THE HIGH COURT

[2024] IEHC 663

Record no. HP 2024/698

Between:

YEOKSEE OOI

Plaintiff

- And -

IRELAND, THE ATTORNEY GENERAL, BRIAN MCDONAGH, and PROMONTORIA SCARIFF DESIGNATED ACTIVITY COMPANY

Defendants

JUDGMENT of Ms Justice Nessa Cahill delivered on 19 November 2024

INTRODUCTION

1. By these proceedings, the Plaintiff (Ms Ooi) seeks various orders, most notably a declaration that s. 2 of the Family Home Protection Act 1976 ("***the Act of 1976***") is repugnant to the Constitution and, in particular, Articles 40.1, 40.5, 41.1, 41.2 and 41.2.1 thereof.

2. This Judgment addresses two motions: The first is the motion issued by the Fourth Defendant and its predecessor in title ("***Promontoria***") seeking an order striking out or dismissing the proceedings against it pursuant to O. 19, r. 28 or O.19, r. 27 of the Rules of the Superior Courts ("RSC") and/or the inherent jurisdiction of the Court ("***the Strike Out Application***").

3. The second motion is Ms Ooi's motion seeking an interlocutory order prohibiting the Dublin City Sheriff, Mr Joseph Burke, or any other person appointed by the County Registrar of Wicklow, or his agents, from evicting Ms Ooi and her family from Dromin House, Drummin East, Delgany, County Wicklow ("***Dromin House***") pending the determination of these proceedings ("***the Injunction Application***").

4. While they are very different applications, there is an important overlap between them. The first question in the Strike Out Application is whether the Proceedings disclose no reasonable cause of action and are bound to fail; and, conversely, the first test for the grant of an injunction is whether there is an arguable or serious issue to be tried. It is now established that the same threshold is applicable to both.

5. Before proceeding further, it is important to record that the First and Second Defendants ("***the State Defendants***") did not participate in the Strike Out or the Injunction Applications. The outcome of the two Applications before me does not decide the fate of Ms Ooi's claim against the State Defendants, but only that of her claim for relief against Promontoria.

BACKGROUND

6. There is a lengthy history of litigation involving Mr McDonagh and Promontoria (among others). It is neither necessary nor efficient to recite this background in this Judgment.

7. The facts that are relevant to the Motions may be more briefly stated and are not in dispute.

Dromin House

8. In 2005, Mr McDonagh purchased Dromin House in his sole name with the benefit of a loan obtained from First Active plc in the amount of €3,000,000 ("***the First Loan***"). This loan was secured by a mortgage over Dromin House, which was agreed by a mortgage deed dated 10 May 2005 ("***the First Mortgage***"). This mortgage was registered in the Registry of Deeds.

9. In 2007, the First Loan was restructured, resulting in Mr McDonagh obtaining a loan facility of €5,009,750 ("***the Second Loan***") which was secured by a second mortgage on Dromin House. This subsumed and cleared the First Loan.The second mortgage deed is dated 3 August 2007 ("***the Second Mortgage***"). This mortgage was also registered in the Registry of Deeds. In the context of the Second Mortgage, Mr McDonagh completed a statutory declaration under the Act of 1976 on 28 July 2007 to the effect that Dromin House was not a family home for the purpose of that Act and no other person had an interest in the property. Ms Ooi asserts that this Second Loan was taken out in connection with a larger commercial investment in which Mr McDonagh was involved.

10. No repayments have been made in respect of the Second Loan since 2013.

11. Promontoria is now the successor to, and holds the rights of, First Active plc under the two Mortgages.

12. Owing to the defaults by Mr McDonagh, Promontoria issued proceedings in the Circuit Court on 18 May 2021 to obtain possession of Dromin House ("***the Possession Proceedings***").

13. As of 1 September 2022, the sum of €5,200,596.71 was owed by Mr McDonagh, with arrears amounting to €2,144,212.36.

14. Following a contested hearing, an order for possession was made by the Circuit Court (His Honour Judge Quinn) sitting in Bray, County Wicklow on 18 January 2023, with a stay on the order of possession for a period of 18 months from the date of service of that order ("***the Possession Order***").

15. Mr McDonagh appealed the Circuit Court Order and, on 19 June 2023, this appeal was given a date for summary hearing on 15 February 2024 ("***the Possession Appeal***").

16. By judgment delivered on 12 March 2024 ("***the Possession Judgment***"), Bradley J decided not to refer the matter to plenary hearing and instead granted the order for possession sought by Promontoria.

17. The stay that was imposed by the Circuit Court expired on 7 September 2024.

18. An execution order was issued by the Country Registrar for County Wicklow on 25 September 2024 ("***the Execution Order***").

19. The County Registrar sent an order for ejectment to Mr McDonagh on 14 October 2024.

20. By notice dated 15 October 2024, the Dublin City Sheriff confirmed his appointment to execute the Execution Order and take possession of Dromin House and required the occupier(s) of Dromin House to vacate the property by midnight on 22 October 2024.

Ms Ooi's Position

21. More than 20 years ago, Ms Ooi and Mr McDonagh commenced a relationship and Ms Ooi moved into Dromin House in 2006.

22. It was common case that Ms Ooi never had an established legal interest in, or title to, Dromin House (Possession Judgment [6]) (although she makes an unexplained averment to the contrary in her replying affidavit in the Injunction Application).

23. Since 2006, Ms Ooi and Mr McDonagh have had three children together, who also reside in Dromin House. It has been found by the Court of Appeal and the High Court that Dromin House is not a 'family home' within the meaning of the Act of 1976 ("*Possession Judgment*", [36]; *Ulster Bank Ireland DAC v Brian McDonagh & Ors* [2023] IECA 265, [7]).

24. As an occupant of Dromin House, Ms Ooi was on notice of the Possession Proceedings and was represented by solicitor and counsel at the hearing in the Circuit Court.

25. She issued these proceedings on 13 February 2024, two days before the hearing of the Possession Appeal was scheduled to take place.

26. On 15 February 2024, Ms Ooi applied to the High Court (Bradley J) for an adjournment of the Possession Appeal owing to the issue of these Proceedings. An application was also filed in these Proceedings for the two actions to be joined and requesting the joinder of the Attorney General as "*amicus curia*" to the Possession Appeal, among other reliefs ("***the Joinder Application***").

27. The adjournment application was opposed by Promontoria on the ground that no constitutional question arises in the Possession Appeal and the proceedings were straightforward possession proceedings.

28. The Possession Judgment ([11]) records that Promontoria's counsel advanced the argument that-

"Ms. Ooi was free to pursue her constitutional challenge against the State, but this did not in any way impugn the entitlement of Promontoria to the possession of the property in accordance with its contractual rights."

29. The adjournment was refused by Bradley J on the following ground (as explained in the Possession Judgment, [18]):

"I held that those proceedings were not a matter for this court, which was dealing with a Circuit Court appeal against the Order of the Circuit Court made on 18 January 2023. Ms. Ooi had been properly served with those proceedings but was not a party to the proceedings and was not a party to the mortgage. I held that the application made by Ms. Ooi for an adjournment also came very late in the day and in the circumstances, I refused the application for an adjournment."

30. Following the summary application under s. 3 of the Land and Conveyancing Law Reform Act 2013, Bradley J decided to grant the possession order sought by Promontoria.

31. In making that decision, Bradley J noted that Ms Ooi had made submissions regarding the constitutionality of s. 2 of the Act of 1976 and that –

"That constitutional challenge will come on for hearing in due course but Ms. Ooi's submissions, in response to Mr. Aylward BL, did not address the matters which have to be considered in the application before me which is an application made for possession by Promontoria under the jurisdiction of the Circuit Court (in an appeal to this court)" ([84]).

32. On 23 October 2024, Ms Ooi filed an application for leave to appeal to the Supreme Court against the Possession Judgment, which was delivered seven months previously. The grounds of appeal are premised on the wording and interpretation of s. 2 of the Act of 1976 and seek to challenge the Possession Judgment and (apparently) the refusal of

the High Court (Bradley J) to grant various reliefs sought by Ms Ooi, including the joinder of these Proceedings and the Possession Appeal.

These Proceedings

33. These Proceedings were issued by means of plenary summons on 13 February 2024.

34. In addition to the declaration that s. 2 of the Act of 1976 is repugnant to the Constitution, Ms Ooi seeks various additional declaratory reliefs, including;

    a) a declaration that s. 2 permitted Promontoria as well as the Third defendant (Mr McDonagh) to violate the constitutional rights of Ms Ooi and her children contrary to Article 45.2(iv) of the Constitution;

    b) a declaration that Ms Ooi and her children are entitled to reliefs pursuant to s. 5(2) of the Act of 1976;

    c) a declaration that the conveyance of Dromin House is of no effect in relation to Ms Ooi's rights under ss. 2 and 5(2) of the Act of 1976; and

    d) Damages.

35. There is also a specific claim made that Dromin House was described as a '*retail unit*' in a compromise agreement which Mr McDonagh and others entered with Ulster Bank in 2013 and that this was a misrepresentation by Promontoria and its predecessor in title to avoid the application of the Act of 1976.

36. On 1 May 2024, the High Court (Sanfey J) listed the Strike Out Application and the Joinder Application for hearing on 25 October 2024.

37. No steps were taken by Ms Ooi in these Proceedings for eight months from February 2024 until 18 October 2024 (other than the delivery of replies to particulars to the State Defendants in August 2024). On 18 October 2024, an application was made *ex parte*

for an *interim* order to prevent the eviction of Ms Ooi and her family from Dromin House.

38. An *interim* order was made by Cregan J on 18 October 2024 prohibiting steps being taken by the Dublin City Sherriff or any other person having notice of the order, to carry out the Order of Execution.

39. The Injunction Application was then issued by means of Notice of Motion and listed for hearing together with the Strike Out Application on 25 October 2024.

40. On 25 October 2025, the Strike Out Application and the Injunction Application were heard. Ms Ooi accepted that the reliefs sought by the Joinder Application were moot and did not proceed with that Application.

41. It is common case that, while the Injunction Application in its terms is directed to Joseph Burke, the Dublin City Sheriff, it is the execution of the Possession Order and the Execution Order which Promontoria obtained pursuant to the Possession Proceedings which Ms Ooi is seeking to prevent.

42. On 25 October 2024 and again on 7 November 2024 Promontoria gave an undertaking in the context of these Proceedings not to take steps to enforce the Possession Order, which undertaking remains in place until 20 November 2024.

The Issues to be Determined

43. The first issue to be addressed is whether Promontoria has demonstrated that the case made by Ms Ooi against it in these Proceedings discloses no reasonable cause of action and is bound to fail.

44. If the answer to that question is ‘no’ the next issue would be whether the Proceedings are an abuse of process and should be struck out against Promontoria on that ground. One topic that would loom large in this respect is whether these Proceedings, insofar as they are being pursued against Promontoria, constitute a collateral attack on the Possession Proceedings.

45. It is only if the answer to the first and second issues is '*no*' that the third issue, the grounds for an injunction, could properly arise: there could be no possibility of granting an injunction to prevent the eviction of Ms Ooi from Dromin House if (a) there is no arguable cause of action, or abuse of process, such that it is warranted and appropriate to strike out the Proceedings against Promontoria; and (b) Promontoria is no longer a party to the Proceedings.

46. If the third issue is reached, this could only be on the basis there is a serious issue to be tried as against Promontoria (resulting in a refusal to strike out). If that is so, the decision on the injunction Application will hinge on questions of delay and the balance of justice, and the multifaceted analysis that entails.

47. Given the imperative of judicial economy and efficiency, I will address those issues – and only those issues – which are necessary to decide the Applications before me.

48. The next section of this Judgment will therefore consider the legal principles applicable to an application to strike out proceedings on the ground it discloses no reasonable cause of action and is bound to fail.

THE STRIKE OUT APPLICATION

Relevant Legal Principles

49. Prior to 22 September 2023, there were two distinct bases on which a court could strike out claims (or parts of claims) at a preliminary stage. One was contained in O.19, rr 27 and 28 RSC, the second was pursuant to the inherent jurisdiction of the Court. There were some differences between the two jurisdictional bases, including that the former was confined to an analysis of the pleadings, whereas the inherent jurisdiction of the court allowed a broader consideration of the issues and affidavit evidence.

50. The jurisdiction to strike out proceedings at a preliminary stage is now largely if not entirely codified in the new formulation of O. 19, r. 28, which provides:

> *"The Court may, on an application by motion on notice, strike out any claim or part of a claim which:*

i. *discloses no reasonable cause of action, or*

ii. *amounts to an abuse of the process of the Court, or*

iii. *is bound to fail, or*

iv. *has no reasonable chance of succeeding."*

51. As noted by Simons J in In *O'Malley v. National Standards Authority of Ireland* [2024] IEHC 500 ("*O'Malley v. NSAI*") at [7],

> "*The amendment to Order 19, rule 28 has the practical effect of eroding the previous distinction between the jurisdiction to strike out and/or to dismiss proceedings pursuant to (i) Order 19 of the Rules of the Superior Courts, and (ii) the court's inherent jurisdiction. Nevertheless the earlier case law continues to have a relevance.*"

52. A good summary of the applicable principles derived from the earlier caselaw can be seen in *IBRC v. Purcell* [2016] 2 IR 83 at [83]:

> **"***The relevant principles can be summarised as follows:-*
>
> *1. the court has jurisdiction pursuant to O. 19, r. 28 and also pursuant to its inherent jurisdiction to strike out proceedings if they are bound to fail;*
>
> *2. in considering an application to strike out proceedings pursuant to its inherent jurisdiction the court is not limited to considering the pleadings of the parties but is free to consider evidence on affidavit relating to the issues in the case (per Costello J. in* Barry v. Buckley [1981] I.R 306);
>
> *3. this jurisdiction to strike out proceedings is one to be "exercised sparingly and only in clear cases" (see Costello J. in Barry v. Buckley);*

4. moreover as McCarthy J. stated in Sun Fat Chan v. Osseous Ltd.[1992] 1 I.R 425, at p. 428 "[g]enerally, the High Court should be slow to entertain an application of this kind";

5. in addition as was explained by Keane J. in Lac Minerals Ltd. v. Chevron Mineral Corporation (Unreported, High Court, Keane J., 6 August 1993) (and quoted with approval by the Supreme Court) in Supermacs Ireland Ltd v. Katesan (Naas) Ltd [2000] 4 I.R 273, a judge in considering an application to strike out or dismiss a claim must be confident that the plaintiff's claim cannot succeed no matter what might arise on discovery or at the trial of the action;

6. if the pleadings can be amended in such a manner as to save the action then the proceedings should not be dismissed (see McCarthy J. in Sun Fat Chan v. Osseous Ltd.);

7. the court can only exercise a jurisdiction to strike out a claim on the basis that "on admitted facts, it cannot succeed" (per McCarthy J. in Sun Fat Chan v. Osseous Ltd.);

8. the court in considering whether to strike out a claim "must treat the plaintiff's claim at its high water mark" (per Clarke J. in McCourt v. Tiernan [2005] IEHC 268, (Unreported, High Court, Clarke J., 29 July 2005, at p. 12);

9. the burden of proof lies on the defendant to establish that the plaintiff's claim is bound to fail (see Salthill Properties Ltd v. Royal Bank of Scotland [2009] IEHC 207, (Unreported, High Court, Clarke J., 30 April 2009)); and

10. the court should not require a plaintiff to be in a position to show a prima facie case, merely a stateable case, in an application to strike out(see Clarke J. in Salthill Properties Ltd v. Royal Bank of Scotland [2009] IEHC 20.)"

53. While regard should be had to any amendments that may be made to render a vulnerable case stateable, this is not without limitation. I am mindful of the caution that -

"*…it is not for this Court to try and identify amendments that might conceivably save the proceedings as they stand in circumstances where no amendments have been put before the Court, either by way of the plaintiff's 29 January 2018 affidavit grounding his application to amend his statement of claim or otherwise. As said by Haughton J. writing for this Court in Fulham v. Chadwicks Limited & Ors [2021] IECA 72 after reviewing the relevant caselaw, the exercise of the jurisdiction to permit an amendment to 'save the action' required that 'the claimant or his/her lawyers will usually be required to intimate an intention to amend, or at least the general nature of the amendment suggested in response to the motion to dismiss'."* (*McAndrew v. Launceston Finance Property DAC* [2023] IECA 43 [91] per Faherty J, Barniville and Ni Raifeartaigh JJ concurring)

54. Another theme that emerges from the decided cases was referenced by Simons J in *O'Malley v. NSAI* at [7]

> *"The Supreme Court had consistently stated—in its case law on inherent jurisdiction applications—that whatever might or might not be the merits of some form of summary disposal procedure, an application to dismiss proceedings as being bound to fail is not a means for inviting the court to resolve issues on a summary basis."*

55. A general rule in applications to strike-out that is particularly important here was addressed by the Supreme Court in *Jeffrey v. Minister for Justice, Equality and Defence*[2019] IESC 27, [2020] 1 ILRM 67. There, the State applied to strike out proceedings in which the plaintiff sought damages for negligence and negligent misstatement arising from inaccurate statements made by a presenting garda during District Court proceedings against him. The grounds on which the strike out was sought included that there was no established duty of care owed by the garda to Mr Jeffrey and that the garda enjoyed immunity from suit.

56. The Supreme Court refused to strike out the proceedings (overturning the decision of the High Court). Clarke CJ determined at [6.2]:

> *"It cannot be said that the law concerning duty of care relating to statements of the type at issue in this case is sufficiently clear that it could be said at this stage that Mr. Jeffrey's claim is bound to fail on the basis of the absence of a duty of care. That is not to say that if these proceedings or other similar proceedings ever come to trial, there may not be difficult issues which need to be determined under this heading."*

57. Clarke CJ concluded there was –

> *"sufficient doubt about the precise parameters of any duty of care which might be owned by a person, such as Inspector Connolly, to anyone else arising out of the conduct of court proceedings, such that it cannot be said that Mr. Jeffrey's proceedings will be bound to fail on the basis of an absence of a duty of care"* ([8.2]).

58. The question of whether there was immunity in that case was also regarded as one of some complexity, in respect of which Clarke J observed (at paragraph 7.4):

> *"It is now well settled that, in the context of a summary judgment motion in which a plaintiff seeks judgment in summary proceedings, a court can resolve straightforward issues of law or the interpretation of documents, where there is no real risk that attempting to resolve those issues within the limited confines of a summary judgment motion might lead to an injustice. By analogy, I would not rule out the possibility, without so deciding, that it may be possible to resolve a simple and straightforward issue of law within the confines of a Barry v. Buckley application. However, even if that should be possible, it could only be appropriate where the issue was very straightforward and where there was no risk of injustice by adopting that course of action."*

59. Applying this to the question of immunity, the Court found -

> *"while concluding that there may well be grounds for believing that Inspector Connolly may enjoy an immunity from suit having regard to the proper characterisation of his role in the District Court proceedings against Mr. Jeffrey, that question is, in my judgment, complex and not one where it can be said with sufficient clarity that the defence will prevail on the grounds of immunity alone"* ([8.3]).

60. This judgment confirms unequivocally that there should be no attempt in a summary motion of this nature to resolve anything other than a straightforward legal issue in respect of which there is little or no risk of injustice. Further, if there is a lack of clarity on the legal question concerned, it is not appropriate to render a decision dismissing the claim summarily. This does not mean that a complex or uncertain legal issue may ultimately not be resolved in favour of the party seeking strike-out following a full trial, rather that it is not an issue which a court should pre-emptively attempt to resolve in the absence of such a trial.

61. This guidance is of direct and heavily persuasive importance here.

62. One final matter that may usefully be mentioned is that, since the broadening of O. 19, r. 28, the necessity, or appropriateness of, relying on any inherent jurisdiction to strike-out proceedings in cases such as this may be doubted. In *Lopes v. Minister for Justice* [2014] 2 IR 301, [2014] 2 IR 301, (at [15]) Clarke J (Laffoy and Dunne JJ concurring) emphasised that the court's inherent jurisdiction should only be invoked when necessary to supplement established procedural rules:

> *"It is important to emphasise that the inherent jurisdiction of the court should not be used as a substitute for, or means of getting round, legitimate provisions of procedural law. That constitutionally established courts have an inherent jurisdiction cannot be disputed. That the way in which the ordinary jurisdiction of those courts is to be exercised is by means of established procedural law including the rules of the relevant court is also clear. The purpose of any*

asserted inherent jurisdiction must, therefore, necessarily, involve a situation where the court enjoys that inherent jurisdiction to supplement procedural law in cases not covered, or adequately covered, by procedural law itself. An inherent jurisdiction should not be invoked where there is a satisfactory and existing regime available for dealing with the issue under procedural law, for to do so would set procedural law at nought."

63. While Promontoria's motion is based on O. 19, r. 28 and/or the inherent jurisdiction of the Court, I propose to deal with it primarily on the basis of the former. It is not clear from the application as presented that there is a need to have recourse to the Court's inherent jurisdiction. It is not therefore appropriate to do so.

Consideration of the Parties' Positions

Preliminary Comment

64. Promontoria makes certain points in its written and oral submissions that are directed to the substance of the constitutional challenge. Reference is made, for example, to the policy choices made by the Oireachtas in deciding not to amend the definition of '*family*' in the Act of 1976 in the context of other legislative and constitutional amendments.

65. Ms Ooi in her submissions also referred to *O'Meara v. Minister for Social Protection* [2024] IESC 1, [2024] 1 ILRM 427 on 22 January 2024 ("*O'Meara*") with a view to showing the substance of the case she wishes to make.

66. However, the inescapable and important point, as referenced by Promontoria, is that the defence of the constitutionality of the Act of 1976 is a matter for the State Defendants. In *S.M. v. Ireland (No. 2)* [2007] IEHC 280 Laffoy J confirms that the "*the appropriate legitimus contradictor"* is "*Ireland through the Attorney General*" when unconstitutionality is asserted. Order 60 RSC serves the purpose of ensuring the Attorney General is on notice and in a position to defend the validity of legislation when impugned.

67. The State Defendants were represented at the hearing of the Strike Out Application but did not participate in that Application. Notably, the State Defendants have not sought to have the Proceedings struck out as against them.

68. Accordingly, regardless of the outcome of this Application, there is an extant challenge regarding the constitutionality of s. 2 of the Act of 1976 as against the State Defendants. I am not therefore deciding the question of whether there is a reasonable cause of action in respect of the constitutionality of s. 2 of the Act of 1976, as this is a cause of action which it will in any event fall to the State Defendants to defend.

69. For this simple reason, I do not propose to engage in an assessment of the merits of the constitutional challenge to s. 2 of the Act of 1976 in this interlocutory application.

70. There are other reasons. It would be fraught with difficulty for this Court to attempt to pronounce on questions of constitutionality, even to the low threshold of assessing the existence of a serious or reasonable cause of action, without hearing from the State. It would also contravene the overriding rule against becoming embroiled in matters of legal complexity in an application of this nature.

71. In these circumstances, a permanent injunction in favour of Ms Ooi would appear to involve erasing the security for the Second Loan, which subsumes the debt that was attached to the property when she first moved into it, and cancelling the right of Promontoria to rely on the security for that loan (which Ms Ooi on her own evidence cannot pay).

72. As there will be no analysis of the substance of the Constitutional Claim in this Judgment, I will refer simply to the "Constitutional Claim", without any attempt to summarise or assess what this substantive claim entails. These will be questions for another day.

73. What must be decided is whether, on the assumption the constitutional challenge (which will unavoidably survive this Strike Out Application), is meritorious, Promontoria has discharged the onus of showing Ms Ooi would have no reasonable cause of action against it or that the Proceedings insofar as they are directed to Promontoria are bound

to fail or have no reasonable chance of success. This was Promontoria's focus in the Application.

74. Turning then to the grounds on which Promontoria relies.

Promontoria's Position

75. Promontoria's case is that there is no reasonable cause of action and/or that the claim against it is bound to fail are addressed in the grounding affidavit of Ms Murphy sworn on 4 April 2024 and in written and oral submissions and can be divided into six broad strands:

a) First, and most prominently, it is asserted that the Possession Proceedings have been finally decided and cannot be revisited or disturbed by a later finding that s. 2 of the Act of 1976 (or the manner in which it has been applied) is unconstitutional ("***the Constitutional Claim***"). It is claimed that possession is not dependent on the Act of 1976 but on the Possession Order, which is a final order. Heavy reliance is placed on *A v. Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88 to advance the related proposition that, even if there is a finding that s. 2 of the Act of 1976 is unconstitutional, this will not allow for any relief to be ordered against Promontoria. It is asserted that the State alone would be liable for any remedy that may flow from such a finding of unconstitutionality.

b) Second, it is asserted that Promontoria had no relationship or dealings with Ms Ooi and owes her no duties and there is no privity of contract with her, and any dealings Promontoria's predecessors in title had with Mr McDonagh (whether in the context of the Compromise Agreement or the Second Mortgage) ("***the Breach of Duty Claim***"). Promontoria seeks to strike out paragraphs 1 and 2 of the Plenary Summons on this basis.

c) Third, it is asserted that most of the reliefs claimed (paragraphs 8, 11, 12, 13, 14 of the Statement of Claim and paragraphs 5, 10, 11 and 13 of the Plenary Summons) are premised on Dromin House being a family home, which it is not,

and that no relief is available under the Act of 1976 ("***the Family Home Claim***").

d) Fourth, Promontoria contends that Ms Ooi cannot apply to set aside the Second Mortgage (as in paragraph 12 of the Plenary Summons and paragraph 14 of the Statement of Claim) not having been a party to it ("***the Second Mortgage Claim***").

e) Fifth, the claim of misrepresentation (in paragraph 6 of the Plenary Summons and paragraph 9 of the Statement of Claim) is stated to be meritless and in any event barred by the operation of the Statute of Limitations 1957 ("***the Misrepresentation Claim***").

f) Sixth, Promontoria seeks to have the Proceedings against it struck out on the grounds they constitute an abuse of process.

Ms Ooi's Reply

76. Ms Ooi's position in reply was that all of the reliefs sought in the Proceedings are connected to each other. She also contends that the lender (originally First Active plc, now Promontoria) was subject to statutory regulation by the Central Bank and was involved in a public law role as such and cannot be released by relying on a private law defence. Her position was that *O'Meara* was about social welfare legislation in the same way that this case is about the Act of 1976. She asserts that Promontoria cannot rely on s. 2 of the Act of 1976 and then assert that it is a solely private law matter.

77. Ms Ooi asserts it was unjust that the High Court did not permit the joinder of the two proceedings and that there is no prejudice to Promontoria by being kept in the Proceedings and they are an integral part of the case.

78. In summary, Ms Ooi's case was that public law provisions were being applied by the Bank and that the public and private law elements of the contract cannot be severed and that it is not in the interests of constitutional justice that Promontoria be removed as a party to the Proceedings.

Discussion

79. The case as pleaded and presented by Ms Ooi is lacking in clarity and particularisation in some important respects. It must be recorded that Ms Ooi has previously been represented by solicitors and counsel in the Possession Proceedings, and had some limited assistance from a "*McKenzie friend*" during the hearing of these Applications (in respect of which Promontoria took a helpfully pragmatic view, while reserving its position). However, she ultimately represented herself in the Possession Appeal, and is a litigant in person in these Proceedings. Accordingly, it is appropriate not to approach her pleadings with the rigour that would be expected of a represented litigant.

80. The characterisation of her case that has been adopted by Promontoria (as sumarised above) is very helpful and the Strike Out Application will be addressed under the headings suggested.

The Constitutional Claim

81. Promontoria relies on *A v. Governor of Arbour Hill Prison* to demonstrate that the outcome of these Proceedings - taken at their height - cannot undermine the finality of the Possession Order or lead to the grant of any relief against Promontoria.

82. This is somewhat ambitious. It requires a finding that there is no prospect that a cause of action could be found to exist against Promontoria if s. 2 is found to be unconstitutional.

83. As a general proposition, the judgments of the Supreme Court in *A v. Governor of Arbour Hill Prison* do not support or establish an overriding rule that a declaration of invalidity of legislation can never have an impact on previous rights, transactions or judicial proceedings. This is manifest even from the paragraphs on the judgment of Murray CJ on which Promontoria relied at hearing, including the following:

> "*I do not accept that it is a principle of our constitutional law that cases which have been finally decided and determined before our courts on foot of a statute which is later found to be unconstitutional must invariably be set aside as null and of no affect*." (per Murray CJ, [17]).

84. Murray CJ went on to reject "*the abstract notion of absolute retroactivity of the effects of a judicial decision invalidating a statute*" ([20]). There are several further references to "*absolute retroactivity*" and "*unrestricted retroactivity*" throughout that judgment.

85. The language employed demonstrates that the focus of Murray CJ was on debunking the notion of absolute, unlimited, unrestricted retroactivity, not on rejecting the possibility that there could ever be a retroactive effect on the basis on the facts of a specific case.

86. Murray CJ concluded that a declaration that a statute is unconstitutional could, based on -

> "*some extreme feature of an individual case… require, for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, that verdicts in particular cases or a particular class of cases be not allowed to stand*" ([126]).

87. Denham J made a similar finding at [165]:

> "*The principle of law is that a declaration that a law is unconstitutional applies in the litigation in which the issue arose, and prospectively, there is no general retrospective application of such an order. However, I do not exclude the possibility that an exception may arise where, in wholly exceptional circumstances, the interests of justice so require*."

88. The possibility of retroactive impacts on prior transactions was more recently confirmed in Mohan v. Ireland [2021] 1 IR 293. O'Donnell J (MacMenamin, Dunne, Charleton and O'Malley JJ concurring) discussed the doctrine of *locus standi* and explained:

> *"[11] Public general legislation exists because a majority of the members of the Oireachtas considered, at some stage, that the legislation was in the public interest. The particular provision challenged may indeed still operate entirely beneficially and helpfully for the great majority of cases. If such a provision is invalidated, it is, in principle, of no effect in law and the area is left unregulated,*

with the result that citizens may be deprived of the benefit of the provision. The invalidity of legislation is therefore a very significant disruption of the legal order which operates in a blunt and, essentially, negative way. It simply removes a law or an aspect of the law, can put nothing in its place, and yet can throw into question transactions taken on foot of the provision."

89. The acknowledgement of the potentially blunt effect of the invalidation of legislation and the possibility that it can throw transactions into question is notable and may be come into sharper focus in this case as it unfolds.

90. Turning then to the very specific point posited by Promontoria, what is said is that the Possession Order is final and this finality is a conclusive answer to any attempted reliance on a finding of invalidity of s. 2 to seek remedies against Promontoria.

91. The question of finality of prior judicial proceedings is certainly an important one when determining the retrospective effect of findings of unconstitutionality (A. *v. Governor of Arbour Hill Prison*; *The People (Director of Public Prosecutions) v Cunningham* [2013] 2 IR 631 ("*Cunningham*"); *Clarke v Governor of Mountjoy Prison* [2016] IEHC 278, [2016] IECA 244; *Wansboro v. DPP* [2023] 1 IR 711 ("*Wansboro*")).

92. However, the position is more nuanced than Promontoria's submissions allow and there are some aspects of this case which may well require more detailed analysis if and when a finding of unconstitutionality is made. It would not be proper or appropriate to attempt to pre-judge or assess these points here. However, it must be noted that the question of retrospectivity is a question of real complexity and is not be quite so straight-forward and clear as Promontoria suggests. It is also inherently unsuitable for determination in a strike-out application of this nature.

93. Three points are mentioned here to illustrate this point at a very high level.

94. First, there is a discussion in some of the many important judgments of the Superior Courts on the question of retrospectivity, about how the prior proceedings were conducted by the litigant in question and whether there were grounds to assert estoppel or acquiescence or similar to preclude the invocation of the intervening finding of unconstitutionality. Indeed, there are some specific indications in *A v. Governor of Arbour Hill Prison* that it is relevant to consider whether the parties had the opportunity to raise and rely on constitutional concerns and exhaust their potential remedies before the earlier decision was rendered ([115]).

95. This point was important in *Cunningham*. In the judgment of the Court of Criminal Appeal, Hardiman J addressed the conduct of Mr Cunningham in his proceedings (which were under appeal when an intervening declaration of unconstitutionality was made in *Damache v. DPP* [2012] 2 IR 266), by contrast with cases such as *A v. Governor of Arbour Hill Prison* (at [71]):

> "*So far as the decision in A. v. Governor of Arbour Hill Prison [2006] IEHC 169, [2006] IESC 45, [2006] 2 I.R. 88 is concerned, we have already demonstrated that this decision substantially turned on the fact that the applicant in A. v. Governor of Arbour Hill Prison [2006] IEHC 169, [2006] IESC 45 had pleaded guilty to the offence and elected to have the case dealt with on that basis. He had never suggested that he was unaware of the age of his young victim and he never appealed his decision. Not only had his case been finally adjudicated, but he was moreover estopped by his own conduct from asserting that the statute was unconstitutional or that his conviction was bad. His position was no different in principle from that of the applicant in The State (Byrne) v. Frawley [1978] I.R. 326. None of these factors particular to cases such as Corrigan v. Irish Land Commission [1977] I.R 317, The State (Byrne) v. Frawley and A. v. Governor of Arbour Hill Prison [2006] IEHC 169, [2006] IESC, such as election, acquiescence and estoppel by conduct, apply to the position of the present applicant. It can thus be said that the present applicant*

is not debarred by his own conduct from taking advantage of the finding of unconstitutionality."

96. This analysis was also influential in *Wansboro*, in which Dunne J emphasised (at [50]) that -

> "*the appellant did not adopt any strategy or engage in any conduct in the course of the proceedings which could debar him from relief. Further, he did not acquiesce in a process which he knew or understood to be unconstitutional.*"

The applicant in that case had a pending appeal against his sentencing when the relevant legislation (ss. 99(9) and 99(100) of the Criminal Justice Act 2006) was found to be unconstitutional and the Supreme Court upheld his right to rely on that finding.

97. A second matter that emerges clearly from several of the judgments in this complex area is that each case must be assessed on its facts.

98. This is confirmed by Murray CJ in *A v. Governor of Arbour Hill Prison*:

> "*There is no doubt that where to draw the line in limiting retrospective effect is a difficult question for courts. One will not find a simple formula for all circumstances or all classes of cases… It is a complex question often resolved on a case by case basis*" ([119]).

99. In *Wansboro*, Dunne J noted (at [52]),

> "*it follows that as has been said before, that there is no automatic rule of consequential invalidity and that as O'Donnell J. noted, certain matters may preclude reliance on any invalidity subsequently established. The extent to which someone may be debarred from relying on the finding of invalidity is something which will depend on the circumstances of any given case. In the earlier discussion in the course of this case, a number of circumstances have been referred to which will have a bearing on such a consideration. It is not*

necessary to refer to those authorities again. Suffice it to say, a finding of unconstitutionality in respect of legislation which has a bearing on criminal proceedings does not mean that steps taken in reliance on the legislation subsequently found to be unconstitutional will necessarily render the criminal proceedings invalid. A variety of factors will require to be considered as can be seen from the case law discussed above."

100. This was also underlined by MacMenamin J in *PC v. Minister for Social Protection* [2018] IESC 57, when he adverted to the need to assess the impact on other cases of a finding of unconstitutional invalidity on a "*case by case basis*" ([65]).

101. The need to weigh and assess each case on its merits is potentially important and difficult to marry with the ground relied on by Promontoria to justify its Strike Out Application

102. A further question of possible relevance that emerges from the cases is whether a third party is seeking to 'piggy-back' on the finding of invalidity of legislation in another case between different parties.

103. Denham J referred to this in *A v. Governor of Arbour Hill Prison*:

"*The cases to date have inherently applied the principle that there is no application retrospectively of a declaration of unconstitutionality outside the litigation, or related litigation, which raised the issue of the validity of the law*." ([151]).

104. She returned to this distinction at [174]:

"*There is no principle of the retrospective application of a declaration of unconstitutionality outside the particular parties of a case, or litigants specifically named by the court. This has long been the practice in this jurisdiction, which practice is based upon sound constitutional principle*."

105. In *PC v. Minister for Social Protection* [2018] IESC 57, O'Donnell J (as he then was) addressed this question (at [37]), when, referring to *A* v. *Governor of Arbour Hill Prison* and to *State (Byrne) v. Frawley* [1978] I.R. 326, he said:

> "*These cases are very important, since they establish beyond question that there is no automatic rule of consequential invalidity, and that certain matters, such as the finality of a conviction, or the failure to take a challenge, may preclude reliance on any invalidity subsequently established. However, both these cases occurred in the field of criminal law and involved attempts by a third party to claim the benefits of an invalidity established in other proceedings. Here, it is the appellant who has succeeded, and who claims for what he contends is consequential relief in the self- same proceedings, which are civil in nature. This, therefore raises slightly different issues*."

106. This highlights the need to identify whether the litigation which is asserted to be final and impenetrable is related to, and/or between the same parties as, the action in which the invalidity finding is made.

107. This in turn underlines a distinction between Ms Ooi and the applicant in *A v. Governor of Arbour Hill Prison*, namely that the latter was convicted based on a guilty plea that had been made in unrelated proceedings, with no attempt to challenge the constitutionality of the legislation in question. There was no suggestion of any inherent unfairness in the process to which the applicant was subject and he was instead seeking to rely on a later decision in an unrelated case. It was referred to as 'piggy-backing' for obvious reasons.

108. I do not attempt to predict how any of these points may be analysed here, but the potential relevance of the fact that it is Ms Ooi who was also a notice party to the Possession Proceedings who brings these Proceedings cannot be discounted at this preliminary stage.

109. Insofar as Promontoria seeks to derive a blanket, unswerving rule that declarations that legislation is unconstitutional will never impact on previous decisions or transactions, neither *A. v. Governor of Arbour Hill Prison*, nor the judgments decided

since then, support any such absolute rule. It is also beyond doubt that retroactivity can apply in the same manner to judicial decisions on the criminal side and the civil side (*Fulham v. Chadwicks Ltd*. [2021] IECA 72 at [38]).

110. It may well be an important factor in this case that the constitutional issues that are now raised in these Proceedings were not part of the Possession Proceedings (although Ms Ooi did at the eleventh hour did seek to adjourn those proceedings and did make submissions regarding the Act of 1976, the relevance of which was disputed by Promontoria). It is significant that Promontoria objected to an adjournment to allow these Proceedings to go first, and also disputed the relevance of the constitutional arguments being raised by Ms Ooi to the Possession Proceedings, on the basis those issues could be addressed instead in these Proceedings.

111. There can of course be no final determination regarding the application of *A v. Governor of Arbour Hill Prison* in this summary hearing. It would require closer scrutiny based on the very specific circumstances then pertaining, if and when a declaration of unconstitutionality is made, and depending on the parameters and nature of any such declaration. There can be no assumption about the outcome or its impact.

112. In summary, while the case on which Promontoria bases a significant plank of its case, *A v. Governor of Arbour Hill Prison*, is authority that there is no absolute, unlimited doctrine of retrospective effect of declarations of invalidity, it does recognise the existence of cases in which there could be such an effect. There is also a specific treatment given to cases between the same parties or in related litigation (although retroactive effect is not so limited). The conduct of the party in question in the previous proceedings (including whether there are grounds to assert estoppel or acquiescence or similar) may also be a relevant factor.

113. Given these considerations, it does not seem safe to conclude that there is no reasonable prospect that a declaration that s 2 is not consistent with the constitutional guarantees invoked by Ms Ooi would have an effect on, or potentially result in remedies against, Promontoria, because of the finality and conclusiveness of its Possession Order.

114. The questions raised moreover falls squarely into the category of complex legal questions which are inherently unsuited to being disposed of in an application of this nature.

115. Promontoria's counsel points out that the Possession Judgment is not directly based on s. 2 of the Act of 1976, but rather on s. 3 of the Land and Conveyancing Law Reform Act 2013. This is relied on to further support the contention that a declaration of invalidity of the former would not and could not unwind or trespass on the Possession Order. However, the question is not quite so binary. The impact of a declaration of invalidity can only be assessed when the terms of that declaration are known. However, it is hard to dismiss any prospect that such a declaration could result in a remedy against a financial institution which relied in part on subsequently-invalidated legislation to establish title to an asset.

116. Further, this submission belies the fact that remedies other than possession are also sought by Ms Ooi. She includes declaratory relief, damages and a claim for compensation or other relief under s. 5(2) of the Act of 1976, among the prayers for relief in the Plenary Summons. It is not inevitable that the only remedy against Promontoria will involve going behind the Possession Order.

117. Consequently, if s. 2 is found to be unconstitutional (whether in the manner in which it has been applied or construed or otherwise), it cannot be said that there is no reasonable cause of action, or prospect of Ms Ooi succeeding in recovering a remedy, against Promontoria.

118. In reaching this conclusion, it is relevant to observe that it was the choice of Promontoria to press for its Possession Proceedings to be heard and determined first and summarily, and to press for the exclusion of constitutional questions from the Possession Proceedings, knowing these Proceedings were then extant against it as well as the State Defendants. While this may be an understandable choice, particularly given the last-minute issue of these Proceedings before the Possession Appeal, it does undermine Promontoria's insistence that the Possession Order cannot be interfered with, and that these Proceedings are accordingly bound to fail.

119. Put another way, it is a situation which is to some extent of Promontoria's own making, if the outcome of these Proceedings were to result in some later reversal of Promontoria's rights, the Possession Order notwithstanding. Having made the election to press on with the Possession Proceedings and to argue for the severance of constitutional questions into these Proceedings, I do not believe Promontoria should fairly be able to rely on the conclusion of the Possession Proceedings, to negate any claim against it in these Proceedings by means of a strike-out application.

120. A related contention was weighed by Baker J in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26 ([61]) in which she rejected the opposition to the Act of 1976 being raised in an appeal in possession proceedings, noting -

> "*it is difficult to decouple the argument on the possession proceedings from the fact that the premises are the principal private residence of the second defendant, was at one point in time the family home of the couple…"*

While that was a very different set of facts, it does suggest that a different approach could have been taken by Promontoria and could have avoided the situation on which it now relies to strike out these Proceedings.

121. A final point to note in this connection is that Ms Ooi filed an application for leave to appeal to the Supreme Court in the Possession Proceedings, but I accept the contention of Promontoria that this does not detract from, or alter, what would otherwise be the finality of the Possession Order for the purposes of the Strike Out Application. Given the analysis already carried out, the point is not however a material one.

Breach of Duty Claims

122. The second set of grounds relied on by Promontoria is the want of any direct relationship or dealings with Ms Ooi. It is claimed that Promontoria owes her no duties and there is no privity of contract or relationship with her, and any dealings

Promontoria's predecessors in title had were with Mr McDonagh (whether in the context of the Compromise Agreement or the Second Mortgage).

123. The claims of Ms Ooi are not yet properly pleaded on this – or several other – aspects of her case.

124. However, it must be recalled that, if two different interpretations of the claims as presented are possible, one which renders it stateable and the other being to the opposite effect, it is incumbent on me to consider the former. This must be particularly apposite when dealing with a case presented by a litigant in person.

125. Ms Ooi's position is that all of the claims are connected and that there is a public law role and duty on the part of banks such as Promontoria's predecessors in title. This alleged public law duty is said to be supported by *Bolger v. Osborne* [1996] IEHC 24. I do not regard that case to be relevant and this alleged public duty of Promontoria is not pleaded and it is difficult to understand its legal or factual connection to the relief sought.

126. However, there is a plausible basis for Ms Ooi to assert, as she does, that the reliefs are all connected. Promontoria seeks to have the Breach of Duty Claims struck out on the basis there is no privity, and was no engagement with, Ms Ooi. However, this may be regarded as somewhat circular.

127. I do not consider it to be a well-founded application to strike out the claims of breach of duty, on the premise that there was no engagement or privity with Ms Ooi, this being, on one view, the precise complaint the Constitutional Claim, is directed towards. However, I regard the Breach of Duty Claims as meeting the necessary threshold to resist the Strike Out Application only insofar as they do concern the Act of 1976. There is no stateable basis for any additional non-particularised duty on the part of Promontoria or its predecessors towards Ms Ooi.

Family Home Claims

128. If there was a degree of circularity to the Breach of Duty Claims, there is a near complete circle with the Family Home Claims. The basis on which Promontoria seeks

to have these claims struck out is that Dromin House is not, and has been found not to be, a "*family home*" within the meaning of the Act of 1976.

129. The primary purpose of these Proceedings is to challenge the exclusion of Dromin House from the definition of the "*family home*" in that Act.

130. Given that the arguability of this Constitutional Claim itself is not at issue, it would be unsound to strike out any aspect of claims as bound to fail or disclosing no reasonable cause of action on the basis contended by Promontoria. They may stand or fall with the overarching Constitutional Claim, but I do not see how findings that were previously made confirming the exclusion of Dromin House from the Act of 1976 can be a justification for striking out a challenge to precisely that exclusion.

Second Mortgage Claim

131. The basis for Promontoria's application to strike out this claim is that Ms Ooi was not a party to the Second Mortgage. This is again a circular proposition. If Ms Ooi is correct in her primary constitutional challenge, the question of the appropriate reliefs can then be weighed. This Second Mortgage Claim is not a standalone claim, but rather a prayer for relief arising from the Constitutional Claim and I do not see that it is appropriate to strike it out as bound to fail on its own merits.

Misrepresentation Claim

132. The basis on which this Claim is sought to be struck out is that it is lacking in merit and is, in any event, barred by the operation of the Statute of Limitations 1957.

133. This claim is quite distinct from the other claims in the Proceedings as it does not relate to application of the Act of 1976 or the statutory declaration that was made under that Act in 2007. It does appear relatively evident (and not to be in dispute) that Ms Ooi was not a party to the Compromise Agreement and that no representation was made to her in the context of it.

134. Given these facts, the claim of misrepresentation as presented in the Statement of Claim does appear to be misconceived and to have no reasonable prospect of success. In making

this finding, I am mindful of the possibility of amendment, but based on *McAndrew v. Launceston Finance Property DAC*, am satisfied that there is no proposed or apparent amendment suggested by Ms Ooi that could salvage this Claim.

135. The operation of the Statute of Limitations is less certain, as it is not possible from the pleadings to identify whether fraud or similar is alleged. This does not in any event require determination here.

136. The striking out of the claim of misrepresentation does not preclude the introduction of the Compromise Agreement as part of the factual context at the trial of these Proceedings or prevent Ms Ooi placing reliance on it in evidence as she may see fit.

Abuse of Process

137. Promontoria's position, in summary, is that these Proceedings are a collateral attack on the Possession Order and were issued as a delayed tactic. It is asserted that these Proceedings are an attempt to re-litigate matters that were dealt with in the Possession Proceedings. The timing of the issue of these Proceedings on 13 February 2024, two days before the hearing of the Possession Appeal, coupled with the last-minute application to adjourn that hearing, is said to evidence this position.

138. Promontoria relies heavily on the decision of Simons J in *Rippington v. Ireland* [2019] IEHC 393, [2011] 4 IR 1, ("*Rippington*") and the decision of the Court of Appeal in which the High Court judgment was upheld ([2021] IECA 97).

139. Ms Ooi's position in reply is that these Proceedings were prompted by the delivery of the Supreme Court judgment in *O'Meara* and that it took a few weeks to prepare and issue them (Ms Ooi being a litigant in person).

140. There are some preliminary factual observations that are relevant to the allegation of abuse of process:

a) First, it appears from the information furnished to me that these are the first proceedings that have been issued by Ms Ooi.

b) Second, Ms Ooi applied to adjourn the Possession Appeal to allow these Proceedings to go first, and also made submissions in the context of that Possession Appeal regarding the challenge to the constitutionality of the Act of 1976, but these submissions were found not to be relevant to the Posssession Appeal, and to be more appropriately dealt with in these Proceedings (the position which was advocated by Promontoria).

c) Third, consequently, the Constitutional Claims were not adjudicated upon in the Possession Proceedings, or any other proceedings to which Ms Ooi was party.

141. It is next relevant to consider the primary case relied on by Promontoria, *Rippington*. As recorded in the judgment of Simons J, Ms Rippington had issued previous proceedings challenging the will of her late sister and then issued proceedings seeking to invalidate a ruling that had been made in the first proceedings. This was challenged as an abuse of process. Simons J explained:

> *"It is an abuse of process for Ms Rippington to seek to reagitate this argument in circumstances where she neither sought to appeal the order at the relevant time nor applied to O'Neill J. to vary the order… It is not open to Ms Rippington to use the within proceedings to launch a collateral challenge to this finding. This is especially so in circumstances where the within proceedings represent, at the very least, the fifth attempt by Ms Rippington to set aside the order"* ([9]).

142. That summarises neatly one part of the factual premise of the decision in *Rippington*: it was the fifth time Ms Rippington had sought to set aside the same order. The order striking out that case was also based on the absence of any loss or damage or an actionable wrong, and the absence of necessary parties. There are significant distinctions between that case and the situation addressed in this Strike Out Application.

143. The judgment of MacGrath J (Costello and Collins JJ concurring) in the Court of Appeal attaches great weight to the fact that the same issues had been fully argued, heard and – significantly – decided at first instance and on appeal. In a passage which was

opened by counsel for Promontoria, MacGrath J referred to the affidavit sworn by Ms Rippington and noted ([47]),

> *"It is patently clear from that affidavit that she wishes to relitigate matters concerning the estate of her sister. All such issues have been fully articulated, argued, and determined, not only at first instance but on appeal and it is clear that, as pleaded, Ms. Rippington seeks, impermissibly, to reopen and to challenge final court orders collaterally."*

144. These considerations play quite differently in this case and it is simply not apparent that the factors that weighed in favour of the orders made in *Rippington* are present here. Put plainly, the issues of these Proceedings were not determined in the Possession Appeal.

145. It was said on behalf of Promontoria that Ms Ooi had a full opportunity to make any submissions she wished in the Possession Proceedings and is now trying to re-litigate the same case. However the judgment of Bradley J records that Promontoria submitted that constitutional arguments were irrelevant to the Possession Proceedings and would be addressed in these Proceedings instead ([83]-[84]):

> *"..Mr. Aylward BL submitted that Ms. Ooi's submission and reliance on the judgment of Hogan J. in O'Meara & Ors v The Minister for Social Protection & Ors [2024] IESC 1 was in relation to her separate constitutional challenge and she had not addressed any matter which would prevent the court from granting Promontoria's application.*
>
> *... In assessing Ms. Ooi's submissions, I note that her central focus concerned the separate constitutional challenge she has brought in relation to section 2 of the 1976 Act which also grounded her application for an adjournment at the commencement of the hearing before me. That constitutional challenge will come on for hearing in due course but Ms. Ooi's submissions, in response to Mr. Aylward BL, did not address the matters which have to be considered in the application before me which is an application made for possession by Promontoria under the jurisdiction of the Circuit Court (in an appeal to this court)."*

146. The proposition that Ms Ooi had the full opportunity to present these arguments is not as clear as suggested and it is certainly not apparent that it supports an application to strike out these Proceedings against Promontoria on the grounds that the issues are spent or have been determined and this is an attempt at re-litigation.

147. Further, as already noted, any prospect of a collateral challenge could have been avoided if Promontoria had not opposed the adjournment of the Possession Appeal. While it is entirely understandable that Promontoria took the position it did, given the last-minute issue of these Proceedings, it does undermine its attempt to now have these Proceedings struck out.

148. Insofar as there is a concern about a collateral attack on the Possession Judgment, and on the previous findings that Dromin House is not a '*family home'*, this is another side of the retroactivity question. There is and can be no question but that the definition of '*family home'* that was applied in previous cases involving Dromin House are based on the law (and the interpretation of same) as it stands. The question that could arise (depending on the outcome here) is whether and what impact a declaration that s. 2 of the Act of 1976 is unconstitutional would retroactively have on those related cases.

149. Finally, Promontoria's counsel placed some emphasis on the lengthy and turgid history of litigation involving Mr McDonagh. This is understandable. However sight cannot be lost of the fact that Ms Ooi is the plaintiff in these Proceedings. She is challenging the exclusion of her non-marital relationship and home from the scope of s. 2 of the Act of 1976. It would be invidious if that same relationship was recognised and relied on as a ground to prevent her pursuit of that challenge.

Conclusion on the Strike Out Application

150. I am not satisfied that Promontoria has discharged the onus it bears to show that Ms Ooi's claim against it is bound to fail, discloses no reasonable cause of action, or has no reasonable prospect of success.

151. This decision is subject to the findings that the claim in misrepresentation does not disclose a reasonable cause of action and the claim of breach of duty only discloses a reasonable cause of action insofar as it concerns the application of the Act of 1976.

INJUNCTION APPLICATION

Relevant legal principles

152. In any application for an injunction, the applicable legal principles are not and cannot be in dispute.

153. The first, threshold step is that the applicant for injunctive relief must demonstrate that there is a serious issue to be tried. This is a low hurdle and requires only that the claim not be frivolous or vexatious (*Merck Sharp & Dohme v. Clonmel Healthcare* [2019] IESC 65 [30], [2020] 2 IR 1, *"MSD").* It has been likened to the threshold for the dismissal of a claim pursuant to the inherent jurisdiction of the Court (*Betty Martin Financial Services Limited v. ESB DAC* [2019] IECA 327 ("*Betty Martin Financial Services*"), [42]).

154. Beyond that, the key question is firmly established by the judgment of the Supreme Court in *MSD* to be whether the balance of justice as between the parties requires the grant of the injunction sought pending the trial of the proceedings.

155. There is no checklist or "*mechanical rules*" (*MSD* [34]) to apply. Rather, in recognition of "*the essential flexibility of the remedy*" (*MSD* [28], [36]), and the objective of finding "*a just solution pending the hearing*" (*MSD* [34]), the overarching imperative is to have regard to the specific facts and matters that arise in each specific application with a view to doing justice between the parties pending trial.

156. The following general principles were set out by O'Donnell J (as he then was) in that case:

> *"(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely*

unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted;

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

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

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

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

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

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

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

157. A factor that is also to be weighed in the balance is whether permanent injunctive relief might be granted in those terms at trial (as suggested by *MSD*). Otherwise, no interlocutory inunction should be granted:

> *"It is a basic test for the grant of an interlocutory injunction that the case is one which if the plaintiff were to succeed at trial a permanent injunction would be granted."* (*H. A. O'Neil Limited v Unite the Union* [2024] IESC 8, [39] O'Donnell J).

158. Depending on the particular circumstances, delay can also militate against the grant of injunctive relief. Butler J expressed this as follows:

> *"Delay is not an absolute concept and what is "reasonable" will vary from case to case. The impact of any given period of delay in the particular circumstances will be relevant to the extent which that delay makes it inequitable for the court to grant the relief sought."* (*Aviareto Ltd v. Global Closing Room Limited* [2021] IECH 377 ("*Aviareto*"), [71]).

159. Even when there is unjustified delay, the Court retains the discretion to decide its impact. In *Betty Martin Financial Services*, for example, Collins J held ([107]):

> *"Having regard to all of these considerations and allowing that there was delay on the part of the Agent and also allowing that the Agent has not convincingly explained that delay, I agree with the Judge that it would not be just or equitable to refuse the injunctive relief sought on grounds of delay."*

160. In *Aviareto*, Butler J also highlighted the relevance of prejudice when assessing delay ([83]):

"Delay is relevant to equitable relief largely because it may be inequitable in the sense of being unfair to the other party to grant such relief after an extended delay. The refusal of relief on the grounds of delay is not intended to punish the party which has been guilty of that delay but rather to protect the innocent party. At its height, an extended delay may indicate acquiescence on the part of a plaintiff with the action being taken by a defendant. In other cases, delay on the part of a plaintiff may have caused the defendant to incur expense on the assumption that its actions were not being challenged which would not have been incurred had the plaintiff moved more quickly. Rights may have accrued by virtue of delay which would not be a factor in the litigation of the delaying party had moved quickly."

Relevant Chronology

161. The specific facts of the Injunction Application are important and may be summarised as follows:

28 July 2007	Statutory declaration by Mr McDonagh for the purposes of the Act of 1976
3 August 2007	Execution of the Second Mortgage
18 May 2021	Issue of the Possession Proceedings
18 January 2023	Issue of Possession Order in Circuit Court with 18 month stay
22 January 2024	Judgment of the Supreme Court in *O'Meara*
13 February 2024	Issue of these Proceedings and the Joinder Application
15 February 2024	Hearing of the Possession Appeal
12 March 2024	Delivery of the Possession Judgment
1 May 2024	Fixing of the hearing date of the Strike Out Application (and the Joinder Application) for 25 October 2024
7 September 2024	Expiry of the stay on the Possession Order
25 September 2024	Execution Order issued
14 October 2024	Order for ejectment issued by the County Registrar
17 October 2024	Call-over of the Strike Out Application and the Joinder Application (at which Ms Ooi was present but made no reference to any injunction application)

17 October 2024	Affidavit sworn by Ms Ooi grounding the application for an interim and interlocutory injunction
18 October 2024	Issue of the Injunction Application and *ex parte* application for *interim* injunction and for short service of the Injunction Application (granted by order of Cregan J)
22 October 2024	Date for vacation of Dromin House
23 October 2024	Application for leave to appeal the Possession Judgment to the Supreme Court
25 October 2024	Hearing of the Strike Out Application and the Injunction Application (Joinder Application not pursued by Ms Ooi).

162. Against this background, it is necessary to consider Ms Ooi's Injunction Application.

163. There are six broad topics that must be assessed in this Application:

(a) The existence of a serious issue to be tried;
(b) The availability of a permanent injunction;
(c) The assertion of delay in seeking injunctive relief;
(d) The absence of an undertaking as to damages;
(e) Allegations of material non-disclosure;
(f) Other factors in the balance of justice.

Serious issue to be tried

164. There is no dispute about the threshold requirement of a "*serious issue to be tried*" being a low one, which has been equated with the threshold for the dismissal of a claim (*Betty Martin Financial Services Limited v. ESB DAC* [2019] IECA 327 [42]).

165. Ms Ooi's case is that Dromin House is her family home and that there is an arguable case that s. 2 of the Act of 1976 (on which Promontoria and Mr McDonagh relied) discriminates against her on the ground of marital status in violation of several sub-articles of Articles 40 and 41 of the Constitution. She swears in the grounding affidavit sworn on 17 October 2024 that the repossession was due to take place on 22 October

2024. She also addresses the Possession Appeal, which she said was limited to the law on repossessions, and she states that the constitutional claims were found to be for another forum.

166. Promontoria rely on the submissions made in support of the Strike-out Application to demonstrate the absence of a "*serious issue to be tried*".

167. As it has already been found that the threshold for a strike-out is not reached, this is not a case which has no prospect of success or which discloses no reasonable cause of action. This translates into a finding that the low threshold of arguability for the Injunction Application is met.

Availability of a Permanent Injunction

168. One factor that it is incumbent on me to consider is whether there is a likelihood of a permanent injunction (MSD at [65(1)]). This was not addressed at the hearing but it is an important threshold test for the grant of an injunction.

> "*It is a basic test for the grant of an interlocutory injunction that the case is one which if the plaintiff were to succeed at trial a permanent injunction would be granted*." (*H. A. O'Neil Limited v Unite the Union* [2024] IESC 8, [39] O'Donnell J).

169. In this case, the amount outstanding on the loan facility is € 5,702,991. While I was not addressed on this point at the hearing, Ms Ooi swears in her affidavit grounding the Injunction Application that she understands that the Second Loan was applied to clear the First Mortgage and a surplus of € 2 million was applied towards costs associated with the commercial investment that was entered by Mr McDonagh and others at that time. Ms Murphy (who swore the affidavit on behalf of Promontoria in reply to Ms Ooi's affidavit) explains that the First Loan was "subsumed" into the Second Loan.

170. Accordingly, the larger proportion of the Second Mortgage appears to have applied in substitution for the mortgage that was taken out by Mr McDonagh in 2005 when he acquired Dromin House and before Ms Ooi resided there. This is a matter on which

more detailed evidence and submission may be available at trial, but from the information presented to me, it appears that at least a proportion of the current indebtedness can be traced back to the First Loan (which was then subsumed into the Second Loan).

171. Given that the Act of 1976 can only be relevant to the Second Mortgage, there appears to be some possible impediment to the prospect of a permanent injunction being granted. At a more fundamental level, while I am satisfied that Ms Ooi's case against Promontoria meets the low threshold required to resist the strike-out of those claims, I have placed reliance on the prayer for damages, declaratory relief and other orders under s. 5(2) of the Act of 1976 in making that finding. Similarly, while I do not consider it possible or prudent at this remove to determine whether Promontoria's rights may be interfered with retrospectively in the event of a finding of unconstitutionality, it is inescapably the case that the Possession Order is a presumptively valid and binding determination which must weigh heavily in the balance in an application of this nature. As O'Donnell J noted when weighing the rights of a holder of an intellectual property right in MSD, it is a "*right conferred by a process of law which is presumptively valid*" ([55]).

172. There is also the fact that the debt attached to Dromin House is currently in excess of € 5.7 million and there is no dispute that no payments have been made to service or discharge any of the monies owing in connection with Dromin House since 2013, 11 years ago.

173. Ms Ooi (on her own evidence and being the sole Plaintiff here) has no means to give an undertaking.

174. In these circumstances, a permanent injunction in favour of Ms Ooi would appear to involve erasing the security for the Second Loan, which subsumes the debt that was attached to the property when she first moved into it, and cancelling the right of Promontoria to rely on the security for that loan (which Ms Ooi on her own evidence cannot pay).

175. It is also relevant to consider the reliefs sought by the plenary summons and statement of claim. There are several declarations and damages sought, and an order to set aside

"*the conveyance*" of 3 August 2007. There is however no prayer for a permanent injunction. Also, the loan that was subsumed into the Second Loan is not addressed. I would not regard this question of pleading as a sufficient standalone basis to refuse an interlocutory injunction, particularly given Ms Ooi is a litigant in person, but it is a factor.

176. The cumulative effect of the matters just mentioned, is that there would be several hurdles to the grant of a permanent injunction in favour of Ms Ooi. It cannot be said with any assurance whether a permanent injunction would be granted, and I make no attempt to pre-judge how a court in full possession of all relevant evidence and submissions may weigh this question, but at this preliminary stage, on the basis of the limited information before me, it seems more likely than not that a permanent injunction would be refused.

177. This conclusion weighs against the grant of the injunction sought by Ms Ooi.

Delay

178. Promontoria oppose the injunction on the ground that Ms Ooi is guilty of delay such as to disentitle her to the injunctive relief sought. Promontoria's case is that she waited until after the expiry of the stay and then sought an injunction ex parte on the eve of the ejectment order taking effect, to try to prolong the stay. It is said that the injunction should have been sought when these Proceedings were issued in February 2024. Ms Ooi in reply points to the judgment in O'Meara. She also relies on alleged delay by the State in these Proceedings.

179. The chronology summarised above demonstrates that Ms Ooi issued these proceedings on 13 February 2024 and was aware since 12 March 2024 that the date on which Promontoria would be entitled to take possession of Dromin House was 7 September 2024. She nonetheless waited for seven months, until the week the ejectment order was issued, to apply for an injunction and seek to appeal the Possession Judgment to the Supreme Court. In the meantime, steps were taken by Promontoria to obtain an execution order and proceed with ejectment proceedings.

180. It is undeniable that Ms Ooi has not moved with all due expedition to seek an injunction in these Proceedings.

181. Ms Ooi has moreover failed to address or explain why it took from January 2024 to October 2024 to apply for an injunction. Any delay in the delivery of the defence by the State Defendants is not relevant to the delay in seeking injunctive relief.

182. I am of the view that, in the particular circumstances of this case, the delay is excessive and unexplained, and that it has caused prejudice to Promontoria. This must be weighed against the overall background, in which the Second Mortgage was executed in Augus 2007, some 17 years ago and the Possession Order was made by the Circuit Court on 18 January 2023, yet Ms Ooi waited until days before she was due to vacate the property before seeking urgent ex parte relief.

183. Promontoria also has a – not unfounded – complaint that there was delay in the issue of these Proceedings and points to the fact that they were issued two days before the hearing of the Possession Appeal.

184. The clear allegation is made that Ms Ooi has been tactical in the timing of these Proceedings and this Injunction Application and, while there is an explanation given for the timing of the issue of the Proceedings (related to the delivery of the judgments in *O'Meara*) I accept that the overall allegation of tactical timing is well-founded on the basis of the facts before me.

185. In particular, there has been excessive, unexplained delay in the issue of this Injunction Application, this delay appears to be tactically motivated, and Ms Ooi has offered no explanation for it. It has also caused prejudice to Promontoria, which acted on the basis of its presumed entitlement to take possession on 7 September 2024.

186. In the very particular circumstances of this case, I am of the view that the delay in issuing this Injunction Application is a factor which weighs in the balance against that grant of the relief sought.

Undertaking as to Damages

187. Promontoria relies on the absence of an undertaking in damages from Ms Ooi to defeat the injunction. What Ms Ooi says in this respect is that she does not have the means to give such an undertaking. Both parties opened authorities on the point, including *Nolan v. Dildar Ltd.* [2020] IEHC 243 (at 227-228, 237), *Minister for Justice Equality and Law Reform v Devine* [2012] 1 IR 326 (at 348-9, 359-360) and *Bainee Alainn Limited v. Glanbia plc* [2014] IEHC 482.

188. In *Nolan v. Dildar Ltd*, Barnville J (as he then was) noted the "*general position*" that an undertaking in damages is "*almost invariably required*" ([229]) and that the court must be satisfied of the ability of the party giving the undertaking to meet a claim made on foot of it ([237]). In *Minister for Justice, Equality and Law Reform v. Devine*, O'Donnell J (dissenting) confirmed that a Court may grant an injunction without an undertaking and that it is a question of discretion and that "*there is no absolute rule requiring the provision of an undertaking in damages*"([96] – [98]). Fennelly J in that case drew a distinction between interim and interlocutory injunctions, noting that "*very powerful reasons*" would be needed to dispense with the requirement of an undertaking in the former, and that, when an interlocutory order is sought, the court can hear both sides and decide whether there are grounds for departing from that requirement ([66]-[67]).

189. These judgments do confirm that it is not an unwavering requirement of every injunction application that an undertaking to discharge damages must be given.

190. Promontoria's position is that Ms Ooi has not discharged the burden of showing she cannot provide an undertaking and that the lack of an undertaking here is not justified.

191. While it is undoubtedly the case that an undertaking is not always necessary for the grant of an injunction, the availability or otherwise of such an undertaking is a relevant factor in the balance of justice.

192. In this case, there has been no cross-examination of Ms Ooi on her assertion that she lacks means to give an undertaking and no evidence has been adduced to support or

contradict that assertion. I do not therefore have any basis to decide whether Ms Ooi does or does not have means, but given her evidence has not been tested, I have no basis not to accept it (mindful of the findings of the Supreme Court in *RAS Medical Ltd v. RCSI* [2019] IESC 4).

193. The question then is how the failure to give an undertaking (owing to an asserted lack of means) is to be weighed as a factor in the balance of justice.

194. There is a real risk that Promontoria would suffer financial harm if the injunction is granted and Promontoria ultimately prevails. Promontoria would be left with this asset in respect of which there are significant arrears, which arrears would continue to accrue and grow throughout the duration of any injunction. The only way this undoubted harm to Promontoria could be remedied would be by means of an award of damages. However, in the absence of an undertaking (or perhaps even if one were given), it seems highly likely that any such award would be irrecoverable. This is a concrete risk of prejudice which must be weighed in the balance of justice.

195. In the particular circumstances of this case, I do consider that the absence of an undertaking in damages weighs against the grant of the relief sought.

Allegations of Material Non-disclosure

196. Promontoria alleges that there was material non-disclosure, a failure to act in good faith, when Ms Ooi applied for an ex parte injunction on 18 October 2024. Five matters are alleged to have been wrongly and dishonestly withheld from the Court.

197. First, it is said that Ms Ooi failed to disclose that she has no legal interest in or title to Dromin House. I am not satisfied that there was an improper failure to disclose this to the Court. It is plain from her grounding affidavit that Ms Ooi relies on asserted rights under the Act of 1976, which would not be consistent with a claim of direct legal interest. While there is a bare averment in her replying affidavit that she holds a legal and equitable interest in Dromin House, this was not before the Court on the ex parte application.

198. Second, it is said that Ms Ooi failed to disclose the fact that Dromin House had previously been found not to be a '*family home'*. For reasons addressed earlier in this judgment, I am not satisfied that the prior findings to this effect are material to these Proceedings. Those findings were undoubtedly correctly made on the basis of s 2 of the Act of 1976 as it is currently applied, which is what these Proceedings seek to challenge.

199. Third, Ms Ooi failed to disclose the Possession Order or the stay contained therein. This is an omission and it would certainly have been preferable if these matters were before the Court hearing the ex parte application. However, I do not regard them as material, given that several of the relevant dates were included in the grounding affidavit, which discloses that the Possession Proceedings commenced in 2021 and the Execution Order did not issue until 25 September 2024.

200. Fourth, complaint is made that Ms Ooi did not disclose that she was legally represented in the Circuit Court. I am not satisfied that this is a material point. The focus of her grounding affidavit is on the Possession Appeal, which was when she first raised issues concerning the Act of 1976. I do not accept that a failure to disclose whether she was legally represented in the Circuit Court was something that could reach the threshold of material non-disclosure.

201. Fifth, Promontoria asserts that Ms Ooi failed to disclose that she had appealed the Possession Order (with Mr McDonagh). This is not an assertion to which I attach any weight. The title to the Possession Appeal records Ms Ooi as a notice party and that is how she was described in the Possession Judgment. In her submissions (which unfortunately veered into unsworn evidence on this point), she insisted that she was not permitted to file a notice of appeal and it was accepted from Mr McDonagh only. In her replying affidavit she confirms that she was not an appellant in the Possession Appeal. There was no notice to cross-examine her on this point, and the material available to me supports her position. I reject Promontoria's allegation of non-disclosure in this respect.

202. In light of the above findings, I do not believe there was non-disclosure that is sufficient to weigh against the grant of the relief sought. However, I must observe that it is disquieting that Ms Ooi attended Court on 17 October 2024 when the Strike Out Application was listed, but made no reference to the intention to issue an injunction

application, particularly given that she swore the affidavit grounding the injunction application that same day and made an ex parte application for relief the following morning. This is not however sufficient to be weighed in the balance in this Application.

Other factors in the balance of justice

203. Dromin House is the home in which Ms Ooi resides with her family. It is not a commercial investment, but a home and cannot be analysed in purely monetary terms. The fact that a property is a family home (whether or not so recognised under the Act of 1976) is an undoubtedly highly important factor in the balance of justice, as assured by article 8 of the European Convention on Human Rights. It cannot however always be decisive (*Launceston Property Finance Ltd v. Burke* [2017] IESC 62, *Morrissey v. NAMA* [2019] IEHC 576). In this particular case, there are several factors which weigh against the grant of an injunction and for these reasons the order is refused.

204. It is a home which was acquired in 2005 with the benefit of a mortgage in the amount of €3 million before Ms Ooi began to reside there. This was ultimately restructured and subsumed into a mortgage of in excess of €5 million.

205. No payment has been made towards the debt owed on Dromin House since 2013. Possession proceedings were issued in 2021 and the prospect of an eviction has been live since then.

206. The inescapable fact is that there is a long-standing, substantial and growing amount of debt attached to the property. Promontoria's counsel confirmed that the monthly repayments are approximately €50,315. The risk and scale of financial exposure will only increase the longer Dromin House remains unsold. Indeed, given Ms Ooi's own evidence about her want of means, it may be questioned whether the retention of a property of the scale, value and cost of Dromin House could be realistic for her.

207. If Ms Ooi ultimately succeeds in these Proceedings, a difficult question may arise about whether and what remedies are available against Promontoria. Among the remedies sought, is an award of damages and relief under s. 5(2) of the Act of 1976. If such an

award was made, there is no reason to doubt Promontoria could and would make the necessary payments. This has been confirmed by Promontoria.

208. It must also be recorded that the Circuit Court granted a stay of 18 months on the Possession Order and Ms Ooi and her family have had this additional period of time to make arrangements to vacate Dromin House.

209. An additional matter that is relevant to weigh in the balance is the Possession Order. While the retroactive effect of a finding that s. 2 of the Act of 1976 is invalid may be a matter to be assessed and determined another day, the Circuit Court and the High Court on appeal have determined that Promontoria has a right to possession of Dromin House. While an application has (belatedly) been made for leave to appeal to the Supreme Court, Promontoria must nonetheless be treated as having a presumptively valid right to possession. Weight must be attached to that right in the balance of justice (per *MSD*).

210. I do not accept Ms Ooi's claim that Promontoria will suffer no prejudice by the grant of the injunction, owing to increasing property prices. Promontoria has an established right to possession as things stand and the effect of the injunction is to deprive it of that entitlement.

211. Promontoria asserts that the injunction would benefit Mr McDonagh and relies on this as a relevant factor which weights against the grant of the injunction. I do not accept that this is a relevant or appropriate matter to consider, particularly given the nature of the claim which Ms Ooi (in her own name) seeks to pursue in these Proceedings. For this same reason, I have not had regard to the affidavit which Mr Mc Donagh filed on 23 October 2024. He was given leave to file that affidavit in respect of the Joinder Motion, but addresses in it matters related to the Strike Out and Injunction Applications, as well as other matters that are not relevant to these Proceedings. Mr Mc Donagh is a defendant in these Proceedings and not a party seeking an injunction. There was opposition to the content of this affidavit being weighed and I accept that is well-founded and do not have regard to it.

212. A final matter to consider is the *status quo* (*MSD* [33]). The simple fact is that Promontoria has a presently established right to take possession of Dromin House and

that is a situation to which regard must be had, if matters were evenly balanced. Given the other factors addressed, I do not believe there is an even balance, but even if there were, it would be a "*counsel of prudence*" (*MSD* [33]) not to interfere with the present *status quo.* This would also lean towards the refusal of an interlocutory injunction.

213. While this state of affairs is regrettable, I conclude that there are various factors in the balance of justice which weigh cumulatively against the grant of the relief sought.

CONCLUSIONS

214. The application by Promontoria to have these Proceedings struck out on the ground that they disclose no reasonable cause of action, are bound to fail or are an abuse of process, is refused. This is subject to the caveat that the claim of misrepresentation does not disclose a reasonable cause of action and is struck out and the claim of breach of duty is struck out save insofar as it concerns the application of the Act of 1976. Ms Ooi is directed to deliver an amended statement of claim.

215. Ms Ooi's application for an interlocutory injunction is refused.

216. In light of the foregoing, my provisional view is that the appropriate order as to costs is for there to be no order. However, I will hear submissions from the parties on 20 November 2024 at 10.30am, including submissions as to costs, should either party wish to contend for a different order.