

THE HIGH COURT

[2022] IEHC 706

2022 No. 546P

BETWEEN

PHOENIX CONSTRUCTION CONSULTING LIMITED

PLAINTIFF

AND

**PERSONS UNKNOWN IN OCCUPATION OF 11A NORTH FREDERICK STREET,
DUBLIN 1 and GERRY WARD**

DEFENDANTS

Judgment of Ms. Justice Eileen Roberts delivered on 12 December 2022

Introduction

1. This judgment relates to four separate motions heard by this court together on 16 November 2022 in the above proceedings. The motions are as follows, identified in the order in which they issued:

(1) the plaintiff's motion dated 16 February 2022 (the '**interlocutory injunction motion**') seeking the following general reliefs against the defendants:

(a) an interlocutory injunction restraining the defendants and all persons having notice of any Order from trespassing at 11A North Frederick Street, Dublin 1 (which I refer to hereafter as the '**Property**') and related reliefs for the delivery of keys and alarm codes;

- (b) an interlocutory injunction restraining any threats to the plaintiff, its servants or agents and restraining any obstruction by the defendants to the taking of possession of the Property by the plaintiff;
 - (c) summary judgment on the plaintiff's claim as against the persons unknown in occupation of the premises; and
 - (d) an order directing the second named defendant to disclose on affidavit all rents paid to him by any person residing at the Property since 30 June 2020.
- (2) the second named defendant's motion dated 16 March 2022 (the '**strike out motion**') seeking to strike out the plaintiff's claim as being vexatious, frivolous, bound to fail and an abuse of process. This motion also seeks, in the alternative, the strike out of those portions of the plaintiff's grounding affidavits that refer to what are alleged to be unfounded and groundless allegations of criminal behaviour by the second named defendant.
- (3) the plaintiff's motion dated 12 October 2022 (the '**default judgment motion**') for judgment in default of appearance against the persons unknown in occupation of the Property; and
- (4) the second named defendant's motion dated 3 November 2022 (the '**discovery motion**') seeking discovery of documents from the plaintiff.

Background to these proceedings

2. The plaintiff was registered as full owner of the Property in folio 177876L Co Dublin on 4 March 2021. The Property comprises a ground-floor commercial unit which is in the plaintiff's possession and no orders are sought in these proceedings in relation to that unit. The remainder of the Property comprises four apartments, numbers 1 to 4 and it is this residential part of the Property that is the subject of these proceedings.

3. The first named defendants, namely persons unknown in occupation of 11A North Frederick Street, Dublin 1, are believed to occupy some or all of apartments numbered 1 to 4. The plaintiff is unaware of the terms on which the units are occupied but says it has not consented to any occupation by these parties. The second named defendant does not reside at the Property.
4. The second named defendant, together with Ruairi O’Ceallaigh and Cormac O’Ceallaigh (who are not involved in these proceedings) purchased the Property on 12 November 2004 from a Mr Patrick McCreevey. That purchase was financed by mortgage from IIB Bank and the purchasers entered into a deed of mortgage with IIB Bank on 12 November 2004. The loan was secured on the Property by way of charge, and the mortgage documentation confirmed the bank’s entitlement to appoint a receiver (with an express contractual power of sale) once the security became enforceable.
5. IIB Bank appointed Mr Ken Fennell as receiver to the bank’s interest in the Property by deed of appointment dated 14 August 2014. IIB Bank (which on 24 October 2008 changed its name to KBC Bank Ireland Plc) was permitted to assign its interest in the mortgage without borrower consent (clause 20.2 of the Mortgage Deed). It assigned its interest to Beltany Property Finance DAC on 30 November 2018 and entered into a deed of novation of receiver on that same date.
6. The plaintiff purchased the Property by contract for sale dated 28 February 2020 which it entered into with Mr Ken Fennell as receiver of the assets of the previous registered owners, being Ruairi O’Ceallaigh, Cormac O’Ceallaigh and the second named defendant. That transaction completed by indenture dated 2 June 2020 entered into by the plaintiff with Beltany Property Finance DAC, selling as mortgagee in possession.

- 7.** The plaintiff states that it was unable to gain entry to the Property following the purchase. While it secured access to the commercial ground floor area it has been unable to gain access to the apartments overhead which continue to be occupied by persons unknown. The plaintiff alleges that the second named defendant changed the locks on the residential part of the Property on 24 June 2020 after the plaintiff had purchased the Property. The plaintiff claims that it has been prevented from repairing the residential part of the Property or gaining access to it and that it has been the victim of threats, intimidation and harassment. The plaintiff says it believes that the persons in occupation are paying rent to the second named defendant.
- 8.** The present proceedings issued on 11 February 2022. Orders are sought by the plaintiff for a declaration that the first named defendants have no legal title or lawful basis to occupy the Property. Injunctions are sought restraining the defendants from trespassing onto the Property. A declaration is sought that any monies received by the second named defendant from the occupiers of the Property since the plaintiff's purchase of the Property on 2 June 2020 are held on trust for the plaintiff.
- 9.** The first named defendants have yet to enter an Appearance to these proceedings. This matter is dealt with separately when this court considers the default judgment motion.
- 10.** The second named defendant represents himself in these proceedings. His defence was delivered on 24 August 2022. He alleges that he fully discharged any debt allegedly owed to KBC Bank Ireland plc by payment in full by way of a promissory note/bill of exchange which he says was accepted by that bank on 21 November 2016. This matter is considered later in this judgment. The second named defendant also claims to be the legal, lawful and beneficial owner of 11A North Frederick Street. He argues that the receiver acted unlawfully and never had any lawful power of attorney to act on behalf of

the second named defendant or to convey the Property to the plaintiff. He also argues that the receiver did so for a price well below market value.

11. The second named defendant complains about what he alleges is the unlawful and forcible entry by the plaintiff onto the Property and the fear and distress caused by the plaintiff's agents to persons living there. He makes wide-ranging allegations against the agents and officers of the plaintiff regarding their behaviour and alleged criminal associates. He denies any involvement in harassment or intimidation of the plaintiff and says that such allegations are defamatory of him. He seeks by way of counterclaim, a declaration that the payment to KBC Bank Ireland plc by his promissory note be declared valid and lawful and that it disposes entirely of the mortgage debt; a declaration that the receiver's appointment with the power of sale is not valid; a declaration that the conveyance and subsequent registration of ownership of the Property is null and void and that he, the second named defendant, is the lawful owner of the Property and is entitled to an order for possession of the Property and all associated assets. He seeks an injunction restraining the plaintiff from trespassing on the Property and seeks an order for the referral by this court to the DPP for a criminal investigation for fraud and perjury by the plaintiff's deponents as well as an order for expenses and losses in respect of rental income, interest and exemplary damages for trespass.

Other related proceedings and the impact of same on the issues before the Court in the present proceedings

12. The second named defendant has issued several other proceedings against various parties that appear to be related to some of the issues in the present proceedings. The papers before this court refer to two other sets of proceedings issued by the second named defendant.

13. In the second-named defendant's supplemental affidavit sworn 15 November 2022 at para 18 he avers that:

“The Plaintiffs registration with the Land Registry has been fraudulently obtained. The herein second named Defendant is the lawful and beneficial owner of the property, the subject of these proceedings and is pursuing the overturning of this registration as part of his Plenary proceedings in case no's 2020/5742P and 2021/3869P.”

14. While this court has not been copied with the pleadings in either of these referenced proceedings it is instructive to note that proceedings 2020/5742P are taken by the second named defendant against *“Ireland, Helen McEntee, Angela Denning, KBC Bank Ireland plc, Ken Fennell, Beltany Property Finance DAC, Jeremy Andrew Harris, Grainne White, Peter Keatley and Dowling Properties Ltd.”* Proceedings 2021/3869P are taken by the second named defendant against a defendant identified as *“McCarthy”*.
15. As noted by Baker J in *Tanager DAC v. Kane* [2018] IECA 352, [2019] 1 IR 385 at paragraph 76, where rectification is sought under section 31 of the Registration of Title Act of 1964 (**the 1964 Act**), it is not necessary that the Property Registration Authority (**PRA**) be joined as a party. If however rectification is sought under section 32 of the 1964 Act on the basis of an alleged error originating in the land registry, the PRA would clearly be a party to the proceedings in order that it be bound by any finding of error on its part and because such finding may, in turn, lead to a claim for compensation against the PRA arising from the making of the error. Proceedings for an order that the register be rectified by the court under section 31 of the 1964 Act will usually be *inter partes* proceedings between the person who claims an entitlement to be registered and the person actually registered.

- 16.** It appears clear that while the second named defendant may have referenced a challenge to the register in these other legal proceedings he has not in fact legally challenged the registration of the plaintiff as owner of the Property. This is clear because the plaintiff is not a defendant in either set of the proceedings identified by him and indeed neither is the PRA. I will return later in this judgment to the relevance of the plaintiff's registration as full owner of the Property.
- 17.** In proceedings 2016/6238P the receiver, Mr Ken Fennell, applied to the High Court to have his receivership confirmed over a number of properties, including the Property the subject of these proceedings. Mr Fennell issued proceedings in that regard against the second named defendant. By order of the High Court (O'Connor J) on 28 July 2016 it was determined that Mr Ken Fennell stood "*validly appointed as receiver over 7 Berkeley Rd 1 Hardwick Street and 11A North Frederick St, Dublin*". That High Court order also directed the second named defendant to deliver up possession to the receiver of a premises in Dundrum. A stay on that order pending appeal was refused by the High Court (McDermott J) on 27 January 2017. The second named defendant was unsuccessful in the Court of Appeal and was also refused leave to appeal further to the Supreme Court. While the focus of the appeals related to the order for possession of a property in Dundrum, the High Court Order dated 28 July 2016 confirming the validity of Mr Fennell's appointment as receiver over the Property appears to settle that aspect of the second named defendant's challenge and it will therefore not be an issue which is revisited by this court in these proceedings.
- 18.** In summary therefore:
- (i) There does not appear to be an existing challenge by way of legal proceedings to the registration of the plaintiff as registered owner of the Property, despite the

averments in that regard made by the second named defendant in affidavits before this court.

(ii) Any argument advanced by the second named defendant regarding the validity of the receiver's appointment over the Property has already been determined by the High Court and will not be reconsidered in these proceedings.

(1) The interlocutory injunction motion

19. The plaintiff's motion dated 16 February 2022 (the '**interlocutory injunction motion**') seeks the following general reliefs against the defendants:

(a) an interlocutory injunction restraining the defendants and all persons having notice of any Order from trespassing at the Property (and related reliefs for the delivery of keys and alarm codes);

(b) an interlocutory injunction restraining any threats to the plaintiff, its servants or agents and restraining any obstruction by the defendants to the taking of possession of the Property by the plaintiff;

(c) summary judgment on the plaintiff's claim as against the persons unknown in occupation of the premises; and

(d) an order directing the second named defendant to disclose on affidavit all rents paid to him by any person residing at the Property since 30 June 2020.

(a) / (b) The plaintiff's claims for injunctive relief to prevent the defendants from interfering with the plaintiff gaining and maintaining access to the Property

20. It is appropriate to consider the general reliefs under paragraphs (a) and (b) above together. They fall under the general question as to whether the plaintiff should now be

entitled to an injunction preventing any interference by the defendants with the plaintiff gaining and maintaining access to the Property.

- 21.** It is common case between the parties that the plaintiff does not currently have proper access to the Property and indeed has not had access since 26 June 2020 despite having purchased the Property on 2 June 2020. The extent of the plaintiff's access to the residential part of the Property is through the outer door into the common internal hallway but no further.

The defences raised by the second named defendant to paragraphs (a) and (b) of the interlocutory injunction motion

i. The claim that the second named defendant owns the Property

- 22.** In his defence and counterclaim the second named defendant alleges at paragraph 3 that he is the “*legal, lawful and beneficial owner of the property which is the subject of this litigation*”. This court does not accept this to be the case in light of the fact that the plaintiff is registered as full owner of the Property and the conclusiveness of the property register.
- 23.** In this case the plaintiff is the registered owner of the Property. This is not a case where a challenge is made to possession by a receiver. The receiver sold the Property to the plaintiff as a bona fide purchaser for value. The courts have on many occasions recognised the conclusive nature of the property register and indeed this is provided for in the Registration of Title Act 1964 at section 31 (1) in the following terms:

“The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or

matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just”.

- 24.** It was held by the Court of Appeal in *Tanager DAC v. Kane* [2018] IECA 352, [2019] 1 IR 385 that the registration of the plaintiff as owner of a charge could not be challenged in possession proceedings having regard to the conclusiveness of the register pursuant to section 31 of the 1964 Act. In possession proceedings, the court was required to accept the correctness of the particulars of registration as they appeared on the folio and could not hear argument that the registration was wrongly made or in other words “look behind” the register. The same principles apply equally where, as here, the plaintiff is registered as full owner of the property rather than as a chargeholder.
- 25.** In *Tanager Baker J* noted at paragraph 27 of her judgment that “*the conclusiveness of the register has been a cornerstone of the system of registration*”. The provisions of section 31(1) of the 1964 Act make the entry on the register conclusive evidence of title subject to the jurisdiction of the courts to direct the rectification of the register on the ground of actual fraud or mistake. While the second named defendant has made allegations of fraud against the plaintiff, there was no evidence of any fraud provided by him.
- 26.** More recently in the High Court decision of *Tarbutus Limited v. Hogan* [2021] IEHC 786, Holland J stated at paragraph 23 of his judgment:
- “On proof of the Folio and Tarbutus’s status as registered owner of the Apartment it appears to me that, failing Mr Hogan’s providing a defence to the claim, Tarbutus’s proofs are in order and I am bound by S. 31 – the conclusivity of the Register – to recognise and vindicate Tarbutus’s full ownership of and right to possession and occupation of the Apartment and grant relief accordingly.”*

27. *Tarbutus* was an action by a registered full owner seeking injunctions against trespassers and so the fact pattern is similar in that regard to the current application, including in respect of the defences raised. *Tarbutus* was decided following a full trial and oral evidence and was not an interlocutory application.
28. The second named defendant has not provided any explanation as to how he could apparently go from being a joint owner of the entire Property with Messrs O' Ceallaigh to the sole legal, lawful and beneficial owner of the residential part of the Property.
29. I find that the second named defendant has not raised a fair issue on his alleged ownership of the Property. The plaintiff has, on the contrary, established a strong case likely to succeed on the point that it owns the Property and is entitled to possession of it.

ii. The claim that the second named defendant has repaid his mortgage in full

30. The next argument advanced by the second named defendant as to why injunctive relief ought not to be granted against him is his allegation that he has already repaid his mortgage by way of promissory note. His Defence and Counterclaim dated 24 August 2022 states as follows in that regard:

“2. The Second named Defendant fully discharged any debt allegedly owed to KBC Bank Ireland Plc., pursuant (but not limited) to The Bills of Exchange Act, 1882, by payment in full with the issuance of a promissory note/bill of exchange, which was accepted by the former chief financial officer of KBC Bank Ireland Plc, Des Mc Carthy on the 21st November 2016.

...

4 The Second named Defendant puts the Court on Judicial Notice of The Bills of Exchange Act, 1882, and the Supreme Court judgment in December 2016 (Collins - v- Minister for Finance & Others 2016 IESC 73).. which affirms the act and affirms

the financial value of promissory notes/bills of exchange to Banks, as an upfront payment of capital on the day they are issued/provided.”

31. The promissory note is dated 17 November 2016 and states that payment in the amount of €1,925,000 will be made on the 17 November 2046. While it is stated that quarterly interest payments of €9265.00 will be made each year, no payments have actually been made or collected under the promissory note.
32. It appears that the validity of the promissory note and its acceptance or otherwise by KBC Bank is the dispute that is the subject of High Court proceedings No.2021/3869P referred to above and it is not an issue before the Court in these proceedings. However, insofar as it is relevant to a consideration as to whether the second named defendant has raised a fair issue to be tried on it so as to persuade this court not to grant an injunction to the plaintiff then I find that this matter does not raise a fair issue for the following reasons.
33. The question as to the validity or otherwise of the promissory note is a matter entirely between the second named defendant and the bank to whom it issued. It is not a matter which concerns the plaintiff. While it could, in theory, have had some relevance to the appointment of the receiver (although I make no such finding and observe that the receiver was appointed years *before* the issue of the promissory note), the High Court has already confirmed the validity of the receiver’s appointment and this is not a matter which will be re-considered by this court.
34. I find that this particular ground of defence has no relevance to the position of the plaintiff as purchaser and owner of the Property. This matter appears to be one raised by the second named defendant in other proceedings taken by him against Mr McCarthy and it will be determined by the trial judge in due course in the context of those proceedings.

On this point therefore I do not believe that the second named defendant has raised a fair issue to be tried.

iii. The claim that there are issues with the validity of the appointment of the receiver

35. The next defence raised by the second named defendant in his Defence and Counterclaim relates to the appointment of the receiver and the power he had to convey the Property to the plaintiff. In summary, it is alleged that the receiver abused the legal process, perjured himself on affidavit and was guilty of fraudulent misrepresentation. This court has no evidence to substantiate those allegations. It is also alleged that the receiver relied upon a power of attorney but that the second named defendant had never given him such a power. When it was pointed out to the second named defendant that the power of attorney was part of his original mortgage documentation, the second named defendant stated orally to the court that this was not his signature. However, there is no evidence before the court to substantiate that statement nor does it feature in any of the pleadings or affidavits before the court.

36. In any event and in light of the previous finding by the High Court and its ruling to the effect that the receiver stood validly appointed over the Property, I find that these issues are *res judicata* and that they are not now available to be raised by the second named defendant as issues in this interlocutory application.

iv. The claim that the receiver sold the property at less than market value

37. The second named defendant complains at paragraph 7 of his Defence and Counterclaim that the sale by the receiver of the Property was “*for a paltry sum of money, less than 50% of the market value of the property*”.

38. Insofar as this argument relates to the actions of the receiver it is not a matter that will be revisited by this court in these proceedings for the reasons already explained.

- 39.** There is no basis advanced by the second named defendant as to why the actual price paid by the plaintiff for the Property is relevant to the plaintiff's title to the Property and I do not believe it is relevant to the plaintiff's registration as full owner. The argument is similar to one made by the defendant in the *Tarbutus* proceedings (and dismissed by the High Court) where the defendant argued that the sale of the Apartment by Tanager DAC was not made on the open market and was at an undervalue and was a fraud on the defendant.
- 40.** In this case the sale of the Property took place by way of contract dated 28 February 2020 which, amongst other things, disclosed the existence of proceedings between the receiver and the second named defendant as well as an order for possession dated 17 May 2017 and other proceedings initiated by the second named defendant in relation to the receivership. The contract also disclosed that the Property was not being sold with vacant possession but rather the purchaser would take it "*as it stands subject to and with the benefit of any rights, entitlements or interests of any current occupier in any part of the subject property*" (paragraph 47.2 of the special conditions). No information was available to the purchaser regarding the nature of those third-party entitlements. It was clear that any purchaser of the Property would need to be prepared for the additional effort and expense involved in gaining vacant possession of the Property and indeed this has proven to be the case. The purchase price for properties sold in such circumstances will reflect these important factors from a purchaser's perspective. I do not accept that there is any evidence that the Property was sold below its market value. This argument would not in any event impugn the plaintiff's ownership of and right to possession of the Property.

Conclusion on paragraphs (a) and (b) of the interlocutory injunction motion

- 41.** In all the circumstances I do not believe that the second named defendant has advanced any ground which would persuade this court to refuse the injunction sought by the plaintiff

to restrain the second named defendant from trespassing on the Property or interfering in any way with the plaintiff's right to possession of the Property of which it is the registered owner. The plaintiff has established a strong case that it is likely to succeed at the trial of the action to obtain a permanent injunction against the second named defendant. Furthermore, I find that the balance of convenience favours granting the injunction sought against the second named defendant who has not raised any credible basis as to why he should be entitled to possession of the property instead of the registered owner. The plaintiff has given an undertaking to the court to compensate the second named defendant in the event that he succeeds at trial. Given that the plaintiff holds full title to the Property without any registered burdens on it, this undertaking is of substance and protects the position of the second named defendant.

- 42.** As against the first named defendants, being all persons unknown in occupation of the Property, they have, despite correspondence having been sent to them and being served with these proceedings, refused to engage with the plaintiff or to provide any details of the basis upon which they remain in occupation of the Property. While they have, as explained below, indicated that they wish to enter an appearance to the proceedings, they have not yet done so. I see no basis whatsoever why they should not be restrained from interfering with the plaintiff's right to possession of the common areas of the Property. Insofar as any of those persons in occupation have pre-existing rights and tenancies subject to which the plaintiff acquired the Property, then the plaintiff will need to deal with those persons on the basis of those entitlements. I am mindful of the fact that the Plaintiff purchased the property subject to disclosed but unknown third-party occupants. I direct that the occupants of each apartment should provide full details of their occupation to the plaintiff within 28 days of this judgment. Pending the provision of this information, I will therefore limit the injunctive relief against the first named defendants so as to restrain any interference by

them with the plaintiff's possession of the common areas of the Property. When this matter is back before this court, which I will fix for 17 January 2023, I will consider any amendments to that interlocutory order as against the first named defendants with the benefit of full details of the terms on which they remain in occupation.

(c) The plaintiff's claim for summary judgment against the first named defendants

43. The plaintiff, as part of its interlocutory injunction motion, seeks summary judgment against the persons unknown in occupation of the premises.
44. The persons unknown have not entered an Appearance or filed any affidavit evidence and the plaintiff is unaware of any legal right they may have to be in occupation of the Property.
45. It is clear that the courts have power to grant summary judgment in plenary proceedings where the defendant has no real or bona fide defence (see *Abbey International Finance Limited v. Point Ireland Helicopters Limited and another* [2012] IEHC 374 as recently approved by the Court of Appeal in *Inland Fisheries Ireland v. Peadar Ó Baoill & others* [2022] IECA 266). However, in light of the circumstances identified in more detail below in relation to the plaintiff's motion for judgment in default of appearance, this court will not at this point grant summary judgment against the first named defendants. Instead I will permit those parties a further short period of time within which to enter an Appearance and to outline the nature of their entitlements (if any) to remain as occupants in the Property. If the first named defendants fail to provide a lawful basis entitling them to remain in the Property then the plaintiff will be in a position to seek further relief against them, including summary judgment should they be able to establish that the first named defendants have no bona fide defence.

(d) The plaintiff's request for an order directing the disclosure of information on affidavit by the second named defendant

46. The final aspect of the plaintiff's interlocutory motion seeks an order directing the second named defendant to disclose on affidavit all rents paid to him by any person residing at the Property since 2 June 2020.
47. This order is sought pursuant to the court's inherent jurisdiction. While it is possible that this information could be sought by way of discovery or perhaps by interrogatories, I believe there may be some practical difficulties in this case in obtaining this information by either of those processes.
48. Evidence regarding any rents received by the second named defendant since the plaintiff purchased the Property is highly relevant to these proceedings. This evidence is, for example, relevant as to the amount of damages that may be due to the plaintiff by the second named defendant if the plaintiff succeeds at trial. It is also potentially relevant to establish the entitlements of any persons in occupation of the Property. It is evidence which may not be easily obtained by way of discovery, which is limited to documentary evidence that remains in existence. Discovery is also an expensive and time-consuming process which, as an unrepresented party, the second named defendant may struggle with.
49. This information might be sought by means of interrogatories. However, while interrogatories can be used to obtain information from the interrogated party about the facts in dispute, they cannot be used to obtain the evidence that will be adduced in order to establish those facts. Interrogatories can also be used to obtain admissions from a party, but that in itself will not provide the detail that will be required by the plaintiff (and ultimately the court) at the trial of these proceedings.
50. The plaintiff has already stated on affidavit and in pleadings, that it believes the second named defendant has continued to receive rent from persons in occupation. It is of some significance to this court that the second named defendant has avoided dealing with this

specific allegation in any of the multiple affidavits he has filed in these proceedings. Indeed, when this court invited the second named defendant at the hearing of this action to direct it to the aspects of his pleadings which address this issue, the second named defendant acknowledged that he had not addressed the allegations regarding receiving rents or organising the tenants and that this remained his position. It is clear therefore that this is not information which the second named defendant will provide on a voluntary basis and that it will be necessary for a formal order to be obtained against him in that regard.

- 51.** Pursuant to its inherent jurisdiction, this court can take steps and make directions to ensure that cases before it are run efficiently and cost-effectively. I am satisfied that the suggestion of a sworn affidavit to be provided by the second named defendant regarding the rents he may have received is an efficient and cost-effective direction to make in this case. It will ensure that the second named defendant does not have to engage in a lengthy and expensive process of discovery or that non-party discovery has to be considered. I will therefore order the second named defendant to disclose on affidavit all rents paid to him by any persons residing at the Property from 2 June 2020 to date, detailing the amounts, the date and identity of the payer in each case. I will hear the second named defendant on the time period he will need to comply with this direction..

(2) The strike out motion

- 52.** The second named defendant's motion dated 16 March 2022 (the '**strike out motion**') seeks to strike out the plaintiff's claim pursuant to Order 19, rule 28 RSC as being vexatious, frivolous, bound to fail and an abuse of process. This motion also seeks, in the alternative, the strike out of those portions of the plaintiff's grounding affidavits that refer to what are alleged to be unfounded and groundless allegations of criminal behaviour by the second named defendant.

53. Order 19 rule 28 provides that a pleading may be struck out on the grounds that it discloses “*no reasonable cause of action or answer*” and, in any case, where the action or defence is shown by the pleadings to be “*frivolous or vexatious*”. In *Aer Rianta cpt v. Ryanair Ltd* [2004] IESC 23 at paragraph 10, the Supreme Court stated that this jurisdiction is one which a court should be “*slow to exercise*”. However, if a court is convinced that a claim will fail a pleading will be struck out. As Baker J stated in *Wilkinson v. Ardbrook Homes Ltd* [2016] IEHC 434 at paragraph 19, the approach of the court should be

“to ask whether the plaintiff could possibly succeed on the case as pleaded and in the light of the facts asserted, and only if it is satisfied that a plaintiff could not possibly establish those facts, or could not possibly succeed on the pleadings, should the proceedings be struck out”.

54. In the present case, and for the reasons already outlined in this court’s consideration of the plaintiff’s interlocutory motion, I am satisfied that the plaintiff, as registered owner of the Property, has a strong case likely to succeed at trial. I find no basis in those circumstances to make any order that the claim is frivolous, vexatious or that it discloses no cause of action which can succeed. Accordingly, I refuse that application by the second named defendant.

55. The second named defendant’s motion in the alternative seeks to strike out the affidavit of Peter Keatley or “*the specific portions that refer to unfounded and groundless allegations of criminal behaviour of/by the second named defendant*”. However, no specific paragraph numbers or sentences are identified.

56. Order 19 rule 27 confers a broad discretion of the court to strike out any part of the pleading that is unnecessary, scandalous or prejudicial. As was observed by the court in *Riordan v. Hamilton* [2000] IEHC 189,

“[p]leadings should not be used as an opportunity of placing unnecessary or scandalous matters on the record of the court, or as an opportunity of disseminating such matters when they have nothing to do with any dispute between the parties.”

57. Having reviewed the grounding affidavit of Peter Keatley sworn 10 February 2022 it confirms at paragraph 9 that in July 2020 *“a person attended my place of business and home in Co Kildare and smashed the windows”*. There is reference to a further incident in August 2020 but the perpetrator is not identified. Paragraph 10 refers to an intimidating incident on 16 August 2020 by *“an unknown male”*. The first specific reference to the second named defendant appears at paragraph 21 of Mr Keatley’s affidavit where it states *“... I have been the subject of acts of intimidation and criminal damage by persons purporting to act on behalf of the persons unknown and/or Mr Gerry Ward.”* There is an allegation at paragraph 23 of Mr Keatley’s affidavit that *“on the 24th day of June 2020, Mr Ward changed the locks”* and an allegation that same was captured on CCTV and that Mr Ward subsequently changed the locks again later in 2020. There is an allegation in paragraph 24 that *“the plaintiff believes that the second named defendant Gerry Ward is assisting the occupants to remain in possession and to obstruct the plaintiff”*.
58. In *Riordan*, the court held that allegations are not to be considered scandalous where they would be admissible in evidence to show the truth about the allegation in pleadings which is material to the relief claimed. However, unnecessary imputations can be struck out as scandalous.
59. I appreciate that the second named defendant entirely refutes the suggestion that he had any responsibility for or involvement in the acts of intimidation pleaded by the plaintiff. These matters are however relevant to these proceedings. Injunctive relief is specifically sought to restrain any form of interference with the plaintiff’s use of the Property. If Mr

Ward did not change the locks and if the plaintiff is unable to prove at trial that Mr Ward did so then this will be a matter which Mr Ward will be in a position to specifically draw to the court's attention in relation to any order it wishes to make. Similarly if it is established that Mr Ward had no involvement with the persons in occupation he will be able to make a similar point at trial. While recognising fully the second named defendant's entitlement to defend his good name and reputation and his strong denial of any involvement with the intimidatory behaviour outlined in Mr Keatley's affidavit, I do not believe that the averments above ought to be struck out as scandalous, given their relevance to the pleaded case. The plaintiff remains at risk if it is unable to establish the truth of these allegations.

(3) The default judgment motion

- 60.** The plaintiff's motion dated 12 October 2022 (the '**default judgment motion**') seeks judgment in default of Appearance pursuant to Order 13 of the Rules of the Superior Courts against the persons unknown in occupation of the Property. It is grounded on an affidavit of Grainne White, solicitor, sworn on 12 October 2022.
- 61.** Ms White's affidavit refers to and exhibits a copy of the High Court Order obtained by the plaintiff following an ex parte application on 4 July 2022 seeking substituted service against the first named defendants. That Order is in the following terms:

"IT IS ORDERED Pursuant to Order 10 rule 1 of the Rules of the Superior Courts that service on the persons unknown in occupation of 11a North Frederick Street Dublin 1 of the Plenary Summons herein and all subsequent documents pertaining to the within proceedings to include notification of any future court dates be effected by leaving a copy of any such document marked for the attention of the occupant of apartments 1 2 3 and/or 4 in the private internal hallway at the property together

with a cover letter confirming that a further booklet of papers is available on request and that same be deemed good and sufficient service of the proceedings herein”.

That Order was perfected on 12 July 2022.

- 62.** Ms White in her affidavit confirms that the plaintiff’s document server attended at the Property on 16 August 2022 and served the occupants of all four apartments with the plenary summons in compliance with the terms of the High Court Order dated 4 July 2022. She also avers that on 31 August 2022 the document server served warning letters and letters consenting to late filing of an Appearance dated 29 August 2022 on each occupant in compliance with the terms of the High Court Order dated 4 July 2022. Her affidavit exhibits all the correspondence served.
- 63.** There is an affidavit of service of Brian Morrissey sworn 7 September 2022 confirming service by him on 16 August 2022 of the plenary summons together with a copy of the Order of the High Court dated 4 July 2022 and a cover letter explaining the Order of the High Court. Mr Morrissey confirms that he affixed an envelope containing these documents addressed to the occupant of each apartment to the inner door which led to the staircase to the four apartments, in compliance with the High Court Order. There is a further affidavit of service of Brian Morrissey sworn on 7 September 2022 in which he confirms that he served 28 day warning letters on each of the occupants of the four apartments on 31 August 2022 in the same manner and that each envelope also contained a letter consenting to the late filing of an Appearance.
- 64.** There is an affidavit of service of Hugh Meiklereid, trainee solicitor, who confirms that on 9 November 2022 he attended the Property to serve on the first named defendants a copy of the plaintiff’s notice of motion for judgment in default of appearance together with Ms White’s grounding Affidavit and exhibits and an explanatory letter. The cover

letter clarified that the hearing of the motion would take place on 16 November 2022 along with the hearing of the plaintiff's interlocutory motion for an injunction. The affidavit of service confirms that separate envelopes for the occupants of each of the four apartments were affixed using duct tape to the private door up to the four apartments in the private foyer of the Property so that service of these documents was effected in accordance with the terms of the High Court Order dated 4 July 2022.

- 65.** The second named defendant sought to vacate the High Court order regarding substituted service on the first named defendants. That application was rejected by the High Court (Dignam J) on 10 November 2022.
- 66.** No Appearance was entered by the first named defendants nor was there any appearance on their behalf when this matter was heard by the Court on 16 November 2022. However at 8.48am on 16 November an email was sent from a private email address to the court registrar in the following terms:

“I send this email on behalf of the tenants residing in 11 A North Fredrick Street, Dublin 1 and should be very thankful if you can provide a copy of this email to the court.

The residents in 11 A North Fredrick Street are all non-nationals\Nigerian and have lived there for approximately 10 years, all struggle with the English language and do not have the financial resources to avail of a lawyer. I am a relative of one of the residents.

They want to defend themselves against the legal action instigated against them and now understand they need to file appearances to the summons and are looking for time to do this.

They also claim that the Residential Tenancies Board is the proper body to deal with this matter and claim the high court does not have jurisdiction, that said, should the high court determine it has jurisdiction, the residents wish to defend themselves and inform the court of the threats and intimidation they have been subjected to by Mr Peter Keatley and a Mr Wilson.

As you can see, I have included the solicitors for the plaintiff on this email, perhaps the court might direct that Coughlan White contact the tenants through me for the sake of easiness.”

- 67.** While the plaintiff has expressed serious reservations regarding the source and authenticity of this correspondence, for present purposes I am prepared to accept it as a genuine request from the first named defendants for time to enter an Appearance.
- 68.** The courts are understandably reluctant to grant final judgment against a defendant who has not been heard and therefore strict compliance with the default procedures is required. I am satisfied that the relevant time periods and service requirements were complied with by the plaintiff and that it was entitled accordingly to issue its motion for judgment in default.
- 69.** In this case, in light of the email request referred to above looking for time to file Appearances and expressing a desire for the first named defendants to defend themselves against the legal action taken by the plaintiff, I believe it is necessary in the interests of justice that the time for delivery of an Appearance should be extended. I therefore extend the time for delivery of an Appearance by the first named defendants by a further period of 28 days from the date of this judgment. I also direct that if any of the first named defendants fail to enter and file an Appearance within that extended period the plaintiff

shall have liberty to enter judgment (without further order) against such defendant for the relief claimed in the statement of claim against them.

70. I direct that future service of all documents on the first named defendants should continue to comply with the terms of the High Court Order dated 4 July 2022. The writer of the email may, at the election of the plaintiff, be copied with correspondence to the first named defendants but such a step is an additional voluntary one and does not replace the need to comply with the earlier court Order. This individual appears to be neither an occupant nor a solicitor/barrister and so has no right to represent the first named defendants in these proceedings.

(4) The discovery motion

72. The second named defendant issued a motion on 3 November 2022 (the ‘**discovery motion**’) seeking discovery of documents from the plaintiff.
73. In most cases the documents sought are documents which are expressly referred to in the affidavits and pleadings filed on behalf of the plaintiff. They could therefore be obtained and inspected pursuant to a notice to inspect. The plaintiff says that it has already provided most of these documents to the second named defendant. However, I believe that it would regularise matters and assist the second named defendant if the plaintiff was required to produce the documentation in an affidavit of discovery.
74. Turning then to a consideration of the documents sought by the second named defendant I confirm as follows: –
- (i)– (vi) – Copies of the documents requested and referred to in Mr Keatley’s affidavit sworn on 10 February 2022 should be provided by way of discovery. An issue arises as to whether the sale price should be redacted from documents (i) and
 - (ii) – The plaintiff has provided a redacted copy of the contract for sale. However it

is possible to read the redaction. It is also the case that the indenture exhibited by the plaintiff does not consistently redact the purchase price. There appears to be little point in the parties continuing to dispute whether or not the second named defendant should be entitled to know the price paid if this information is already known to the second named defendant and has been provided to him, even if inadvertently.

(vii) – The category of “*all Garda correspondence and all Garda reports*” is too broad and should be reworded to make it specific to those reports and correspondence which relate to the Property or to instances of intimidation alleged to relate to the Property or the plaintiff’s ownership of same.

(viii) – The category of CCTV camera footage should be confined to the changing of locks incident alleged by the plaintiff.

(ix) – This category seeks evidence proof of the plaintiff’s ability to fund these proceedings and an award of exemplary damages and is not an appropriate category of discovery in these proceedings.

(x) – This category seeks evidence/proof that the deponent of the plaintiff’s affidavits is fully tax compliant and it is not an appropriate category of discovery in these proceedings.

(xi) – This category appears confusing. Insofar as it relates to the Garda correspondence and reports which are part of or are referred to in the plaintiff’s pleadings, it is allowed.

(xiii) – (xv) – Discovery will be ordered of these categories noting my earlier comments in relation to redaction of the purchase price.

(xvi) – (xvii) – These categories should be reworded to read “all documents the plaintiff intends to rely on to support its claims of threats, intimidation and harassment as referred to in paragraphs 11 and 12 of the plaintiff’s Statement of Claim.”

(xviii) – This category seeks disclosure of how a third party could make certain comments in an inspection report and it is not an appropriate category of discovery.

(xix) – This is a publicly available statute and is not necessary to order it to be made available by discovery.

Conclusion

- 75.** In relation to the plaintiff’s **interlocutory injunction motion** I will make an order granting injunctive relief to the plaintiff against the defendants pending the trial of this action in the terms of paragraphs 4, 5, 6 and 8 of the plaintiff’s notice of motion.
- 76.** I will make an order in terms of paragraphs 2 and 3 of the notice of motion as against the second named defendant. I will make an order in terms of paragraphs 2 and 3 of the notice of motion as against the first named defendants but limited until further order to the common areas of the Property.
- 77.** I refuse the order for summary judgment sought against the first named defendants in the terms of paragraph 9 of the plaintiff’s notice of motion.
- 78.** I direct that the first named defendants should, within four weeks of the date of this judgment provide full details of their occupancy to the plaintiff. I defer making any decision of the relief sought at paragraph 1 against the first named defendants until particulars of their occupancy have been provided as directed.

79. I make an order against the second named defendant in the terms of paragraph 7 of the notice of motion requiring him to disclose on affidavit rents paid to him by any persons residing at the Property from 2 June 2020 to date. The said affidavit should identify the payer and the amounts paid and date and period of payment in each case. I will hear the second named defendant in relation to the time period required to complete this affidavit.
80. No order is made in respect of paragraph 10 of the notice of motion as this issue was not advanced at the hearing.
81. In relation to the second defendants **strike out motion** I refuse the reliefs sought at paragraphs 1 and 2.
82. In relation to the plaintiff's **judgment in default of appearance motion** against the first named defendants, I will direct that the first named defendants be given an extension of time of 28 days from the date of this judgment to enter and file an Appearance/
Appearances failing which the plaintiff will have liberty to enter judgment (without further order) against any defendant who fails to do so for the relief claimed in the statement of claim against them.
83. In relation to the second named defendant's **discovery motion** I make an order for discovery as set out in this judgment and will hear the parties in relation to the time period required and the identity of the plaintiff's deponent.
84. This matter will be listed for mention on Tuesday 17 January 2023 at 10.30am when I will hear the parties in relation to the form of order, further directions and submissions in relation to legal costs and any other issues arising.