THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2020] IECA 307
Record Number: 2019/442

Whelan J.
Noonan J.
Power J.

BETWEEN/

CLARE COUNTY COUNCIL

RESPONDENT

- AND -

BERNARD MCDONAGH AND HELEN MCDONAGH

APPELLANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 12th day of November 2020

Introduction

1. This is an appeal against the orders made by Allen J. in the High Court on 15 October 2019 wherein he granted interlocutory injunctions pending the trial of the action. The orders restrained the appellants and all other persons having notice of the making of the order from placing and retaining their caravans, vehicles and associated property on Clare County Council's (hereinafter "the Council") land at Cahercallamore, Ennis, County Clare comprising the land in Folio 50734F County Clare. The court granted a further interlocutory injunction, mandatory in its terms, that the said parties be compelled to remove forthwith their caravans and vehicles and associated property from the said land. The court granted an interlocutory order pursuant to s. 160(3)(a) of the Planning and Development Act 2000, as amended, requiring immediate cessation of the unlawful use of the

Council's said lands which had resulted from the placement and retention of the appellants' caravans and vehicles thereon for the purpose of caravanning and habitation and mandating the appellants, pending the determination of the trial, to remove forthwith their caravans, vehicles and associated property from the Council's said lands.

Background

2. The appellants are members of the Traveller community. Since March 2017 the Traveller community is recognised as a distinct ethnic group.

3. This is the third occasion in succession in which the Council has had to apply to the High Court for interlocutory injunctions to restrain breaches of planning legislation arising from unauthorised use of either part of the public highway or Council-owned property for caravanning and habitation.

4. To understand, more fully, the current proceedings in their context it is necessary to briefly outline key elements of the housing history of the appellants. It appears that from in or about the month of March 1998 until November 2012 the appellants resided at No. 1 Ashline, Kilrush Road, Ennis, County Clare. The dwelling was one in a development constructed on the lands in Folio 42569F County Clare (Ashline) which is in the ownership of the Council. The dwelling house was destroyed by fire in or about 11 November 2012. It has been held in separate proceedings ("the Ashline proceedings"), that, at the latest, the tenancy of the appellants in the property ended in or about the month of February 2013. From November 2012, in the aftermath of the fire, the appellants appear to have initially resided briefly in Cork and with relatives. The second appellant then moved to reside with her mother-in-law at a dwelling house in Considine Road, Ennis, County Clare. Thereafter, from between the month of December 2013 and late September 2017, a period of almost four years, the appellants resided at Shallee Drive, Ennis, a private rented dwelling house. It became

necessary to vacate the latter property in or about September 2017 in order to carry out essential repairs.

The Ashline proceedings

Initial occupation of public highway at entrance to Ashline site

5. In a judgment by Allen J. in the High Court, *Clare County Council v. McDonagh* [2019] IEHC 662, delivered in separate proceedings between the same parties pertaining to the appellants' occupation of the Council's Ashline property, and which judgment and ensuing permanent injunctions have notably not been the subject of any appeal by the appellants, the said judge characterised events of September 2017 thus: -

> "24. When, in September, 2017, Mr. and Mrs. McDonagh had to move out of the private rented house in which Mrs. McDonagh had been living for coming up to four years, they brought mobile homes to the side of the road outside the Ashline site, which had been locked up for coming up to five years. Mr. McDonagh's evidence was that they had no choice but to go back to the side of the road, but he accepted in cross-examination that he and his wife had refused two offers of the house in Beechpark and two more of other houses in Ennis, one at Aisling Estate, Shanaway Road, and another at Cappahard, Tulla Road.
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> 25. In September, 2017 someone tried to break into the Ashline site. Mr. McDonagh declined, on his solicitor's advice, to say whether it was he. Following the attempt to enter the site, the council placed thirteen one tonne concrete bollards across the entrance to the site. On 24th November, 2017 these bollards were moved using a forklift or other heavy machine. Mr. McDonagh declined, on his solicitor's advice, to say whether it had been he who moved the bollards."

As is clear from the above, for a period of approximately two months the appellants were encamped at the entrance to Ashline at Ennis on an area that comprised part of the public highway and thereafter moved onto the Ashline site.

6. The Council instituted the Ashline plenary proceedings on 15 December 2017. It issued a motion seeking mandatory and prohibitory interlocutory orders to restrain breaches of the Planning and Development Act 2000, as amended, and trespass, and same was returnable before the High Court on 18 January 2018.

Appellants' consent to interlocutory injunctions

7. On the latter date, the appellants consented to interlocutory injunctions being granted pending the trial of the Ashline proceedings restraining them, their servants, agents or otherwise howsoever from unlawfully placing and retaining caravans and associated vehicles or property on the Ashline site together with a further order compelling the appellants to remove the caravans, property and associated vehicles forthwith from the said lands pending trial of the action.

8. The Ashline litigation proceeded to a plenary hearing and ultimately a reserved judgment was delivered on 10 October 2019 from which judgment and orders the appellants did not appeal. The said judgment will be considered further, presently.

Occupation by appellants of R475 public highway and lands at Cahercallamore

9. Having vacated the Ashline site, the appellants relocated themselves for the third time to a nearby lane approximately fifty metres from the Ashline site. Same comprised part of the public highway - the R475 Ennis to Kilrush Road. The appellants remained there from January 2018 until August 2018. The within proceedings were instituted by the Council on 23 July 2018, seeking a permanent prohibitory injunction restraining the defendants and all other persons having notice of the making of the order from unlawfully placing and/or retaining caravans and associated vehicles or property on a public right of way situate at Ashline, Kilrush Road, Ennis, County Clare. The

proceedings also sought a permanent mandatory injunction compelling removal forthwith of the said caravans, property and associated vehicles from the said public right of way.

10. By notice of motion returnable for 8 August 2018, the Council sought interlocutory orders, both prohibitory and mandatory. By the return date the appellants had relocated themselves together with their vehicles, caravans and associated property yet again. This time they relocated to other Council lands comprised in Folio 50734F County Clare (Cahercallamore).

Hearing of the Council's application for interlocutory relief

11. The application for interlocutory relief came on for hearing before Allen J. on 25 July 2019. Through inadvertence the pleadings had not been amended to reflect the fact that the appellants had moved from the public highway onto the Council's lands in Folio 50734F at Cahercallamore and that oversight was ultimately rectified by order of the court on 15 October 2019. At the hearing, the court was informed that the Cahercallamore lands were the property of the respondent Council and were situate within a mile radius of the Traveller accommodation facility provided by the Council at St. Enda's, Beechpark, Ennis, County Clare. As of 5 October 2018, the Council had observed the presence of two caravans and a mobile home on the lands. It was alleged by the Council that the appellants had constructed a road and provided a courtyard to accommodate the placement and retention of caravans and mobile homes on the Council's lands. They had been served with notices directing cessation of the illegal occupation, use and development of the said lands on 2 November 2018 which called upon them to remove themselves together with their caravans and vehicles forthwith. The position of the Council was that, whilst the appellants may have been disgruntled in relation to the immediate unavailability of accommodation of their choosing, this did not confer any entitlement upon them to take the law into their own hands or occupy these lands.

Bespoke housing demand of the appellants

12. The position being adopted on affidavit by the appellants in the course of these proceedings was that based on the "principle of compatibility" they were not in a position to move to reside in the Beechpark Traveller site as "this would be out of the question for one family to do to another, unless coerced into it" (see, para. 11 of the affidavit of the first appellant of 8 July 2019).

13. The housing demand of the appellants was identified formally in writing to the Council on 18 January 2017. In effect what the appellants were seeking at that date was the exclusive use by them and five of their (adult) children of a wholly refurbished Ashline site of six dwelling houses "but only as a family-site as always intended since 1969, when the land was first offered to the Traveller community for accommodation by the Diocese of Killaloe for their needs for permanent homes." The Folio does not identify any such limitation of ownership or user and the Council deny its existence. Thus, the claim was no more than a bare assertion.

14. The appellants' position was that what they sought was Traveller accommodation in a Traveller specific scheme for the extended McDonagh family. It was also contended that there was a lack of equity proofing of policies towards members of the Traveller community on the part of the Council. The appellants' position had nuanced slightly by the hearing date and is addressed in the judgment under appeal at p. 74 of the transcript which is considered below.

Evidence of availability of accommodation at date of hearing

15. At p. 49 of the transcript of 25 July 2019 in response to a query from the trial judge of where the appellants were expected to go, counsel for the Council responded: -

> "…we have offered accommodation previously which was refused because it wasn't Traveller-specific accommodation. They are approved for housing accommodation and we will use our best endeavours to look for Traveller-specific accommodation going forward from here. Currently we don't have a house to say: 'You can move in there'. But our previous offers of a house have been refused. …we offered a number of houses previously and one

> of them was specifically chosen by the County Council because it had a downstairs bathroom which would have facilitated Mrs. McDonagh managing her health issues… That's been taken. We couldn't leave it vacant on an ongoing basis but… that's an indication of what we have tried to do previously. We will continue to try to find something in the next period of time but just at the moment there isn't anything there. That doesn't mean we won't continue to try to address the needs of Mr. and Mrs. McDonagh, but it's quite clear, while a house may become available, there isn't a Traveller-specific accommodation except at Beechpark. And I recognise what Mr. McDonagh has been saying at some length about the incompatibility of his family with the …family that are there at present."

16. Counsel on behalf of the appellants argued before the High Court that, were interlocutory orders to be made, the appellants would have "nowhere to go". Reliance was placed on the obligations of the Council pursuant to the Housing (Traveller Accommodation) Act 1998, as amended, and the Housing (Miscellaneous Provisions) Act 2009, as amended; the right of the appellants to a home; and, the European Convention on Human Rights ("ECHR"). In particular, the jurisprudence of the European Court of Human Rights ("ECtHR"), Article 8 in that regard was invoked, including the decision in *Winterstein and others v. France* (App. No. 27013/07) (Unreported, ECtHR, 17 October 2013).

<u>*Ex tempore* judgment appealed against</u>

17. In his *ex tempore* judgment, the trial judge considered ss. 3 and 160 of the Planning and Development Act 2000, as amended. He was satisfied that the bringing of mobile homes and caravans onto Cahercallamore constituted "development" within the meaning of s. 3 and it was common case that same was unauthorised. Therefore, the Council was entitled to apply for relief under s. 160.

18. He then noted the various bases on which the application for prohibitory and mandatory interlocutory injunctions was resisted, including the contention that the Council was in breach of its own obligations pursuant to s. 10(2)(i) of the Planning and Development Act 2000, as amended, to include in its County Development Plan objectives for the provision of accommodation for Travellers for the use of particular areas for that purpose. The Council had acknowledged that the Development Plan did not provide areas which are zoned for Traveller use. The trial judge found (p. 71 of transcript) that s. 10(2)(a), which refers to zoning, does not require land to be zoned for Traveller use: -

> "The fact that no land has been specifically zoned for such use does not mean that the plan fails to meet the statutory objective in paragraph (i) to make provision for accommodation for Travellers and the use of particular areas for that purpose."

The trial judge continued: -

> "I am not persuaded that the defendants have made out any arguable case that the plaintiff has failed to comply with its obligations under the Planning and Development Act. In any event, any failure of that regard would properly be dealt with by way of a judicial review against the County Council and could not justify a trespass on Council land or unauthorised development on the land."

19. Regarding the contention that the application for interlocutory relief was premature since there was then pending before the High Court a judgment (delivered on 10 October 2019, [2019] IEHC 662) in relation to the appellants' claim to have a tenancy at Ashline, the trial judge observed: -

> "If Clare County Council has breached the defendants' rights in relation to Ashline that would not justify them in trespassing upon or carrying out unauthorised development on any other Council lands, specifically the lands that are the subject of this application."

20. The trial judge rejected the contention that the Council had not drawn down funding which was available to it for Traveller specific accommodation. At p. 71 of the transcript, line 27 *et seq*., he observed: -

> "The issue as to whether Clare County Council has failed to draw down money for Traveller-specific accommodation is one of the issues which has already been argued in the substantive Ashline case. Again, if there was such failure it would never justify the defendant[s] taking the law into their own hands and annexing a site for their occupation."

21. Allen J. then considered the options available to the appellants and the contention that they had nowhere to go, observing at pp. 71 to 72: -

> "… it is clearly evident that there is no Traveller-specific accommodation available for the defendants. There is a site at a halting site called Beechpark nearby, which has been offered to Mr. and Mrs. McDonagh, but for them to take that up would give rise to so-called compatibility issues with the incumbent family. What is clear, however, is that the defendants have previously been offered and refused a number of offers of accommodation on the basis that it is not Traveller-specific, and moreover that the accommodation could not accommodate the extended McDonagh family."

22. The trial judge then considered the jurisprudence including the High Court decision of Baker J. as upheld on appeal in *Mulhare v. Cork County Council* [2017] IEHC 288, [2018] IECA 206 which had encompassed a thorough review of the jurisprudence including the decisions in *McNamee v. Buncrana U.D.C.* [1983] I.R. 213, of Smyth J. in *McDonagh v. Clare County Council* [2004] IEHC 184, and of Peart J. in *Fingal County Council v. Gavin* [2007] IEHC 444. In the latter case, Peart J. considered an application for a declaration that the Council provide suitable Traveller accommodation for the defendants within its functional area for a grouping of 80 persons on a single

site. Peart J. considered s. 2 of the Housing Act 1988, and the definition of homelessness, and the obligations of a housing authority under s. 9 of that Act if that definition were met, observing: -

> "By reason of the fact that in my view reasonable offers in all the circumstances of this case were made by the plaintiff council, I cannot regard the defendants as coming within the meaning of homeless appearing in this section, as to do so would amount to giving the family a right of veto over accommodation offered. I note in particular that the section specifically provides that it is the authority's view of the reasonableness of the accommodation which is relevant, and that the persons concerned are not conferred with any veto or power of approval."

Allen J. also cited with approval the following extract from the decision of Smyth J. in *McDonagh v. Clare County Council*, which had been endorsed by Baker J. in *Mulhare* at para. 37: -

> "It cannot have been the intention of the legislature that at all times and in all circumstances the Housing Authority would have available and vacant and ready for occupation either conventional permanent or conventional emergency accommodation… It is for the Housing Authority to prioritise the building programme necessary to house those entitled under the Acts - and to prioritise those whom it considers entitled to such accommodation under the TAP and/or on the Housing List."

23. The trial judge, in the judgment under appeal, rejected the contention that the Council had failed in its statutory obligation pursuant to s. 6 of the Housing (Traveller Accommodation) Act 1998 to effect adequate assessments of the needs of the appellants in respect of housing, observing:-

> "The simple answer to this is that the McDonaghs were anonymously, as were all the other Travellers in County Clare, taken into account when the current Clare Traveller Accommodation Programme was drawn up, and they have been taken into account also in

the planning of the new Traveller Accommodation Programme now under consideration." (p. 74 of transcript)

The trial judge continued: -

> "In any event, it seems to me that the County Council, in deciding how to deal with an unlawful encampment, is entitled and obliged to take into account the need to uphold the rule of law. The Council will, if possible, make arrangements for alternative shelter for Mr. and Mrs. McDonagh. The most serious impediment to the provision by the County Council of alternative shelter is the defendants' insistence on Traveller-specific accommodation, not only sufficient to their own needs and the needs of the minor children living with them, but also for the needs of the entire wider McDonagh family, their sons and partners and their children. Such accommodation, it is well established, is something that Mr. and Mrs. McDonagh are not entitled to insist upon."

24. The trial judge, in analysing the authorities, observed at p. 75 that: -

> "… the balancing of competing claims on the housing resources of a Local Authority is a matter for the Local Authority. In any event, it seems to me that any failure on the part of Clare County Council, if any, to reach its obligations under the Planning and Development Act or under the Housing Act could not make lawful what otherwise is unlawful. That being so, no issue arises as to the right of the defendant to be on the land or to have carried out the development of the land which has been carried out. In those circumstances the principles set out in *American Cynamid v. Ethicon* [1975] A.C. 396] or in this jurisdiction the principles set out in [*Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88] is not engaged, there being no *bone fide* issue to be tried as to the defendants' entitlement to be on these lands. No question arises as to the adequacy of damages or the balance of convenience, and it seems

to me that as a matter of law the County Council is entitled to the orders which it seeks as of right."

25. In regard to the trespass aspect of the claim and the principles governing an application for an interlocutory injunction to restrain same, the trial judge placed reliance on the well-established test in *Keating & Co. Ltd. v. Jervis Shopping Centre Ltd.* [1997] 1 I.R. 512.

26. The matter was further dealt with by the trial judge on 15 October 2019, it having come to light that errors had occurred in regard to the amending of the plenary summons and in relation to costs. The court granted the prohibitory and mandatory interlocutory injunctions sought together with the interlocutory orders pursuant to s. 160(3)(a) of the Planning and Development Act 2000, as amended, subject to a stay. This is the order under appeal.

Notice of Appeal

27. The key ground of appeal advanced at the hearing is that the High Court failed to determine whether the appellants' caravans, vehicles and associated property as placed on the Council's Cahercallamore lands constitute a "home" within the meaning of Article 8 ECHR such as to attract the protection thereof and, if so, whether the interference proposed by the Council in the form of the orders granted by the High Court amounted to a proportionate interference with the right under Article 8 to respect for one's home.

28. Reliance was placed on the ECtHR decision in *Winterstein and Others v. France* which in turn had followed from earlier jurisprudence of that court including *Buckley v. United Kingdom* (App. No. 20348/92) (1997) 23 E.H.R.R. 101; *Prokopovitch v. Russia* (App. No. 58255/00) (2006) 43 E.H.R.R. 10; *McCann v. United Kingdom* (App. No. 19009/04) (2008) 47 E.H.R.R. 40; and, *Orlić v. Croatia* (App. No. 48833/07) [2011] H.L.R. 44. In addition, reliance was placed on the decisions of *Yordanovia and others v. Bulgaria* (App. No. 25446/06) (Unreported, ECtHR, 24 April 2012), *Chapman v. United Kingdom* (App. No. 27238/95) (2001) 33 E.H.R.R. 18, *Connors v. United*

Kingdom (App. No. 66746/01) (2005) 40 E.H.R.R. 9 and *Wells v. United Kingdom* (App. No. 37794/05) (2007) 44 E.H.R.R. SE20.

29. It was contended, in particular, that Irish domestic law, including decisions such as *Mulhare*, did not accord with the jurisprudence of the ECtHR on the basis that they do not provide for any proportionality assessment such as is warranted. The appellants sought the setting aside of the prohibitory and mandatory interlocutory injunctions together with the orders made pursuant to s. 160(3)(a) of the Planning and Development Act 2000 pending the trial of the action.

30. In written submissions, it was, *inter alia,* contended that the conduct of the respondent Council had resulted in a failure to facilitate a Traveller way of life, particularly by consistently electing not to draw down available funding allocated for the purposes of Traveller specific accommodation, coupled with a failure by the Council to zone any land for the purpose of Traveller accommodation in its Clare County Development Plan 2017-2023. It was submitted that this amounted to a disproportionate interference. The appellants further placed reliance on a letter dated 13 December 2019 from their solicitor sent to the Council. In that letter it was contended that the Council's ongoing failure to provide Traveller specific accommodation to the appellants subsequent to the making of the orders herein appealed against amounted to a breach of s. 3(1) of the Equal Status Act 2000 and constituted prohibited conduct within the meaning of that Act. It was proposed to seek redress by referring the case to the Circuit Court if that state of affairs should continue. The Council opposed the appeal on all grounds.

Discussion

The approach to be adopted by an appellate court to an exercise of judicial discretion -prohibitory injunctions and orders

31. Collins J. in *Betty Martin Financial Services Ltd. v. EBS DAC* [2019] IECA 327 analysed the relevant jurisprudence as to the correct approach to be adopted by this court when asked to review

on appeal a decision made by a High Court judge in an interlocutory application involving the exercise of judicial discretion. Of note are the following excerpts from his judgment which I adopt as a correct statement of the law: -

> "35. What is before this Court is, of course, an appeal from the decision of the High Court and, citing *Lawless v. Aer Lingus* [2016] IECA 235 and *Ganley v. RTÉ* [2019] IECA 18, the Agent contends that that decision was made in the exercise of the Judge's discretion, based on a correct application of the applicable principles and that the decision was one that was clearly open to him on the evidence and, accordingly, a significant margin of appreciation should be afforded to that decision… In his oral submissions, Mr McGrath SC refined that position somewhat, accepting (correctly, in my view) that a distinction is to be drawn in this context between the analysis of whether a fair question/serious issue had been established on the one hand and, on the other, the Judge's consideration of adequacy of damages, balance of convenience and delay. [It was] accepted that if this Court identified an error of principle in the analysis of the Judge, it could properly intervene but as regards the latter, intervention was appropriate only if this Court was satisfied that there is an injustice.
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> …
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> 37. In *Lawless v. Aer Lingus* (a discovery appeal), Irvine J (with whose judgment Hogan and Keane JJ. agreed), referred to her judgment (for the Court) in *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27 (an appeal to this Court against the High Court's refusal to dismiss the proceedings on grounds of delay) which comprehensively analysed the authorities before expressing its conclusion in the following terms:
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> > '79. … we consider that the true position is that set out by MacMenamin J. in [*Lismore Builders Ltd. (in Receivership) v Bank of Ireland Finance Ltd.* [2013] IESC 6**]**, namely, that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay

> great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any *a priori* rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed.'

38. In *Lawless,* Irvine J. added the following qualification to that statement:

> '23. However, it seems to me that all too often parties who are somewhat dissatisfied by interlocutory orders made in the High Court seek to use this Court as a venue to re-argue their application *de novo* in the hope of persuading this court to exercise its discretion in a somewhat different fashion from that which was adopted by the High Court judge at the original hearing. That is a practice which I believe is not to be encouraged. In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion.'

39. Accordingly**,** while as a matter of principle, '*great weight*' is to be given to the views of the High Court Judge, the ultimate decision on this appeal is for this Court. It is also clear that the [Appellant] is not required to establish any error of principle as a pre-requisite to this Court coming to a different conclusion to the Judge.

…

41. Separately, it is clear that a judge must give sufficient reasons for his or her decision such that the parties can understand the basis for that decision".

32. In summary therefore, a party seeking to set aside an interlocutory order of the High Court made in the exercise of its discretion must establish that an injustice will be done unless the order is set aside. In making its assessment, this court will place great weight on the views of the trial judge but is untrammelled by any *a priori* rule restricting the scope of that appeal. If the trial judge fails to provide adequate reasoning for his or her views or decision or fails to engage appropriately with the parties' arguments, that will affect the weight given by this court to those views.

Principles governing the grant of interlocutory injunctions

33. An interlocutory injunction is an equitable remedy and its granting is governed by equitable principles. In *Equity and the Law of Trusts in Ireland* (7th ed., Round Hall, 2020), at p. 644 *et seq.*, Hilary Biehler provides a comprehensive and invaluable analysis of the jurisprudence which has led to some refinement of the applicable test and recognised guidelines which inform the exercise of judicial discretion in granting or refusing an interlocutory injunction. On the requirement of the trial judge to consider whether the applicant has demonstrated a serious or fair question to be tried, the author observes at pp. 654 to 655: -

> "It has tended to be generally accepted that the strength of the plaintiff's claim should not be a relevant factor in determining whether an injunction should be granted once it has been accepted that a fair question has been raised, save in an exceptional case such as where the trial of the action is unlikely to take place."

Biehler notes at p. 656 that: -

> " …there is some merit in the view expressed by Lord Hoffmann in *National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.* [[2009] 1 WLR 1405] that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other and that amongst the factors which it may take into account is the likelihood that

the injunction will turn out to have been wrongly granted or withheld, 'that is to say the court's opinion of the relative strengths of the parties' cases'."

Merck Sharp & Dohme v. Clonmel

34. Of assistance in considering the operative principles governing the grant or refusal of interlocutory relief is the comprehensive analysis of O'Donnell J. in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd.* [2019] IESC 65 at para. 64 regarding the steps as might be followed where interlocutory relief is sought by a plaintiff to vindicate a property right (in that case intellectual property): -

"(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted;

(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the *American Cyanamid* and *Campus Oil* approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;

(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;

(4) The most important element in that balance is, in most cases, the question of adequacy of damages;

(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;

(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it *may* be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial.

(7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;

(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined."

In order to assess the balance of justice in this instance, it is necessary to consider the appellants' submissions on the applicability of ECtHR jurisprudence to the facts of the instant case

Mandatory Interlocutory Injunction

35. The Council sought and obtained mandatory orders as well as prohibitory interlocutory relief. Keane in "Equity and the Law of Trusts in Ireland", 3rd Edition, 2017, Bloomsbury

Professional, emphasises the materially different approach to be taken by the court where the interlocutory relief sought is mandatory in nature;

> "The position is undoubtedly different at the interlocutory stage. Since there is no final adjudication on the respective rights of the parties at that stage, the defendant in general should not be required to carry out works which may involve him in expense and inconvenience if the plaintiff's claim should ultimately prove unfounded and he wishes to undo them. Moreover, as pointed out by Megarry J in *Shepherd Homes Ltd v Sandham*, 1971 Ch. 340 an interlocutory injunction normally seeks to regulate the conduct of the defendant by requiring him to continue to act as he had done in the past whereas a mandatory injunction generally looks to the future. In a much-cited passage, he said:
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> > 'On motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.' [5.112]
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> "In *Campus Oil v Minister for Industry and Energy (No 2)*,[1983] IR 88 where, as we have seen, the Supreme Court laid down the principles as to the burden of proof on an applicant for an interlocutory injunction, and where the relief claimed was mandatory in nature O'Higgins CJ referred to the statement of the law by Megarry J. but pointed out the factors in the instant case that distinguished it from the normal case in which the court would require 'a high degree of assurance' before granting mandatory relief at that stage. The defendants were seeking to preserve the *status quo* – the usual basis for an interlocutory injunction, as pointed out by Megarry J – under which the plaintiffs were required to purchase their oil supplies from the State and, in doing so, to comply with the existing statute law. The learned

> Chief Justice also stressed the special considerations that arose when one of the objects of the interlocutory relief was to secure compliance with the law, a point also emphasised more recently in *Okunade,* 2012, 3 IR 152 by Clarke J speaking for the Supreme Court." [5.113]

36. Irvine J. in *Taite & Anor v Beades* [2019] IESC 92 carried out a useful analysis of the jurisprudence governing the principles now to be taken into account in the grant or refusal of a mandatory injunction. Her judgment makes clear that the trial judge must be satisfied before granting a mandatory interlocutory injunction that the applicant has established a strong case that he is likely to succeed at the hearing of the action. Furthermore , that the High Court judge should make a clear statement of such a finding in the judgment.

37. Hilary Biehler in the *Irish Law Times* 2020, 38 (13), 190-195 reviewed recent guidance from the Supreme Court where she observed at p.194:

> "The fact that the "strong case" test should be applied where relief which is mandatory in substance is sought was confirmed by Clarke C.J. in the decision of the Supreme Court in Charlton v Scriven 2019 IESC 28. The principle that the courts impose a higher threshold on a party seeking an injunction of a mandatory nature which actively compels them to act in a specific manner was also reiterated by Irvine J. in *Taite v Beades*."

Okunade

38. That analysis accords with the views of Clarke J. (as he then was) in *Okunade v. Minister for Justice* [2012] IESC 49, [2012] 3 I.R. 152 at para. 67 where he articulated the central dilemma confronting the court in the exercise of its equitable jurisdiction on an application for an interlocutory injunction as one which "stems from the fact that the court is being asked, on the basis of limited information and limited argument, to put in place a temporary regime pending trial in the full knowledge that the court does not know what the result of the trial will be." He identified the

appropriate approach where such a dilemma confronted the court thus: "…the underlying principle must be that the court should put in place a regime which minimises the overall risk of injustice."

39. More recently Irvine J. in Taite v Beades (ante) reiterated the Okunade principle observing:

> "28. The strength required of an applicant's case will similarly be adjusted where an injunction goes "a long way towards deciding the case". As an interlocutory injunction is intended and justified on the basis that it only ever puts in place a temporary arrangement, the court also requires a greater degree of assurance before intervening in cases where an injunction would in effect not be temporary, see Clarke J. at para. 9.9 in Okunade v. Minister for Justice, Equality & Law Reform [2012] IESC."

Alleged disproportionate interference with appellants' rights under Article 8 ECHR

40. As stated by Murray C.J. in *McD v. L* [2009] IESC 81, the ECHR is not directly applicable in this jurisdiction. Rather, s. 2 of the European Convention on Human Rights Act 2003 requires that, in interpreting and applying any statutory provision or rule of law, a court shall, insofar as is possible and subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions. Section 4 of the said Act provides that when interpreting and applying Convention provisions a national court shall take due account, *inter alia,* of the jurisprudence of the ECtHR and relevant decisions of the European Commission of Human Rights and the Committee of Ministers. The analysis of the trial judge shows that he did so and his analysis was correct.

41. Section 2 of the European Convention on Human Rights Act 2003 provides at subs. 1: -

> "(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

42. Section 3 of that Act provides: -

> "(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

43. It is clear from the framework of the 2003 Act that the ECHR is not directly applicable as part of the law of the State and may be relied upon only in the circumstances and in the manner specified in the 2003 Act. The position was clarified in *McD v. L*, wherein Murray C.J. observed at p. 5 regarding the role of national courts in interpreting jurisprudence of the ECtHR: -

> "…international treaties to which a state is a party can only be given effect to in a national law to the extent that national law, rather than the international instrument itself, specifies… Article 29.6 of the Constitution provides in very clear terms 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.' This is consistent with the sovereign legislative powers vested in the Oireachtas by Articles 6 and 15 of the Constitution. The Oireachtas, in turn, when determining whether, and to what extent, an international agreement shall be part of the domestic law of the State is governed by the provisions of the Constitution."

44. The principles were further reiterated by the Supreme Court in *O'Donnell v. South Dublin County Council* [2015] IESC 28 at para. 78.

45. Article 8 ECHR provides: -

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

46. It is clear from the history of the *travaux préparatoire* and the early jurisprudence on Article 8 that it is intended to protect individuals from arbitrary interference by a public authority in private and family life including the enjoyment of a home. For an interference to be permissible, it must be to pursue one of the legitimate aims specified in Article 8(2) and must be "necessary in a democratic society". This necessarily encompasses that such interference is proportionate to the aim pursued.

47. The jurisprudence makes clear that Article 8 does not confer any entitlement to be provided with a home or a positive obligation to provide alternative accommodation of an applicant's choosing. This was put beyond doubt in the decisions *Burton v. United Kingdom* (App. No. 31600/96) (1996) 22 E.H.R.R. CD134, *Buckley v. United Kingdom* (App. No. 20348/92) (1997) 23 E.H.R.R. 101 and *Chapman v. United Kingdom* (App. No. 27238/95) (2001) 33 E.H.R.R. 18.

48. On a number of occasions, the European Court of Human Rights, in considering cases involving Travellers, had observed that Article 8 cannot be construed as imposing a positive obligation to ensure vacancies on official sites for persons wishing to return from settled residence to the traditional Traveller way of life as exemplified by *Burton v. United Kingdom.*

49. In the later case of *Chapman v. United Kingdom*, at para. 95 the court held that to afford a Traveller who has unlawfully established a caravan site different treatment from that accorded to non-Travellers who breached relevant planning law and environmental regulations would "raise substantial problems under Article 14 of the Convention."

50. In *Winterstein*, the applicants alleged that there had been a violation of Article 8 ECHR on account of their eviction from land on which they had been settled for a long time and it was further contended that they had sustained discrimination in breach of Article 14 ECHR. In sharp contrast with the appellants, the applicants, or one or more of them, had an interest in the land, however their use and development of same was in breach of the relevant planning laws and in particular the lands were situated in an area protected from development by its zoning which was characterised as a natural area qualifying for protection on account of the quality of the landscape and its various characteristics.

Home

51. In *Winterstein*, at para. 52 of the judgment, the court noted the applicants' submission that the State's interference with their right to respect for their private and family life and their home could not be regarded as proportionate in the light of three factors; the duration of the applicants' residence in the municipality, their destitution and the lack of any housing solutions suited to their way of life. The court outlined the applicants' position thus: -

> "…On the first point, they emphasised that they had been living on the land for many years, over thirty years for some families, and that under French law this gave them adverse possession. In their view it was therefore wrong for the Government to assert that the length of occupation did not give rise to any rights.
>
> 53. On the second point, they rejected the Government's argument that their destitution had been sufficiently taken into account since the coercive fines had not become payable, and observed that, since the State could not have been unaware that they were receiving legal aid, it would be sufficient for the State not to maintain the penalty if it really wanted to take account of their economic situation."

52. The court noted the further argument of the applicants that the lack of suitable possibilities for relocation demonstrated that the State had not satisfied the condition of proportionality.

53. The ECtHR's assessment of the concept of a "home" within Article 8 ECHR is outlined in para. 69 of the judgment in *Winterstein*. In the course of analysing whether there had been an interference with the Article 8 rights of the applicants, the court noted that: -

> "…the concept of 'home' within the meaning of Article 8 is not limited to premises which are lawfully occupied or which have been lawfully established. It is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular premises constitutes a 'home' which attracts the protection of Article 8 will depend on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place (see *Buckley v. United Kingdom*…paras. 52 to 54; *McCann*…para. 46; *Prokopovitch v. Russia*…para. 36; and *Orlić v. Croatia*… para. 54).
>
> In the present case it is not in dispute that, at the material time, the applicants had been residing for many years (between five and thirty years) at the locality… The court thus takes the view that the applicants had sufficiently close and continuous links with the caravans, cabins and bungalows on the land occupied by them for this to be considered their 'home', regardless of the question of the lawfulness of the occupation under domestic law."

The court further and separately went on to observe at para. 70 that: -

> "…the present case also brings into play, in addition to the right to respect for one's home, the applicants' right to respect for their private and family life… It reiterates that the occupation of a caravan is an integral part of the identity of travellers, even where they no longer live a wholly nomadic existence, and that measures affecting the stationing of caravans affect their ability to maintain their identity and to lead a private and family life in

> accordance with that tradition (see *Chapman*…para. 73; *Connors*…para. 68; and *Wells v. United Kingdom*…)"

The judgment continued at para. 71: -

> "…The court is, however, of the view that the obligation imposed on the applicants, on pain of a coercive fine, to vacate their caravans and vehicles and to clear any constructions from the land constitutes an interference with their right to respect for their private and family life and their home, even though the judgment of 13 October 2005 has not to date been enforced…"

54. The analysis of the court in *Winterstein* proceeded by a consideration of four distinct factors: firstly, whether there had been an interference with the Article 8 rights of the applicants; secondly, if so, whether same was in accordance with the law; thirdly, whether it was done in pursuance of a legitimate aim and finally whether the interference was necessary. The court had no difficulty in concluding in regard to the first issue in light of the very long duration of proven occupation of the site in that case by the claimants that the obligation imposed on the applicants to vacate their caravans and vehicles and to clear any constructions from the land constituted an interference with their right to respect for their private and family life in their home. Weight was attached to the fact that the order had been subject to a daily coercive fine. The court was satisfied that it amounted to such an interference notwithstanding that no steps had been taken to enforce the fine aspect.

55. The court was satisfied that the interference had occurred based on the provisions of the relevant planning code and thus the interference was "in accordance with the law within the meaning of Article 8(2)" (para. 72). The court likewise concluded having due regard to the court's reasoning in the previous judgment of *Chapman,* in the context of enforcement of planning law, that regard was to be had to "rights of others in the community to environmental protection" and thus concluded that, as in para. 82 of the *Chapman* judgment, "the interference at issue pursued the legitimate aim

of protecting the 'rights of others' through preservation of the environment" (para. 73). Finally, the court then turned to a consideration as to whether the orders were necessary in a democratic society within the meaning of Article 8(2) in light of the earlier decisions of the court in *Chapman* and *S. and Marper v. United Kingdom* (App. Nos. 30562/04 and 30566/04) (2009) 48 E.H.R.R. 50. The court concluded: -

> "75. An interference will be considered 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. While it is for the national authorities to make the initial assessment in all these respects, the final evaluation of whether the interference is necessary remains subject to review by the court for conformity with the requirements of the Convention."

The court proceeded to observe: -

> "76. A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference (see *Chapman*… para. 91; *S. and Marper*…para. 102; and *Nada* [(App. No. 10593/08) (2013) 56 E.H.R.R. 18] para. 184). The following points emerge from the Court's case-law (see *Yordanova*…para. 118):
>
> > (α) In spheres involving the application of social or economic policies, including as regards housing, the Court affords the authorities considerable latitude. In this area it has found that '[i]n so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation' (see *Buckley*…para. 75;

and *Ćosić*… para. 20), although the Court retains the power to find that the authorities have committed a manifest error of assessment (see *Chapman*… para. 92).

(β) On the other hand, the margin of appreciation left to the authorities will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of fundamental or 'intimate' rights. This is the case in particular for Article 8 rights, which are rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community (see, among many other authorities, *Connors*… para. 82).

(γ) It is appropriate to look at the procedural safeguards available to the individual to determine whether the respondent State has not exceeded its margin of appreciation in laying down the regulations. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8… The requirement for the interference to be 'necessary' raises a question of procedure as well of 'substance'…

(δ) Since the loss of one's home is a most extreme form of interference with the right under Article 8 to respect for one's home, any person at risk of being a victim thereof should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, he has no right of occupation… This means, among other things, that where relevant arguments concerning the proportionality of the interference have been raised by the applicant in domestic

judicial proceedings, the domestic courts should examine them in detail and provide adequate reasons…

(ε) When considering whether an eviction measure is proportionate, the following considerations should be taken into account in particular. If the home was lawfully established, this factor would weigh against the legitimacy of requiring the individual to move. Conversely, if the establishment of the home was unlawful, the position of the individual concerned would be less strong. If no alternative accommodation is available the interference is more serious than where such accommodation is available. The evaluation of the suitability of alternative accommodation will involve a consideration of, on the one hand, the particular needs of the person concerned and, on the other, the rights of the local community to environmental protection…

(ζ) Lastly, the vulnerable position of Roma and travellers as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases…; to this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the way of life of the Roma and travellers…"

Application of the law to the facts

56. It is not in contest that the respondent Council is the owner of the lands in Folio 50734F, County Clare. The appellants have articulated no claim to a beneficial or other lawful entitlement over same. The appellants do not deny that their current conduct in entering upon, residing in and refusing to vacate, notwithstanding the service of valid notices to vacate, constitutes a clear breach of the planning legislation. Regard must be had to the current circumstances of the appellants in the context of their recent pattern of conduct in repeatedly declining reasonable offers of

accommodation by the Council and engaging in numerous breaches of the planning legislation, requiring repeated applications by the Council to the High Court for injunctive relief. With regard to the mandatory interlocutory injunctions sought I am satisfied that there was clear evidence before the High Court judge which met the higher standard required of an applicant who seeks a mandatory interlocutory injunction and which demonstrated that the Council had made out a strong case that it is likely to succeed at the trial of the action to obtain permanent mandatory injunctions and orders in like terms. The appellants established no stateable defence or basis in law as would justify their continuing acts of trespass and continuing breaches of the Local Government Planning and Development Act 2000.

57. The evidence is consistent only with a decision having been made to engage in repeated breaches of the planning legislation, acts of trespass and unlawful conduct for the purposes of exerting pressure on the Council to secure housing demands of a bespoke nature, kind and scale for which the appellants have established no lawful entitlement. The appellants have exhibited a cavalier attitude to environmental and planning law and to complying with court orders, only to immediately thereafter commence committing further breaches of planning law on lands not covered by the earlier court order/s.

58. By contrast, in the instant case the current occupation, on the appellants' own version of events, represents the fourth instance in short succession in which they have occupied or taken possession for habitation purposes either of a part of the public highway or lands which are owned by the Council. The court has made repeat orders; once on consent (Ashline) and again after an interlocutory hearing (R475) to restrain continuing breaches of planning law as well as trespass. The appellants have failed to identify any authority either under domestic law or the Convention's jurisprudence for the proposition that the act of going onto property by an act of trespass and placing caravans and vehicles on the property for the purpose of caravanning and habitation in a manner

which clearly breaches s. 160 of the Planning and Development Act 2000 can be thereupon defended by the assertion that the caravans and vehicles are in use as a "home".

59. There has been no delay or acquiescence on the part of the Council. Indeed the within proceedings were initially instituted to restrain occupation of part of the public highway as comprised a portion of the R475 adjacent to a school. Therefore on the facts as fairly construed by the trial judge, what was before him was a routine case seeking the removal of individuals who had unlawfully occupied property over which they made no claim of ownership of any kind. The occupation and its use by the appellants is in clear breach of the planning legislation and that does not appear to have been contested.

60. As stated above, Article 8 ECHR confers no positive entitlement to be provided with a home. The term "home" is an autonomous concept in the Strasbourg jurisprudence as was made clear in *Buckley v. United Kingdom* at para. 63 and *Khatun v. United Kingdom* (App. No. 38387/97) (1998) 26 E.H.R.R. CD212 at p. 215. Whether a habitation comprises a "home" within the meaning of Article 8 does not depend on the resident being able to claim that he owns any proprietary interest in the premises or even that his presence there is lawful. This was acknowledged by Lord Bingham in *Harrow L.B.C. v. Qazi* [2004] 1 A.C. 983 at para. 9. As the jurisprudence has evolved it appears clear that the test is essentially a factual one; namely, whether the claimant of Article 8 rights can show sufficient and continuous links with the place contended to constitute a "home".

61. On the evidence, at no time were the appellants left under an impression that they were to be permitted to continue to reside on the Cahercallamore lands. The respondent Council continuously sought possession of same and it is clear from the affidavit evidence that they promptly and unequivocally proceeded to exercise their statutory obligation to enforce the Planning Code and their right to recover possession of the lands occupied by the appellants by seeking injunctions to restrain trespassing.

62. Further, it is noteworthy that at no time did the appellants deny that they were engaging in trespass or unauthorised use and development of the land and they did not appear to dispute that ownership resided with the Council.

63. Whereas they asserted that the lands had been vested in the Council many decades before for the purpose of Traveller accommodation, that assertion was not proven.

64. The trial judge's finding of fact at para. 24 of the substantive decision, [2019] IEHC 662, that the appellants had rejected four separate offers of housing, is not being contested. In particular, it is noteworthy that on 7 December 2017 the Council offered the appellants a tenancy of a newly acquired and refurbished four-bedroom dwelling house at 16 The Woods, Cappahard, Tulla Road, Ennis which was declined by the appellants. They also declined the Council's offer of 30 November 2017 to nominate them to Co-operative Housing Ireland for standard housing accommodation at Ashling, Shanaway Road in Ennis. This was in addition to the refusal of two offers of a house at Beechpark.

65. It is further significant that there has been a standing commitment on the part of the Council to ultimately redevelop the lands at Ashline, in conjunction with adjoining lands, to provide for forty units of social housing accommodation. It is envisaged and acknowledged that the appellants will be offered permanent accommodation in a new dwellinghouse provided as part of that scheme of development in the fullness of time and upon its completion. The appellants' stance as outlined on affidavit and in the oral evidence of Mr. McDonagh was that such offers of accommodation would not be acceptable because they were not Traveller specific and could not accommodate the extended McDonagh family. That stance confers no rights upon them.

66. In an affidavit of 10 January 2018 in the Ashline proceedings, Liam Conneally for the Council deposed at para. 6: -

> "…the Plaintiff has at all times offered to construct a dwellinghouse for the Defendants' household at Ashline, Ennis and to make same available for permanent occupation by them as tenants pursuant to the Housing Acts should they wish to reside there. That remains the Plaintiffs' position."

67. The appellants did not identify any authority either within the Strasbourg jurisprudence or in domestic law in support of the proposition that they are legally entitled to compel the Council to fulfil their demand for bespoke housing - being Traveller specific accommodation sufficient to accommodate the wider McDonagh family which at the moment would require six distinct units of accommodation.

68. The statutory obligations of the Council do not extend to an obligation to provide accommodation or a site exclusively for the extended McDonagh family. The *Mulhare* line of jurisprudence makes clear that the bar is set relatively high in challenges to Housing Authorities' decisions where exercising public duties in the context of deploying limited resources and I agree with the views expressed by Baker J. in that regard. On 2 November 2018, the Council's solicitors wrote to the appellants pointing out that they had been offered housing accommodation by the Council, including the only Traveller specific accommodation then available, and had refused same. The Council's solicitors also informed the appellants that they were in breach both of the Traveller Accommodation Acts (with regards to the location of their temporary dwellings) and the planning legislation, with regards to the development carried out.

Alleged failure of respondent to draw down funding for Traveller specific accommodation

69. Regard must be had to the fact that a substantially identical argument was advanced in the parallel Ashline proceedings. In the judgment delivered in that case on 10 October 2019, Allen J. roundly rejected the contentions advanced, observing at para. 84: -

> "The defendants' misunderstanding rapidly became apparent from the evidence of Mr. Niall O'Keeffe, an administrative officer with the council, and Ms. Fiona Mooney, now an administrative officer, but at the relevant times a senior executive officer with responsibility for housing. The procedure is that housing authorities submit proposals for development which they propose to undertake, together with a budget. Proposals are submitted in January of each year and funds are allocated by the department in April or May. It is only when funds have been allocated that the council can begin the process of designing and building the developments. As the expenditure is incurred by the council, an application may be made to the department to recoup its expenditure. The allocation is not cash. The figures shown in the table for 'funding allocation' are figures for approved expenditure which, when incurred by the council, will be recouped by the department. Because of the inevitable lag between approval by the department, construction of the project, payment by the council, and eventual drawdown, the figures given for allocation do not represent money which is readily or immediately available to the councils."

70. The findings of Allen J. in that case have not been appealed by the appellants. In substance, it is an issue which ought more appropriately to have been litigated by way of judicial review. Clearly, such an application is now long since out of time having due regard to O. 84 of the Rules of the Superior Courts governing time limits. Even if established, it could never have provided a defence to breaches of the planning law or trespass.

Application of the principles governing the grant of interlocutory injunctions to the evidence

71. It is clear that Allen J. took into account the extensive jurisprudence of the ECtHR opened to him in addition to the submissions of the parties regarding the domestic jurisprudence and the legislation. The key domestic decisions under consideration were the decision of Baker J.in *Mulhare v. Cork County Council*, as upheld by this court on appeal and *Keating & Co. Ltd. v. Jervis Shopping*

Centre Ltd., with regard to the issue of housing. There was uncontroverted evidence before the court of unauthorised development by the appellants on the Council's Cahercallamore lands together with trespass on the said lands. The court was satisfied that the appellants had been offered reasonable accommodation by the Council and had rejected same on four separate occasions. It is clear that any offer which did not meet the appellants' prerequisites (namely, that it was Traveller specific and exclusively available to the extended McDonagh family) would have been rejected.

72. The judgment comprehensively and correctly analysed the domestic jurisprudence, relying on the decision of Smyth J. in *McDonagh v. Clare County Council* for the proposition that the failure of Clare County Council to provide the type of accommodation that the applicants sought and wanted did not constitute by itself a breach of statutory duty: "The obligation of a housing authority is to respond to… a need not a want." (p. 72 of judgment).

73. The trial judge was correct in his analysis of the jurisprudence and its application to the facts as exemplified in his observations at p. 74 of the transcript that the Council: -

> "…in deciding how to deal with an unlawful encampment, is entitled and obliged to take into account the need to uphold the rule of law. The Council will, if possible, make arrangements for alternative shelter for Mr. and Mrs. McDonagh. The most serious impediment to the provision by the County Council of alternative shelter is the defendants' insistence on Traveller-specific accommodation not only sufficient to their own needs and the needs of the minor children living with them, but also for the needs of the entire wider McDonagh family, their sons and partners and their children. Such accommodation, it is well established, is something that Mr. and Mrs. McDonagh are not entitled to insist upon."

74. That analysis based on the facts and having due regard to the authorities and the jurisprudence, both domestically and at Strasbourg level, is entirely correct.

75. With regard to the issue of trespass, ultimately the appellants failed to identify any lawful basis on which they were entitled to be present upon the lands. The judgment of Keane J. in the High Court in *Keating & Co. Ltd. v. Jervis Shopping Centre Ltd.* has been followed in this court on a number of occasions. In particular, there is the dictum of Keane J. at p. 518 where he said: -

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

76. Those principles have been followed in this court including in the decision *Bank of Ireland v. O'Donnell* [2015] IECA 73, [2016] 2 I.R. 185.

77. It is clear on the evidence and having due regard to the approach adopted by the trial judge that he did not deviate from or offend the "proportionality" test regarding interference with the appellants' rights, including their right to housing and the enjoyment of their home. In *Ward v. South Dublin County Council* [1996] 3 I.R. 195 at pp. 203 to 204, Laffoy J. clearly identified the delimitations on a court to intermeddle with the deployment by a housing authority of its resources:-

> "It is not the function of this Court to direct a local authority as to how it should deploy its resources or as to the manner in which it should prioritise the performance of its various statutory functions. These are matters of policy which are outside the ambit of judicial

review. Moreover, in relation to the function at issue here, the provision of accommodation in the form of halting sites for members of the travelling community to which a housing authority owes a duty under s. 13, while there may be informed opinions as to how the function would be best performed, which differ from the approach being adopted by the housing authority, it is no function of this Court to adjudicate on the merits between the differing points of view."

78. The matter was also considered in the High Court by Charleton J. in *Doherty v. South Dublin County Council (No. 2)* [2007] IEHC 4, [2007] 2 I.R. 696 where he noted at para. 30 that "[t]he housing authority… has obligations only in accordance with its resources and according to the scheme of priorities set out by it."

Balance of convenience and adequacy of damages

79. Where, as here, the respondent has a plain and clear established right of property and the appellants' potential defences lack substance, the court will not consider the balance of convenience and it ought to proceed to grant the interlocutory mandatory and/or prohibitory injunctions even where the trespass complained of causes no harm. In the instant case, there is evidence of conduct which, separately and distinctly to the issue of trespass, constitutes a clear breach of the planning legislation.

80. The hearing and the evidence adduced before the High Court provided a comprehensive opportunity to have the proportionality of the orders sought determined with due regard to the respective rights of the parties and the public interest. The trial judge correctly concluded that the orders were warranted and the said orders did not violate any contended right of the appellants. The decision in *Chapman v. United Kingdom* held that there is no Convention right to be provided with a home by a contracting State.

81. The housing demand of the appellants was identified in the judgment of Allen J. delivered on 10 October, [2019] IEHC 662, at para. 47 and in effect the appellants seek six houses in a Traveller specific scheme, not necessarily in Ashline. In all the circumstances, and having due regard to the evidence, the demand is disproportionate and amounts to a purported exercise of a veto on the part of the appellants in pursuance of an entitlement which they have not established they enjoy in law. The stance adopted by the appellants is "unreasonable" in the sense considered by Peart J. in *Fingal County Council v. Gavin*. The respondent, as housing authority, has made reasonable offers of accommodation for the benefit of the appellants. I take judicial notice of the housing crisis in the State and the limited resources of the respondent to meet housing demands in its administrative area.

82. The appellants' contention that the Council has failed to facilitate the way of life of the appellants, in particular by electing not to draw down available funding for the purposes of Traveller specific accommodation, has been comprehensively addressed in the Ashline judgment of Allen J., which decision has not been appealed against. Further, any attempt to seek judicial review of the Clare County Development Plan 2017-2023 is now substantially out of time.

83. Whilst Ireland's Common Core Document (HRI/CORE/IRL/2019), forming part of its reports under, *inter alia*, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, makes for interesting reading it does not establish any justiciable or enforceable rights for the benefit of the appellants pursuant to those covenants or allied covenants and conventions. Nor do the Concluding Observations of the Committee on the Elimination of Racial Discrimination on Ireland's combined fifth to ninth reports (CERD/C/IRL/CO/5-9) establish any justiciable or enforceable rights for the benefit of the appellants.

Summary

84. I am satisfied, in light of the evidence before him, that the decision was made in the exercise of the trial judge's discretion, based on a correct application of the relevant principles, and that the decision was one that was clearly open to him on the evidence. That evidence included that the appellants did not dispute the title of the Council to the property in question. Neither did they identify any stateable legal basis which entitled them to trespass on the Council's property.

85. No evidence was adduced as could amount to any stateable defence to the continuing user of the Council's lands for an unauthorised development in clear breach of s. 160 of the Planning and Development Act 2000. The provisions of the Planning and Development Act 2000 invoked by the Council operate for the public benefit and the protection and preservation of the environment. As such, they are measures "necessary in a democratic society" for a legitimate aim. The enforcement procedure operated and as applied by the High Court was proportionate to the legitimate aim which the legislation pursued.

86. The Council identified compelling reasons in the public interest for taking the enforcement proceedings repeatedly against the appellants. As such, they fall to be viewed in light of para. 72 of the *Winterstein* judgment: -

> "The Court notes that these provisions are accessible and foreseeable and thus concludes that the interference was in accordance with the law within the meaning of Article 8(2)."

87. The measures invoked by the Council and applied by the court were well within the wide margin of appreciation afforded to the State and state authorities, as the ECtHR acknowledged in *Chapman.*

88. Neither the alleged failure of the Council to draw down funds for Traveller specific accommodation, a matter which was rejected by Allen J. in his judgment of 10 October 2019 in the

Ashline proceedings between the same parties, nor any asserted non-compliance with any obligation pursuant to the Housing (Traveller Accommodation) Act 1998 (none such being identified at the hearing), were same to be proven at trial, could give rise to a valid defence either to the claim for relief under s. 160 of the Planning and Development Act 2000 or the claim to restrain trespass.

89. The appellants rejected several wholly reasonable offers of housing by the Council, including the offer of housing with Co-operative Housing Ireland at Shanaway Road, Ennis and also the offer of a refurbished four bedroom house with three bedrooms upstairs (one *en suite*) at Cappahard, Tulla Road, Ennis. To address the second appellant's accommodation requirements, as indicated to the Council by her GP, this house also had a downstairs bedroom and toilet and a kitchen, utility and living area.

90. The accommodation offers made by the Council were reasonable and it is clear that the appellants formed an intention to refuse all offers, insisting that the Council provide them forthwith with six dwelling houses for the exclusive use of the appellants and five of their sons, with the latter's partners/spouses and children. This demand, made in the middle of a national housing crisis, was not reasonable and could not readily be met by the Council given the demands upon it and its limited resources as the evidence clearly demonstrated. The conduct of the appellants was tantamount to asserting a veto over accommodation offered, a right which was not established to exist.

91. In concluding that the approach of the Council was reasonable the trial judge was well within the margin of appreciation which is to be properly afforded to the trial judge and was further proportionate in all the circumstances of the case having regard to his determination as to the Council's statutory remit and limited resources.

92. No breach of the Equal Status Act 2000 was identified.

93. Contrary to the arguments advanced, on careful analysis Irish domestic law, particularly the judgment of Baker J. in *Mulhare*, fully accords with the ECtHR jurisprudence and implicitly balances the competing Convention rights of other affected parties, including the property rights of others which enjoy protection under Article 1 of the First Protocol of the Convention.

94. Enforcement of the relevant environmental and planning laws, where, as in this case, clear and sustained, repeated breaches are demonstrated to exist, accords with the State's obligations under EU environmental law, and the State's obligations under Article 37 of the Charter of Fundamental Rights of the EU. Vindication of the environmental protection rights of the public, which in the context of the facts in this case arises under the Planning and Development Act 2000, is placed within the remit of the respondent Council. The repeated and continuing breaches of same undermine the rule of law and no objective justification for the said conduct was identified at the original hearing.

Conclusions

95.

a. The hearing of an appeal from an interlocutory injunction does not involve a re-hearing.

b. Bearing in mind the principles adumbrated by O'Donnell J. in *Merck Sharp & Dohme v. Clonmel*:

(i) The evidence points towards a strong likelihood that the plaintiff will succeed at trial in light of the clear breaches of the Planning and Development Act 2000 and the continuing acts of trespass of the appellants.

(ii) In the instant case, the appellants assert that the accommodation in question constitutes their "home". As demonstrated above the jurisprudence of the ECtHR relied upon by the appellants does not support that contention on the facts. The

appellants lacked the requisite close and continuous links with Cahercallamore which is a prerequisite to establishing a Convention-recognised "home". Hence, I am satisfied that no fair question to be tried has been established by the appellant as could warrant this court interfering with the determination of the High Court in that regard.

c. The decision appealed against was made in the exercise of the trial judge's discretion, based on a correct application of the applicable principles and was one clearly open to him on the evidence. A significant margin of appreciation should be afforded to that decision.

d. The Council did not seek to rely on the adequacy of damages electing to approach the issue on the merits instead. That fact is reflective of their proportionate and reasonable behaviour.

e. No error of principle in the analysis of the trial judge was identified by the appellants which would warrant intervention by this court.

f. In assessing the balance of justice in this instance, I am satisfied on the evidence that, in contrast to *Winterstein*, the appellants have no nexus with or interest in the Cahercallamore lands. The appellants have not established any legal basis whereby the Council could in law be obliged to divert its limited resources to meet bespoke housing demands of the appellants. The conduct of the Council throughout was proportionate and fair. Repeated, reasonable offers of accommodation by the Council have been unreasonably rejected by the appellants.

96. All the above being so, the appellants have failed to establish any basis on which I could conclude that the High Court judge fell into error in granting the interlocutory reliefs sought by the Council and refusing the claims advanced by the appellants.

97. It follows that this appeal should be dismissed.

Pandemic

Position pending plenary hearing

98. It is noteworthy that the orders of the High Court have been subject to a stay since their making. In the intervening time the Covid-19 pandemic has emerged and I take judicial notice of the fact that Ireland has now been placed on Level 5 of the framework of restrictions provided by the Government's *Resilience and Recovery 2020-2021: Plan for Living with COVID-19*. Level 5 restrictions came into effect on midnight 21 October and are to be in place for a period of six weeks. Level 5 restrictions involve penalties for movement outside 5 kilometres of one's home subject to particular exceptions.

99. It is noted that, the appellants having rejected the various offers of housing and accommodation made to them, the said accommodation was reallocated to others in need of housing as counsel for the respondent explained at the hearing of the appeal.

100. In light of the current exigencies and the significant uncertainty surrounding the trajectory of the Covid-19 pandemic in the State, I am of the view that notwithstanding that the appellants have failed in their appeal the court should in consultation with the parties put in place a regime in the nature of a limited stay which minimises the overall risk to the welfare, health and safety of the appellants pending the trial in the exceptional context caused by the pandemic. In proposing to do so I have regard to the fact that the provisions of the Emergency Measures in the Public Interest (Covid-19) Act (No. 2 of 2020) and in particular s. 5(7) or any equivalent measure appear to be no longer in operation. It provided: -

> "5. (7)(a) Notwithstanding any of the provisions in this section, all proposed evictions in all tenancies in the State, including those not covered by the Act of 2004, are prohibited during the operation of the Emergency Measures in the Public Interest (Covid-19) Act 2020.

(b) For the avoidance of doubt, this section applies to all Local Authority and Approved Housing body dwellings.

(c) For the avoidance of doubt, all Travellers who are currently resident in any location should not during this crisis be evicted from that location except where movement is required to ameliorate hardship and provide protection and subject to consultation with the Travellers involved."

The said measure appears to have been deleted by the Residential Tenancies and Valuation Act 2020 (No. 7 2020), s. 13(b) which came into force on 1 August 2020. I also note the English High Court decision of Auerbach J. in *Chichester District Council v. Sullivan* [2020] EWHC 2154 which the parties may wish to have regard to.

101. In the circumstances, notwithstanding that the breaches of the planning legislation and trespass are extensive, longstanding and repeated and involved intervention by the courts on separate occasions, the court will hear submissions as to whether a short stay is warranted in light of the Covid-19 pandemic and the purpose, extent, terms and duration of same. In the circumstances, the respondent Council will be afforded 14 days from the date of delivery of this judgment within which to put forward, in a submission not exceeding 2,000 words, its views and any proposals it may have in relation to such a stay, including also in relation to the issue of costs, and the appellants a further 14 days to put forward their responses (not to exceed 2,000 words) to same.

102. As this judgment is being delivered electronically, Noonan and Power JJ. have indicated their agreement with it.