[2019] IEHC 942

THE HIGH COURT

[2019 No. 8790 P]

BETWEEN

REMCOLL 2 LIMITED

PLAINTIFF

– AND –

FRED WALSH, GORDON HUGHES, ITA REYNOLDS, BRYAN CRIBBEN, ADRIAN SMITH, DESMOND WISLEY AND PERSONS UNKNOWN AT THE ROCK CENTRE, BALLINAMORE, COUNTY LEITRIM

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 23rd December, 2019.

A. Introduction

1. An interim injunction was granted by the court at Remcoll's behest on an *ex parte* basis on 15 November. This judgment concerns Remcoll's application, heard on 18 December, for a continuing interlocutory injunction.

2. Remcoll owns a property at Ballinamore, Co Leitrim (the 'Property'). It has been engaged in works on the Property for the purpose of permitting the fulfilment by a related company of a contract with the Department of Justice and Equality to provide sheltered accommodation for 25 families seeking asylum in Ireland. When word as to the intended occupants of the works became public, the Property was beset by a 24-hour, non-stop protest, which had been preceded by an attempt to burn down the premises on the Property. The protest was marred by singularly inappropriate behaviour that included, *inter alia,* intimidation, bullying, vandalism, the erection of a steel mesh stockade on the Property and efforts to contain security staff; it even escalated to the point where the interior of premises on the Property was penetrated and wall-to-floor barricades erected therein.

3. Remcoll believes that the named defendants occupied leadership roles in respect of the protest. It is not disputed that each of the named defendants participated in the protest. Nor, apart from the attempted arson which preceded the protest, has any of the singularly inappropriate behaviour that transpired during the protest been disavowed by the named defendants.

4. A striking effect of the protest was to prevent Remcoll's servants/agents going about their lawful business at the Property; in this regard the court notes that no evidence has been tendered by the named defendants to contradict the affidavits of the architect, builder or security guards tendered by Remcoll and to which the court turns later below.

5. The protests ceased immediately on the granting by the court of the interim injunction. The named defendants each aver that the protests would have ended anyway without the intervention of the court. None of the defendants aver that the protests would not re-commence in the event that the injunctive relief is not continued.

B. The Property

6. It is useful to consider first the location and ownership of the Property. In this regard Mr Collins, Remcoll's CEO avers, *inter alia*, as follows (Pleadings Book 1, Tab 5):

"4. The property the subject matter of these proceedings is known as The Rock Centre (known colloquially as 'The Rock') which is entirely comprised in Folio LM20931F (the 'Property') at Ballinamore in the County of Leitrim. The Plaintiff is the registered owner of the Property….The Property covers a space of just under ten acres.

5. Access to the Property is achieved by the Ballinamore Relief Road which is not a public road. The Ballinamore Relief Road was constructed by the original developer under a Part 8B planning application. The relief road has not been declared a public road under Section 11 of the Roads Act 1993."

7. None of the just-quoted text is challenged. This is significant because when one looks at the plenary summons, one of the claims is for damages for trespass. Arising from this, the second injunctive relief sought in the notice of motion of 21.11.2019 is "[a]*n interlocutory injunction restraining the Defendants, their servants or agents, and any persons acting in concert with them or with knowledge of the said injunction, from trespassing upon or otherwise entering the Property"*.

8. The court cannot but note at this juncture that a landowner with an un-impugned title to property is typically entitled as a matter of right, unless there be good reason shown, to an injunction to restrain trespass (*Keating & Co. Ltd. v. The Jervis Shopping Centre Ltd*. [1997] 1 IR 512, at p. 518). Remcoll's claim sounds in trespass, its title to the Property is un-impugned and the named and other defendants are not entitled to 'roll up' at Remcoll's property and 'camp out' there for the period of a protest. The named defendants, it seems to the court, appear to have lost sight of the fact that the locus of the protest is not public property, it is private property owned by Remcoll; the defendants have not obtained permission from Remcoll to do what has been done on the Property; on the contrary, Remcoll does not want them on the Property.

C. Some Unchallenged Elements of Remcoll's Complaints

9. There are manifest inconsistencies attending the explanations provided by the defendants in relation to the various matters canvassed in the affidavit evidence. It is a feature too of the named defendants' affidavit evidence that where allegation of particular conduct is denied, there is no effort by any of the defendants to aver what in fact occurred. The court, of course, is not in a position to resolve any of these matters at this stage of the within proceedings. Instead, it proposes to consider in this section of its judgment those elements of the complaints that are articulated by Remcoll and which are not challenged, and to see whether those matters of themselves warrant the continuation of the injunctive relief previously granted by the court.

10. The first (unchallenged) matter of importance is the past erection of a seven-foot wire fence around the Property. Mr Collins in the above-referenced affidavit, at para. 19, avers*, inter alia, that "[o]n Tuesday the 22nd October a cordon of 7 feet tall wirefencing was erected around the rear of the Property by the protestors*". Curiously, this event is not the subject of any comment by the named defendants; it is almost as if this, to them,

was something normal/permissible to do on somebody else's property without permission, which, of course, it is not.

11. The second (unchallenged) matter of importance is that the effect of the erection of the fence was to create a narrow passageway through which security guards had to pass to enter the buildings on the Property. In this regard the court recalls the affidavit evidence of Mr Grennan, an operations manager with GSL Security, an entity that provides security services to Remcoll in relation to the Property. He avers, *inter alia,* (Pleadings Book 1, Tab 16, para.17) that "*while I was on site the protestors erected a steel mesh type fence approx.. seven-foot-high along the back of the building three foot out from the wall and fire exits….The effect of the fence is [was] to create a narrow passageway along which security men and visitors must walk if they are to enter or exit the Property."*

12. The third (unchallenged) matter of importance is the effect of what the protestors did in throwing up the fence, which was that in order to go to work security workers (incredibly) had to climb over the fence to get in and out of their place of lawful work. Thus, Mr Grennan avers, in the above-referenced affidavit, at para. 12, that "[t]*he two security guards climbed over a fence and gained entry to the Property. The night shift security guard climbed out the same way. The security staff felt very intimidated and threatened by this behaviour."*

13. The fourth (unchallenged) matter of importance is that large blocks of concrete and also water tanks were set up at the entrances and exits to the Property. Mr Grennan, in the above-referenced affidavit, avers, *inter alia*, that "[o]*n 23rd October at 06:45 I received a phone call from our security guard who was going on site to say that all entry points/exits to the building were blocked with concrete bollards and a large water tank at the front door".*

14. The fifth (unchallenged) matter of importance to note is that the effect of the blocking of the entrances and the exits was in effect to contain/trap site staff in the Property. Mr Collins in the above-referenced affidavit avers, *inter alia*, as follows in this regard:

> *"18. Large blocks of concrete and water tanks were set up in front of all the entrances to the centre to stop any access into or egress from the premises. Members of the security team were locked inside the centre overnight as these blockades were set up. These events occurred over the course of the night of the 22nd to 23rd October."*

15. It is perhaps worth noting in this regard that the said members of the security team were being locked inside a building which somebody had sought to set ablaze only a few days previously. Yet the defendants come to court making no comment at all about the effect of this conduct on the individuals who were subject to same.

16. The sixth (unchallenged) matter of importance is that the locks of the doors which served the buildings on the Property were glued shut, rendering them unusable. Mr Collins in the above-referenced affidavit avers, *inter alia*, as follows in this regard:

"19. They [the protestors] also changed a lock in one of the access doors, which gave access to a fire escape, to stop workers gaining access to the building. The front of the building was blocked by the protestors and again access to workers was blocked. Glue was used to seal the locks on access doors so the doors could not be opened."

17. The seventh (unchallenged) matter of importance is that an attempt was made to nail shut an entry/exit door. Mr Grennan in the above-referenced affidavit, at para. 17, avers, inter alia, that "[o]*n the 28th October an attempt was made to nail shut an entry/exit door. This attempt was abandoned when interrupted by a member of security staff."* Again, the court notes that this episode has not been disavowed by the named defendants.

18. The eighth (unchallenged) matter of importance is the profoundly serious consequence of the interference with the doors. Mr Grennan in the above-referenced affidavit, avers, inter alia, as follows in this regard:

> *"The protestors changed the lock on one exit door and it is locked permanently. They have put glue into the lock on the front door and it now cannot be opened….As a consequence there is now no functioning emergency exit at the Property. My men are extremely worried because – as outlined above – there has already been one attempt made to burn the Property to the ground."*

19. Again, the court notes that this objectionable behaviour has not been disavowed by the named defendants.

20. The ninth (unchallenged) matter of importance is that the protest involved a full-time, 24-hour, non-stop picket placed on the Property with numbers of protestors managed by means of a so-called 'whistle system'. Mr Collins, in the above-referenced affidavit, avers, *inter alia*, as follows, in this regard:

"17. A full-time, twenty-four-hour picket was put in place at the Property on Sunday the 20th of October. The minimum number I have witnessed participating in this picket is 20 individuals while I have witnessed as many as 45 individuals picketing the Property. There is a notification system in place between the protestors which allows numbers to be rapidly increased. This notification system involves the blowing of whistles which appears to be quite effective as the area is small and many protestors live or work near the Property. A makeshift campsite has been established at the site. Builders attempting to gain access to the centre have been intimidated by members of the picket line and subsequently refused entry to carry out finishing works. 90% of all contractors hired have refused to enter the premises due to fear of the people around the centre".

21. The fact that this is how the protest was organised is not denied.

22. The tenth (unchallenged) matter of importance is that sight of the Private Security Authority licences was demanded every day from the security guards working at the Property, even though the persons working as guards did not change much. Mr Grennan, in the above-referenced affidavit, avers, *inter alia*, as follows in this regard:

> *"20. On the morning of 30th October, I received a call at approximately 06:50 informing me that male protestors stopped security staff who had been attempting to access the building through the channel along the fence, asking them for their PSA (Private Security Authority) licence and taking photos of it. When the licences had been produced protestors walked outside the fence and alongside security staff members while security walked inside the narrow three-foot space for 200 metres to get in. Again, the security staff have been frightened by the extraordinary hostility shown towards them and the disregard shown for their safety by the protestors and complain of very serious intimidation."*

23. In his third affidavit, Mr Collins avers, *inter alia*:

> *"Mr Smith states…that there was no intimidation of Joseph Grennan's staff. The only thing that has ever passed between protestors and security staff, according to his version of events, was the security staff were asked to produce their ID badges. Mr Smith states his belief that this is something security workers are obliged to do when a member of the public asks them to. Mr Smith goes on to allege that in making such requests the protestors wanted to make sure that these men were genuine security staff because the protestors were afraid 'someone' would enter the building and cause damage and the protestors would get the blame. I find this an astonishing suggestion. The security workers were on the building prior to the pickets because the situation in which the protest came to be called had generated a situation where an attempt had been made to burn the building to the ground. There is a rota of workers at the Property and it has been the same people on that rota since the day the protest started. At most, there were four workers. The protestors were familiar with their faces. They were always in security clothing, in the uniform of GSL and these workers were there 24 hours a day: yet every day they were regularly stopped and questioned by the protestors and they were obliged to move through the gauntlet which had been set up for them."*

24. This is unchallenged evidence of targeted, nasty, hostile harassment of people endeavouring to go about their lawful work.

25. The eleventh (unchallenged) matter of importance is that having engaged in all these activities at the perimeter of the premises on the Property, the protest (remarkably) proceeded to the erection of floor-to-ceiling barricades *inside* the said premises. Mr Grennan in the above-referenced affidavit, avers in this regard:

> *"19. Obstacles have been placed inside the Property which prevent the use of an escalator and block access to an entry/exit point located adjacent to the Tesco store. These obstacles were installed on or around Monday the 28th of October….*

29. On the evening of Friday 8th November another entry/exit at the top of the escalator was blocked off by protestors with a seven-foot high fence."

26. The twelfth (unchallenged) matter of importance is the issue of the drones that were flown around the Property for the purpose of interfering with the ability of the security guards to get any respite from the situation presenting. Mr Grennan, in the above-referenced affidavit, avers, inter alia, as follows:

"18. My security staff and I have also noticed that drones controlled by the protestors have been caused to fly around and above the Property….As such there is no respite for the members of my staff. Even on a tea-break at the top of the building there is always someone effectively peering at them.

28. The protestors have what could be described as a support van on site in which food and beverages are prepared. This van is the property of Desmond Wisley….I believe that Mr Wisley is the individual who is controlling the drones which are flown around the building."

27. It turns out that this last belief was correct. Yet far from apologising for this conduct, Mr Wisley's stance is that he did not engage in the drone-flying too often. One does not have to imagine just how perturbing the drone-flying must have been for the workers on-site because Mr Collins in his third affidavit speaks to this aspect of matters, averring*, inter alia,* as follows:

"58. Mr Wisley suggests that I, and other deponents on behalf of the plaintiff, exaggerated about the presence and effect of drones. He confirms that he did fly drones around the Property, but says he checked his logbook – which he didn't exhibit – which apparently shows that there were only three drone flights during the relevant period, and that the drones were in the air for thirty-two minutes in total….The point being made (at paragraph 18 of Joseph Grennan's affidavit [i.e. the para.18 quoted just above]) was not that the drones were constantly there, but that there was a constant feeling on the part of the security guards that they were being harassed and watched, and the presence of drones fed into this. I would hardly have thought that the point needed to be made – and yet it does not seem to have occurred to Mr Wisley – that flying drones in a built-up area for the purpose of peeping into windows of the upper storeys of buildings is not normal flying activity. The only purpose of peeping through upper-storey windows at my staff was to let them know that they were being watched, to deny them any private moment and to make them uncomfortable in the same way as his neighbours would be deeply uncomfortable if Mr Wisley flew his drones to the upper windows of their homes to peep in at them."

28. Mr Wisley makes no comment in this regard.

D. The Effects of the Protest on Workers

29. The twelve matters mentioned above are serious matters, none of which have been put in issue by the named defendants. Any of these matters, it seems to the court, would by itself be serious enough to engage the discretion of the court to grant the interlocutory injunction now sought. Cumulatively they provide overwhelming evidence for the court to grant such relief. Yet serious though the above twelve points are, they go to what was done, rather than the effect of same on the individuals affected by what was done. There is, in this regard, a remarkable failure by the named defendants to address those effects, which effects are set out clearly in the affidavit evidence of (1) Mr Kershaw (a GSL staff member), (2) Mr O'Sullivan (an architect who was engaged by Remcoll to do certain work at the Property), (3) Mr Thorausch (a GSL staff member) and (4) Mr Maxwell (a onetime property developer from whom the Property was acquired by Remcoll and who was later engaged to manage Remcoll's refurbishment project at the Property).

30. Mr Kershaw avers, inter alia, as follows (Pleadings Book 1, Tab 34):

> *"14. As I have stated above, I feel like an animal when arriving and leaving work due to being forced to enter a cage to enter and exit the building. I have requested that an alternative access point be found but the protestors have changed the lock on the only other entry/exit point which is a fire escape. This door has also been glued shut and silicon has been poured into the keyhole. The protestors' actions in this respect make me worry for my safety if anything should go badly wrong at night at the Property in view of the fact that there has already been one attempt to set the Property on fire.*
>
> *15. The atmosphere at the Property is very, very intimidating and it is a very distressing work environment to have to face daily. I have attempted to calm the situation by speaking with the more reasonable protestors and explaining that myself and my colleagues are simply trying to do our jobs and secure the Property and have no wish to become involved in aggressive stand-offs with the protestors. I have asked for the harassment and intimidation to stop but it has continued without any let-up.*
>
> *16. I feel deeply uncomfortable and unsafe at work. Emergency exits are glued shut and various entry and exit points [are] unusable due to the actions of the protestors. I arrive and leave work through a barrier of intimidating and aggressive individuals. At this point, I feel that I putting my life at risk when going to work.*
>
> *17. I feel as if I am going to work in a prison. It is a toxic environment and one which is greatly distressing."*

31. Nobody 'marks' this affidavit in the pleadings, no security guard, for example, has sworn an affidavit to the effect that Mr Kershaw is exaggerating or that his feelings are not a proportionate response to the situation that he faced.

32. Mr O'Sullivan avers, *inter alia*, as follows (Pleadings Book 1, Tab 37):

"5. On arrival in Ballinamore, I called Frank Maxwell, who is the contractor engaged on the Ballinamore project, and requested that he might bring me into the building and to the site which I needed to view. Frank informed me that he could not do so as if he was to arrive on site he would be 'lynched by the crowd'. He informed me that it is not safe for his building contractors on site.

6. I could hardly believe that the situation was as bad as had been described to me and so I asked Frank how I was to gain access and I was informed that the protest is confined to the areas outside the building and that there should not be a problem accessing the clinic and the food-store. Nonetheless, having been informed that it was not safe on sire for contractors I was apprehensive about accessing the building and going about my work. However, there is an urgency attached to this project which I am aware that the Plaintiff requires to complete as soon as possible. I decided to complete the work which I had travelled from Cork (a journey of four hours) to attend to.

7. I entered the building and walked into the concourse. It quickly became apparent that goods had been removed from the existing food store and were being used to block access off the concourse. Moreover, a 6-7 foot high mesh fence had been installed in the concourse blocking all alternative access avenues and making it impossible for me to access the areas which I had needed to inspect.

8. There was a man who seemed to be on patrol in front of this fence. I asked him if he was a member of security. He informed me that he was not, and he was, in fact, a protestor with the group outside while folding his arms and standing upright. I did not need him to inform me verbally that access would not be provide beyond the fence: that was already blindingly clear. For the avoidance of doubt, the situation was simply that I wanted to do the work for which I had been hired and I was not allowed to carry it out: there was no argument to be had.

9. At this point I formed the view that the situation was simply unsafe for me. I made my way to Tesco and purchased some items to ensure I would not be challenged as to what my purpose on site was. Once outside I contacted two colleagues to discuss the matter. We were all agreed that as the situation was unsafe the only option was to leave without having completed my work.

10. I contacted Frank Maxwell again to relay what had occurred. Frank advised that he would contact security and have them escort me to the site. I was willing to attempt this as I felt that this would be a sufficient level of protection. Twenty minutes later I again spoke with Frank who informed me that security had said that it was not safe for me to access the site. I was informed that up until my phone call neither Frank Maxwell nor the member of security he spoke with had been aware of the installation of the 6-7 foot high mesh fence inside the property [emphasis in original]."

33. Mr Thorausch avers, *inter alia*, as follows (Pleadings Book 1, Tab 58):

"7. On the morning of Wednesday, the 23rd October, I arrived at the Property to commence my shift at around 7 a.m. I found that the entrance to the building had been locked. At the entry and exit points to the building large bollards had been placed. I could not gain access to the building and my colleagues could not exit the building….There were about ten protestors on the site at this time. I was informed by the protestors that no member of the security staff would be allowed to enter or exit the building. I was asked for and provided details of my PSA Licence and my name. The number of my licence was noted down by a protestor.

8. I was informed that if the bollards preventing access to the building were removed that additional protestors would be called and there would be trouble. I felt unnerved as there was nothing I could do in this situation and I was being prevented from doing my job. In the end I was forced to climb over a wall to access the building whole my colleagues were forced to exit the building the same way.

9. I am aware that my colleagues felt extremely intimidated by this accident and I can understand this. I am originally from…Germany and now reside permanently in Ireland. When in Germany I received high-quality military training as an infantry member of the German Air Force and I believe this has helped me to cope with incidents such as these, but I can see that many of my colleagues are finding the situation extremely difficult.

10. I have been approached subsequently by protestors seeking details of my PSA licence which I provide when asked to do so.

11. There is a serious fire issue at the Property due to the way in which the protestors have blocked various access points. If there was a fire it would certainly be very dangerous. If there was a fire then the escape routes are very limited and – as my colleague Paul Kershaw has outlined in his Affidavit – the fire escape has been blocked. This dangerous situation is compounded by the fact that there has in fact been an attempt made to set the Property on fire.

12 My wife has been at the Property on two occasions to meet me briefly. On both occasions she has been questioned by protestors as to what she is doing at the Property.

13. The work environment at the property is certainly extremely difficult and I am fortunate to have training to deal with similar situations which I can rely on. If it were not for my military training I think that I would feel extremely intimidated."

34. Mr Maxwell avers, *inter alia*, as follows (Pleadings Book 3, Tab 8):

"3. I am advised that assertions have been made in a number of recent Affidavits sworn by the Defendants in this matter that no tradespeople who attended at the property were denied access to the property and that if tradespeople did not enter the property during the course of the protest then they made that choice out of

respect for the protest. I have also been advised that the protest has been described to the court as silent, respectful and in the nature of a 'family affair'. I make this Affidavit for the purpose of addressing these assertions.

4. *The work at the Rock Centre progressed well until meetings were held in Ballinamore which culminated in a protest and picket being placed on the building, Monday the 21st of October was the first day that the protestors began to make work at the building difficult. On that day both I and contractors at the Rock Centre were taunted by the protestors. Specifically Mr Desmond Wisley continuously taunted me by shouting 'Judas' at me. From that day all contractors accessed the building via the rear entrance until access was completely blocked by the protestors.*

5. *Also on the 21st October Fred Walsh and Ciaran Smyth arrived on site. They walked around the building and seemed to me to be identifying entrances. The next morning every entrance to the building, both front and rear, was blocked. From the 22nd October onwards we could no longer gain access to the building and the tradespeople, who are all locals, were very reluctant to pass the protest and would not do so. Some of the tradespeople were 'allowed' to gather their tools by the protestors but they were warned at the same time not to work on the building.*

6. *A couple of days after the tradespeople were forced off the site I met with Fred Walsh who is the chairman of the protest committee and explained my predicament having been engaged to complete a project which is very important to my company. I explained that we were on a contract and had incurred significant costs and owed a lot of money to various parties incurred as part of the project. I said if we didn't finish the project we would not get paid and this would have a knock-on effect on the sub-contractors almost all of whom were local people. He told me the project was not happening and that we would not be allowed into the building to finish the work. He then told me that if 'them people' move in we can all lock our doors. I understand that by 'them people' he meant the unfortunate families who were to be accommodated in the asylum centre.*

7. *I am also involved in a small shop at the top of the town in Ballinamore. A boycott was placed on this shop. Several of the shop's customers were harassed, intimidated and warned not to go into it. It appears that this was due to my involvement in attempting to complete the project at the Rock Centre.*

8. *Throughout the duration of the protest I had grave concerns for my own safety and I would have such concerns again if my company lost the protection of the injunction."*

35. It is quite something for the defendants to the within proceedings to swear that tradespeople (who were locals) did not pass the protest out of respect for the protestors, in circumstances where they have not furnished to the court even a single affidavit from anyone swearing to this version of events. Mr Maxwell tells of the level of personal

intimidation and vindictiveness that has presented. None of the defendants looked for any time to deal with any of the matters set out in the affidavit/s of any of Messrs Kershaw, O'Sullivan, Thorausch and Maxwell concerning the effects that the protest had on them.

E. Some Case-Law

36. Turning to some of the principal applicable case-law, the court has been referred, in particular, to *Keating & Co. Ltd. v. The Jervis Shopping Centre Ltd* [1997] 1 IR 512, *Eircell Ltd v. Bernstoff (& Others)* [2000] IEHC 18, *Thames Cleaning and Support Services Ltd v. United Voices of the World* [2016] EWHC 1310 and *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd* [2019] IESC 65. The court briefly considers each of these cases hereafter.

1. Keating.

37. In the development of the Jervis Street Shopping Centre, cranes were moving through the airspace of the lands owned by Keatings and they sought an injunction to prevent that. Of particular interest is the following observation of Keane J., as he then was, at p. 518:

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

38. In the context of the within application, Remcoll's title is not in issue and no evidence has been tendered (because none could be tendered) to the effect that the defendants have/had a right or entitlement to do that to which objection has been taken by Remcoll as property-owner.

2. Eircell.

39. This case arose from the nationwide installation of mobile phone masts at the turn of the century. Eircell had come to an arrangement to erect a mobile phone mast on land. The individual plaintiffs, who were part of a protest group, objected to the erection of the mast, claiming that radiation it emanated posed a cancer risk, and engaged in a disruptive, intimidating protest to stop Eircell proceeding as it wanted. Barr J., at p. 10-11, observes, *inter alia*, as follows:

> *"It is not in controversy that Eircell would be entitled to the injunctive relief which they seek pending trial of the action if they satisfy the court on two points. The first is that as to the right of way controversy, there is sufficient evidence before the court to establish that there is a fair issue to be tried in that regard. In the light of*

the foregoing arguments, I have no doubt that Eircell has established that proposition.

The second factor which must be established by the plaintiff is that in all the circumstances the balance of convenience favours the granting of the injunctive relief sought. In that regard they rely on the following points:-

(i) There is presently a part of their phone network which has a poor signal. The mast is required to remedy that deficiency. Without it Eircell is at a disadvantage with its competitor and is suffering an on-going loss of business on that account. It is impossible to quantify that loss and, therefore, damages do not constitute an adequate remedy.

(ii) In determining what loss or inconvenience would be suffered by the group or anyone else if the relief sought is granted the issue relates only to the perspective [sic; prospective?] *use of the boreen by Eircell which it is accepted will be minimal. Accordingly, no significant relevant loss will be suffered by the defendants pending the trial of the action.*

(iii) It is proper for the court to take into account the merits of the group's case and their reprehensible conduct in the matter of intimidation and attempted unlawful enforcement of alleged rights.

(iv) Conversely, it is also proper to take into account the fair and reasonable behaviour of Eircell and its agents in this matter.

All in all, I am satisfied that the balance of convenience favours the granting of the relief sought pending the trial of the action".

40. Here the court is likewise presented with a protest that has been conducted in a reprehensible manner. Notably, Barr J. in striking the balance of convenience asks himself what damage could be caused to the protestors by the granting of the injunction sought? Here a like question arises in respect of the defendants: what damage could be caused to them in injuncting them from watching or besetting, or trespassing upon Remcoll's property? How could this result in damage to the defendants? In this regard, there is, with respect, a complete failure on the part of the named defendants to apprehend what is at stake in the issuing of the within application. What is being sought is a limited relief to stop them from engaging in quite outrageous behaviour on Remcoll's own property. That the defendants would look to resist this is, with all respect, extraordinary, given what they have averred to in their own affidavit evidence.

3. Thames Cleaning.

41. The decision of the English High Court in *Thames Water* has certain resonances with comments made by this Court in the granting of the interim injunction, *viz*. that people have a right to protest; however there are parameters within which that right is circumscribed and when individuals step over those boundaries the courts will not hesitate to exert their entitlement to grant reasonable injunctive relief; nobody has a right to

behave in any way s/he wants simply because s/he objects to or is offended by another's course of conduct. These observations, it seems to the court, are all the more pertinent when a protest is not taking place on a street, or near or in the vicinity of a property, but in actual occupation of another's land and the penetration of premises thereon.

42. In *Thames Property* a dispute arose concerning a disorderly picket on a street outside a shop. There are particular protections in the context of industrial disputes, with what is presently before this Court not being an industrial dispute. Even so, the observations of Warby J., at paras. 48-52, are of interest:

> *"48. I have viewed the video clips which Mr Elia wanted his addressees to view. The first clip is introduced by a screen shot referring to the 'Topshop 2'. The accompanying video shows a very noisy and disorderly protest involving, at an estimate, upwards of 40 people in a crowd occupying the whole pavement in front of a Top Shop store during opening hours. The demonstration is clearly organised, with banners, and drumming, shouting, whistling and clapping. Red smoke billows around. It is quite impossible for members of the public to pass through the crowd without encountering substantial obstruction. At least one police officer is jostled. Mr Elia is clearly the organiser and leader of the event. He declaims at the crowd and passers-by loudly through a megaphone. One of the 'Topshop 2' is present, next to the second defendant. She might perhaps be said to be there to picket. But she does not address anyone with the aim of discouraging them from working. Mr Elia explains to the crowd that she has come to 'face her oppressors and tell them to fuck off'. Mr Elia encourages crowd members, saying: 'Anyone who wants to express their disgust at this company using the megaphone feel free to do so.'*
>
> *49. Speech of this kind is not unlawful. Freedom of speech includes the right to embarrass or offend. It is not necessary in a democratic society to prevent people telling their alleged oppressors to 'fuck off' or expressing their disgust at the employment practices of high street shops. It may be legitimate to do this noisily. If the word 'picket' were given the broad meaning attributed to it by the claimants, the order they seek would have the effect of prohibiting the defendants from encouraging such behaviour 'at Wood St'. I would not grant such an injunction, which would go too far.*
>
> *50. But such activities can tip into public disorder, harassment, intimidation, and other interferences with the rights of others which it is necessary and proportionate to prevent, for one of the legitimate aims identified in Articles 10(2) and 11(2). The more they involve physical confrontation at close quarters between the protesters and with those seeking to go about their lawful daily activities of going to work or to the shops or places of entertainment the more likely they are to go beyond the lawful limits of protest. Mr Elia himself has referred to 'the right for individuals to protest peacefully'. The conduct shown in the video clips goes beyond that limit, in my judgment.*

51. This is most clearly the case outside Top Shop. But the video of events at the Barbican arts centre shows what is clearly an organised group of union staff and 'supporters' engaged in an organised and prepared protest, again using banners, the chanting of slogans, banging and shouting, and again a megaphone is wielded by Mr Elia to denounce the employer loudly to all present. This is clearly an incursion onto private land, involving obstruction, and interference with lawful activities. It is clearly not an event which involves passers-by lending their support to a picket.

52. Mr Elia's witness statement, served since the hearing before Garnham J, seeks to minimise this activity or to put a gloss on it. He says the videos are condensed into 2-3 minutes, and are intended to give 'a heightened sense of tension and drama and use emotive music in order to create atmosphere and portray emotions'. I have not heard Mr Elia give evidence, and there has been no cross-examination. Doing the best I can, however, I do not think a trial court would find this evidence convincing. Mr Powell submits that the videos "do not portray the whole protest fully and, in that sense, accurately." But condensed material can be accurate. Mr Elia's evidence does not say, and I do not believe, that the videos contain a false or misleading portrayal of the events they depict. Mr Elia's evidence sits ill with the anger and aggression shown in the defendants' own publicity material, and smacks of an attempt to play things down after the event, when confronted with the threat of an injunction. Nor do I find persuasive Mr Powell's submission that these proceedings have themselves brought about a change of heart such that the court can conclude that there probably would be no unlawful conduct if the application was refused."

43. In the within proceedings, there is an incursion onto private land and a protest organised on an ongoing basis and in such a way as to involve physical confrontation. There is harassment and intimidation and the court has had furnished before it the evidence of of Messrs Kershaw, O'Sullivan, Thorausch and Maxwell concerning the effects that the protest had on them, which evidence has not been gainsaid. The conduct of the protest at issue has tipped far beyond what could be described as legitimate, appropriate or proportionate – an observation that the court can safely make even at this stage in the proceedings, given the number of serious matters (touched upon above) that are unchallenged in the within proceedings.

44. The named defendants (with the exception of Mr Wisley) are claimed by Remcoll to be in a leadership role in respect of the protest. It is not in issue that all of the named defendants have been involved in a protest where objectionable activities have taken place and consequent upon which Remcoll seeks protection. It is a matter of concern that the named defendants adopt the position that the application before the court is moot, even though the defendants are not in a position to confirm that the said objectionable activities would not start up again were the court to decline the continuation of the injunctive relief that is now being sought. In this regard, the court notes that since the making of the interim order, there have been breaches of that order:

(1) In the third affidavit of Mr Collins, referenced above, he avers, inter alia, as follows:

> *"12. One fact in particular convinces me that the Plaintiff needs to secure interlocutory orders. I was speaking to Frank Maxwell, the head builder on site, on Monday 9 December, and he informed me that there had been a power outage on Sunday night as a result of a storm. The power was down in the whole town of Ballinamore for about an hour, around 11 pm. During that time persons unknown took down all four of the planning application notices at the Property, and tore the injunction orders off the wall at the main entrance and threw them down in behind the trolleys at Tesco. I was amazed at the opportunism of this. To think that people would go out on a stormy night, to avail of a power outage, and rip down Court orders and planning applications. What will be clear from the foregoing is that the Property is being watched constantly and it re-confirms to me that there is still a strongly negative attitude in some quarters of the population towards this project, and that the Property and the people now occupying it [seven families have moved in since the court made the interim order], continues to need the protection of this Honourable Court."*

Clearly a sorry state of affairs continues to present in terms of the hostility in some quarters to the (re-) development of the Rock Centre and the arrival of, as Mr Maxwell gently puts it in the above-quoted affidavit evidence (in the course of describing outrageous alleged racism) *"the unfortunate families…accommodated in the asylum centre".*

(2) In a supplemental affidavit of Mr Kershaw (Pleadings Book 3, Tab 4), Mr Kershaw also avers, *inter alia,* to an alleged breach of the interim injunction on 30th November 2019 when a white Ford Transit van marked entered land across the road from the Property and remained on the land while the occupants (whom it is averred were *"remembered…as protestors at the Property*") appeared to be engaged in taking photographs of the Property. A partial explanation has been provided by the father of one of the named defendants in this regard, though there are striking omissions in what is averred to, most notably (i) there is no mention of the taking of photographs and (ii) only the actions of the father are sworn to whereas Mr Kershaw avers to having viewed two individuals.

4. Merck Sharpe & Dohme (2019)

45. This is a judgment from last summer in which O'Donnell J., for the Supreme Court, reviews the law concerning the granting of injunctions. In this regard, the following observations seem especially pertinent:

> "30. Lawyers, whether judges, practitioners, teachers, or students, tend to favour propositions which can be reduced to some simple formulae that can be readily understood, remembered, and applied. The lucidity of the admirably short judgment in American Cyanamid has lent itself to the reduction to some apparently simple and logical steps. Once it is established that there is a serious issue to be

tried, then it was normally no part of a court's function when considering an application for an interlocutory injunction to attempt to anticipate the outcome of the case. Instead, the court should proceed to assess the balance of convenience. As to that the governing principle related to the adequacy of damages, this involved considering two hypotheses and balancing the outcome. If the plaintiff was refused an injunction but succeeded at the trial would he or she be adequately compensated by the award of damages at the trial? On the other hand, if the defendant was restrained by injunction, but nevertheless succeeded at the trial, would he or she be adequately compensated by the award of damages pursuant to the undertaking for damages which the plaintiff would have been required to give at the time of the grant of the injunction? In either case, it was also relevant to consider if the party was capable of meeting any award of damages if made.

…

34. *Clarke J. (as he then was) observed in Metro International S.A. v. Independent News & Media plc [2005] IEHC 309…that this is largely a semantic issue, and I agree that in most cases either approach would lead to the same conclusion. It is apparent, however, that Clonmel, for example, lay some stress on the argument that if damages are an adequate remedy for the plaintiff, then an injunction should be refused without any further inquiry as to the balance of convenience or indeed other factors. While I consider it as an error to treat the observations in American Cyanamid and Campus Oil as akin to statutory rules, it is nevertheless necessary to consider if the judgment supports this approach. At para. 408B of the report of the judgment in American Cyanamid, the judgment stated that unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, 'the court should go on to consider ... the balance of convenience'. As to that, the 'governing principle' is the adequacy of damages. This implies that the adequacy of damages is part of the balance of convenience. However, at para. 408F Lord Diplock states:- 'It is where there is doubt as to the adequacy of the respective remedies in damages ... that the question of [the] balance of convenience arises'. This suggests that adequacy of damages comes before the balance of convenience, which on this approach would involve a consideration of a number of unusual factors. The ambiguity in this regard is an indicator that the decision was not intended to lay down strict guidelines: instead, it was intended to remove the existing guideline of a requirement of a prima facie case which had become entrenched, and reassert the flexible nature of the remedy.*

35 *In my view, the preferable approach is to consider adequacy of damages as part of the balance of convenience, or the balance of justice, as it is sometimes called. That approach tends to reinforce the essential flexibility of the remedy. It is not simply a question of asking whether damages are an adequate remedy. As observed by Lord Diplock, in other than the simplest cases, it may always be the*

case that there is some element of unquantifiable damage. It is not an absolute matter: it is relative. There may be cases where both parties can be said to be likely to suffer some irreparable harm, but in one case it may be much more significant than the other. On the other hand, it is conceivable that while it can be said that one party may suffer some irreparable harm if an injunction is granted or refused, as the case may be, there are nevertheless a number of other factors to apply that may tip the balance in favour of the opposing party. This, in my view, reflects the reality of the approach taken by most judges when weighing up all the factors involved."

46. Having regard to the foregoing it seems to the court that the primary issues before the court in adjudicating on the within application is whether there is a fair question to be tried and where the balance of convenience or the balance of justice lies – though the court does not see in any event that damages would be an entirely adequate remedy for Remcoll in all the circumstances presenting and described herein.

F. Miscellaneous

47. A number of issues might usefully be touched/re-touched upon before the court proceeds to its conclusions:

(1) At the hearing, counsel for the defendants identified all six named defendants as the six individuals who had taken the lead in negotiations with the Minister and in the 'peaceful' protest. That is a submission which sits most uneasily with certain of the averments of the defendants as to not having had a leadership role.

(2) Although each of the defendants in their affidavit evidence condemn the arson done at the Property, the fact that their condemnation is limited (and it is limited) to the arson and not, *e.g.*, to the erection of barriers and the containment of workers, does seem rather to offer an insight as to how they view, *e.g.*, the unchallenged singularly inappropriate behaviour that occurred at the Property and which is described above.

(3) As to the defendants' affidavits having been filed, as was suggested by their counsel in argument, not to answer the within application as such but to defend their reputations, a reasonable query might be raised as to what the day's hearing of the interlocutory injunction was about, if this is so. This Court cannot adjudicate one way or another at this time on the substantive dispute, in particular as to which version of events is correct.

(4) It has not been alleged by Remcoll that the defendants are guilty of the attempted arson at the Property; rather what is alleged in this regard is that the named defendants have stoked an atmosphere of fear and tension in the locality of Ballinamore, which atmosphere permitted some individual to believe that s/he could take matters into her/his own hands in a potentially devastating manner.

(5) It has been submitted by counsel for the six named defendants that her clients have been named as defendants because they are each a good 'mark' for damages. There is no evidence in support of this submission. Moreover, the reason why they are joined is identified in para.28 of the first affidavit of Mr Collins (quoted in footnote 1 above), though the court must admit that it does not see why one would proceed in any event against defendants whom one did not perceive to be a good 'mark' for damages.

(6) There is nothing procedurally wrong/misconceived in Remcoll having not proceeded against the named defendants in a representative capacity. They are not so sued because they have not been identified at random or otherwise as representative of the protestors as a whole. They are being sued in their personal capacity because (i) they are personally identified (with the exception of Mr Wisley) as being the individuals with a leadership role in respect of the protest, and (ii) they are each identified (along with Mr Wisley) as persons who were actually protesting at a protest in the context of which the acts complained of took place.

(7) It is contended by the defendants that no reason remains for the continuation of the interim injunction because seven families have now moved into the asylum centre. This does not chime with events on the ground: in the course of an hour-long black-out on 9th December all the copies of the court's interim order were torn down from the Property, an affront to the court, and also an indication that the Property continues to be watched by people who are profoundly hostile to the asylum centre. Mr Kershaw has sworn to people taking photos of the Property on 30th November and nobody has gainsaid that. So there appears to be an air of hostility vis-à-vis the asylum centre at a time when vulnerable people are now there and require the continuing protection of the court. In that context it seems to the court that it would be utterly irresponsible of it to remove the protection that has vested (thanks to the interim order) pending the trial of the action, which trial can, in the court's view, be brought on relatively quickly in the New Year (there is no need for extensive discovery and the key witnesses appear already to have been identified).

(8) As to the criticism that no notice was provided that injunctive relief was to be sought, Mr Collins in his third affidavit (referenced above) avers, *inter alia,* as follows:

> *"15. The inconsistency which attends the Defendants' complaint in this regard will not be lost on this Honourable Court. Each of the Defendants deny that they occupied any leadership role in respect of the protest. What purpose would a 'cease and desist' letter have served: after all on the Defendants' version of events they were people without influence or leadership in respect of the protest? Of course the Defendants were leaders, spokespeople and influencers in respect of the protest….Leaving aside the disingenuousness of the Defendants and the internal incoherence of the narrative to which each of*

them has now sworn, the protests were aggressive, intimidating, bullying, carried the whiff of violence, were associated with an attempted arson and had reached the point where workers and professionals were being refused unfettered access to the property. Given that this was the degree to which the protests had escalated, the Plaintiff had no reason to believe that a modest request to 'cease and desist' would be met with a positive response. Moreover, the Plaintiff had a genuine concern – which the Defendants' refusal to condemn any of the outrageous carry-on at the Rock Centre has done nothing to assuage – that if the protestors were tipped off that the Plaintiff was seeking an injunctive relief that this would prompt even more extreme behaviour up to, and including, another attempt to burn the Property.

16 [T]*he reliance which the Defendants place on the absence of a 'cease and desist' letter speaks to an utter inversion of the responsibilities of the respective parties to this dispute. If it is the case that the Defendants were about to arrange for the termination of the protest at the Property, then one would have expected them to alert the Plaintiff to the fact that the campaign of bullying and intimidation were about to stop: instead the application for injunctive relief was finally necessitated because in the days beforehand the harassment of workers was significantly escalated to the point where a third party service provider and an architect were prevented from accessing the Property. The truth of the matter is that the protest was not going to end until this Honourable Court forced the Defendants to back down."*

(9) Counsel for the defendants referred to the reference in the affidavit evidence of Mr Collins to the Property now being in a 'spotless condition' as proof that Remcoll has suffered no damage. However, this is to misunderstand Mr Collins' averment, a point to which he avers in his third affidavit (referenced above):

"78. Five of the defendants state that they do not believe the plaintiff suffered any damage. They refer to my comment in my second affidavit that after the protests stopped – this Honourable Court having granted the reliefs sought by the Plaintiff – I visited the Property and said that it was 'spotless'….What I meant was [that] the protestors had taken everything away, except the portable toilet. All rubbish was gone, all the tents, vans, fuel for fire was taken away. I did not mean that the plaintiff had not suffered any damage over the course of the protest. I outlined the damage suffered, and the potential damage to the plaintiff, at paragraphs 29-35 of my First Affidavit. In circumstances where the Defendants are all legally advised I believe that they understand the difference between the detritus of the protest being cleared away and the Plaintiff having suffered damage."

(10) The court has been urged not to continue the injunctive relief because if the court does that, how could anyone ever 'look behind' the affidavit evidence furnished by Remcoll in the within application? However, the answer to that complaint is not to refuse the injunction (because that would require the court to engage in assessing

the evidential merits of the affidavit evidence before it in the absence of cross-examination). The affidavit evidence will be 'looked behind' at trial and will be found to be truthful and accurate, or not. If truthful and accurate, then the characters of the six defendants will undeniably be tarnished. But if the affidavit evidence furnished by Remcoll is found to be untruthful or inaccurate then the named defendants' characters will be restored, and they will be able to seek such remedy as they may by reference to Remcoll's undertaking as to damages. That is how such matters are always resolved. The issue for now is the balance of justice. None of the defendants have sworn as to any personal disadvantage arising in relation to the continuation of the injunctive relief.

(11) The defendants complain that they have been wrongly blamed for the wrongdoing done at the protest. That is a matter which will be determined at trial, but yes, for now they have been roundly blamed by Remcoll for the organisation of (and participation in) the protest where the actions occurred. Ultimately the evidence before the court will be tested at trial, but that evidence is at this time, it seems to the court, serious enough to warrant continuation of the injunctive relief.

G. Some Conclusions

48. What are the appropriate conclusions to be drawn by the court from all that it has described in the preceding pages? It seems to the court that the following conclusions might be drawn, in addition to such other conclusions as are stated elsewhere in the court's judgment:

(1) There is a fair issue to be tried between the parties. There are substantial allegations of trespass, harassment and intimidation and interference with economic rights, many of which are challenged by the named defendants but many of which are uncontroverted.

(2) Leaving aside that the named defendants say they are not in a position of leadership, and Remcoll states that they are, the court notes that the named defendants have declined thus far to commit to do anything to rein in the excesses of protestors.

(3) The court is concerned that on the defendants' version of events the protest has been suspended because, for the time being, the defendants have gained the advantage that they have in their interactions with the executive branch of government concerning the use of the asylum centre. This makes it more likely (not less so) that the protests will resume if the protestors do not continue to be satisfied regarding their interactions with the executive branch.

(4) There is an ugly and frightening lawlessness to the form which the protest took, including an utter disregard for private property rights, which gives no comfort that, absent court order, there will be a return to general lawfulness of action. Indeed, there has to be some concern, given the events of 9th December, in particular the removal and disposal of the posted court orders (an affront to the court) that even

the proposed continuation of the injunctive relief may not suffice to see a return to a general situation of lawfulness, pending the outcome of Remcoll's substantive action; that said, it seems to the court that a continuation of the court's injunction can only assist in preserving the *status quo ante* (and the rule of law) in this regard.

(5) There is no serious challenge to the evidence of Messrs Kershaw, O'Sullivan, Thorausch and Maxwell concerning the effects that the protest had on them. By contrast, none of the assertions by the defendants as to how the protest was viewed by the workmen has been the subject of affidavit evidence from even one such workman.

(6) Having regard to *Thames Cleaning*, an organised, prepared protest which takes place on private land, interfering with lawful activities, is an appropriate situation in which to grant injunctive relief.

(7) Having regard to *Keating*, a landowner whose title is not in issue is *prima facie* entitled to an injunction to restrain trespass.

(8) Where protestors engage in intimidation and their conduct is reprehensible the court, as in *Eircell*, ought not to be slow in granting injunctive relief in order to mark its disapproval of such activity.

(9) The above-quoted observations of O'Donnell J. in *Merck Sharpe and Dohme*, if the court might respectfully observe, articulate the key concern of any court presented with an application such as the within, which concern can be described in a variety of forms, *viz*. where is the balance of justice?; where will the greatest justice be done?; and on foot of which outcome is there the least risk of injustice? Here, Remcoll owns property attended by unwanted protestors whose protest has been attended by the most unsavoury of conduct. On the other hand, there are the named defendants: they come to court to challenge the injunction; however, their affidavit evidence suffers from the deficiencies/drawbacks identified in the preceding pages. This is a situation where the balance of justice clearly lies in favour of continuing the protection, which protection is particular only to the lands owned by the Remcoll.

49. Having regard to the foregoing, the court will grant the interlocutory injunctive relief sought, subject to the continued provision of an undertaking as to damages.