[2019] IEHC 649

THE HIGH COURT

[2019 No. 771 P.]

BETWEEN

SHAWL PROPERTY INVESTMENTS LIMITED

PLAINTIFF

AND

A. AND B.

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 1st day of October, 2019

Overview

1. In 2005 the first defendant borrowed a little over €8 million to fund the purchase of a portfolio of eight residential properties in south Dublin, among them houses at [Blackacre], and [Whiteacre]. The first defendant failed to meet his obligations to the lender and in 2018, following an assignment of the loan and security, the two houses were sold to the plaintiff. In the meantime, the first defendant had been adjudicated bankrupt, and later discharged.

2. About three months after the sale of the houses to the plaintiff, the first defendant broke in to them and changed the locks and he now claims that they are his and/or that they belong to his former life partner and the mother of his teenage children, and/or both. The defendants have delivered a counterclaim by which they claim a declaration that the two houses, which neither of them paid for, but which the plaintiff did pay for, are theirs.

3. The essential issue on this application is whether the defendants are entitled to insist that the plaintiff's action for permanent injunctions restraining trespass must go to trial on oral evidence.

The facts

4. There is little dispute as to the facts. I will identify later such dispute as there is and deal with the materiality of the disputed facts.

5. By letter of loan offer dated 20th October, 2005, EBS Building Society ("*EBS*") offered to advance to the first defendant a loan of up to €8,318,000, over 25 years, to fund the acquisition by the first defendant of a portfolio of eight residential investment properties in south Dublin. The first defendant accepted the offer on 16th November, 2005 and drew down the loan on 13th December, 2005.

6. The loan was offered, accepted and drawn down upon terms that EBS would have a first legal mortgage over each of the eight properties. On 6th January, 2006, the first defendant executed a deed of mortgage and charge over several properties, including that at [Blackacre], and on 10th January, 2006, he executed a deed of mortgage and charge over the house at [Whiteacre].

7. When the property market turned, the first defendant was unable to meet his obligations and on 29th October, 2009, the High Court (Dunne J.) made an order for possession of all the properties in favour of EBS.

8. EBS did not execute the order for possession but instead, on 26th May, 2010, appointed Mr. Paul McCann as receiver over the properties.

9. On 9th September, 2013 EBS marked judgment in the Central Office against the first defendant in the sum of €9,433,173.79.

10. By deed of conveyance and assignment dated 30th June, 2017, EBS DAC (as it by then had become) transferred the first defendant's loan and the security held for it to Beltany Property Finance DAC ("*Beltany*"). On 10th September, 2018, Beltany, in exercise of the power of sale contained in the mortgages, sold the properties at [Blackacre] and [Whiteacre] to the plaintiff. The assurances to the plaintiff were duly registered in the Registry of Deeds.

11. In the meantime, there had been a protracted battle between Mr. McCann and the defendants. Between the time of his appointment on 26th May, 2010, and about March, 2014 the conduct of the receivership was unremarkable. Mr. McCann was managing the properties and collecting the rents. However, when, in March 2014, Mr. McCann offered the properties for sale, the defendants tried to recover possession of all eight properties and to collect the rents from the tenants.

12. By plenary summons issued on 29th April, 2014, Mr. McCann commenced proceedings against the defendants and "*Anti-Eviction Taskforce*" claiming orders requiring the defendants to vacate the premises the subject of these proceedings, and restraining the defendants from entering upon or attending at, or otherwise interfering with the receivership in respect of the other six properties in the portfolio, as well as the properties the subject of these proceedings.

13. By order made on 15th May, 2015 (for the reasons given in a comprehensive written judgment delivered on 27th April, 2015) the High Court (Donnelly J.) granted the relief sought by Mr. McCann and dismissed a counterclaim by the second defendant. An appeal by the second defendant against the order of 15th May, 2015, was dismissed by the Court of Appeal on 9th February, 2017. An application by the first defendant to the Court of Appeal for an extension of time in which to file a notice of appeal against the judgment and order of 15th May, 2015, was withdrawn on 20th March, 2017.

14. Although the challenges to the order of the High Court of 15th May, 2015, had been disposed of by the Court of Appeal, the defendants did not obey it and by order of the High Court (Baker J.) made on 4th May, 2018, the first defendant was attached, and the second defendant was committed to Mountjoy Prison.

15. The second defendant appealed against the order of 4th May, 2018. On 17th May, 2018, the Court of Appeal refused an application for a stay on the High Court order pending appeal but expedited the hearing of the appeal, which it heard on 29th May, 2018. For the reasons given in a comprehensive written judgment delivered by Peart J. on 21st June, 2018, the second defendant's appeal was dismissed.

16. The receiver's motion to attach and commit was listed for further consideration before the High Court (Baker J.) on 19th July, 2018, and was adjourned to 9th October, 2018, with liberty to the parties to apply, including during the long vacation, on 48 hours' notice or on such shorter notice as might be permitted by a judge of the High Court.

17. On 27th August, 2018, the second defendant gave notice that she wished to purge her contempt and her application was dealt with by the High Court (Quinn J.) on the following day. The second defendant undertook to the court to vacate the premises and not to interfere directly or indirectly with them and was discharged from custody.

18. The second defendant's belated compliance with the order of 15th May, 2015, cleared the way for the sale of the properties and they were, as I have said, sold to the plaintiff on 10th September, 2018.

19. Along the way, the first defendant was adjudicated bankrupt on 4th April, 2017, and discharged from bankruptcy on 4th April, 2018.

20. The plaintiff went into possession of both properties on 11th September, 2018.

21. Late in the morning of 2nd December, 2018, a group of five men and one woman broke into the house at [Blackacre] and changed the locks. The woman claimed to be the owner of the house by virtue of a purported transfer to her by The [X] Family Trust, for the benefit of the first defendant's teenage daughters. The intruders were on that occasion put out by the Gardaí.

22. At about the same time on the same day, a group of about eight men led by the first defendant broke into the house at [Whiteacre]. Later that afternoon, the intruders were put out by the Gardaí.

23. On the morning of Monday 28th January, 2019 the first defendant, this time accompanied by about six men, again broke into the house at [Blackacre] and again changed the locks. Later in the morning the second defendant arrived, and in the afternoon the defendants were joined by their daughters. The Gardaí were again called, but on this occasion the first defendant claimed that he was the owner of the building and would not leave.

24. On 30th January, 2019 the High Court (Reynolds J.) made an interim order restraining the defendants from trespassing on either of the properties or from interfering with or obstructing the plaintiff's possession and gave liberty to the plaintiff to issue and serve a motion for interlocutory orders, returnable for 1st February. On the return date, the defendants (who had left the property on service on them of the order of 30th January) gave sworn undertakings to abide the order of 30th January, and on 8th February, 2019, consented to interlocutory orders, which were then made by Reynolds J.

25. On 8th March, 2019, Reynolds J. made an order by consent for the exchange of pleadings.

The pleadings

26. By its statement of claim delivered on 12th April, 2019 the plaintiff pleads that it is the full legal and beneficial owner of the properties at [Blackacre] and [Whiteacre], which it claims to have acquired from Beltany on 10th September, 2018. It is said that on 11th September, 2018 one of the directors of the plaintiff, Mr. Martin Sadlier, went into occupation of [Blackacre] and the other director, Mr. Joey Walsh, went into occupation of [Whiteacre], since when, it is said, the plaintiff and Messrs. Sadlier and Walsh have been subjected to an orchestrated and malicious campaign of unlawful conduct which has been organised, endorsed, facilitated and executed by the defendants.

27. The particulars of the alleged campaign include allegations that:-

(1) On 17th September, 2018, the first defendant purported to create a deed of trust (which was registered with the Property Registration Authority on 22nd November, 2018) which purportedly vested the properties in Mary Monks, in trust;

(2) On 2nd December, 2018, the defendants and their servants or agents broke into both properties and remained there until put out by An Garda Síochána;

(3) The plaintiff and its directors and the occupants of the properties have been subjected to a campaign of false and defamatory and derogatory statements and intimidation in the pursuit by the defendants of what are said to be false and baseless claims that they have an interest in the properties;

(4) On 28th January, 2019 the defendants broke into the [Blackacre] house;

(5) In the course of the forced entries into the properties, the properties and their contents have been damaged, to the tune of an estimated €9,780.93 in the case of [Blackacre] and €30,000 in the case of [Whiteacre];

(6) The defendants have misappropriated a sum of approximately €5,000 in cash from the [Blackacre] house.

28. The plaintiff claims a declaration that the defendants have no estate, right, title or interest in either of the properties; a variety of injunctions restraining interference with the property and with the plaintiff's officers, shareholders, servants and agents; and damages for trespass, slander of title and intentional interference with the plaintiff's economic interests.

29. The defence admits that the first defendant entered the properties, changed the locks and immobilised the intruder and CCTV systems, but denies that any damage was thereby done.

30. The gravamen of the defence pleaded is that the plaintiff is not the full legal and beneficial owner of the properties: rather that the first defendant is. In 35 short paragraphs the defence sets out a chronology of events over the fifteen years between the date of the EBS loan and the date of the sales (or, as the defendants contend, purported sales) to the plaintiff, by reference to which, it is argued, the pleadings disclose

four issues to be determined as to the validity of plaintiff's title and the first defendant's entitlement to the properties.

The application for summary judgment

31. By the notice of motion now before the court, the plaintiff first seeks summary judgment on its claims for declaratory and injunctive relief, only. If the court is disposed to grant that relief, and to make an order for costs, the plaintiff will abandon its claim for damages.

32. Mr. Stephen B. Byrne, for the plaintiff, acknowledges that an application for summary judgment other than in respect of a claim for a debt or liquidated sum is unusual, but he argues that the court has jurisdiction to give summary judgment. Mr. Byrne relies on the decision of Kelly J. (as he then was) in *Abbey International Finance Ltd. v. Point Ireland Helicopters Ltd. and Elitaliana SpA* [2012] IEHC 374.

33. *Abbey International* was a judgment given in a case which had been admitted to the Commercial List of the High Court. The plaintiff's claim was for specific delivery of three helicopters and a medical kit which it had leased to the defendants, as well as a sum in excess of €3 million for unpaid rent, and it applied for summary judgment for the entirety of its claim on the ground that there was no defence. Kelly J. dealt first with the issue as to whether it was open to the plaintiff to apply for summary judgment for a claim other than a claim for a liquidated sum. He concluded, by reference both to the inherent jurisdiction of the High Court and the specific rules which applied to cases transferred to the Commercial List, that it was. At para. 17 of the judgment, he said:-

> *"I can see no reason in either law or logic why a defendant who has no defence to a liquidated claim may be subject to an application for summary judgment, but not to be so in the case of an action seeking unliquidated damages or other substantive reliefs."*

34. Kelly J. recalled the judgment of Costello J. (as he was) in *Barry v. Buckley* [1981] I.R. 306 and the observation of McCarthy J. in *Sun Fat Chan v. Osseous Ltd*. [1992] I.R. 425, where, at p. 428, it was said:-

> *"In Barry v. Buckley Costello J. referred to the notes on [s. 27, sub-s. 5 of the Judicature (Ireland) Act 1877] as set out in Wylie on the Judicature Acts. Since the matter has not been debated, I express no view upon the decision in Barry v. Buckley save to comment that applying the underlying logic, a defendant may be denied the right to defend an action in a plenary hearing if the facts are clear and it is shown that the defence is unsustainable. This appears to have been the net effect of the decision in the High Court (Dixon J.) in Dolan v. Neligan (1959) reported in its second phase in [1967] I.R. 247."*

35. Kelly J. went on to quote from the judgment of Geoghegan J. in *Dome Telecom Ltd. v. Eircom Ltd*. [2008] 2 I.R. 726, in which Geoghegan J. held that in modern times, the courts are not necessarily hidebound by the interpretation of a particular rule of court and

that if there is no rule in existence, precisely covering a situation calling for efficient case management and fair procedures, the court has an inherent power to fashion its own procedure. While the Supreme Court in *Dome Telecom* was divided on the issue as to whether the discovery sought by the plaintiff and ordered by the High Court was necessary and proportionate, Fennelly J. expressed his agreement with the approach which Geoghegan J. said should be adopted in a case where the rules of court had been overtaken by technology.

36. In *Abbey International* Kelly J. concluded, at para. 24:-

> *"If there is an inherent jurisdiction to strike out proceedings which have no reasonable prospect of success then, in the interests of justice, why should there not, in an appropriate case, be a jurisdiction to adjudicate summarily upon a purported defence? If the defence offered is alleged to be lacking any reasonable prospect of success, then the plaintiff should have the ability to seek to recover judgment regardless of the type of proceedings. I believe that there is no good reason why such an application cannot be brought and considered by the court."*

37. In opposing the application, Mr. Brendan Donelon, emphasised the fact that *Abbey International* was a case which had been admitted into the Commercial List. So it was, and Kelly J. found jurisdiction in the Commercial List Rules to deal with the plaintiff's claim summarily: but he expressed that finding to be quite apart from the inherent jurisdiction which he had already found.

38. It was further argued that because the court in *Abbey International* gave summary judgment only for the liquidated sum, and not for specific delivery of the helicopters, that what was said about the jurisdiction to summarily determine other claims was *obiter*. However, while the note of the judgment shows that the court did not give summary judgment on the claim for specific delivery, it did give conditional leave to defend: which was plainly an exercise of the jurisdiction which the court had found to exist.

39. The test to be applied on applications for summary judgment is well established. The threshold to be applied in deciding whether a defendant should have leave to defend is a very low one. Before summary judgment is granted it must be very clear that the defendant has no defence. See *Aer Rianta cpt v. Ryanair Ltd*. [2001] 4 I.R. 607. Nevertheless, there must be substance to the proposed defence and it must be based on facts which if true and established would amount to a defence.

40. As to the approach to be taken to facts put before the court on an application for summary judgment, in *Irish Bank Resolution Corporation v. McCaughey* [2014] 1 I.R. 749, Clarke J. (as he then was) said:-

> *"Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept the facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be*

forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts, which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in Aer Rianta. It needs to be emphasised that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."

41. As to the approach to be taken by the court to questions of law arising on motions for summary judgment, the plaintiff relies on the judgment of Clarke J. in McGrath v. O'Driscoll [2007] 1 I.L.R.M. 203, which was approved by the Supreme Court in *Danske Bank A.S. v. Durkan New Homes* [2010] IESC 22. In *McGrath* Clarke J. said, at p. 210:-

> *"So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."*

42. I turn now to apply those legal principles to the instant case.

The first issue – the first defendant's bankruptcy

43. There appear to be two separate arguments as to why and how the first defendant's bankruptcy is said to be relevant. One is a proposition of law, of sorts. The other is a mixed proposition of fact and law.

44. The defence expressly pleads the loan agreement between the first defendant and EBS of 20th October, 2005; the creation of the mortgages on 6th and 10th January, 2006; the making of the order for possession on 29th October, 2009; the appointment of the receiver on 26th May, 2010; the proceedings taken by the receiver and the progress of those proceedings until the final orders were made by the High Court on 15th May, 2015; and the adjudication of the first defendant on 4th April, 2017. The first argument, which I have characterised as a proposition of law, of sorts, is that the adjudication of the first defendant on 4th April, 2017, "*extinguished the loan facilities*". That is just silly.

45. The defence then moves to a plea that on 29th April, 2017, the first defendant brought an application to show cause against his adjudication, which application was dismissed by the High Court (Costello J.) on 17th July, 2017. The first defendant complains that EBS, in resisting his application to show cause, failed to disclose to the court the transfer (referred to as the purported transfer) of the loan facilities to Beltany on 30th June, 2017. It is said that Beltany was or ought to have been aware of the non-disclosure and that the first defendant reserves his right to bring an application, if necessary, to annul and/or set aside his bankruptcy and/or to add EBS and/or Beltany to the within proceedings. From

this, the first defendant leaps to a claim that he is entitled to a declaration that he remained the legal and beneficial owner of the properties.

46. The second argument, which I have characterised as a mixed question of law and fact, is that the alleged failure of EBS to disclose to the bankruptcy judge on 17th July, 2017 that the loan had been transferred to Beltany on 30th June, 2017 invalidated the transfer. That is a mere assertion for which no sensible basis was advanced.

47. In the further alternative, it is pleaded that the first defendant's bankruptcy (if valid, which is denied) extinguished the loan facilities so that there was nothing to transfer to Beltany on 30th June, 2017. This is a refinement of the first argument.

The second issue – equitable interest / estoppel

48. Paras. 26 – 31 of the defence are said to "*plead a case grounded in estoppel and/or that [the defendants] acquired an equitable interest in the properties*." What is pleaded is that:-

> *"26. Further and without prejudice to the foregoing, subsequent to the aforesaid purported transfer [to Beltany], it was at all material times represented by Beltany, and/or their servants or agents, that the sums under the Loan Facilities remained outstanding and that they would accept the sum of €1.5 million (each) for the Properties.*
>
> *27. In or around this time, the defendants had funds available of €5.5 million and were looking to redeem a number of properties from Beltany including the Properties as defined herein.*
>
> *28. The defendants relied upon the aforesaid representations and sought to procure additional funding in respect of the Properties.*
>
> *29. Despite the aforesaid, Beltany sought to transfer the Properties to the plaintiff on 10th September, 2018, for the sum of €1.1 million (each).*
>
> *30. In the premises, to the extent that the Loan Facilities and Mortgages were validly transferred to Beltany (which is denied), Beltany were estopped from seeking to convey the Properties to the plaintiff in or around 10th September, 2018.*
>
> *31. The plaintiff, and/or their servants or agents were aware or, in the alternative, ought to have been aware of the aforesaid equitable interest held in the Properties."*

49. Being as charitable as I can, this is nonsense. Assuming, as I must for present purposes, that the defendants could establish that Beltany said that it would accept €1.5 million for each of the properties, the defendants do not allege that they agreed to pay it. If I stretch para. 27 to mean that the defendants offered to redeem a number of the properties in the portfolio, including the properties the subject of these proceedings, it is not suggested that Beltany ever agreed to that. What the first defendant says in his

replying affidavit on this motion is that there were funds available, after his discharge from bankruptcy, to buy back "*the properties held by Beltany*" – therefore all of the properties – and to "*discharge him of all liabilities with Beltany*". Again, there is no suggestion that any money was ever offered to Beltany or that Beltany ever agreed to anything. While the defence used the word redeem, it is quite clear that the liabilities secured on the portfolio of properties were nearly twice what the defendants say they had available to them.

50. It is said that in reliance on the aforesaid representations – which can only be the alleged representation that Beltany would take €1.5 million each for the houses – the defendants sought to procure additional funding. It is not said that they did ever have the money to buy the houses, or when, or that they ever offered to buy the houses at the alleged asking price.

51. In my firm view the proposition that the naming of an asking price to a would-be purchaser might give rise to an estoppel preventing the owner of a property from selling it to anyone else is ridiculous. *A fortiori* the proposition that an expression of interest in a property coupled with an attempt to raise the purchase price might give rise to an equitable interest in property is hair raising.

The third issue – mortgagee in possession

52. It is said, variously, that Beltany was not entitled to sell as mortgagee in possession; that Beltany did not sell as mortgagee in possession; and that on 10th September, 2018, as a matter of fact, it was the receiver and not Beltany who was in possession of the properties.

53. The origin of this argument is an averment in the affidavit of Mr. Sadlier grounding this application that the plaintiff purchased the properties from Beltany which, he believed and was advised, was selling them as mortgagee in possession, and an averment in the affidavit of Mr. Sadlier sworn to ground the interim application that the security personnel engaged by the receiver left the [Blackacre] house on 11th September, 2018. The averment as to the date on which the security personnel left the house does not, as Mr. Donelon argued, establish that Beltany was not in possession on the date of the conveyances, but there is an issue of fact on the pleadings as to whether Beltany was in possession on the date of completion. That is an issue of fact which could not be decided on an application such as this, but the real question is whether it is relevant.

54. Section 21(2) of the Conveyancing Act, 1881 – until it was repealed by the Land and Conveyancing Law Reform Act, 2009, and since it has been revived for mortgages created prior to 1st December, 2009 by the Land and Conveyancing Law Reform Act, 2013 – provides:-

> *"Where a conveyance is made in professed exercise of a power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified*

by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power."

55. To this, s. 5(1) of the Conveyancing Act, 1911 added, and since 2013 for mortgages created after 1st December, 2009 again adds:-

> *"Upon any sale made in professed exercise of the power conferred on mortgagees by the Act of 1881, a purchaser is not, and never has been, either before or on the conveyance concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given, or the power is otherwise properly and regularly exercised."*

56. The fundamental flaw in the defendants' argument is that the statutory power of sale is not conditional on the mortgagee being in possession. It is true that in the vast majority of cases the mortgagee will be in possession, and will, if necessary, get a court order to put him into possession but this is because of the difficulty of persuading anyone to buy while the mortgagor remains in possession.

57. The conveyance and assignment, in the case of [Blackacre], and the conveyance in the case of [Whiteacre], were both made in exercise of the powers vested in Beltany by virtue of the mortgages "*and every other power it enabling*" and assured the properties to the plaintiff freed and discharged from all right or equity of redemption and from all claims and demands under the mortgages. That is the end of the matter. Whether, as a matter of fact, Beltany was or was not in possession is irrelevant to the effectiveness of the assurances to give good title to the plaintiff.

The fourth issue – formalities

58. Besides the issue as to whether Beltany was in possession at the time of the conveyances to the plaintiff, the defence seeks to agitate a number of technical issues in relation to the deeds of sale.

59. The defence denies (although the statement of claim does not assert) that Beltany was, or that the plaintiff is, in possession of the title deeds to the properties in order to effect a valid conveyance of the properties to the plaintiff. The defence denies (although the statement of claim does not assert) that the conveyances were executed under the common seal of Beltany and/or the plaintiff. The defence purports to put the plaintiff to strict proof that the conveyances to the plaintiff were executed in accordance with the relevant (unspecified) provisions of the law and/or Beltany's and/or the plaintiff's articles of association. The defence purports to put the plaintiff to strict proof of the validity of the registration of the deeds in the Registry of Deeds, and as to whether a first registration was required in the Land Registry.

60. The defendants were neither privy nor party to the conveyances of the properties to the plaintiff. I accept the submission on behalf of the plaintiff that the defendants are not entitled to seek to pick them apart or, perhaps more accurately, to make a series of wild

general allegations in the hope of fabricating issues to be used to attempt to justify a request for discovery.

61. In *English v. Promontoria (Aran) Ltd. (No. 2)* [2017] IEHC 322 Murphy J. considered the entitlement of a borrower to challenge the validity of a sale of his loan and the security for it. Murphy J. said:-

> *"The approach taken by the plaintiff to this application has been to raise a multiplicity of issues cocerning execution and redaction as set out above. Counsel has raised many hares relating to these issues. He has invited the court to speculate that the redacted portions of the mortgage sale deed and the deed of novation may reveal that there is some wider context to these transactions; that there might be other parties involved; that without sight of the redacted portions of those deeds one cannot be sure that the underlying agreements between Promontoria Holding 128 B.V. and the various Ulster Bank entities are valid. All of the issues raised by counsel for the plaintiff would be properly and validly raised if the plaintiff were a party to the deeds with an entitlement to challenge their efficacy, but he is not a party to the deeds. He is a third party whose only entitlement is to be shown that the stranger knocking on his door claiming possession has in fact acquired the interests of Ulster Bank Ireland Limited.*
>
> *In this application what the plaintiff has singularly failed to do is to engage properly with the evidence that is actually before the court. The court has sworn uncontroverted evidence that Promontoria (Aran) Limited has acquired Ulster Bank Ireland Limited's interest in the plaintiff's loans and the security underpinning them. The evidence shows the mechanism by which they were acquired. The defendant has underpinned the uncontroverted evidence by exhibiting the relevant portions of each deed and the entirety of the deed of conveyance and assignment of the plaintiff's mortgage.*

62. In *English*, a man who had borrowed money from one financial institution was faced with a demand from another financial institution for possession of the security. The borrower was entitled to be shown that the stranger knocking on his door had a valid assignment of the debt and security. This is a case in which a man has broken into another man's house and would challenge the owner to prove the irrelevant minutiae of the circumstances in which the owner's title deeds came to be executed as a condition of getting out. In this case it is the first defendant who is the stranger.

63. The plaintiff's title deeds, duly executed, stamped and registered, are before the court and are plainly regular on their face. A purchaser who had signed a contract to purchase the properties would not be entitled to thrash about in the undergrowth of the memorandum and articles of association or the minute books of the vendor or its predecessors in title to confirm the formalities of execution of the deeds: and the defendants certainly are not.

The alleged campaign of intimidation

64. The plaintiff, as I have said, alleges that in the period since 11th September, 2018 it and its servants and agents, and Messrs. Sadlier and Walsh, in particular have been the subject of an orchestrated campaign of malicious and unlawful conduct. The defence denies this and refers to a letter of 7th February, 2019 from the defendants' solicitors to the plaintiff's solicitors. That letter took issue with some of the detail in the affidavit of Mr. Sadlier grounding the application for the interlocutory orders, such as which of the defendants was present at which incident and when.

65. As to the allegations of a malicious campaign, the letter of 7th February, 2019 denied that the defendants had social media accounts or that they knew the people responsible for the accounts complained of. The first defendant did, however, take responsibility for two letters in similar terms written to Messrs. Sadlier's and Walsh's employers which were dated 4th December, 2018 and marked "*without prejudice*". So, in the same breath, the first defendant denied and admitted corresponding with Messrs. Sadlier's and Walsh's employers.

66. The two letters of 4th December, 2018 gave an account of what had allegedly happened at each of the houses on 2nd December, 2018. The first defendant wrote to each of the employers that a number of very young women had been found in the [Blackacre] house, in various states of undress, and to have been engaged in drug taking with an unidentified well-known GAA footballer. He continued:-

> *"All of the women were foreign nationals, two of them appeared to be very young but claimed not to be minors, and all of them appeared to be intoxicated and or under the influence of drugs and alcohol. There were drugs and drug paraphernalia at the property and the GAA footballer was witnessed taking drugs with one of the young girls by one of the parties who attended at the property with Mary Monks."*

67. The first defendant expressed shock and horror that Messrs. Sadlier and Walsh were falsely and maliciously claiming to be the owners of the properties; competing with their employers; trading on insider information; and exposing the employers to underhanded trading.

68. For the reasons given, I am satisfied that the defendants have no interest in the properties the subject of these proceedings and they have no legitimate interest in communicating with the Messrs. Sadlier's and Walsh's employers.

69. I cannot on this application make any determination as to the responsibility, if any, of the defendants for the social media postings. Neither could I (nor am I asked to) resolve the issues as to the defendants' responsibility, if any, for any damage, if any, done to the properties at the time they were broken into.

Miscellaneous other irrelevancies

70. Besides the issues which I have addressed, the defendants canvass a number of other matters which are said to be relevant, but which plainly are not.

71. Firstly, it is denied that the properties are occupied by Messrs. Sadlier and Walsh as their principal private residences. It is none of the defendants' business who occupies the properties or on what terms. The defendants point to the fact that the addresses recorded in the Companies Registration Office for Messrs. Sadlier and Walsh are different to those given in the affidavits of Mr. Sadlier and suggest that this requires explanation. It does not. The residential and business addresses of the directors of the plaintiff have no bearing whatsoever on the plaintiff's entitlement to quiet and peaceful possession of its property.

72. Secondly, it is asserted that the defendants' consent to the making of the interlocutory orders was given strictly on the basis that there would be a full trial of the action. It is true that the defendants, by their solicitors, in a letter written on 7th February, 2019 intimated that they would be consenting to the making of the interlocutory orders and asserted a right and wish for a full trial: but the plaintiff never agreed to that. In all the circumstances of the case, and particularly in view of the fact that no replying affidavit had been delivered in answer to the claim for interlocutory injunctions, the defendants' consent to the making of the orders was no great concession.

The counterclaim

73. The second relief sought by the plaintiff on this motion is an order pursuant to O. 19, r. 28 and/or the inherent jurisdiction of the court striking out the defendants' counterclaim on the grounds, variously, that it discloses no reasonable cause of action, is bound to fail, is frivolous and vexatious, and is an abuse of process. It is further argued that the defendants are precluded from raising the issues raised in the counterclaim by reason of the doctrines of *res judicata* and issue estoppel, and the rule in *Henderson v. Henderson* (1843) 3 Hare 100.

74. It is not useful to dwell on the *res judicata* and issue estoppel arguments, but I do observe that the first defendant's bankruptcy, the transfer to Beltany, the engagement (such as it was) with Beltany, and the sale to the plaintiff all long post-dated the judgment of Donnelly J. on 27th April, 2015.

75. As to the jurisdiction of the court to strike out claims, again the applicable principles of law are well established. They are as laid down by the decisions of the High Court in *Barry v. Buckley* [1981] I.R. 306 and the Supreme Court in *Keohane v. Hynes* [2014] IESC 66.

76. The jurisdiction to strike out claims is to be exercised sparingly and with caution and only in the clearest cases. An application such as this, whether pursuant to O. 19, r. 28 or the inherent jurisdiction of the court will not succeed where the deficiency in the pleading can be rectified by an amendment, or the case might be saved by an appropriate amendment of the pleadings. See for example *Lawlor v Ross* [2001] IESC 110.

77. The counterclaim first of all repeats the defence and the defendants counterclaim for a declaration that they or one or other of them are the legal and beneficial owners of the properties, and that the plaintiff is not. Alternatively (and without notice to Beltany) they

ask that the conveyances of 10th September, 2018 be set aside. For the reasons given, the defence and counterclaim discloses no basis for any claim by the first defendant to the property. There is no clue as to how or why the second defendant might conceivably claim to have any interest in the properties.

78. I was reminded by Mr. Donelon of the *dictum* of McCarthy J. in *Sun Fat Chan v. Osseous Ltd*. [1992] 1 I.R. 425 to the effect that experience has shown that the trial of an action may identify a variety of circumstances, perhaps not entirely contemplated at earlier stages in the proceedings, or that the trial may disclose a different picture to that which appeared clear. The need for caution and circumspection is a recurring theme in the authorities but this, it seems to me, is a black and white case. The plaintiff bought and paid for two houses. The first defendant previously owned them but never paid for them. No amount of noise or smoke is going to change that.

79. The second leg of the counterclaim is a complaint that as part of the application for interim and interlocutory relief, the plaintiff exhibited an unredacted copy of the judgment of Donnelly J. delivered on 27th April, 2015 which was marked "D*o not publish on website*". That disclosure, it is said, represents a clear breach of the defendants' right to privacy and/or the Data Protection Act, 2018 and/or contempt of court and is actionable in damages.

80. The action taken against the defendants by the receiver, it will be recalled, principally concerned the same properties as are the subject of these proceedings. There were in that case two main planks to the second defendant's defence. The first was an argument that the loan documentation was so flawed that it could not be relied upon to justify the appointment of the receiver. The second was an argument that a settlement made between the defendants in family law proceedings had given rise to a beneficial interest in the property for the second defendant, which took priority over the interest of EBS. Both arguments were rejected by the High Court and the Court of Appeal. The second defendant did not accept the judgment of Donnelly J. and spent nearly four months in Mountjoy Prison before purging her contempt.

81. On 28th January, 2019 the plaintiff was confronted with a situation in which a person who until five months previously had steadfastly refused to accept the authority of the High Court, had that day gone back into one of the houses. The plaintiff, presumably, was advised that there was no conceivable justification for the occupation but (unless perhaps by reference to a cock and bull story about a settlement by The [X] Family Trust, which, in the event, did not resurface) could not even guess what excuse might be offered. The plaintiff, in applying ex parte to the High Court for interim orders was bound by a duty of full disclosure, which included a duty to disclose the fact and outcome of the previous action against the same defendants in respect of the same properties.

82. The judgment of Donnelly J. records that some of the evidence and submissions in the receiver's case were heard in camera but that the judgment would necessarily refer to those matters. The judge noted that it would be necessary to redact the names of the parties and the properties so that, before publication, there should be as minimal as

possible reference to the family law proceedings as would be consistent with the requirement to give reasons for the proper adjudication on the issues raised. The judgment records that Donnelly J. proposed to discuss the redaction of the judgment with the parties and it is available on the Courts Service website as *McCann v. A, B and C* [2015] IEHC 366. The names of the defendants have been anonymised and the addresses of the properties redacted.

83. There is no evidence before the court on this application as to how the plaintiff came to be in possession of the unredacted judgment and it is, perhaps, unsatisfactory that the plaintiff should have it: but the responsibility for the fact that the plaintiff has it lies with whomever it was gave it to the plaintiff, and not the plaintiff.

84. In any event, the substance of the defendants' complaint of infringement of privacy is that the plaintiff exhibited an unredacted copy of the judgment. If the plaintiff had exhibited the redacted judgment, the affidavit would have had to explain that A and B were, respectively, the first and second defendants in this case, and that the first and second redacted properties were the houses at [Whiteacre] and [Blackacre]: which would have amounted to the same thing.

85. In my view there is no substance to the complaint in relation to the use by the plaintiff of the unredacted copy of the judgment and that the defendants' counterclaim for damages on this count is bound to fail.

86. Thirdly, the counterclaim pleads that at the interlocutory hearing the plaintiff had "*considerable legal presence, including prominent senior and junior counsel, a managing partner and various other legal and/or other professionals*," which is said to be "*… at distinct contradistinction with the purported size and nature of the plaintiff.*" If this is supposed to convey that the plaintiff could not afford to pay expensive solicitors and fashionable counsel from its own resources, there is no indication as to what the "*purported size and nature of the plaintiff*" is, and so there is no basis for any such suggestion. The counterclaim goes on to purportedly put the plaintiff "*to strict proof as to the source of its funding and/or whether assistance is being provided by EBS, Beltany and/or the receiver*". The allegation, if it is an allegation, regarding the funding of the litigation is indignantly rejected by Mr. Sadlier as completely false and baseless.

87. It seems to me that the thinly veiled suggestion of maintenance is another example of the defendants casting about for anything and everything they might conceivably throw at the plaintiff. There is no basis for it and it is vexatious. Even if the action was funded by the original lender or the vendor to the plaintiff, that would be utterly irrelevant to the plaintiff's right in law to the peaceful occupation of its property.

Conclusions

88. Applying the test laid down in *Abbey International Finance Ltd. v. Point Ireland Helicopters Ltd. and Elitaliana SpA* [2012] IEHC 374, I find that the defendants do not have an arguable defence. The only disputed fact is whether at the time of the conveyances to the plaintiff Beltany was in possession. I take the defendants' case at its

high-water mark but if Beltany was not in possession, that did not invalidate the sales. There is no issue of fact or nuanced question of law such as would warrant a trial of this action.

89. It is very clear that the defendants have no defence and there will be a declaration that they do not, nor do either of them, have any estate, right, title or interest in either of the properties. In addition, there will be a permanent injunction restraining the defendants their servants and agents and all other persons with notice of the making of the order from trespassing or entering upon or otherwise interfering with the properties. I will hear counsel as to what ancillary orders are appropriate.

90. Applying to the counterclaim the principles enunciated by Clarke J. in *Lopes v. Minister for Justice* [2014] IESC 21, I find that even on the basis of the facts as pleaded, the counterclaim discloses no reasonable cause of action and is frivolous and vexatious and should be dismissed under O. 19, r. 28.