the lands in order to complete that transaction is not an imminent or urgent one.

82. I am mindful that the plaintiff council is of the view that the site at St. Dominick's is the only available site at the present time which can be made available to the defendants once the site has been cleaned up and its present state has been examined in order to find out what if any services are absent and which may have to be restored in order to make it habitable. That process is expected to take about twelve weeks to complete once undertaken, should the cost of doing so be such that the necessary resources are available for any work involved. I have no information as to whether since this case was heard before me any steps have been taken to clean up the site and assess the existence or absence of services.

83. I propose therefore adjourning the question of what order this Court should make until such time as the plaintiff council is in a position to make this site available to the defendants, or indeed any other suitable site. The question of the safety of the defendants should they be required to occupy the site at St. Dominick's, if that is still the only possible site, is something which will have to be at least considered. But it is not the council's function to police the defendants at that site or to police the neighbouring McDonaghs. That will be, as it must be, a matter for the Gardaí to advise in relation to.

84. Common-sense suggests that consultation should take place between all affected parties to ensure as far as possible that the saga of hostility and violence at St. Dominick's, which has led this Court now to hear and determine three separate sets of proceedings resulting from the feuding between these families, ceases and that the lives of all concerned can be lived in an atmosphere of neighbourliness and peace. I am not so divorced from reality as to ignore the possibility that these sentiments may fall on deaf ears. But I would hope that the Gavins would cooperate in the council's efforts to resolve their predicament in a manner which reasonably meets their concerns.

85. I will hear submissions as soon as possible in relation to how long this matter should be put back for in order to facilitate such a resolution to this intractable problem, and what steps need to be taken.