

THE HIGH COURT

[2021] IEHC 691
[2020 No. 6319 P.]

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND

NOEL ROGERS AND UNA ROGERS

DEFENDANTS

JUDGMENT of Ms. Justice Butler delivered on the 2nd day of November, 2021

Introduction

1. For historical reasons, it can be difficult to approach issues concerning eviction dispassionately in Ireland. Nonetheless, the courts cannot ignore the legal consequences which flow when the law has taken its course and a lender becomes a mortgagee-in-possession. In this case, the plaintiff is seeking, as a mortgagee-in-possession, interlocutory relief requiring the defendants to vacate property which was previously their family home and in which the plaintiff alleges they are now trespassers. As is frequently the case, there is a long and involved history to the issues between the parties going back to the making of an order for possession by the High Court (Dunne J.) on 14th July, 2008.
2. The plaintiff's application is opposed by the second defendant, Mrs. Rogers, on a number of grounds which I will outline in due course. There was no appearance on behalf of Mr. Rogers, although the plaintiff established to the satisfaction of the court that he had been served with the proceedings and, further, that the plaintiff's solicitors had corresponded with him in respect of all details concerning the date of the hearing and how to access the virtual courtroom. The court had concerns because certain correspondence was received by the Central Office directly from Mr. Rogers. Initially, in December, 2020, he wrote indicating that, although his wife had legal representation, he could not afford it and that he had neither the legal nor the IT knowledge to defend his position and was, in effect, *"not capable of dealing with this matter"*. On 2nd June, 2021, a medical certificate was received from Mr. Roger's general practitioner detailing certain longstanding medical issues. However, part of the case made by Mrs. Rogers is premised on the fact that her marriage to Mr. Rogers has broken down. Counsel on behalf of Mrs. Rogers confirmed to the court that only Mrs. Rogers and the children of the marriage were staying in the property at the date of the hearing, although he could not confirm the date when Mr. Rogers had left. On the basis of Mrs. Rogers' assurance that Mr. Rogers was not in occupation of the property, in consequence of which he could not be trespassing in the property, the court proceeded to hear the plaintiff's application.
3. The central issue to be decided on this application is the strength of the second defendant's contention that the alleged eviction of herself and her husband from the property on 10th March, 2020 was invalid because the execution order on which it was based, purportedly an order granting leave to issue execution made by Barniville J. on 12th November, 2018, had lapsed. A number of other issues were also raised by the second defendant as to the validity of service on her of various legal proceedings and orders and an alleged lack of direct communication by the plaintiff with her as to the

seriousness of the arrears on the mortgage account. As will be seen, I do not think these latter issues have either legal or factual substance. In order to understand how the issues arise, it is necessary to understand the history of dealings between the parties including the various court applications and orders.

Factual History

4. In 2006, the defendants jointly entered into a mortgage agreement with the plaintiff and, on 26th October, 2006, they drew down a loan of €404,585 which was secured on their property at Coravilla, Bailieborough, County Cavan. Almost immediately, the defendants ran into difficulty in making the scheduled repayments and, by mid-2007, payments were sporadic and arrears were accumulating. Consequently, in 2008, the plaintiff issued special summons proceedings seeking to recover possession of the property. These proceedings were served by a summons server separately on both the first and second defendants at their premises on 16th May, 2008. The special summons came on for hearing before Dunne J. on 14th July, 2008 and she granted the plaintiff an order for possession against the defendants. The order recites that it was made in the presence, *inter alia*, of counsel for the defendants, plural.
5. The granting of the order for possession clearly had some effect in terms of the defendants' repayment of their mortgage because, by 2009, payments were being made on a regular, albeit intermittent, basis. I note from the exhibited statements of the loan account that in 2006 payments were made by direct debit and were frequently returned unpaid. By 2009, the statements show the payments made as "*CHQ/Cash Payment*". This is consistent with the second defendant's evidence on affidavit that, in December, 2009, she spoke by telephone with an employee of the plaintiff who gave her details of the plaintiff's account into which a payment was to be made. The second defendant is critical of the plaintiff's employee for not discussing (the plaintiff uses the word "*disclose*") any problems with the account. However, by this stage, the plaintiff already had secured an order for possession and, the second defendant was clearly aware that cash payments were being made by the defendants which was presumably because they were unable to manage direct debits. It is unclear exactly what further disclosure the second defendant believes was warranted.
6. Payments continued to be made throughout 2010 and 2011, albeit with occasional exceptions, at a level of about one-sixth of the amount actually due each month. By February, 2012, payments had ceased altogether. Since that date, only four payments have been made by the defendants. Two payments of €1,000 each were made in May, 2015 in response to steps taken by the plaintiff discussed further below and two payments of €1,500 each were made by the second defendant in response to these proceedings in July and August, 2020. This means that in over nine years the defendants have paid only €5,000 in respect of a loan which originally stood at in excess of €400,000 but which, with arrears and interest, is now nearly double that amount. It is a striking feature of this case that, for nearly a decade, there has been no meaningful engagement by either defendant with any positive action that might be taken with a view to resolving their indebtedness to the plaintiff.

7. Unsurprisingly, the plaintiff took action in respect of this scenario. On 25th September, 2013, a copy of the order for possession was personally served on the second defendant. In 2015, as more than six years had elapsed since the granting of the order for possession, the plaintiff applied to the High Court under O. 42, r. 24(a) for leave to issue execution against the defendants of that order. The motion papers in respect of that application were personally served on the second defendant by arrangement in a church carpark in Virginia, County Cavan, on 16th February, 2015. The High Court (Costello J.) made an order on 3rd March, 2015 granting the plaintiff leave to issue execution. That order is largely irrelevant as the plaintiff did not in fact proceed to execution. Nonetheless, it has become relevant to this application because the second defendant, who denies all knowledge of both the state of her mortgage account and the existence of any proceedings, was personally served with and accepted documents in respect of that application. The grounding affidavit to the 2015 application which was served with the papers, exhibited a copy of the loan account statement.
8. The action taken by the plaintiff in 2015 prompted a short series of payments by the defendants in May, 2015 followed by negotiations with the plaintiff conducted, apparently on behalf of both defendants, by a financial consultant. In fact, it appears that part of the reason the plaintiff did not proceed to execution on this occasion was that when the plaintiff lodged the order for possession with the County Registrar and advised the defendants' financial advisor of this, the first defendant attended at the sheriff's office and stated that an agreement had been reached in the terms proposed by his financial advisor, terms which had in fact been rejected by the plaintiff. During the time taken by the sheriff to confirm the position with the plaintiff, the execution order lapsed. The plaintiff continued attempts to negotiate with the financial advisor but, by 2017, was not receiving any response to correspondence from him, not even to confirm whether he was still acting on behalf of the defendants.
9. In October, 2018, the plaintiff again sought leave of the High Court to issue execution under O. 42, r. 24. Again, the grounding affidavit exhibited a copy of the loan account statement from which it was evident that, since 2012, only two payments of €1,000 each had been made. The motion papers were served on the second defendant by registered post. The plaintiff has exhibited the receipt for this registered letter signed by the second defendant and dated 5th November, 2018. On 12th November, 2018, the High Court (Barniville J.) granted the plaintiff "*leave to issue execution of the order for possession*" which had been granted on 14th July, 2008. The order recites that there was no attendance in court on behalf of the defendants. That order was again served by registered post on the second defendant and, again, the plaintiff has exhibited the receipt signed by the second defendant on 4th January, 2019. An order of possession addressed to the County Registrar for County Cavan issued from the High Court on 19th July, 2019.
10. Execution of that order took place on the morning of 10th March, 2020 through the eviction of the defendants. According to the plaintiff's asset manager who has sworn the grounding affidavit on the plaintiff's behalf, at that point "the plaintiff entered into possession of the property as mortgagee-in-possession". She also deposes to the fact

that, following execution of the possession order, the defendants broke back into the property and now occupy the property as trespassers.

11. On 11th March, 2020, the plaintiff received a letter from a solicitor acting on behalf of the second defendant making certain proposals. That letter opened by stating:-

"...Una Rogers who was in her house yesterday having a cup of tea midday with her husband when a security firm, together with the undersheriff and a number of guards arrived at her property and evicted our client and her husband in the space of three minutes."

The letter seems to acknowledge that the defendants were in fact evicted and does not mention that the defendants had re-entered the property and were at the time of the letter in occupation of it. It also describes the defendants as drinking tea together in their home in the middle of the day without suggesting that the couple were separated or living apart in any way. The letter goes on to claim that the second defendant was unaware of the "dire financial situation" in relation to the Start Mortgage account and claims that the second defendant's husband had withheld all financial details from her. The details of the proposal made by the solicitor are not relevant to the question of whether the defendants were lawfully evicted.

12. The account of the eviction given by the second defendant on affidavit differs from the account which she presumably gave to her solicitor and which formed the basis of his letter. In the account on affidavit, she is not drinking tea with her husband but, rather:-

"I had just returned from the farmyard and had gone upstairs to change my clothes, when I heard a number of cars coming up the driveway to the house. I looked out the window and saw four or five cars, one of them a Garda car.

I did not know what was happening. I was surprised by the loud bangings on the door and I could hear people coming into the kitchen and my husband talking to them. My husband called me to come down and said "come down Una, we have to go away for a while". When I got to the bottom of the stairs there was a big man standing at the door, while another man appeared to be doing something with the lock. I went to get my coat and I asked what was going on? The tall man standing at the door said "you are being evicted". As I turned to go into the kitchen with my coat in my hand a third man handed me a letter. There were others in the kitchen, they said nothing and I walked out to the car with my husband."

13. The letter handed to the second defendant on the occasion of the eviction is exhibited by her. That letter is quite clear in its terms as to the nature of the action being carried out and its practical consequences. It refers firstly to the order for possession granted on 14th July, 2008. It then states:-

"Please be advised that this order of possession has been lawfully executed today the 10th day of March 2020 by the Cavan County Under-sheriff's Office."

The letter then sets out certain practical arrangements in relation to the defendants removing their goods from the property and their responsibility to ensure that all utility accounts have been closed with their providers. In relation to the removal of goods, the letter states as follows:-

"Please note that we are instructed to advise you that if it is the case that there are goods left in the property after it is taken into possession, you can contact the Asset Management Department or Start Mortgages Designated Activity Company (hereinafter called "Start Mortgages") on [a telephone number is given] to organise a time and date for supervised entry of a representative acting on your behalf, to enter the property to retrieve the rest of your belongings."

The defendants are then advised that if they do not make contact in order to make such arrangements within ten days, that Start Mortgages will sell and dispose of their property.

14. Despite the fact of eviction and the contents of this letter, the second defendant avers that, after leaving the premises, herself and her husband returned about half an hour later. She gives an account of what she alleges her husband told her as they were leaving on the morning of the eviction which in turn is based on what one of the men present at the scene - and apparently directing matters - had said to him. All of this is, of course, hearsay and it is notable that the first defendant has not gone on affidavit to support his wife's account of events. On this account, the second defendant's husband told her that one of the men present at the scene had advised him to leave the house for ten minutes, after which they would be gone and the defendants "*could come back or do what we liked at that stage*". The second defendant maintains that, on the basis of this exchange, an understanding was clearly given to her husband that the defendants could return and that they were not giving up occupation of the property. On their return, she states that there was no impediment to accessing the property. She remained in the car while her husband got out and walked around. She describes him as having returned with a lock in his hand and later telling her that he found it "*with the key in it discarded on the pathway*". This of course is also hearsay evidence, not to mention highly unlikely as it would mean either that those conducting the eviction did not take steps to secure the property or that the property was broken into by a separate set of trespassers in the 30-minute interval during which the defendants were absent.
15. The second defendant then goes on to give an account of an official whom she describes as being from the plaintiff's asset management department and being the same person who handed her the letter on 10th March, calling to the house on 12th March, 2020. According to the second defendant, this person had seen the correspondence from her solicitor and the CEO of the plaintiff had sent him to speak with her. He told her he could see from her reaction on the day of the eviction that she did not know anything about what was happening and advised her that she could take out an injunction against the plaintiff. He allegedly removed a camera from the premises but did not make any demand of the defendants that they leave the premises.

16. The plaintiff's deponent disputes the account given by the second defendant of the events on both 10th and 12th March, but the alternate account given by her is also hearsay as she was not personally in attendance on either occasion. She confirms that Blackwater Asset Management were retained by the plaintiff to assist the sheriff in the execution of the possession order. She asserts that on their return to the property, the defendants gained access by breaking the new lock that had been installed by the plaintiff's agents. No direct evidence of this is provided but, on the face of it, it is inherently more probable than the second defendant's account of her husband finding the lock on the pathway on their return to the property after a 30-minute absence. She confirms the attendance at the property of an agent from Blackwater Management on 12th March but denies that this was at the request of the CEO. She also denies that this agent advised the defendants that they could issue injunction proceedings and says that, on the contrary, he informed them that their re-occupation of the property was likely to result in injunction proceedings being taken by the plaintiff against them. Again, this is inherently more probable and more legally correct than the second defendant's account but is not a direct rebuttal of a conversation to which the second defendant claims to have been a party.
17. Meanwhile, correspondence continued between the second defendant's solicitor and the solicitors on behalf of the plaintiff. On 25th March, 2020, the plaintiff's solicitor wrote a letter which dealt in large part with service of various proceedings and documents on the second defendant but also confirms the plaintiff's understanding that, following the execution of the order of possession, the defendants broke back into the property and continued to occupy the property as trespassers. The second defendant was advised that the plaintiff was reserving its right to apply to the High Court for further orders against both defendants arising from their failure to comply with the order for possession. However, in light of the COVID-19 crisis and the national lockdown which had been implemented some days earlier, the plaintiff indicated that it would withhold further action for a period of three months and suggested that the defendants use the time wisely to secure alternative accommodation. No great argument was had on the legal effect of this 3 months hiatus. However I am fully satisfied that in the exceptional circumstances which applied during which the plaintiff could not take any action which would involve its servants or agents coming into physical contact with the defendants and severe restrictions on the ability to institute and to prosecute litigation, the fact that the plaintiff withheld action for the period of the lockdown does not constitute an acquiescence by the plaintiff in the defendants' occupation of the property or a waiver of any legal right on the part of the plaintiff.
18. At the end of the three-month interval, further correspondence between the solicitors ensued in August, 2020. The proposals made by the solicitor on behalf of the second defendant were rejected as being inadequate in light of the enormous arrears on the loan account. At this point, two payments of €1,500 were made by the second defendant. Those are the last payments made on the account. On 11th September, 2020, the plaintiff instituted plenary proceedings against the defendants seeking orders requiring the defendants to vacate and permitting the plaintiff to recover the property and seeking

damages for trespass. A motion seeking interlocutory relief was issued on the same date initially returnable to 11th January, 2021.

19. Finally, in summarising the factual background to the proceedings, I should note the second defendant's evidence of the ill health suffered at various times over the years by both herself and her husband. It is of course unfortunate that the defendants have suffered these setbacks and I have no doubt that ill health may have been a contributory factor in the defendants' failure to deal realistically with their indebtedness to the plaintiff. However, it is notable that the earliest event relied on is a serious farm accident involving the first defendant in June of 2011. By then, the mortgage account was already seriously in arrears. The plaintiff had obtained an order for possession some three years earlier and, although payments were being made and continued to be made into 2012, they were being made at a level which was insufficient to meet the contractual monthly amount let alone the arrears. By the time the second defendant began to suffer ill health in 2014, no payments at all had been made for over two years. Again, I do not doubt that the second defendant's health issues have been a source of serious stress and anxiety for her. However, as she claims to have been entirely unaware of the defendants' dire financial circumstances, she cannot (and indeed does not) simultaneously claim that this added to the stress caused by her medical problems. Obviously, the court is very aware of the human aspects to a case of this nature and is cognisant of the personal impact that apparently insurmountable financial difficulties can have on a debtor's health. However, there must be a limit to the extent to which a court can expect a plaintiff to forbear in the pursuit of its legal entitlements, perhaps indefinitely, because of the ill health of defendants.

Legal Issues arising

20. On the basis of the facts as set out above, the plaintiff seeks an interlocutory injunction requiring the defendants to vacate the premises. The plaintiff claims to be entitled to such an order as the mortgagee-in-possession following the execution of an order of possession by the sheriff on 10th March, 2020 and the taking of possession by the plaintiff thereafter. The plaintiff claims that once it is appreciated that the defendants are present in the property as trespassers, then the interlocutory relief sought is prohibitory and not mandatory in nature. Consequently, the appropriate threshold test which the plaintiff must meet is whether there is a serious question to be tried (per O'Donnell J. in *Merck Sharp & Dohme v. Clonmel Healthcare Ltd* [2019] IESC 65) rather than the higher test of a strong case, likely to succeed at trial (per Fennelly J. in *Maha Lingam v. Health Service Executive* [2006] 17 ELR 137). However, counsel submits that even if the higher threshold applies, it is met by the plaintiff on the facts of this case. Further, it is contended that the balance of convenience favours the grant of an injunction as damages would not be an adequate remedy both because the defendants were already significantly indebted to the plaintiff and because no undertaking as to damages has been offered by the defendants.
21. In response, the second defendant makes a number of arguments which can be grouped under three headings. Firstly, it is contended that the eviction on 10th March, 2020 was

invalid because the order pursuant to which the plaintiff sought to enter into possession of the property (being that of Barniville J. of 12th November, 2018) had lapsed. In a related argument, the second defendant contends that the plaintiff's entire application seeking to recover possession is out of time as it is issued more than twelve years after the order for possession made by Dunne J. in July, 2008. Secondly, it is contended that the plaintiff failed to communicate properly with the second defendant in two respects, namely in the service on her of formal documents and, more generally, in informal communications with the agents of the plaintiff as regards the state of the defendant's mortgage account and the risk to her family home. Because of this alleged lack of communication, it is asserted that the plaintiff does not have "clean hands" and, consequently, should not be granted equitable relief. Thirdly, it is contended that, through its agents, the plaintiff acquiesced and consented to the second defendant remaining in possession of the property.

22. I think the logical sequence for dealing with these issues is to look firstly at the second defendant's contention that the eviction was invalid due to the lapse of the relevant court order. If the second defendant succeeds on that point, it puts the plaintiff's claim to be a mortgagee-in-possession in serious doubt with a consequential impact on whether the plaintiff can meet either of the relevant thresholds for the grant of an interlocutory injunction. It is also a purely legal issue which does not depend on the court's evaluation of the weight to be attached to the second defendant's affidavit evidence as against the documentary evidence advanced by the plaintiff and, thus, is one which, if it is to be revisited at a substantive hearing, will be dealt with on the same material as is currently before the court. For reasons to which I will return below, I will address this issue from the perspective of whether the second defendant has established a strong defence, likely to succeed at trial.
23. If the second defendant succeeds on that issue, it may not be necessary to consider the other issues in any detail. However, if the second defendant fails to establish that the eviction was invalid, then I think the court should look at the criteria for the grant of an interlocutory injunction and, in particular, the issue of the applicable threshold standard which is a matter of dispute between the parties. I will then look at the other arguments raised in light of the particular standard which is to be met. Finally, I will examine the balance of convenience and the adequacy of damages.

What Constitutes an Execution Order

24. The parties are agreed that the execution of court orders is, in general, governed by O. 42 of the Rules of the Superior Courts and that, in this case, because more than six years had elapsed from the date of the order for possession (July, 2008), the plaintiff was required to make an application to the High Court under O. 42, r. 24(a) for leave to issue execution. The relevant portions of O. 42, r. 24(a) provide as follows:-

"Where six years have elapsed since the judgment or order,... the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly. The Court may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any

issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried:..."

Order 42, rule 5 provides that judgment for the recovery of land may be enforced by an order of possession. The terminology has potential to be confusing because of the significant legal difference between an order for and an order of possession. An order for possession as granted in 2008 does not, of itself, permit the plaintiff to take possession of the land the subject of the order. Rather, it demands that the defendants deliver up possession of the land to the plaintiff. In the event of failure to comply with such an order, as occurred in this case, execution becomes necessary and the plaintiff must convert the order for possession into an order of possession which can then be executed. In the judgment of the Court of Appeal in *Carlisle Mortgages Ltd v. Costello* [2018] IECA 334, Peart J. refers to this latter order as "an execution order of possession" whilst noting that the nomenclature is capable of leading to confusion. The plaintiff contends that the order of Barniville J. granting leave to issue execution is not itself an execution order and does not operate to put the plaintiff in possession of the property. Rather, it authorises the taking of an administrative step, namely the issuing of the order of possession by the High Court to the County Registrar, a step which could have been taken by the plaintiff without leave of the High Court within the first six years after the original order for possession was made. Consequently, on foot of Barniville J.'s order of 12th November, 2018, the plaintiff applied for and obtained an order of possession which was dated 19th July, 2019. That order, which the plaintiff characterises as the execution order, was executed on 10th March, 2020 which is within one year of the date of its issue. The plaintiff contends that all of these steps are perfectly regular and valid.

25. The case made by the second defendant is that the order of Barniville J. is either the or, at very least, an execution order. This argument depends on the interaction between O. 42, r. 24, O. 42, r. 20, and O. 47, r. 2. The relevant portion of O. 42, r. 20 provides:-

"An execution order or an order of committal, if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such order may, at any time before its expiration, by leave of the Court, be renewed by the party issuing it for one year from the date of such renewal and so on from time to time during the continuance of the renewed order..."

Thus, an execution order has a one-year life span but is capable of being renewed. Order 42, rule 8 offers a partial definition of what is meant by an execution order. It provides:-

"In these Rules the term "execution order" shall include orders of fieri facias, sequestration and attachment and all subsequent orders that may issue for giving effect thereto. The term "issuing execution against any party" shall mean the issuing of any such process against his person or property as under the preceding rules of this Order shall be applicable to the case."

The use of the word "*include*" suggests that the rule contemplates other types of execution orders may exist and fall within the scope of O. 42. However, it is notable that the three examples actually cited in O. 42, r. 8 are all orders which allow the direct seizure or the taking of legal possession of a defendant's property with the potential for that property to be sold or otherwise applied in satisfaction of a judgment or a potential judgment.

26. The second defendant argues that the order granted by Barniville J. on 12th November, 2018 is an execution order and, consequently, under O. 42, r. 20, it expired on 11th November, 2019 and, therefore, was not in existence on the date of the eviction. This argument is based on a number of separate strands. Firstly, counsel points to the practice of the Central Office which treats an order granting leave to issue execution under O. 42, r. 24 as coming within the scope of O. 42, r. 20 and, thus, expiring after one year. The fact that this is so is noted by Simons J. in *Carlisle Mortgages v. Sinnott* [2021] IEHC 288 as is the fact that the lender in that case had queried the correctness of the Central Office's interpretation and application of the rules (see paras. 25 and 27 of the judgment). The point was not decided by Simons J. as the application before him had been made by the lender on the working assumption that a further order was required. Accepting as a working assumption that an order granted under O. 42, r. 24 is an execution order with a one-year lifespan, does it necessarily follow that an execution order issued pursuant to such leave has a lifespan which is limited to the residue of that of the leave order under O. 42, r. 24 or does it, itself, have an independent lifespan of one year pursuant to O. 42, r. 20? I will return to this issue which is central to the second defendant's argument.
27. The second strand of counsel's argument is based on s. 2 of the Enforcement of Court Orders Act, 1926 which defines an execution order as follows:-

"the expression "execution order" means and includes any writ, decree, warrant, or other document by whatever name called issued by a court in a civil matter directing or authorising the execution of an order of the court by the seizure and sale of a person's property or by putting a person in possession of lands or premises or delivering to him specific property."

It seems to me that in order to constitute an execution order within the meaning of s. 2, that two criteria must be met. Firstly, the order must be one which directs or authorises the execution of an order and, secondly, it must do so by the seizure or sale of property or the putting of a person into possession of land. Counsel for the second defendant argues that the language used in s. 2 is sufficiently broad to encompass the order made by Barniville J. on the basis that it authorises the execution of the order for possession made by Dunne J. in 2008. I have some difficulty accepting this argument. The order made by Barniville J., in its terms, grants the plaintiff leave to issue execution of the order for possession made by Dunne J. but inherently expects or requires an additional step to be taken by the issuing of the execution order (i.e. the step it authorises) before execution can take place. If a very generous approach were to be adopted towards the

interpretation of the section, a case could be made that the order of Barniville J. directs or authorises the execution of the earlier order, i.e. that the first part of the s.2 criteria is met. However, the order of Barniville J. categorically does not authorise the seizure or sale of property, the putting of the plaintiff into possession of the property or the delivery to the plaintiff of the property, i.e. the second part of those criteria. It is the subsequent order issued on 19th July, 2019 which allows the crucial step which put the plaintiff into possession of the property to be taken. Therefore, I do not think it is by any means clear that Barniville J.'s order is one which falls within s. 2 of the 1926 Act. However, I do not think it is necessary to determine this point definitively in order to decide this application.

28. Finally, the second defendant relies on O. 47, r. 2 of the Rules of the Superior Courts. Order 47 is headed "*Order of Possession*" and rule 2 provides as follows:-

"Where by any judgment or order any person therein named is directed to deliver up possession of any lands to some other person the person prosecuting such judgment or order shall, without any order for that purpose, be entitled to sue out an order of possession on filing an affidavit showing due service of such judgment or order, and that the same has not been obeyed."

The phrase "*sue out*", as used in this context, means to apply for and obtain a court order. The rule as a whole makes it clear that this application is not one made on notice to a Judge of the High Court but rather is made in the Central Office by the filing of the stipulated affidavit. The order of possession issued by the High Court on 19th July, 2019 was issued pursuant to this rule.

29. I have had some difficulty understanding the basis of the argument made by the second defendant under this rule. She relies on the judgment of Dunne J. in *Carlisle Mortgages Ltd v. Canty* [2013] 12 JIC 0302 apparently to say that such an application cannot be made *ex parte*.

My difficulty understanding the argument is not helped by the fact that the headnote to the judgment completely ignores the distinction between the order for possession and the order of possession in the case to the point of ignoring the fact that the latter issued on a separate date and over a year after the former. The distinction, which is relevant to the issues under consideration, is both noted and maintained in the judgment itself. Although ostensibly similar in many respects to this case, the factual position in *Carlisle v. Canty* was materially different in key respects. As here, the plaintiff had obtained judgment against the defendant including an order for possession of certain lands in 2008. As the judgment remained unsatisfied, the plaintiff arranged for its execution by obtaining an order of possession in October, 2009 and an eviction was initially planned for early 2010. That did not proceed because of negotiation between the parties and two further planned eviction dates were postponed for similar reasons. On 4th July, 2011, the order of possession of October, 2009 was renewed for a year but two attempts to execute the order failed for reasons which are not relevant here. In February, 2013 the plaintiff applied under O. 42, r. 20 to renew the order of possession dated October, 2009. The defendant opposed the application arguing, by analogy with the position in respect of the

renewal of a plenary summons under O. 8, that once the order of possession had expired, it was not open to the High Court to renew it.

30. This argument was accepted by Dunne J. although she noted that there was nothing to prevent the plaintiff from seeking another execution order in the form of an order of possession issued in the usual way from the Central Office. The only legal significance attaching to the non-renewal of the lapsed summons was that a fresh order of possession would rank in priority from the date of its issue rather than from the date of the earlier order whereas a renewed order would, under O. 42, r. 20, retain the priority accorded by virtue of the time of the original. Consequently, a fresh order might potentially lose priority over any other execution order issued in the interim.
31. Counsel has directed my attention to passages in the judgment where the arguments made by the unsuccessful plaintiff are set out and to the distinction drawn by Dunne J. from the earlier decision of O'Hanlon J. in *Wymes v. Tehan* [1988] IR 717. Dunne J. disagreed with O'Hanlon J.'s conclusion that an application seeking the renewal of an order of execution could be made *ex parte* rather than on notice to the other party. Having looked at these passages closely, I am unable to see how they assist the second defendant. All of the applications in *Carlisle v. Canty* were made within six years from the date of the original judgment so O. 42, r. 24, which is central to this case, was not engaged at all. Put simply, the court did not consider the nature of an order under O. 42, r. 24 such as that made by Barniville J. The plaintiff in this case has not sought to renew an existing or elapsed order of execution under O. 42, r. 20 much less to do so without notice to the defendants.
32. The argument made is that the application by the plaintiff to the Central Office for a fresh order of execution pursuant to the leave granted to do so somehow served to extend the life of the order made by Barniville J. in November, 2018, but again this is not entirely clear. In consequence, the argument seems to be either that the issuing of the execution order was invalid because the application for it was not on notice or, alternatively, that the execution order could no longer be relied on by the date of the eviction as the order of the 12th November, 2018 had lapsed due to efflux of time. In my view, both of these arguments are misconceived.
33. Firstly, it is very much open to question whether the order made by Barniville J. on 12th November, 2018 was an execution order. It allowed the plaintiff to issue execution but did not in its terms itself permit execution. The requirement to take an intervening step and to issue execution (i.e. to sue out an execution order of possession) is crucial. Put simply, the plaintiff could not have proceeded to arrange an eviction on foot of Barniville J.'s order alone. How then can the granting of leave to issue execution be characterised as an execution order?
34. Secondly, the order of 12th November, 2018 authorised the taking of a particular step, namely the issuing of execution, which step was actually taken as evidenced by the order of possession of 19th July, 2019. Once that application had been made to the Central Office, the leave granted by Barniville J. had been acted on and, consequently, the order

was effectively spent. Applying to extend the life of an order which is spent would serve no meaningful purpose. Although the second defendant has sought to link the lifespan of the execution order to the unexpired residue of the spent order granting leave to issue execution, no authority is offered for that proposition save *Carlisle v. Canty* which, for the reasons set out above, I do not believe to be on point.

35. Thirdly, even if I am incorrect in my view that the order of 12th November, 2018 is not an execution order, there is nothing in the rules to suggest that an execution order of possession properly applied for pursuant to an order made under O.42, r.24, does not itself have a full one-year lifespan under O. 42, r. 20. In other words, the order of 19th July, 2019 is undoubtedly an execution order whether or not the order of 12th November, 2018 is also one. Therefore, in its own right, that order is valid and may be acted on for a period of one year from the date on which it was issued. I am not satisfied that the second defendant has identified anything in the rules or in the jurisprudence which indicates that the lifespan of the execution order issued on 19th July, 2019 was truncated by virtue of it having been applied for under the authority of an order made on 12th November, 2018.
36. Equally, I am not satisfied that the second defendant has identified any basis for suggesting that the application made by the plaintiff for the issuing of execution (as distinct to the application for leave to issue such execution) is one which should have been made on notice. Manifestly, in normal course the issuing of execution is not a step which is required to be taken on notice to the other side and a formal application to the High Court, the merits of which will be considered and decided by a High Court judge, is not envisaged. No particular authority has been advanced as to why that application, as distinct from an application under O. 42, r. 20 or O. 42, r. 24, is one which had to be made on notice in this case or, indeed, how it might be made on notice given the procedures applicable to the suing out of such an order.
37. Finally, the second defendant suggests that the plaintiff's application is statute barred because more than twelve years had elapsed from the date of the judgment in July, 2008 before the institution of these proceedings in October, 2020. Under s. 11(6)(a) of the Statute of Limitations, 1957, an action shall not be brought upon a judgment after the expiration of twelve years from the date on which the judgment became enforceable. This point has been comprehensively dealt with by Allen J. in *KBC Bank Ireland Plc v. McGann* [2019] IEHC 667. In circumstances similar to this case, the bank obtained judgment and an order for possession against the defendants and ultimately an execution order of possession was issued within six years of the date of the judgment and an eviction carried out after that six-year period had expired. Allen J. noted firstly (at para. 25) of the judgment that "*the cause of action on which these proceedings is founded is trespass which commenced on 17th December, 2018 and which has been continuing since*". At para. 38, he noted that, on that date, the property was no longer the first defendant's dwelling and commented "*it had been until a week before, but it ceased to be when the order for possession was executed*". Ultimately, he concluded that the case was simple. Once the County Registrar had entered the property pursuant to the order of possession

and caused the bank to have possession of the land and premises, anything the defendants did thereafter they did as trespassers. In other words, as the judgment had been executed, the cause of action in the proceedings before him was not one brought on the judgment but was instead based on the fact that the bank had legal title to and possession of the premises.

38. A similar conclusion was reached by Peart J. in *Carlisle Mortgages v. Costello* (above). At para. 31 of that judgment, he stated as follows:-

"In my view, at that point the order for possession had been executed. Possession had been taken of the lands on foot of the order for possession. Thereafter no further action needed to, or could, be taken on foot of that particular order. Its purpose had been achieved. Thereafter, any adverse action taken by the appellant after that date constituted an act of trespass. None amounts to a re-taking of possession as such. It follows that the respondent did not need to re-execute the order for possession by making any application to renew the execution order of possession after the 17th July 2014 because he was already in possession as mortgagee in possession. He was entitled to seek to restrain any subsequent trespass of the lands by the appellant..."

39. A similar position applies here. The proceedings now brought by the plaintiff are not proceedings to enforce the original judgment which was executed on 10th March, 2020. Having executed the judgment, the proceedings now taken by the plaintiff are taken against the defendants as trespassers on the plaintiff's property, a trespass which commenced on 10TH March 2020 and which is still continuing. No question of a breach of the statute of limitation arises.

Test for Interlocutory Injunction

40. In circumstances where I do not think that the second defendant has raised a legal issue of substance as regards the validity of the eviction, the next step is to consider the test that the plaintiff must meet on this application for an interlocutory injunction. The crucial question here is whether the injunction is characterised as a prohibitory injunction or a mandatory injunction. The plaintiff asserts that the application is for a prohibitory injunction to restrain the defendants from doing something which is *prima facie* illegal pending the trial of the proceedings. The second defendant contends that this is a mandatory injunction to which they have a strong defence. The strength of the defence is of course relevant because if the application is properly characterised as a mandatory injunction then under the *Maha Lingam* test, the plaintiff must establish that it has a strong case which is likely to succeed at trial and the likelihood of success at trial decreases with the strength of the defence likely to be raised to the proceedings.
41. In the second defendant's written submissions, the court is urged to exercise its jurisdiction to grant a mandatory injunction sparingly "*as it places a burden on the defendant to do something rather than to undo or refrain from doing something*". This of course begs the question as to whether an order directed at requiring persons who are *prima facie* trespassers to leave property is placing a burden on them to do something or

alternatively requiring them to refrain from doing something. Much depends on the extent to which actions of the defendants can be characterised as being *prima facie* legal or *prima facie* illegal in the context of the litigation. The second defendant does not really address this issue and simply assumes that because the practical effect of the order sought would be to require the defendants to leave the property that the injunction must of its nature be mandatory.

42. The plaintiff distinguishes these trespass proceedings from, for example, proceedings taken by a receiver appointed under a charge looking to recover possession of property. I note that in *Hafeez v. CPM Consulting Ltd* [2020] IEHC 536, Keane J. regarded an application for an injunction directing a landlord in occupation to deliver up possession of a property to a tenant formerly in occupation as being a mandatory injunction. It seems from the judgment that this was not actually disputed by the applicant who had been the tenant of a property under a lease which had been forfeit and who sought to recover possession of the property. It would be ironic if a tenant seeking to recover possession of a property following the taking of certain legal steps by the landlord were required to meet the higher, strong case, threshold, but the same tenant, if he broke back into the property and was in *de facto* illegal occupation, could insist that the landlord meet the higher threshold in order to secure interlocutory relief against him. The mere fact that the defendants are in occupation of the property cannot, in my view, serve to alter the legal burden on the plaintiff if the defendants' occupation is not lawful. Consequently, on balance, I am inclined to accept the plaintiff's argument that this is an application for a prohibitory injunction to restrain an ongoing trespass rather than a mandatory injunction requiring defendants to deliver up possession of property to which they might have lawful title.
43. As it happens, I do not think that the test to be met will make a critical difference in this case because I do not think that the grounds relied on by the second defendant are of legal or factual merit. I have considered the main legal issue raised earlier in this judgment and I will consider the other issues below.

Communication with Second Defendant

44. Much is made by the second defendant of an alleged failure on the part of the plaintiff to communicate with her in respect of the state of her mortgage account. Her solicitor made a data access request, apparently on behalf of both defendants, and received records of all phone calls between the plaintiff and the defendants. Most, but not all, of the 135 calls recorded are between the first defendant and the plaintiff's employees. It might also be noted that the bulk of these phone calls occurred between 2009 and 2010 when cash payments were being made on a regular, but intermittent, basis by the defendants. A smaller number occurred between 2013 and 2015, and only four since 2015, two of which were with a "third party authority" being presumably the financial advisor in 2016 and the second defendant's solicitor in July 2020.
45. In addition to the telephone records, the plaintiff has exhibited correspondence sent by it to the defendants jointly over various periods. Initially, there was extensive correspondence sent to the defendants in 2007 before the court proceedings in 2008.

Further correspondence was sent in 2013 and again in 2018 when the plaintiff advised the defendants in respect of its voluntary assisted sale and supported voluntary surrender options. In addition, extensive correspondence was sent to a financial consultant apparently acting for both defendants in 2016 and 2017.

46. The plaintiff says that her husband is a domineering character who maintained control over the family finances without informing her of what was happening. Apparently, he opened all post even when addressed jointly to both of them. He also dealt directly with the plaintiff's employees, as is evident from the record of telephone calls. She complains, in particular, that the first defendant told an employee of the plaintiff both in 2014 and again in 2018 that the couple had split up but the plaintiff did not thereafter make any attempt to contact her directly. As a result of all of this, the plaintiff claims on affidavit that, as of the date of the eviction, she was entirely unaware that the mortgage had not been paid and entirely unaware of the existence of any court proceedings. I have great difficulty accepting the second defendant's evidence in this regard.
47. The plaintiff has exhibited evidence of personal service on the second defendant of the 2008 summary summons proceedings (on 16th March, 2008); of the order made in those proceedings (on 25th September, 2013); of the motion papers for the application under O. 42, r. 24 made to Costello J. (on 16th February, 2015); and of service by registered post for which the second defendant signed of motion papers for the application under O. 42, r. 24 made to Barniville J. (on 2nd November, 2018) and of the order made by Barniville J. (on 4th January, 2019). The motion papers in each application included an affidavit exhibiting a statement of the defendants' mortgage account showing the extensive arrears and the fact that payments were not being made, either at all or as required under the loan agreement. All sets of papers, except the first, referred to the fact that an order for possession had been made in 2008. The second defendant either ignores the evidence of formal service on her of important court documents or claims that she received the documents but did not open the envelopes or look at their contents, at times giving descriptions of the circumstances in which she was served many years earlier, that simply strain credulity. She canvasses the possibility that her teenage daughter might have signed for registered post without addressing the fact that her own name and signature is on the receipt. In my view, the only way the second defendant could have been unaware of the lengthy court proceedings in this case is by a wilful determination to ignore them.
48. Even if I am wrong in my view of the evidence, the plaintiff clearly took all steps required of it to serve the second defendant and cannot be faulted if the second defendant chose not to look at much less to engage with documents with which she had been properly served. Contrary to the second defendant's suggestion, it is not the function of a summons server to explain the contents of the legal documents which he or she is serving. The mere fact of formal service being personally effected on a litigant should, of itself, be sufficient for the person served to at least open the envelope and read the documents inside.

49. The evidence as regards the state of the defendants' marriage is at best vague. The position seems to have fluctuated over time. I make no criticism of the defendants either for separating or for reuniting as life can be complex and, in addition to their precarious financial situation (of which the second defendant claims to have been entirely unaware), they also faced significant health challenges as well as the more routine challenges of running a business and raising a family. The court has not been informed that there was any formal separation agreement nor that any court orders were made in relation to the breakdown of the defendants' marriage. The significance of a formal separation is that it usually entails a degree of organisation of the parties' financial affairs which would in this case have included the defendants' indebtedness to the plaintiff and the fact that there was an order for possession in respect of their family home and at least part of their farm. Despite the first defendant verbally informing the plaintiff of his marital difficulties, it does not seem that a change of address was ever provided in respect of either of the defendants nor was any formal, written contact made with the plaintiff in relation to the mortgage account in view of the breakdown of the joint mortgagors' marriage. The court has not been given any chronology to confirm the periods when the defendants were separated and when they were living together nor any explanation of the first defendant's position in relation to occupation of the property at times when the couple were separated. Most of the correspondence received by the plaintiff over the relevant period would suggest that the defendants were and remained a couple. Indeed, the initial correspondence received from the second defendant's solicitor in connection with the eviction describes the second defendant as having been in her house the preceding day *"having a cup of tea midday with her husband"*.
50. I note with some concern that the order made by Dunne J. in 2008 expressly records that counsel appeared on behalf of the defendants. If the second defendant's evidence were to be accepted, it would mean that a solicitor and counsel had acted on her behalf without her instructions. A similar point arises in respect of the financial consultant whose correspondence in 2016 suggests that he was acting on behalf of both defendants in relation to their outstanding mortgage, although of course, he would not necessarily have been bound by the same professional obligations applicable to the lawyers who acted on behalf of both defendants.
51. It may also be significant that the second defendant returned to the property with the first defendant and they appear to have jointly re-entered the property notwithstanding their earlier eviction. It was, perhaps, telling that counsel on behalf of the second defendant was unable to inform the court when the first defendant has ceased to reside in the property, a matter which must have been within the second defendant's knowledge. In pointing out these omissions the court is not questioning the fact that the defendants are and have at times been separated. However, the vagueness of the evidence does raise a serious issue as to how the plaintiff is supposed to have assumed the additional legal obligations the second defendant now contends for on the basis of the plaintiff's knowledge of that separation.

52. What, if anything, is the legal significance of the plaintiff's failure to communicate individually with the defendants on being verbally informed by the first defendant that the parties' marriage had split up? Firstly, it should be noted that all documentation relating to the legal proceedings were individually served on each of the defendants but the second defendant claims not to have opened, read or taken any cognisance of the documents with which she was served. Therefore, it is difficult to accept that had more informal correspondence been addressed to her individually, she would have reacted any differently.
53. Secondly, eight of the telephone calls recorded in 2009 and 2010 were between the second defendant and the plaintiff's employees. According to her own evidence, on at least one of these occasions, the second defendant was enquiring as to the correct account into which to make a cash or cheque payment which was then made the following day. It seems unlikely, to say the least, that the second defendant was not aware during this period that mortgage repayments were being made on an *ad hoc* basis by cash or cheque in circumstances where the direct debit arrangements which had originally been put in place were no longer operating, presumably because of the inability of the defendants to meet those direct debits regularly from their bank account. Again, to maintain that she was entirely unaware of any difficulties notwithstanding her active engagement throughout this period requires a level of wilful determination to ignore what is occurring.
54. Obviously, things may well have changed when the second defendant became ill but, by then, the order for possession had already been obtained, the defendants had had an extended opportunity over 3 years to regularise the position in relation to their mortgage and the plaintiff was moving towards execution of that order. All of the formal steps relating to the execution of the order for possession were taken with the second defendant being individually and properly served. In all of the circumstances, I do not accept counsel's characterisation of the plaintiff as having ignored the second defendant's real interest in the matter for twelve years.

Whether Plaintiff Acquiesced in Defendants' Re-Entry

55. The second defendant also contends that a servant or agent of the plaintiff acquiesced in the defendants' re-entry onto the property after their eviction. The court faces some difficulty in dealing with this point as the evidence on both sides is largely hearsay because neither deponent was party to what is, allegedly, the crucial conversation between an agent of Blackwater Asset Management (who were in turn the agents of the plaintiff) and the first defendant. However, even taking the second defendant's evidence on this point at its height, her husband was advised to leave the house for ten minutes after which those involved in the eviction would be gone and they "*could come back or do what [they] liked at that stage*". In circumstances where the second defendant acknowledges that she had been formally told that she was being evicted and where she was handed a letter from the plaintiff confirming that fact and advising of strict arrangements that would need to be made for herself and her husband to collect their belongings from the property, I have considerable difficulty in treating the reported

statement as providing the basis for an understanding, allegedly clearly given, that the defendants would be returning and would be remaining in occupation of and in possession of the property. The second defendant clearly understood that she had been evicted and instructed her solicitor on that basis the following day. To assert that the defendants were somehow led to believe that they would remain in occupation and possession of the property is manifestly inconsistent both with the statement that they were being evicted and the correspondence handed individually to both defendants on the morning in question. Even if the second defendant re-entered the property on the basis of this understanding, it is difficult to see how it could be construed as a reasonable understanding on her part.

56. Further, I regard it as fanciful to suggest that, within 30 minutes of the defendants leaving the property, a lock which had been placed on the property was found discarded, with the key still in it, on the pathway. This may well be what the second defendant was told by her husband but that does not make it a credible statement. For it to be correct, it would mean either that those responsible for carrying out the eviction (which included the under-sheriff and a number of Gardaí), deliberately left the premises unlocked notwithstanding that they were carrying out an eviction or, alternatively, that a third party broke into the premises and left before the defendants did so in an interval of less than 30 minutes between the eviction party leaving and the defendants returning.
57. Finally, the second defendant gives evidence of a conversation which occurred on 12th March between herself and the same official from Blackwater Asset Management who had handed her the letter during the eviction on 10th March. Although the contents of this conversation are also disputed by the plaintiff, in this case the second defendant was a party to the conversation and is in a position to give evidence of it, whereas the plaintiff's evidence is purely hearsay – admissible in principle on an interlocutory application but to be given appropriate weight against the direct evidence available on any issue. However, nothing in that conversation alters the legal position. At its height, she was told by the person in question that he realised she had not known what was happening on the day of the eviction and that he advised her she could take legal action against the plaintiff. Neither of these statements have any particular legal significance. If the second defendant was unaware of what was happening on the morning of the eviction, it was because she had not read the documents which had been personally served on her over a number of years. Insofar as the person in question did not request or demand the defendants leave the premises, save in circumstances where a claim of adverse possession might arise a failure to demand that trespassers leave the premises does not, of itself, give the trespassers any right to remain.
58. In considering these issues, if the *Maha Lingam* test applies and plaintiff were required to establish a strong case likely to succeed at trial in order to be granted an interlocutory injunction, the court must look at the strength of the defence and form a view of the extent to which it is likely to displace the case which has been made out by the plaintiff. The matter was considered by the Supreme Court in *Charleton v. Scriven* [2019] IESC 28 where Clarke C.J. put the position as follows (at para. 6.13 of the judgment):-

"Where no real case of any substance is made by a defendant which puts forward a credible basis for suggesting either that receivers were not validly appointed or that receivers, although validly appointed, are seeking to exercise powers which they do not have, then it will not matter whether any interlocutory injunctive relief which the relevant receivers seek can properly be characterised as respectively mandatory or prohibitory, for there will be a more than adequate basis for suggesting that a strong case has been made out."

59. Consequently, the question I have to ask is whether the evidence and arguments put forward by the second defendant amounts to a case of substance and a credible basis for suggesting that the eviction of the defendants was not properly carried out. In this case, I am satisfied that the case made by the defendants does not reach that threshold. Consequently, the plaintiff has met the threshold requirement in relation to the grant of an interlocutory injunction whether that requirement is the lower serious issue to be tried test or the more stringent strong case test.
60. The last matter for the court to consider is where the balance of convenience lies pending the final determination of the proceedings. The case made by the plaintiff to the effect that damages would manifestly not be an adequate remedy has been summarised above. The second defendant's written submissions contain a section on the balance of convenience and the least risk of injustice and all of the case law cited is relevant to that issue (see *J.McD. v. P.L.* [2008] 1 IR 417, *Okunade v. Minister for Justice* [2012] 3 IR 152, *Betty Martin Financial Services Ltd v. EBS DAC* [2019] IECA 327, *AIB Plc v. Diamond* [2011] IEHC 505 and *Shelbourne Holdings Ltd v. Torriam Hotel Operating Company Ltd* [2010] 2 IR 52). However, no specific argument is made on the facts as to why the balance of justice favours allowing the defendants to remain in the premises from which they have been evicted or why the risk of least injustice would be caused by adopting the same approach.
61. Insofar as the second defendant relies on the *dictum* of McCracken J. in *B&S Ltd v. Irish Auto Traders Ltd* [1995] 2 IR 142 to the effect:-

"It is normally a counsel of prudence, although not a fixed rule, that if all other matters are equally balanced, the court should preserve the status quo."

this begs the question as to what is the status quo on the facts of this case. It cannot be the case that, if trespassers go into occupation of property, that occupation must be regarded as the status quo which the law should protect until it has been determined otherwise. In this case, the plaintiff as mortgagee-in-possession is *prima facie* the person entitled to possession of the property. Allowing the defendants to remain in the property while the plaintiff prosecutes the proceedings it has been obliged to take by virtue of the defendants' unlawful actions would not be the maintenance of the status quo but rather the inversion of the *status quo*.

62. I remain conscious that in human terms all of these events have created a disastrous situation for the defendants' family. Unfortunately, the court has been provided with very

little information as to the second defendant's personal circumstances which it can weigh in the balance in her favour. The court is told that she was ill over a period between 2014 and 2016 and felt the effects of these illnesses up to 2020 but no medical reports have been provided and no real detail is provided as to her current position. It can be gleaned from the papers that the second defendant is the mother of children at least some of whom may live with her, but no detail is provided as to how many children she has nor how many reside with her nor the ages of these children. While it was indicated in correspondence that the second defendant had taken over the running of the business and was preparing to dispose of assets to reduce the defendants' indebtedness to the plaintiff, these transactions do not appear to have materialised and no financial information at all is provided as regards the state of the defendants' farming business. No undertaking as to damages is offered and, in the circumstances, there is no basis for believing that the defendants could meet an order for damages, having paid very little of the monies they owe the plaintiff since 2012 and not having paid anything between 2015 and 2020 and almost nothing since the summer of 2020.

63. In conclusion, there is nothing before the court which would allow me to conclude that notwithstanding the plaintiff's position as mortgagee-in-possession, the least injustice in this case would be caused by permitting the defendants to remain in the property, ostensibly as trespassers, pending the determination of the proceedings. In all of the circumstances, I am prepared to grant the plaintiff the interlocutory injunction sought.