UNAPPROVED
THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 363
Appeal Number: 2019/427

Whelan J.
Faherty J.
Binchy J.

BETWEEN/

CASTLETOWN FOUNDATION LIMITED

PLAINTIFF/RESPONDENT

- AND -

GEORGE MAGAN

DEFENDANT/APPELLANT

Judgment of Ms. Justice Faherty dated the 21st day of December 2020

1. This is the defendant's appeal of the judgment and order of the High Court (Hunt J.) dated 10 September 2019 refusing him relief pursuant to Part II of the Landlord and Tenant (Amendment) Act 1980 as amended ("the 1980 Act") and holding that his residential tenancy was validly determined under the provisions of the Residential Tenancies Act 2004 ("the 2004 Act"), that he did not enjoy any right of relief against forfeiture and that he had not established any other legal right to occupation or possession of the property in question.

Background

2. The relevant background (paras. 3-36 hereof) is for the most part derived from the judgment dated 21 November 2018 delivered by Haughton J. in the proceedings.

3. The proceedings concern a property known as Castletown Cox House and Estate, County Kilkenny. In 1991, the defendant, who is a life peer in the United Kingdom, purchased the property through Castletown Estates Limited ("CEL"). Throughout the 1990s, he purchased surrounding farmlands, resulting in a total acquisition, to include Castletown Cox House, of 513 Acres. It is acknowledged by all concerned that Castletown House is one of Ireland's few surviving great Georgian Houses. Since 1999, substantial sums have been spent on the refurbishment and modernisation of the property.

4. The defendant arranged for Castletown House and Estate to be transferred into a trust -Eaglehill Trust-for two of his children, Henrietta Black (née Magan) and Edward Magan. The current trustee (having been appointed on 4 April 2013) is Yew Tree Trustees Limited (formerly DW Trustees Limited). The trust is administered in Jersey.

5. The plaintiff is a limited liability company registered in the British Virgin Islands. It is the owner of Castletown House and Estate. In turn, the plaintiff is owned and controlled by the trustee. CEL manages Castletown House and Estate on behalf of Eaglehill Trust.

6. While the defendant's primary home is in London, Castletown House has been a secondary home for the Magan family since in or about the 1990's.

7. By Letting Agreement dated 15 December 2010, the plaintiff let Castletown House and some 53.61 acres of land to the defendant for a term of three years, terminating on 12 December 2013, at a rent of €100,000 per annum together with VAT, payable by monthly instalments ("the Letting Agreement" or "the December 2010 Letting Agreement"). The Letting Agreement appears to have replaced an existing business tenancy concluded between the parties in 2004.

8. Pursuant to clause 2.1 of the Letting Agreement, the defendant agreed to pay the rent at the time and in the manner specified in the agreement. Under Clause 2.7 he agreed not

to reduce any payment of rent by making any deductions therefrom or setting off any sum against rent. Pursuant to Clause 2.17 he agreed "to use the property as a residence only for the first named tenant and his dependants." Clause 4 provided, *inter alia*, that whenever the tenant was seven days late in paying any rent, even if it was not formally demanded, the landlord may end the tenancy by giving the tenant not less than four weeks written notice. Any such termination would not cancel any outstanding obligations owed by the tenant to the landlord.

9. Notwithstanding Clause 2.17, the tenancy was not registered with the Residential Tenancies Board ("RTB").

10. It is common case that on the expiry of the term of the tenancy on 12 December 2013 the defendant continued in occupation of the demised property on foot of a tenancy from year to year, arising by implication. It is also the case that the last rent payment or contribution to rent was in July 2012. As set out in the judgment of Haughton J., as of 12 April 2018 the total sum due in respect of rent was €571,893 exclusive of interest. The defendant did not dispute those figures. It is the case that the defendant raised a counterclaim in the within proceedings alleging breach of contract on the part of the plaintiff under which the parties had made an agreement in 2005 for the upkeep and maintenance of Castletown House. In an affidavit sworn 31 August 2018, the defendant averred that the plaintiff had failed to pay any sum in respect of the upkeep and maintenance from 2017 onwards in contrast to payments made by the defendant which were put at €361,167.72. As found by Haughton J., the running expenses of Castletown House are significant, being in the order of €500,000 per annum.

11. It appears that in or about mid-2015, the trust's primary lender, Sancus Jersey Limited (Sancus), was expressing serious concern to the trust in respect of accumulating debt. It indicated that unless a resolution was found it would call in the security held,

namely Castletown House and Estate. This triggered a process of consultation by the then trustee with the defendant and the beneficiaries of the trust. Following these consultations, on 3 October 2016 the defendant advised the trustee of arrangements being progressed whereby Castletown House Estate would be acquired at fair market value out of the trust ownership. According to the defendant, this was most likely going to be achieved through a financing of the Irish Heritage Preservation Trust. The defendant further advised that if by Friday 14 April 2017 the acquisition had not concluded, the trustee would need to seek a sale to a third party.

12. The April 2017 deadline passed without the defendant's proposal coming to fruition. Notwithstanding the correspondence of 3 October 2016, post April 2017, the position being adopted by the defendant and Mr. Edward Magan was that the trustee should proceed by way of sale of certain real estate in the UK instead of the Castletown Estate. However, the plaintiff did not agree with the defendant's stance and accordingly proceedings were brought in the Royal Court of Jersey ("the Jersey Court") by the plaintiff seeking approval in principle for the sale of the Castletown Estate. Those proceedings, in which the defendant and Mr. Edward Magan were both represented, were heard on 4 July 2017. On that date the Jersey Court, *inter alia,* approved the plaintiff's decision to market Castletown House and Estate.

13. On 6 July 2017, Mr. Edward Magan instituted High Court proceedings in this jurisdiction seeking to restrain the marketing and sale of Castletown Cox. These proceedings were initially stayed pending mediation which took place in London and led to a mediation agreement on 26 September 2017 under which the plaintiff could continue marketing the property but same would not be sold pending consideration of any refinancing proposal that the defendant and Mr. Edward Magan might put forward.

14. However, on the basis of no realistic refinancing proposal having been forthcoming, in October 2017 the plaintiff again applied to the Jersey Court to approve a sale of the property. At this time the indebtedness charged on the property was some £11.5m. stg. and was due for repayment on 21 December 2017. Having satisfied itself that all appropriate parties were represented or on notice, by Order of 31 October 2017 the Jersey Court directed, *inter alia*, that the Castletown Estate be sold at a price not less than €19m.

15. In November 2017, the plaintiff agreed to heads of terms for a sale in principle to a third party for a price in excess of €19m. This was in circumstances where the primary lender to the trust (Sancus) had provided a final deadline for the repayment of its loan.

16. It should be noted in July 2017, the defendant instituted proceedings in Bermuda seeking to remove the trustee in its capacity as manager of the trust and to set aside the decision by the plaintiff to sell the Castletown Estate. In a ruling of 13 November 2017, the Supreme Court of Bermuda held that while it had a jurisdiction to remove the trustee, it would be an abuse of process for the defendant to re-litigate in Bermuda issues which had already been determined by the Jersey Court following *inter partes* hearings, and inconsistent with the comity of courts for the Bermudian Court to permit its processes to be used to undermine the exercise by the Jersey Court of its lawful supervisory personal jurisdiction over trustees resident within its jurisdiction.

17. It should also be noted that the injunction proceedings brought by Mr. Edward Magan in this jurisdiction in July 2017 were set for hearing on 6 December 2017 but did not proceed.

18. By Notice of Termination dated 22 December 2017 ("the First Notice of Termination") served on the defendant, the plaintiff advised that "the tenancy of the dwelling at Castletown House, Carrick on Suir, Co. Kilkenny will terminate on 3 August, 2018. You must vacate and give up possession of the dwelling on or before the

termination date." The reason given for the termination was "the fact that the landlord intends to enter into a binding contract for sale within three months of the termination of the tenancy". The Notice advised that any issue as to the validity of the Notice or the right of the landlord to serve it must be referred to the RTB under Part 6 of the 2004 Act within 28 days from the receipt of the Notice. The defendant did not seek to challenge the validity of the First Notice of Termination before the RTB.

19. On 7 March 2018, the plaintiff was authorised by the trustee to exchange contracts for the sale of the Castletown Estate. Pursuant to the contract, the plaintiff was obliged to complete and deliver up vacant possession of the property by August 2018.

20. On 21 March 2018, the plaintiff served a notice headed "14 Day Warning Notice-Failure to Pay Rent-Notice served pursuant to Section 67(3) of the Residential Tenancies Act, 2004". The Notice referred to rent arrears of €568,559.90 as of 13 March 2018 and indicated that if the defendant failed to pay the rent within fourteen days the landlord "is permitted to terminate the tenancy giving 28 days' notice and by serving a notice of termination on you". This Notice was served without prejudice to the First Notice of Termination which had been served on the defendant on 22 December 2017 pursuant to s.34(4) of the 2004 Act.

21. On 12 April 2018, the plaintiff served a second Notice of Termination for "failure to pay rent" ("the Second Notice of Termination"). Thereunder, the defendant was advised that his tenancy would terminate on Friday 11 May 2018 and that he had to vacate and give up possession of the property on or before the termination date. The reason for the termination was said to be due to the breach of tenancy obligations in that the defendant had failed to pay rent on the dates it fell due for payment. Again, the Second Notice of Termination advised that any issue as to the validity of the Notice or the right of the landlord to serve it had to be brought to the RTB within 28 days of receipt of the Notice.

22. As of 12 April 2018, the arrears of rent totalled €571,893.00. In a letter of 9 May 2018 from the defendant's then solicitors Ivor Fitzpatrick & Co. to the plaintiff's solicitors A&L Goodbody, there was an acknowledgment that the defendant was "faced with a Notice of Termination expiring this Friday, 11 May, 2018".

23. On 10 May 2018, Ivor Fitzpatrick referred a dispute regarding the validity of the Second Notice of Termination to the RTB. The plaintiff's solicitors were not advised of the referral.

24. On the morning of Wednesday 23 May 2018, the plaintiff through its agents re-entered and recovered possession of Castletown House and the demised lands, a time when there were no members of the Magan family in occupation. As found by Haughton J., there was no evidence before the High Court to suggest that on the date of re-entry the plaintiff or its solicitors had any notice of the dispute that had been referred to the RTB on 10 May 2018.

25. The referral notice to the RTB alleged that the plaintiff's Second Notice of Termination was invalid on a number of grounds including that rent was not due or that there was dispute as to the amount, insufficient notice given, uncertainty of the notice and failure by the landlord to pay substantial sums due to the defendant (in respect of which the defendant proposed to institute High Court proceedings). In a letter of 15 May 2018 to the RTB from the defendant's solicitors, the RTB was requested to note that the dispute lodged was without prejudice to the defendant's assertion that the 1980 Act applied to him and the subject property. Accordingly, the RTB were asked to defer from further processing the dispute until the issues under the 1980 Act were resolved.

26. On 24 May 2018, Ivor Fitzpatrick wrote to the plaintiff's solicitors protesting at the "unauthorised and unlawful entry" onto Castletown Demesne and into Castletown House. The letter referred to the submission made on the defendant's behalf to the RTB and called

upon the plaintiff, its servants or agents to leave the property and to abide by the procedures of the RTB.

27. On 25 May 2018, A&L Goodbody wrote to Ivor Fitzpatrick asserting that the defendant was engaged in an abuse of process but proposed that the defendant and his family be permitted to stay at Castletown House on terms specified in the letter. This proposal was not accepted by the defendant.

28. By Notice of Intention to Claim Relief dated 14 June 2018 the defendant served notice on the plaintiff of his intention to claim a new tenancy under Part II of the 1980 Act in respect of Castletown House and 52.61 acres, and in the alternative €10m. compensation for disturbance, and compensation for improvements.

29. Following the expiry of the requisite 28 days provided in the notice, on 19th July 2018 the defendant issued Circuit Court proceedings entitled *"The Circuit Court of Kilkenny between George Magan Plaintiff and Castletown Foundation Limited Defendant"* by way of Landlord and Tenant Civil Bill seeking an order that he was entitled to a new tenancy, and alternatively compensation for improvements and/or disturbance.

30. Para. 3 of the endorsement of claim on the Civil Bill pleaded occupancy of the premises "continuously since 1991 and continuously since 1996 when the premises were demised to [the defendant] by Castletown Estates Limited". The further pleas referred, *inter alia,* to a lease of the premises to the defendant by way of "business letting agreement" dated 24 December 2004. Reference was made to the December 2010 Letting Agreement and that the defendant held the premises under a yearly tenancy at an annual rent of €100,000 arising on the expiry of the term fixed in the Letting Agreement. It was pleaded that the premises were a tenement within the meaning of s.5 of the 1980 Act. It was pleaded that the premises have been continuously in the occupation of the defendant within the meaning of the 1980 Act and that they have "*bona fide* been used, partly for the

purpose of carrying on a business within the meaning of the Act". It was further pleaded that the First Notice of Termination and the Second Notice of Termination were wholly invalid and of no legal effect. It was claimed that the defendant was entitled to a new tenancy in the premises in accordance with Part II of the Act, in particular s. 13 thereof.

31. On 24 September 2018 the defendant was advised by the trustee that the deadline (21 September 2018) for the repayment of the Sancus loans had passed in circumstances where Sancus had previously warned that enforcement would follow in the event of non-payment. The letter referred to the effect of default of the Sancus loan, which raised the prospect of Sancus instructing an insolvency practitioner to realise trust assets. The defendant was advised however that the trustee was "pleased to report that Sancus was paid this afternoon with a loan at 0% interest from the purchaser of the property. The loan is subject to retrospective repricing if the sale of Castletown does not complete in a timely manner." The defendant's solicitors, Ivor Fitzpatrick, were advised in similar terms by A&L Goodbody.

32. By the time of this correspondence, the plaintiff had instituted the within proceedings by way of plenary summons issued on 3 July 2018 seeking, *inter alia,* declarations that the tenancy entered into between the plaintiff and the defendant pursuant to the Letting Agreement had been validly terminated for, *inter alia,* the failure by the defendant to pay rent due and owing thereunder, that the defendant was not entitled to seek a new tenancy or other relief pursuant to Part II of the 1980 Act by virtue of s.17 thereof and that the defendant's intended application to court for relief for a new tenancy under the 1980 Act was an abuse of process. The plaintiff further sought injunctive relief against the defendant, judgment in the sum of €571,893 representing arrears of rent, damages for breach of contract, damages for unlawful interference of the plaintiff's economic interests and damages for the tort of abuse of process.

33. By his Defence and Counterclaim, the defendant sought possession of the property, if necessary, a declaration that the periodic tenancy was still subsisting, relief against forfeiture, damages for trespass, breach of contract and misrepresentation, aggravated and exemplary damages and judgment in the sum of €361,167.72.

34. A Reply and Defence to Counterclaim was delivered on 17 August 2018.

35. The matter was heard by Haughton J. in November 2018. The defendant was fully legally represented by GJ Maloney Solicitors and two senior counsel (Ivor Fitzpatrick having come off record in October 2018). The plaintiff's overall position was that the proceedings instituted in July 2018 were necessary to preserve the intended sale of Castletown House and Estate in the face of what were described in the plaintiff's submissions to this Court as "strategies" on the part of the defendant. The plaintiff contended that it was entitled as a matter of law to obtain judgment for the rent outstanding, thereby putting beyond doubt any contention that the rent was not due and owing and putting beyond doubt that the defendant was not entitled to a new tenancy by virtue of s.17 of the 1980 Act. It was also the plaintiff's contention that due to the urgency of the claim, the High Court could determine whether there was any basis to the claim to a new tenancy, given that the plaintiff's case was that claim was manifestly unstateable in law and brought for an ulterior purpose.

36. Following the hearing, Haughton J. was satisfied to grant summary judgment in the sum of €571,893 to the plaintiff. By Order of Haughton J. of 5 December 2018, the plaintiff was to recover against the defendant the sum of €457,541.40, which reflected the obligation on the defendant to remit to the Collector General 20% of the due rent by way of Witholding Tax.

37. It is common case that Haughton J. did not determine the issues concerning the defendant's entitlement to a new tenancy or whether the tenancy was validly terminated.

38. The learned judge did not accede to the plaintiff's application that the new tenancy issue should be determined in the High Court in circumstances where the urgency of the matter had abated because the loan which Sancus had advanced to the trustee had been repaid by way of a loan from the purchaser of Castletown House and Estate. He therefore stayed that aspect of the proceedings to allow the issue of entitlement to a new tenancy to be determined in the Circuit Court.

39. However in May 2019, Haughton J. lifted the stay put on the proceedings in circumstances where the defendant had not progressed the Circuit Court proceedings, and where the learned judge was satisfied that since the Circuit Court proceedings could not be determined by the end of July 2019, there were significant financial risks for the plaintiff if the defendant's claim to a new tenancy was not concluded in early course.

40. Upon lifting the stay, Haughton J. directed a trial in the High Court of the following issues:

(1) Does the defendant have an entitlement to seek a new tenancy under Part II of the 1980 Act on the grounds of business user?

(2) Does the operation of s.17 of the 1980 Act mean that the defendant is not entitled to statutory relief in connection with that tenancy in accordance with the provisions of the 1980 Act?

(3) Has the tenancy been validly terminated (to include but not limited to a finding that it has been validly terminated under the 2004 Act) such that the defendant is no longer entitled to possession?

(4) Does the defendant have any entitlement to relief against forfeiture?

(5) Does the defendant have any other legal basis upon which he is entitled to possession or occupation of the property?

41. By the time Haughton J. lifted the stay and directed the trial of the five issues referred to above, the defendant's solicitors, GJ Maloney, had come off record both in these proceedings and the Circuit Court proceedings and Adams Law had come on record. However, following the fixing of the hearing date for 10 and 11 July 2019, the defendant discharged Adams Law and notified the plaintiff that he would be representing himself.

Events prior to the trial scheduled for 10 and 11 July 2019

42. On 6 June 2019, the defendant appeared before Haughton J. seeking an adjournment. That application was refused but the time limit for the filing of the defendant's submissions was extended. Via email correspondence firstly addressed to the court by Mr. Edward Magan, on 8 July 2019 A&L Goodbody became aware that the defendant had a medical condition for which he had had invasive surgery and that he required a lengthy period of convalescence. A&L Goodbody's response in correspondence sent to Mr. Edward Magan on 8 July 2019 was to seek a detailed medical report as to the defendant's inability to attend the trial scheduled to commence on 10 July 2019. It was said that this was in circumstances where the trustee had received information that the defendant had not undergone surgery but rather an elective procedure. It was pointed out that the defendant had been seen out and about in London on 6 July and 7 July 2019. The defendant was advised that in the absence of such medical report being forthcoming application would be made by counsel for the plaintiff on 9 July 2019 for the case to remain listed for trial on 10 July 2019.

43. It appears that no immediate response was received from the defendant and, accordingly, the plaintiff's counsel brought the matter to the attention of Haughton J. on 9 July 2019. By the time the plaintiff's counsel appeared in court on 9 July, the High Court was in receipt of email correspondence including a medical report that had been sent by the defendant to Ms. Dermody, High Court Registrar.

44. As is clear from the transcript of the proceedings which took place before Haughton J. on 9 July 2019, the plaintiff cast doubt on the defendant's proclaimed inability to attend the trial scheduled for 10 July 2019 on the basis that, as advised to the plaintiff by Mr. Patrick Magan, another son of the defendant, the defendant's whereabouts and movements in London were inconsistent with the picture being portrayed in the email sent by Mr. Edward Magan to the court on the morning of 9 July 2019**.**

45. As the transcript shows, before adjudicating on the defendant's request for an adjournment, Haughton J. considered it desirable that the court would have a more detailed medical report. He opined that while "there may have been some incident last week that led [the defendant] to undergo diagnostic procedures" a more detailed medical report was required to ascertain whether there was any medical or diagnostic reason why the defendant could not attend on 10 July for the trial. Accordingly, the plaintiff's solicitors were to contact the defendant for the latter to arrange the procurement of a medical report from the defendant's supervising consultant, Dr. F. The medical report was to address the question of when the defendant would be fit to attend trial if he was not fit to attend on 10 July 2019. If the trial could not proceed on that date, Haughton J. stated that he intended to re-fix it at the earliest date in view of the urgency then pertaining.

The hearing of 10 July 2019

46. On 10 July 2019, the scheduled trial date, Haughton J. was advised by counsel for the plaintiff of an exchange of emails between the plaintiff's solicitors and Mr. Edward Magan but in circumstances where no medical report had been provided to the plaintiff. It appears however that the High Court was in possession of the requested medical report *via* email correspondence of 9 July 2019 from Mr. Edward Magan. It also had a letter from the defendant. These communications (including the medical report) were duly furnished to

the plaintiff's legal representative by Haughton J. for the purposes of the plaintiff being able to deal with the defendant's application for an adjournment then before the court.

47. Having duly considered the medical reports then before him, and having heard the plaintiff's submissions, Haughton J. was satisfied to adjourn the proceedings. In adjourning the matter, Haughton J. noted that the defendant had had a medical issue the week prior which required his hospitalisation and ongoing tests. He noted Dr. F's recommendation that the defendant needed a stress-free period before he would be fit to attend at the trial. He noted that the defendant had not in fact undergone invasive surgery. He noted that the proceedings had brought stress to the defendant and that the adjournment being given would afford him an opportunity to obtain further legal representation which would reduce his stress levels. However, while the defendant's doctor had recommended a three-month stress-free period, Haughton J. was not disposed to adjourn the case for such a period given the then urgency of the matter, in particular, the liability that rested with the trust in respect of interest on the loan that had been provided by the purchaser of Castletown House and Estate and the risk that the purchaser might issue a demand on the facility. Haughton J. duly allocated two days, commencing on 9 September 2019, for the trial of the issues previously directed by him.

48. Haughton J. directed that the defendant's replying submissions should be filed by 16 August 2019 and that if the defendant disputed the appropriateness of the Issue Paper which set out the matters to be tried, that should be covered in his written submissions.

49. The transcript of the hearing of 10 July 2019 was duly furnished to the defendant by the plaintiff's solicitor. No appeal was lodged by the defendant against the decision to fix the hearing date for 9 and 10 September 2019.

Events post 10 July 2019

50. The defendant's response to the events of 10 July 2019, and Haughton J.'s directions, is contained in correspondence sent by Mr. Edward Magan to A&L Goodbody on 16 August 2019. Mr Edward Magan wrote:

> "I am writing to let you know that I am fully aware of my Father's responsibilities to Judge Haughton to submit legal submissions today.
>
> As you know he has been incapacitated for several weeks and under strict advice from his [doctor] not to in any way exert himself. Other than a few days' non-strenuous holiday in England, he has not been able to travel at all.
>
> The responsibility has therefore fallen on me to help my Father to pull together the necessary legal submissions in what is obviously a technically complicated legal area for a lay litigant. I have therefore been working assiduously to review all of the relevant legal arguments and previous correspondence to properly inform additional submissions relevant to the hearing on 9th July (sic).
>
> I am working through the weekend in consultation with my Father. You will have the submissions in the very near future".

51. Mr. Edward Magan followed up on this correspondence with a further email on 19 August 2019 advising as follows:

> "I have attached my Father's witness statement that has previously been submitted.
>
> As per my message to you below my Father has been incapacitated and I have been discussing the situation with legal advisors. Whilst I acknowledge the guidance from Judge Haughton on the key issues at stake, my Father's witness statement as per the attached nevertheless covers a number of the issues that will be articulated at the forth coming hearing. Take note that I will be making further submissions with regards to all five issues, especially the fifth issue as raised by Judge

Haughton, namely 'does the Defendant have any other legal basis upon which he is entitled to possession or occupation of the property'. On this basis my Father reserves all of his rights. Please provide me with updated Book of Pleadings…"

Events arising prior to and during the scheduled hearing dates of 9 and 10 September 2019

52. It appears that at some point between 3 September 2019 and 6 September 2019 the defendant was in possession of two medical reports prepared by Dr. F., both dated 3 September 2019. One of the reports recorded Dr. F.'s "serious belief" that the defendant should be "stress protected". In the other report, addressed "To whom it may concern", Dr. F strongly advised that the defendant be stress protected "until at least the end of this calendar year."

53. At 17:27 on Friday 6 September, Mr. Edward Magan emailed Ms. Dermody, Registrar, attaching a letter "for the court" and the two medical reports dated 3 September 2019 together with other documentation said to counter the plaintiff's asserted "urgency" of the proceedings. The letter stated that the defendant's health "has not improved over the past few weeks". Reference was made to Dr. F.'s advice in July 2019 that the defendant should be "stress protected". Attention was then drawn to the 3 September medical reports. The letter concluded by extending the defendant's apologies "for having to seek a further period of deferral for these particular proceedings."

54. At 17.27 on 6 September 2019, Mr. Edward Magan received an automated response from Ms. Dermody's email account which stated:

"I am out of the office until 23/09/2019".

55. It appears that Mr. Edward Magan, having duly made enquiries, then ascertained that Mr. Kevin O'Neill, Principal Registrar, was a relevant court contact. At 10.03 on Monday 9 September Mr. Edward Magan emailed Mr. O'Neill at "kevino'neill@courts.ie" advising

that he had received an "automatic" response from Ms. Dermody and requesting Mr. O'Neill's assistance in transmitting his attachments to the court. No response was received from Mr. O'Neill. On 10 September 2019, at 14:15, Mr. Edward Magan e-mailed Mr. O'Neill at "ko'neill@ courts.ie", advising that he had just gotten hold of the latter email address and again requesting Mr. O'Neill's assistance in relaying his attached documents to the court. Mr. Edward Magan did not receive a response to either of his emails to Mr. o'Neill. Mr. O'Neill's actual email address is KevinP.O'Neill @courts.ie.

The trial of the five issues

56. The five issues which Haughton J. had directed be tried duly came on for hearing before Hunt J. on 9 September 2019. It is common case that there was no appearance by the defendant or anyone on his behalf on that date. It is also common case that neither the plaintiff nor the trial judge was in receipt of Mr. Edward Magan's email correspondence to Ms. Dermody and Mr. O'Neill dated, respectively, 6 September 2019 and 9 September 2019. Asked by the trial judge if he was surprised at the defendant's absence, counsel for the plaintiff responded to the effect that he would not be surprised at either the defendant's presence or absence and that it would also not have been a matter of surprise if the defendant's son, Mr. Edward Magan, or a firm of solicitors on the defendant's behalf, had appeared, given the history of the matter and in particular the number of legal firms which at various times had represented the defendant in the proceedings.

57. As is clear from the transcript of the proceedings of 9 September 2019, the trial judge was apprised by counsel for the plaintiff that the trial had originally been scheduled to commence on 10 July 2019 but that on 6 July 2019 and 9 July 2019 the court had received correspondence from the defendant indicating his inability to attend the trial scheduled for hearing on 10 July 2019 for medical reasons.

58. The transcript of 9 September 2019 also clearly shows that the learned judge was fully aware of Haughton J.'s ruling of 10 July 2019. It further shows that the trial judge was apprised by counsel for the plaintiff of the communications received from the defendant and/or on his behalf in August 2019 after he was furnished with the transcript of 10 July 2019 proceedings.

59. Hunt J. was satisfied that the emails of 16 and 19 August 2019 from Mr. Edward Magan to the plaintiff's solicitors displayed knowledge of the hearing scheduled for 9 September 2019.

60. Counsel for the plaintiff went on to advise the trial judge of email correspondence which the plaintiff's solicitor, Mr. Casey of A&L Goodbody, had received from Mr. Edward Magan on the afternoon of Friday 6 September 2019.

61. At 16:45 on Friday 6 September 2019 (some forty minutes or so before he emailed Ms. Dermody), Mr. Edward Magan emailed Mr. Casey attaching two letters both dated 6 September 2019, one of which was for the attention of Mr. Casey solely with the other directed to Mr. Casey, Mr. Jonathan Benford (a director of the plaintiff) and another named individual. The contents of this second letter are not germane to the within appeal.

62. The letter addressed to Mr. Casey solely took issue with the plaintiff's claim that there was urgency in the proceedings and set out reasons why this was not the case. The letter referred to what was described as Mr. Casey's and the plaintiff's counsel's "unethical" behaviour before the High Court in July 2019 in casting doubt on the *bona fides* of the defendant's medical difficulties, in particular references which had been made in court in July 2019 to the defendant having been seen out and about in London and spotted elsewhere despite his medical difficulties. Myriad other matters were raised in the letter that are not immediately germane to the within appeal. The letter did, however, state, with regard to the defendant:

> "For well over two months now, ever since the initial development of [the defendant's medical condition] he has been, apart from one brief visit, exclusively residing in London, largely recuperating at his home, as very strongly advised by his senior specialist medical consultants."

63. The 6 September 2019 correspondence to Mr. Casey was described by the plaintiff's counsel to the trial judge as "Delphic" on "the fairly net question" of whether the defendant would be attending on 9 September 2019.

64. The transcript shows that the two letters of 6 September 2019 from Mr. Edward Magan to the plaintiff's solicitor were handed to the trial judge on 9 September albeit with the proviso they should not be addressed in open court on the basis that they did not address the issues in the case and that in the case of one of the letters, there were matters of personal sensitivity relating to a third party. The trial judge agreed that the contents should not be referred to in open court. Counsel for the plaintiff submitted to the trial judge that the letters demonstrated that the defendant was aware of the trial date, an assertion with which the trial judge agreed.

65. The trial judge, albeit satisfied that the defendant was aware of the trial, queried whether the defendant's non-attendance left the plaintiff "with a penalty kick and no goalkeeper". He noted that a defence had been filed and that matters had been brought to a point where he did not believe that the plaintiff could simply assert that it was entitled to judgment without anything further. Indeed, as will be seen, the trial did not proceed on such basis.

66. The trial duly commenced with counsel for the plaintiff making an opening submission to the court and thereafter calling evidence.

67. It should be noted at this stage that as the proceedings were heard in the Commercial Court, both parties had filed witness statements in accordance with the relevant Practice Direction.

68. The plaintiff's position was set out in witness statements prepared by Mr. Benford, a Director of Yew Tree Trustees Limited (the trustee), and Mr. Edward Whelan who was employed as maintenance manager at Castletown House until in or about 2013. In his statement Mr. Benford states that it has been the trustee's understanding that the December 2010 Letting Agreement was residential, with the Magan family using the property as a secondary residence. His statement notes that there is a specific clause restraining the defendant from using the property for any other purpose than a private residence. He further states that there was never a request from the defendant seeking to amend any term of the Letting Agreement. While Mr. Benford was aware that the defendant hosted occasional events at the property, his understanding was that these were private events and not inconsistent with the Letting Agreement or what one might expect for a property such as Castletown Cox.

69. In his statement, Mr. Whelan, estimates that the defendant resided at Castletown House for an average of 45 days a year. He states that in the period between 2006 to 2013 there were visits to the property from third parties who were friends or acquaintances of the defendant and that these constituted private visits. He estimated that between 2013 and 2016 a maximum of six events annually were hosted by the defendant and Lady Magan. He states that these events were mainly for the defendant's personal friends and family (normally visiting from the UK and Ireland with some from the United States). He also states that "it is possible that some of these events also included certain members of the public and various societies." He refers to tours being given to these individuals by the Head Gardener. At para. 8 of his statement, Mr. Whelan states:

> "There was an increase in group visits to the property in 2015 and 2016. Generally, I recall that from the period of spring to autumn each year there was an average of six group visits. Some of the groups would have tea and coffee in the west wing of the main house. My understanding was that these individuals were personal contacts of Lord Magan and he wished to showcase Castletown Cox and the estate to these visitors. I understood that these visits were all organised through Lord Magan's personal assistant … or Lady Magan."

70. Mr. Whelan recalls the attendance of a number of local groups to the estate, including Clonmel Garden Club and Kildalton Horticultural College. According to Mr. Whelan, these were "mainly one-off visits" organised by Mr. John Shelly. Mr. Shelly was the manager of the Castletown Estate from 1991 to 2018. Mr. Whelan also recalled a visit from the Royal Horticultural Society of Ireland of which he believed the defendant and/or the estate to be a member. He states that if these groups ever entered Castletown House they would be accompanied by the defendant or Lady Magan. Mr. Whelan's statement went on to set out notes made in his diary of visits to Castletown Cox in the years 2013-2016. He was unable to establish from his notes whether these groups were personal friends of the defendant and Lady Magan or private tours. Mr Whelan's statement also referenced an annual event concerning Kilmoganny Hunt (whose pack of hounds have been kennelled on the grounds of Castletown Cox since 1946). According to Mr. Whelan this annual event ceased in 2010 save for one hosting in 2014. Mr. Whelan further references an annual fundraiser (sometimes twice yearly) for the local branch of the Irish Countrywomen's Association, an event which Mr. Whelan states continued after the termination of the defendant's tenancy.

71. Witness statements were also filed on behalf of the defendant.

72. In the defendant's witness statement, under the title "Cultural Activities at Castletown House", it is stated that the restoration and refurbishment of Castletown "was intended to be a cultural project and that there was never any intention prohibiting any such user. To do so would have been inherently contrary to the very purpose of the estate and the expenditure on the tenement". Thereafter, the defendant states:

> "I have a very clear recollection and understanding that there is a clause in the lease that forbids business use at the tenement relating to carrying out business for profit. It did not and was not ever intended to cover the broader cultural aspects of Castletown. I note that there was no operation of any of my personal business from Castletown."

73. The defendant appended a schedule of visits to the house by individuals and groups during his tenancy which outlines over 100 visits to the property from 2010 to 2017, ranging from some seven visits in 2013 to eighteen visits in 2014 and 2015 respectively. The visitors detailed in the schedule include various named individuals and groups. In his statement, the defendant notes that the proceeds received for garden visits were passed on to the Royal Horticultural Society of Ireland and proceeds from visits to the house to the Irish Georgian Society. He states that in 2016, due to the trustee's intention to sell Castletown, together with the trustee failing to meet costs of maintenance of the estate, he felt less able to welcome visitors to the property.

74. In his witness statement, the defendant takes issue with the contents of Mr. Whelan's statement and questions Mr. Whelan's capacity to comment on the defendant's user of Castletown, asserting that Mr. Shelly was more qualified than Mr. Whelan to comment on such matters as Mr. Shelly "was in a position of knowledge about the day to day issues at Castletown".

75. The witness statement of Mr. Shelly was also part of the intended evidence of the defendant. He states that the defendant made "access both to the mansion house itself and to the extensive formal and informal gardens available to many people including cultural and gardening groups and private tours." He states that he accompanied many visits personally and he gives examples of the arrangements of visits for "Greenhill nursing home (in 2014, 2015 and 2016), Kildalton (the local and well known horticultural college), the County Manager for Kilkenny County Council, persons from Coolmore, and also persons from Ballydoyle, and planning staff with regards to a proposed local wind farm – to name but a few". Mr Shelly states that monies were charged for such visits but that the proceeds were donated to the organisations named in the defendant's witness statement, with no monies being retained by the defendant.

76. Witness statements from five other individuals, prepared in support of the defendant's case, largely related to whether the demised property was a "tenement" for the purpose of the 1980 Act. Mr. John O'Connell, conservation architect, opines that "the tenement lands encompass the extensive Formal and Informal Gardens, ornamental canal and 18th century man-made lake". It is stated that the tenement land has always been distinct from surrounding agricultural and park land and provides "an entirely relevant and appropriate 'Tenement' setting for this remarkable 18th century Mansion House". Professor Fitzroy (Roy) Foster, a historian with expertise in Irish architectural and social history, states that he has visited Castletown House on several occasions. He agreed with Mr. O'Connell that the house and 53 acres constituted a tenement. Mr. Thomas Packinham, a writer specialising in trees, landscape and environmental issues, also supports the statement of Mr. O'Connell, describing the tenement as the "exotic core" of the Castletown Estate. Mr. Patrick Bowe, an author on the History of Irish Gardens, also agreed with Mr. O'Connell that the 53 acres were "subsidiary and ancillary lands" to Castletown House.

Professor Robert Myerscough, a retired garden consultant, past president of the Royal Horticultural Society of Ireland and chairman of the RHSI Garden Show Committee, in his statement, also agreed that the 53 acres were "inseparable from the house".

77. As duly made clear to the trial judge on 9 September 2019, the plaintiff did not dispute that the demised property met the definition of "tenement" set out in the 1980 Act.

78. At the trial, evidence was given by two witnesses called on behalf of the plaintiff, namely Mr. Benford and Mr. Whelan. Both adopted their witness statements as their evidence. The trial concluded with submissions made on behalf of the plaintiff on the issues which were before the trial judge.

79. Hunt J. delivered his *ex tempore* judgment on 10 September 2019. At the outset, it is important to note, as the transcript of the hearing shows and as already referred to, that the trial judge did not allow the matter to proceed by way of "open goal" for the plaintiff, but rather directed that evidence be called. It is also evident from his judgment that his consideration of the issues took particular account of the contents of the witness statements put forward by the defendant.

80. The trial judge first addressed whether the defendant had an entitlement to seek a new tenancy under Part II of the 1980 Act on the ground of business user. In addressing this issue, he accepted that cultural activities of the nature and frequency described in the witness statement of Mr. Shelly (for the defendant) took place on the tenement. He accepted the evidence given by Mr. Whelan (called by the plaintiff) and did not consider that there was any relevant or substantial inconsistency between the evidence of these two witnesses.

81. Having regard to the definition of "business" in the 1980 Act, Hunt J. accepted that the activities relied on by the defendant to support his claim for a business tenancy fell within the definition of business contained in the 1980 Act. He opined however that the

statutory definition of business had to be applied in any case by reference to the specific facts and applying the generic principle that the matter of user, either for residential or business, "must be considered in the round". He opined that while it was always possible to isolate activities carried on in any premises of any nature in support of an argument that a particular user was in place at a specific time, the fact remained that the issue of user must be considered on an overall basis and not by accepting or isolating individual instances. He found that the principle that an overall assessment is carried out based on the entirety of the evidence to be supported by s.13(1)(a) of the 1980 Act which requires that a business user be *bona fide* and that it must be conducted wholly or partly for the purpose of carrying on a business. He stated:

> "It is therefore necessary, but not sufficient, that the activities relied upon by the Claimant for a new tenancy fall within the definition of 'business' as set out in the 1980 Act. However, in order to be sufficient as well as necessary, the nature and extent of the activities relied upon must also be such as to satisfy the requirements of good faith and whole or partial use, as also set out in the statute."

82. Turning to the facts of the case, Hunt J. found that the defendant permitted and encouraged occasional use of his property in connection with the provision of cultural services arising from the unique historical and architectural value of the property. The trial judge found that to be both commendable and entirely consistent with the specific nature of the tenement in question but in his view it was not sufficient to permit him to reach a conclusion that the property was even partly used for the purpose of carrying on a business based on those activities. Taking the matter at its highest, Hunt J. characterised those activities as "a minor adjunct" to the purpose expressed in the December 2010 Letting Agreement, which permitted the defendant to occupy the property as a residence for

himself and his family. Accordingly, he could not characterise the activities as having any more significant character than that.

83. Hunt J. opined that the defendant's claim that the activities conducted on the estate constituted a business might have had more substance had the public been periodically admitted to the property pursuant to an applicable statutory scheme, albeit that itself could only be a significant factor in the assessment of user rather than being determinative of the nature of the user in question.

84. Hunt J. then stated:

> "Even if I am wrong in relation to this conclusion, I am fully satisfied that the Defendant cannot fulfil the requirement that his business was carried out on a *bona fide* basis within the meaning of Section 13 of the 1980 Act. This conclusion derives from the established background to the user in question. In this case the Defendant elected to settle his property upon trusts to his children in 1999 and entered a detailed letting agreement with the trustees in 2010, presumably with the benefit of legal advice, by which he expressly covenanted he would use the property in question as a residence only for him and his dependants. In my opinion, this is the most relevant and weighty factor in determining the nature of the use of the property by the Defendant and later assertions as to subsequent business use must be evaluated within this overall factual context. In these circumstances, I am satisfied that the Defendant cannot fulfil the requirement that the business use relied upon by him is *bona fide* and in this regard I accept and apply to the facts of this case the reasoning of [Ó Caoimh J.] in his judgment in *Harry O'Byrne v. M50 Motors Limited,* a judgment of the High Court delivered on 1st November 2001."

85. The learned trial judge went on to conclude that the defendant had failed to establish *bona fide* user insofar as the user contended for was clearly in breach of an express term of the Letting Agreement. He was further satisfied that if the defendant in fact carried on a business on the premises, that business was carried on knowingly in breach of the tenancy agreement and, as such, could not be a *bona fide* user just to entitle the defendant to a business tenancy under the 1980 Act.

86. As a matter of fact, Hunt J. did not believe that the defendant ever genuinely apprehended that the activities carried on by him amounted to the conduct of a genuine business on the premises. He found this to be corroborated by the absence of any records or structure pertaining to such a business and by the defendant's subsequent reference of the Second Notice of Termination to the RTB "which is in law and in fact entirely inconsistent with the proposition which he now seeks to advance"

87. With regard to the second issue to be tried, Hunt J. was satisfied that even if the defendant was otherwise entitled to a new tenancy on the basis of business user, that entitlement would have been barred by the operation of the provisions of s.17(1)(a)(ii) of the 1980 Act in circumstances where he was also satisfied on the evidence that the defendant's tenancy had been terminated by a valid notice to quit, or in the case of a business user, by reason of a breach by the tenant of a covenant of his tenancy.

88. With regard to the third issue in the trial, Hunt J. was satisfied that the First Notice of Termination issued by the plaintiff on 22 December 2017 was effective to determine the defendant's residential tenancy on the basis that the trustee at the time of service of that notice required to sell the property in accordance with its decision (as was subsequently approved by the Jersey Court), and in specific circumstances where the defendant knew that this was a valid purpose of the First Notice of Termination, having been a party to the litigation in the Jersey Court. The trial judge found that the defendant had not and could

not challenge the basis of the First Notice of Termination and was satisfied that service thereof validly ended the defendant's right to possession of the property.

89. The trial judge determined the fourth issue on the basis that the factual and legal reality of the case was that the tenancy was residential and not business, and as such, under the relevant legislation relief against forfeiture of a residential tenancy could no longer arise. He opined that even if he was wrong in this conclusion, the defendant had offered no practical basis by which the court, acting as a court of equity, could consider granting relief against forfeiture in the circumstances of this case.

90. With regard to the fifth issue, Hunt J. could not discern any other legal basis upon which the defendant was entitled to possession or occupation of the property.

91. Accordingly, the Order of the High Court dated 10 September 2019 was that:

(1) The defendant was not entitled to seek a new tenancy or other relief in the relevant property pursuant to Part II of the 1980 Act;

(2) The defendant would not be entitled to a new tenancy by reason of the operation of s.17 of the 1980 Act due to breach of covenant on his part;

(3) The defendant's residential tenancy had been validly determined under the provisions of the 2004 Act;

(4) The defendant did not enjoy any right of relief against forfeiture;

(5) The defendant did not establish any other legal right to occupation or possession of the property.

The appeal

92. The defendant's (an appellant in person) grounds of appeal can be summarised as follows:

- The defendant was unable to attend the High Court in September 2019 because of a medical condition.

- Up to the hearing of the case in September 2019, High Court staff (Ms. Dermody) had always communicated correspondence sent by or on behalf of the defendant to the High Court. Letters sent by the defendant on 7 July 2019, 9 July 2019 and 10 July 2019 were passed to the court. Mr. Edward Magan's letter of 6 September 2019 (dictated by the defendant) was passed via e-mail of 6 September 2019 to Ms. Dermody in similar "mode" as previous correspondence.
- The defendant's urgent communications, which included correspondence from his medical advisors, of 6 September 2019 and 9 September 2019, as sent by Mr. Edward Magan *via* e-mail to court personnel, were not received by the trial judge prior to the hearing of 9 September 2019.
- As a result, the defendant was unable to present his Defence to the court, was unable to cross-examine the witness evidence of the plaintiff, was unable to contradict the factual submissions made by counsel for the plaintiff (which were to the effect that the defendant was not unwell), was unable to challenge the alleged urgency of the case and was unable to give evidence.
- Accordingly, when the defendant failed to attend, having attempted to communicate why he could not be in attendance, the trial judge was unaware of his communications of 6 and 9 September 2019, with the result that the defendant was unable to defend himself from the arguments of the plaintiff, namely that his medical condition was illusory and his decision not to attend tactical.
- The defendant's absence from the trial was not referable to any wilful act in circumstances where he was under the mistaken belief that the email contact

made on his behalf on 6 and 9 September with previously "effective" email addresses was the appropriate way to communicate with the High Court.

- The defendant's inability to attend, left the plaintiff, as noted by the trial judge, with "a penalty kick and no goalkeeper".
- Albeit having used the same channels of communication as in all previous hearings, due to the fact that neither of his e-mails of 6 September 2019 and 9 September 2019 appeared to have been passed on to the court, a serious miscarriage of justice has taken place in circumstances where the trial proceeded in his absence. The defendant (a lay litigant) was entitled to a fair hearing in accordance with natural and constitutional justice.
- The defendant did not receive a fair hearing and seeks a rehearing.
- The plaintiff's arguments in court on 9 September 2019 were to the effect that the defendant was "socialising" when in fact the defendant was resting pursuant to the advice of his medical advisors.
- The defendant had explained his presence in July 2019 at a named location to the plaintiff, but the plaintiff did not open that correspondence to the court.
- The plaintiff's solicitors have consistently attacked the defendant over his health, claiming his health issues were contrived.
- Information was put before the court by the plaintiff on 9 September 2019 that was grossly misleading and loaded with innuendo.
- The trustee has briefed the media in a manner that painted the defendant as a wholly irresponsible character.
- The hearing took place in September 2019 due to a case for urgency made by the plaintiff. It had argued that an interest payment was supposedly due on the loan from an unknown prospective purchaser of the property. The plaintiff

made the case to the court on 9 July 2019 that the interest payment on this loan was supposedly due on 24 September 2019. The case for urgency argued in court by the plaintiff in July and September 2019 was based on an entirely false premise of an immediate shortage of funds in circumstances where the trustee had funds to meet such exigency. Accordingly, there was no case for urgency. This was not brought to the attention of the court.

The defendant's submissions

93. By and large, the defendant's written and oral submissions to this Court mirror the grounds set out in his Notice of Appeal. Additionally, he contends that the trial judge erred in failing to enquire about his medical condition or was caused to err by the failure of the plaintiff to adequately draw his medical circumstances to the trial judge's attention. He further submits that even if this Court finds the trial judge and the plaintiff blameless, the fact remains that he was unable for medical reasons to travel to Ireland for his trial in September 2019 and accordingly he should be entitled to have his case reheard fairly in all the circumstances.

94. The defendant emphasises that he is a 74-year old lay litigant who settled very substantial family trusts. He asserts that the current trustee, the controller of the plaintiff, has taken control of the trusts and initiated aggressive litigation against him and the beneficiaries across four jurisdictions. He asserts that the trustee has painted him and Mr. Edward Magan, a primary beneficiary of the trust, as having deliberately hired and fired legal teams to delay court proceedings, a claim which is untrue and a slur on the defendant. This is so in circumstances where the defendant – the creator of the wealth in the family trusts – and Mr. Edward Magan have had to liquidate their personal assets to fight the trustee, resulting in hundreds of thousands of euros having been paid to lawyers.

95. It bears noting that notwithstanding the nature of the relief being sought by the defendant, he has not put any matter on affidavit.

The plaintiff's submissions

96. The plaintiff opposes the within appeal and denies that there was any unfairness in the manner in which the trial proceeded or was conducted. It is submitted that the defendant's contention, that because the hearing proceeded in his absence the decision of the trial judge should be set aside, is manifestly vexatious because it is clear that the defendant chose to absent himself from the trial and failed in any meaningful way to apply for an adjournment.

97. If a party chooses not to appear at a hearing, this can never, of itself, be a ground for appeal. In the instant case the defendant had notice of the hearing and was given every opportunity to participate therein. Accordingly, the principle *audi alteram partem* cannot be deemed to have been violated.

98. As is clear from the decision of the trial judge, judgment was not given in default. Hunt J. listened to the submissions and to the evidence as presented by the plaintiff and determined the case based on the evidence before him. This included witness statements submitted by the defendant. It is submitted that, in truth, the outcome of the case would not have been affected by the presence of the defendant.

99. Many of the claims and accusations made by the defendant in his legal submissions are vexatious, scandalous and are denied. The plaintiff does not accept the characterisation of the history of events as set out by the defendant in his legal submissions. Suggestions by the defendant that the plaintiff (or indeed the trustee) have leaked confidential and/or private material to the media concerning the defendant's health are without any substance.

100. The suggestion that there was no urgency to the within proceedings in September 2019 is not correct. There was genuine urgency in the proceedings being determined on or

before mid-September 2019. This is in circumstances where the plaintiff had obtained a loan from the purchaser of Castletown House and Estate in September 2018 as a means of preventing enforcement (including a potential fire sale) by the erstwhile lenders of their security over Castletown House and Estate. The loan from the purchaser was sufficient to pay the sums due under the facility but did not constitute a contribution to the cash flow or to the reserves of the trust's finances to enable it to discharge its ongoing liabilities indefinitely. The term of the Loan Agreement as between purchaser and the plaintiff was primarily governed by (i) the Loan Agreement and (ii) a Side Letter, each dated 24 September 2018. The loan was an "on demand" facility whereunder the purchaser had agreed that it would not exercise its right to demand repayment of the loan so long as the sales process was proceeding and so long as there was no deterioration in the outlook of the within proceeding for the plaintiff, or other deterioration in the circumstances or assets of the plaintiff. While there was agreement that there would be no interest charged for the first year of the term of the loan, if the sale was not completed by 23 September 2019 double digit interest was to be retrospectively applied to the loan from the date of the drawdown of same.

101. In his oral submissions to the Court, counsel for the plaintiff asserts that the defendant's appeal is entirely misconceived in that he seeks through the appeal to run an adjournment application after the first instance hearing has taken place. He contends that the defendant fails to meaningfully engage with the merits of the case or demonstrate why an appeal on the merits could ever succeed. It is asserted that the defendant's appeal has more of the characteristics of an application to set aside the High Court judgment of 10 September 2019, an application which it was open to the defendant to make pursuant to O.36, r.33 of the Rules of the Superior Courts ("RSC") and which he did not do. It is accepted, however, that the defendant has an entitlement to appeal and that in the interests

of justice the Court should deal with the defendant's ground of appeal that as he was not in court on 9 and 10 September 2019 he was disadvantaged as a result.

Discussion

102. Before turning to the issues in the appeal, it is necessary to address the defendant's claim of unfairness in the plaintiff having furnished documents to this Court immediately prior to the hearing commencing without the defendant having had the opportunity to consider the documents. I am satisfied no unfairness arises. The documents furnished comprised the December 2010 Letting Agreement, the First Notices of Termination and the Second Notice of Termination. These documents were well known to the defendant. In the first instance they were appended to Mr. Benford's witness statement which the defendant received in June 2019. Moreover, the defendant was a signatory to the Letting Agreement and *qua* tenant the recipient of the termination notices in December 2017 and April 2018 respectively, both of which were also referred to in the judgment of Haughton J. delivered after a hearing in which the defendant was legally represented. The final document put before the Court by the plaintiff was a copy of the decision of this Court in *Allied Irish Banks Plc v. Forde* [2020] IECA 133. I do not perceive any unfairness in that regard. Taking all of these matters into consideration, no unfairness could be said to accrue to the defendant (albeit he is a lay litigant) by dint of the above documents being put before the Court.

The issues

103. Arising from the parties' submissions, the issues which arise for consideration are twofold. Firstly, whether the judgment of Hunt J. should be set aside on the ground that it was obtained irregularly. Secondly, even if the judgment was obtained regularly, whether the matter should nevertheless be remitted to the High Court to prevent any possibility of

injustice to the defendant on the basis that the merits of the defendant's defence mandate such a course.

104. This case concerns a judgment obtained after a plenary trial in circumstances where the defendant did not appear at the trial. As observed by Whelan J. in *Allied Irish Banks Plc v. Forde* [2020] IECA 133:

> *"Two sub-categories emerge from the jurisprudence being firstly, cases where a party deliberately refrained from attending the trial (examples include Shocked v. Goldschmidt [1998] 1 All E.R. 372; Nolan v. Carrick [2013] IEHC 523) and secondly, those where by reason of accident, mistake or inadvertence a party who wishes and intends to attend court and be heard failed to do so (as occurred in Bank of Scotland plc v. McDermott [2017] IEHC 77)."*

105. In *Shocked v. Goldschmidt*, Leggatt L.J. identified *"general indications"* derived from the authorities as to when a court should accede to an application to set aside a judgment after a trial, observing that each case, *"depends on its own facts and that the weight to be accorded to the relevant factors will alter accordingly".* Leggatt L.J. set out a number of factors and accorded pre-eminence to factors (1) and (2):

> *"1. Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision.*
>
> *2. Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a re-hearing.*
>
> *3. Where the setting aside of judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so.*

4. The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success.

5. Delay in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it.

6. In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise his discretion in his favour.

7. A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences.

8. There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short."

106. The principles set out in *Shocked v. Goldschmidt* have been cited with approval in this jurisdiction (See *Danske Bank v. Macken* [2017] IECA 117).

107. In the present case, the defendant claims unfairness in the way the plaintiff obtained judgment and seeks that the judgment be set aside on that basis.

108. It is well established that if a judgment is obtained in an irregular fashion a court has a wide discretion to set it aside (See *AIB v. Lyons* [2004] IEHC 129).

109. As put by Clarke J. (as he then was) in *O'Tuama v. Casey* [2008] IEHC 49:

"Where judgment is obtained irregularly, the court will normally set aside the judgment without enquiring into the merits of the proposed defence. The logic of this position is that the judgment should not have been obtained in the first place and the plaintiff who has obtained judgment irregularly should not have any benefit by reason of having obtained judgment in that fashion. On the other hand, where

judgment is obtained regularly, the court may, nonetheless, be persuaded to set aside the judgment so as to permit the defendant to defend the proceedings but will only do so after considering the possible merits of the defence which the defendant would wish to put forward."

Was there procedural unfairness to the defendant in the trial having proceeded in his absence?

110. Notwithstanding the arguments canvassed by the defendant on this issue, I am satisfied that the judgement of 10 September 2019 was not irregularly obtained. I so find for the reasons set out below.

111. Undisputedly, the defendant was aware of the trial scheduled to proceed on 9 and 10 September 2019. It was so scheduled following a hearing which took place before Haughton J. on 10 July 2019. In fact, the trial had originally been scheduled to commence on 10 July 2019 but was adjourned for the reasons set out by Haughton J. on 10 July 2010. Due to the paucity of information in the medial report which was before Haughton J. at the hearing on 9 July 2019, the learned judge directed the procurement of a more detailed medical report before any adjournment would be contemplated, which was forthcoming. As already set out above, on 10 July 2019, after considering the medical report, and after hearing counsel for the plaintiff, Haughton J. duly adjourned the matter for two months to September 2019. He did so in the obvious exercise of his discretion in balancing the interests of the parties. As is clear from the transcript of the 10 July 2019 hearing, Haughton J. expected that the matter would proceed in September 2019 on the basis that it was sufficiently urgent for the case to be given a vacation hearing date.

112. The awareness of the defendant and his son, Mr. Edward Magan, that the trial was scheduled for hearing on 9 and 10 September is apparent from the contents of correspondence sent on 18 August 2019 by Mr. Edward Magan to the plaintiff's solicitors,

which included reference to the fact that the defendant was in the process of preparing for the forthcoming trial in September 2019.

113. It is also apparent that once the defendant was in receipt the transcript of the 10 July 2019 hearing (as had been sent to him by the plaintiff's solicitors at the direction of Haughton J.), he and Mr. Edward Magan were aware that the trial was proceeding on 9 and 10 September 2019. They also understood that any further adjournment application as might be made could not be done in the absence of communication with the plaintiff in that regard. Haughton J. specifically directed that any medical evidence that the defendant may wish to rely on going forward could not be sent to the High Court to the exclusion of the plaintiff, a direction which was known to the defendant from the contents of the 10 July 2019 transcript.

114. Despite the directions given by Haughton J. on 10 July 2019, no attempt was made by or on behalf of the defendant to furnish the 3 September 2009 medical reports to the plaintiff in advance of 9 September 2019, or indeed even advise the plaintiff that the defendant had in his possession medical advice that he be stress protected until the end of the calendar year. The failure to apprise the plaintiff's solicitors of this state of affairs was in circumstances where Mr. Edward Magan was in fact communicating with the plaintiff's solicitors on 6 September 2019. At 16.45 on Friday 6 September 2019, Mr. Edward Magan emailed two letters to the plaintiff's solicitor. Myriad matters were addressed in those communications but the one matter that was most definitely not addressed was the defendant's intention to seek an adjournment of the trial scheduled for 9 and 10 September 2019. Of more significance is that in the 6 September 2019 correspondence, Mr. Edward Magan takes issue in the strongest terms with the plaintiff's solicitor for the manner in which the plaintiff characterised his father's medical difficulties at the hearing before Haughton J. on 10 July 2019. In circumstances where Mr. Edward Magan clearly had his

father's health very much to the forefront when writing to Mr. Casey on 6 September 2019, it is to me incomprehensible why he did not alert Mr. Casey to the intention he so clearly had (given that some 45 minutes later he emails Ms. Dermody (High Court Registrar)) of seeking an adjournment of the trial.

115. While, undoubtedly, Mr. Edward Magan engaged in a process of communicating with Ms. Dermody on 6 September 2019, there are aspects of this communication that merit comment. Firstly, Mr. Edward Magan's email to was sent to Ms. Dermody at 17.27 on Friday 6 September 2019. By that time Ms. Dermody (to whom absolutely no blame can be ascribed, and, in fairness, the defendant does not ascribe blame to her) was out of her office. Mr. Edward Magan received an automated response from Ms. Dermody's email account at 17.27 on 6 September 2019. It was thus known to him that Ms. Dermody would not be in a position to bring the contents of Mr. Edward Magan's letter and the medical reports attached thereto to the attention of the High Court. It is, to me, incomprehensible why, at that stage, in the knowledge that the trial was scheduled to commence the following Monday, and where Mr. Edward Magan had available to him a channel of communication with the plaintiff, he chose not to alert the plaintiff's solicitors of the defendant's intention, for medical reasons, not to attend the trial, so that the plaintiff could at least apprise the trial judge of the situation.

116. It is also the case that on Monday 9 September 2019, at approximately 10 a.m. (one hour before the hearing was scheduled to commence), Mr. Edward Magan emailed Mr. O'Neill in terms already outlined above. It is common case that the contents of this email did not reach the trial judge, most probably because an incorrect email address had been used. No blame can be ascribed to Mr. O'Neill (and indeed, in fairness the defendant does not seek to do so).

117. The defendant now puts forward the email correspondence he engaged in with Ms. Dermody and Mr. O'Neill as evidence of his earnest efforts to apprise the High Court of his inability to attend his trial. While, as I have said, undoubtedly, efforts were made by Mr. Edward Magan on the defendant's behalf to make contact with the courts on 6 and 9 September 2019, there is, however, no general entitlement of a party to seek to obtain an adjournment in the manner attempted by or on behalf of the defendant. At the end of the day, the defendant did not appear at the High Court on 9 September 2019 and no application for an adjournment was made to the High Court on that date.

118. The defendant may rightfully argue that the very reason an application for an adjournment was not moved on 9 September 2019 was because, for medical reasons, he was unable to travel (this indeed being the reason for his seeking an adjournment of the trial in the first place). However, even accepting the logic of such an argument, this cannot absolve the obligation that was on the defendant as and from 3 September 2019 (the date of the medical reports) to ensure that any application for an adjournment was properly before the High Court. As I have already alluded to, the defendant could have apprised the plaintiff's solicitor at any point after 3 September 2019 of his inability to attend the trial. No explanation was offered to the Court at the hearing of this appeal as to why the defendant waited, in effect, until close of business on the last working day before the trial date, to communicate with anybody about the contents of the medical reports. Moreover, pursuant to the direction of Haughton J. of 10 July 2019, the defendant was obliged to provide the plaintiff with medical reports in the event that an adjournment application was to be applied for. Had he done so, Mr. Casey, the plaintiff's solicitor, as an officer of the court, would have ensured that the matter was brought to the attention of the trial judge. Even if Mr. Edward Magan was not prepared to attach Dr. F's medical reports to his email to Mr. Casey on 6 September 2019, Mr. Casey, had he at least been alerted to the

defendant's inability for medical reasons to attend the trial, would have advised the High Court of this on 9 September 2019. However, the defendant, and/or Mr. Edward Magan, elected not to advise the plaintiff's solicitors, or the plaintiff, that the defendant was unable to attend the hearing on 9 September 2019.

119. In his submissions to this Court, the defendant says he was reluctant to share any of his confidential medical information with the plaintiff for fear of same finding its way into the national press. In this regard, he points to certain other information which found its way into the national press. The defendant points the finger of blame at the plaintiff. The plaintiff denies the claim made by the defendant in this regard. I do not intend to adjudicate on that particular issue. Suffice it to say that even if the defendant had the concerns he now outlines, those concerns could not be said to have been reasonably held as of September 2019. This is in circumstances where the defendant's concerns had already been the subject of discussion before Haughton J. in July 2019. As the transcript of 10 July 2019 demonstrates, Haughton J. accepted that the defendant was entitled to confidentiality regarding his medical condition and made this known to the plaintiff. Moreover, on 17 July 2019, the plaintiff's solicitors wrote to the defendant quoting the words of Haughton J. on 10 July 2019 and stating that "[b]oth the court and counsel for the Plaintiff have endeavoured to keep references to the particulars of [your father's medical condition] to a minimum and that's as it should be".

120. It also bears observing that albeit a lay litigant since in or about June 2019, prior to that the defendant had instructed three sets of solicitors in the within proceedings. When the proceedings first commenced, Ivor Fitzpatrick solicitors were on record for the defendant. After they came off record, Messrs. GJ Maloney Solicitors were on record. After that firm came off record, Messrs. Adams Solicitors were on record for the defendant until they subsequently came off record. Moreover, in the context of the defendant's

Circuit Court proceedings, Messrs. Walter Smithwick solicitors were on record for him until they came off record. While I do not suggest that the defendant should have reverted to any one of these firms for the purposes of instructing them to appear before the High Court on 9 September 2019 and seek an adjournment on his behalf, it is patently clear that the defendant knew his way around the legal system and thus could have instructed a firm of solicitors for the purposes of appearing in court on 9 September 2019 and seeking an adjournment.

121. It is also of significance, to my mind, that the medical reports of 3 September 2019, upon which the defendant relies as evidence of his inability on medical grounds to travel to Ireland for his trial, do not say that he was unable to travel. Nor do the reports suggest in any express terms that the defendant was not capable of dealing with a court case. By and large, the 3 September 2019 reports do not vary in any significant degree from the medical reports which were before Haughton J. in July 2019 and in the context of which Haughton J. clearly believed that a two-month adjournment to September 2019 was the appropriate response to the medical evidence then presenting.

122. All the indications from the documentation which is before this Court, including the transcript of the hearings before Haughton J. on 9 and 10 July 2019, are that the plaintiff and its legal team were wholly blameless in not alerting the trial judge on 9 September 2019 that the reason for the defendant's absence may be that he was unable to travel for medical reasons. The fact of the matter is that the trial judge was entirely in the dark on 9 September 2019 that the defendant considered himself medically unfit to attend his trial. For all of the reasons set out above, the fault for this must lie with the defendant.

123. Accordingly, the fact that the trial proceeded on 9 September 2019 in the absence of the defendant does not lead to a conclusion that the trial judge acted unfairly in permitting the trial to proceed despite the defendant's absence. Nor can it be said that the entreaties of

the plaintiff on 9 September 2019 that the trial should proceed in the absence of the defendant visited unfairness on him in circumstances where the plaintiff was kept entirely in the dark in relation to his absence and his intention to seek an adjournment of the trial.

124. Insofar as the defendant suggests to this Court that the trial judge was not fully apprised of all matters known to the plaintiff as of 9 September 2019, that suggestion is not accepted. As is evident from the transcript of 9 September 2019, all matters (including the correspondence of Mr. Edward Magan of 6 September 2019 to the plaintiff's solicitor) were put before the trial judge. Moreover, as I have already alluded to, the trial judge had the benefit of the transcript of the hearings before Haughton J. on 9 and 10 July 2019. In summary, therefore, I am satisfied that the decision to proceed with the trial was entirely within the proper discretion of the trial judge. It follows that the judgment rendered by the trial judge on 10 September 2019 was regularly obtained. I perceive no procedural unfairness in the manner in which it was obtained. Accordingly, there are no grounds upon which this Court should set aside the judgment on the basis that it was irregularly obtained.

Are there grounds to set aside the judgment of the High Court, in the interests of fairness, on the basis that the defendant has a reasonable prospect of success in the proceedings, either in establishing that he is entitled to a new tenancy because of business user or on some other basis?

125. Notwithstanding that the Court has found that there was no procedural unfairness in the trial having proceeded in the absence of the defendant, it remains the case, as set out in *O'Tuama*, that it is open to the Court, in the interest of justice, to set aside the judgment and remit it back to the High Court so that the defendant can defend the proceedings. This requires however the Court being satisfied that the defendant has a defence on the merits,

and, in the words of Leggatt L.J. in *Shocked v. Goldschmidt,* that the defence "*enjoys real prospects of success"*.

126. In his witness statement dated 20 June 2019, the defendant is claiming that the demised property was used for a business. This claim is of course being made in the teeth of Clause 2.17 of the Letting Agreement whereby the parties *agreed* that user was to be residential. Leaving aside, for the moment, Clause 2.17, if the defendant establishes business user, that will take him outside the provisions of s.3(2) the 2004 Act, thereby allowing him to make a claim under the 1980 Act. The right to a new tenancy then falls to be determined under s.13(1)(a) of that Act, which indeed is the claim being made by the defendant in the within proceedings.

127. I turn now to the question of whether the defendant has a real prospect of success in establishing a business user and, if so, would he nevertheless be precluded from obtaining relief under the 1980 Act by the provisions of s.17 thereof (the first and second issues as directed to be tried by Haughton J.). It should be noted at this juncture that neither the grounds of appeal nor the defendant's written submissions address the substantive issues which Haughton J. directed be tried.

128. The Court has however the defendant's witness statements (which were also before the trial judge). Taking all of the matters set out in the defence witness statements at their highest and accepting, as I do, that some of the activities described in the witness statements furnished by and on behalf of the defendant meet the definition of "business" in the 1980 Act, I cannot find that the matters relied on by the defendant meet the requisite reasonable prospect of success threshold that is required for the matter to be remitted to the High Court for adjudication. Indeed, I entirely agree with the conclusion arrived at by the trial judge, namely that the activities relied on by the defendant could only be characterised as a "minor adjunct" to the purpose expressed in the December 2010 Letting Agreement.

Hunt J. correctly stated that the question of whether the cultural activities described in the witness statements furnished by or on behalf of the defendant had to be considered "in the round…and not by excerpting or isolating individual instances." The trial judge found support for this in s.13(1)(a) of the 1980 Act which provides:

> "13.— (1) This Part applies to a tenement at any time if—(*a*) the tenement was, during the whole of the period of five years ending at that time, continuously in the occupation of the person who was the tenant immediately before that time or of his predecessors in title and *bona fide* used wholly or partly for the purpose of carrying on a business, …"

129. I should also say at this stage that Hunt J.'s conclusion that the cultural activities involving visitors to Castletown Cox were no more than a "minor adjunct" was not, on my reading of his judgment, reached by way of preferment of the evidence of Mr. Whelan over the contents of Mr. Shelly's witness statement (or indeed the defendant's witness statement). Rather, he expressly states that he perceived no substantial inconsistency between the evidence of Mr. Whelan and the contents of Mr. Shelly's statement. This I feel is relevant to the issue of whether the defendant would have a reasonable prospect of success were the case to be remitted to the High Court for rehearing. In his submissions to this Court, the defendant asserts that remittal of the matter is necessary, *inter alia,* to allow him to cross-examine Mr. Whelan. It appears to me, however, that cross-examination of Mr. Whelan would not elicit anything more than the trial judge determined in the defendant's favour, i.e. the trial judge's acceptance that the activities relied on by the defendant did in fact occur. As far as the trial judge was concerned, it came down to a question of degree. I take the same view. Even taking the level and frequency of the cultural activities relied on by the defendant to ground a claim to business user at their height, the primary purpose of the tenancy was residential. On any reasonable reading of

the defendant's and Mr. Shelly's witness statements, the activities therein described do not confer on the tenement -Castletown House and the 52.3 acres- the character of a business user within the meaning of the 1980 Act. In arriving at this conclusion, I have taken into account that the definition of "business" in the interpretation section of the 1980 Act includes "cultural, charitable, educational, social or sporting activities" not carried on for gain or reward, but that in and of itself is not sufficient to engage the relief provided by s.13 of the 1980 Act.

130. More significantly in this case, however, the defendant faces what I consider to be an insurmountable hurdle in meeting the reasonable prospect of success criterion necessary for a remittal of the matter to the High Court. In the face of the clear and express terms of the December 2010 Letting Agreement that the tenancy was residential, I fail to see how he could ever establish that his business was conducted on a *bona fide* basis, as required by s.13 of the 1980 Act. Clause 2.17 of the Letting Agreement is fatal to the defendant's proposed defence of business user, in my view. In *O'Byrne v. M50 Motors Ltd.* [2001] IEHC 196 (a case cited by the trial judge), Ó'Caoimh J. held that the business user in issue in that case was in breach of an express term of the tenancy agreement. That is also the position in this case. Moreover, the defendant's referral of the second Notice of Termination to the RTB is, as noted by the trial judge, entirely inconsistent with the proposition that his activities on the demised house and lands constituted *bona fide* business user.

131. As already referred to, the defendant's defence of business user, even if it could be established, must be considered in light of s. 17(1) of the 1980 Act which provides, in relevant part:

> "17.— (1) (a) A tenant shall not be entitled to a new tenancy under this Part if—

> (i) the tenancy has been terminated because of non-payment of rent, whether the proceedings were framed as an ejectment for non-payment of rent, an ejectment for overholding or an ejectment on the title based on a forfeiture, or
>
> (ii) the tenancy has been terminated by ejectment, notice to quit or otherwise on account of a breach by the tenant of a covenant of the tenancy…"

132. Thus, even if I was satisfied (which I am not for the reasons already set out) that the defendant had a reasonable prospect of success in establishing business user, it is a fact that his tenancy was terminated by reason of non-payment of rent. While no notice of termination pursuant to s.17(1)(a)(i) was served on the defendant (hardly surprising given that he held the demised property on a residential basis as set out in Clause 2.17 of the Letting Agreement), it is a fact that he was served with a notice of termination pursuant to s. 67(2)(b)(ii) of the 2004 Act for failure to pay the contracted-for rent (the Second notice of Termination). Thus, the absence of a specific notice under s. 17(1)(a)(i) is not, to my mind, something to which I should attach undue weight in circumstances where, firstly, it is now beyond dispute that the defendant was in arrears of rent as of the date of service of the Second Notice of Termination (see the judgment of Haughton J. of 18 November 2018 and the consequent Order of 5 December 2018). Secondly, it bears emphasising that the plaintiff and the defendant had expressly agreed (at Clause 8 of the second schedule to the 15 December 2010 Letting Agreement) that any notice of termination should be served in accordance with the provisions of the 2004 Act.

133. Moreover, whatever way one looks at the matter, even if the defendant had a reasonable prospect of establishing business user (which I do not find), albeit that no notice thereunder was served on the defendant he would also be precluded by the provisions of

s.17(1)(a)(ii) (termination for breach of covenant) of the 1980 Act from applying for a new tenancy.

134. The third issue which Haughton J. directed to be tried was whether the defendant's residential tenancy has been validly terminated such that he is no longer entitled to possession. The defendant, at para. 25 of his Defence and Counterclaim, makes the bare assertion that the First Notice of Termination (served on him on 17 December 2017) is invalid in its own terms or, in the alternative, that the First Notice of Termination was invalidated by the Second Notice of Termination. The question is whether the defendant has a reasonable prospect of success in succeeding under either limb of the above argument.

135. With regard to the claim that the First Notice of Termination is invalid on its own terms, I am satisfied that the defendant has no reasonable prospect of establishing that to be the case. Turning firstly to the relevant statutory provision. Para. 3 of the table to s. 34 of the 2004 Act provides that the landlord may terminate a Part 4 tenancy where it is intended, within three months of the notice of termination of the tenancy, to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole interest in the dwelling or property containing the dwelling. In the present case, the First Notice of Termination advised, *inter alia*, that the property was going to be sold. As set out earlier in this judgment, both the defendant and Mr. Edward Magan were parties to the proceedings in the Jersey Court, following which the Jersey Court sanctioned the sale. The property has been sold. I am satisfied that the defendant has no reasonable prospect of success in establishing that the First Notice of Termination did not validly end his right to possession of Castletown House. Furthermore, I am satisfied that the defendant has no reasonable prospect of establishing that the First Notice of Termination was invalidated or somehow overtaken by the Second Notice of Termination. There is nothing expressly or

inherently contradictory in the service of the two notices in circumstances where the First Notice of Termination addressed the proposed sale of the property and the Second Notice of Termination addressed an entirely different basis to terminate the tenancy, namely the failure to pay the contracted-for rent.

136. It is the case that the defendant has referred the Second Notice of Termination to the RTB. That fact however, to my mind, cannot assist him in his claim in these proceedings to be entitled to a new tenancy given, firstly, my finding that he has no reasonable prospect of success in establishing business user and, secondly, the very obvious contradiction to the business user defence which the referral of the Second Notice of Termination to the RTB invokes in the mind of any reasonable person and, thirdly, given that s.17(1)(a)(i) of the 1980 Act disentitles a tenant to a new tenancy under Part II of the 1980 Act where the tenancy has been terminated because of non-payment of rent. Even if the RTB were to find some frailty in the Second Notice of Termination served pursuant to s.67(2)(b)(ii) of the 2004 Act (which I doubt), the defendant cannot surmount the fact that were he indeed engaged in business user, an entitlement (underpinned by non-payment of rent) to serve a notice under s.17(1)(a)(i) of the 1980 Act existed, even if it was not served in this case.

137. It is also noteworthy that the defendant does not plead in his Defence and Counterclaim that the Second Notice of Termination was defective procedurally: he pleads only the rent was not due and owing. The latter argument cannot be maintained in light of Haughton J.'s judgment of 18 November 2018 and consequent Order of 5 December 2018.

138. As regards the fourth issue directed to be tried, i.e. whether the defendant can obtain relief against forfeiture, it follows from the conclusions arrived at above, that this relief cannot be available to the defendant given that his tenancy was residential and terminated as such under the 2004 Act pursuant to the First Notice of Termination and/or the Second

Notice of Termination, and not by forfeiture (which is in any event proscribed by s. 58 of the 2004 Act).

139. The fifth issue which Haughton J. directed be tried was whether the defendant has any other basis upon which he is entitled to remain in possession. The trial judge could discern no legal basis upon which the defendant was entitled to possession or occupation of the property.

140. I note that in the correspondence sent to the plaintiff's solicitors on 19 August 2019, it was intimated by Mr. Edward Magan that the defendant reserved his rights on the fifth issue to be tried. In his written and oral submissions to this Court, the defendant has not advanced his arguments in this regard. Certainly, the defendant's Notice of Appeal and oral submissions raise myriad matters. Numerous complaints are levelled against the trustee (including alleged defrauding of the beneficiaries of the trust). Complaints are also levelled at the plaintiff's legal advisors. These matters are not for this Court. The alleged complaints do not go to the question of whether the defendant has a legal basis other than claimed business user and/or asserted invalid termination of his residential tenancy (both of which have been rejected by this Court as holding out a reasonable prospect of success for the defendant) such that he should remain in possession or occupation of the demised property.

141. In my view, the defendant has not shown this Court that he has a good defence on the merits or that he has a defence which has a reasonable prospect of success, or to put it another way, *"a real chance of success"* as the jurisprudence demands (see *The Saudi Eagle* [1986] 2 Lloyd's Rep 221, approved by Peart J. in *Allied Irish Banks Plc v. Lyons* [2004] IEHC 129). Accordingly, I find no basis for the Court to remit the matter to the High Court for trial on the five issues described above or any one of them.

142. In the course of the hearing of the within appeal, it was brought to the attention of the Court that the defendant was adjudicated bankrupt in the UK on 8 September 2020. In light of the findings of the Court it is not necessary to consider the implications of the defendant's bankruptcy on the within proceedings or how the Court might have exercised its discretion to remit the matter had the defendant met the reasonable prospect of success threshold.

143. Having regard to all of the foregoing I would dismiss the within appeal.

Costs

144. The plaintiff, who succeeded in the High Court, has succeeded in this appeal. Accordingly, it follows that the plaintiff should be entitled to its costs. If, however, either party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled, but any party seeking such a hearing will run the risk that if they are unsuccessful they may incur further costs. If no indication is received within the twenty-one-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

145. As this judgment is being delivered electronically, Whelan J. and Binchy J. have indicated their agreement therewith.