

**THE HIGH COURT**

**[2006 No. 5888 P]**

**IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS  
ACT 2003, SECTION 3(1)**

**BETWEEN**

**LAURENCE PULLEN, CAROL PULLEN, EMMA LOUISE DOUGLAS (A  
MINOR) SUING BY HER MOTHER AND NEXT FRIEND, CAROL PULLEN  
AND BRENDAN DANIEL DOUGLAS (A MINOR) SUING BY HIS MOTHER  
AND NEXT FRIEND, CAROL PULLEN**

**PLAINTIFFS**

**AND**

**DUBLIN CITY COUNCIL**

**DEFENDANT**

**AND BY FURTHER ORDER**

**IRISH HUMAN RIGHTS COMMISSION**

**AMICUS CURIAE**

**AND**

**ATTORNEY GENERAL**

**NOTICE PARTY**

**JUDGMENT delivered by Ms. Justice Irvine on the 28<sup>th</sup> day of May, 2009**

The first and second named plaintiffs are former tenants of Dublin City Council. By a tenancy agreement dated 15<sup>th</sup> December, 2004, they became the occupiers of premises at 40 Cloncarthy Road, Donnycarney, Dublin. The second and third named plaintiffs are the children of the second named plaintiff.

As a result of complaints of un-neighbourly conduct on the part of the plaintiffs, a notice to quit was served by the defendant. The plaintiffs did not deliver up possession and accordingly, proceedings were instituted pursuant to s. 62 of the Housing Act 1966 (the Act of 1966), as amended by s. 13 of the Housing Act 1970. The defendant sought and obtained a warrant for possession from the District Court on 30<sup>th</sup> November, 2006.

In the within proceedings the plaintiffs sought a number of reliefs including a declaration that the defendant, in proceeding to terminate their tenancy and/or in proceeding to seek recovery of possession of the dwelling occupied by them, failed to perform its functions in a manner compatible with the State's obligations under the European Convention on Human Rights (the Convention).

In its judgment, delivered on 12<sup>th</sup> December, 2008 the court reached the following conclusions on the facts of the case, namely:-

- (i) That the defendant as an organ of the State for the purposes of s. 3 of the European Convention on Human Rights Act 2003 (the Act of 2003) was required to perform its functions in accordance with the State's obligations under the Convention.
- (ii) That the house at Cloncarthy Road, Dublin, was the plaintiffs' home for the purposes of Article 8 of the Convention.

- (iii) That the defendant, in its decision to evict the plaintiffs based upon a finding of anti-social behaviour, was destined to interfere with the plaintiffs' rights under Article 8 of the Convention. In this regard, the European Convention on Human Rights Act ("the ECHR Act 2003") placed new obligations on the defendant as to the circumstances in which it might, in a Convention compliant manner, avail of the procedure for eviction provided for in s. 62 of the Act of 1966.
- (iv) That having regard to the magnitude of the right with which the defendant intended to interfere and the consequences of such interference, the defendant was obliged to justify such interference as being not only in pursuit of the legitimate aims identified in Article 8(2) but also as being necessary in a democratic society.
- (v) That the use of s. 62 of the Act of 1966 to interfere with the plaintiffs' right to respect for their home following an in-house investigation, in circumstances where such a procedure did not afford the plaintiffs any opportunity to dispute the lawfulness or the proportionality of the defendant's decision to evict them, was not justified as being necessary in a democratic society and was disproportionate to the defendant's stated aims having regard to the significance of the rights interfered with.
- (vi) That the interference was disproportionate, particularly in circumstances where the defendant had available to it, within its legal framework, an alternative procedure namely, that provided for in s. 14 of the Conveyancing Act 1881, which, if implemented, would have provided the requisite

safeguards for the plaintiffs' rights whilst meeting the defendant's legitimate aims.

- (vii) That the defendant did not comply with its obligations under s. 3 of the ECHR Act 2003 and did not perform its functions in a manner compatible with the State's obligations under the Convention.
- (viii) That the defendant, in performing its functions as an organ of the State, failed to have regard to the plaintiffs' rights under Article 6(1) of the Convention.
- (ix) That Article 1 of the First Protocol was subsumed by the primary breach under Article 8.

### **The Present Application**

Consequent on the court's findings referred to above, the court has now been asked to determine the following issue:-

"Does the court have jurisdiction to grant an injunction when it has found that an organ of the State has acted in a manner which is incompatible with its Convention obligations?"

The aforementioned issue comes back before the court by reason of the injunctive relief originally claimed by the plaintiffs at para. (i) of the plenary summons. The consequences of the court granting the relief now claimed would be to preclude the defendant from executing the order of the District Court of 30<sup>th</sup> November, 2006.

### **The Relevant Provisions of the ECHR Act**

The long title to the Act states that it is:-

“An Act to enable further effect to be given, subject to the Constitution, to certain provisions of the Convention for the protection of Human Rights and Fundamental Freedoms.”

Section 3 of the Act provides that:-

- “(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.
- (2) A person who has suffered injury, loss or damage as a result of a contravention of *subsection (1)*, may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to *subsection (3)*, in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.”

Section 5 of the Act provides:-

- “(1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of *section 2*, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as ‘a declaration of incompatibility’) that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.
- (2) A declaration of incompatibility –

- (a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made, and
- (b) shall not prevent a party to the proceedings concerned from making submissions or representations in relation to matters to which the declaration relates in any proceedings before the European Court of Human Rights.”

### **Article 13 of the Convention**

“Right to an effective remedy.

Everyone whose rights and freedoms as set forth in this convention violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

### **The Plaintiffs’ Submissions**

The plaintiffs rely upon the jurisdiction of the court to grant injunctions pursuant to the provisions of the Judicature Act (Ireland) 1877 and the Courts (Supplemental Provisions) Act 1961. The plaintiffs submit that the court enjoys full jurisdiction to grant an injunction as a final remedy particularly in circumstances where monetary compensation provides an inadequate remedy to an injured party. The plaintiffs submit that the ECHR Act 2003 does not amend or appeal any of the aforementioned provisions and in these circumstances it is open to the court to grant an injunction in the present case.

The plaintiffs rely upon the title of the Convention, its Preamble and Article 1 in support of their contention that this Court should fashion an effective remedy in response to its finding that the defendant was in breach of its obligations under s. 3(1) of the ECHR Act 2003. Article 1 provides that:-

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

Section 1 of the Convention, of course, includes Articles 2 – 18 of the Convention. Particular reliance is placed upon Article 13 which has already been set out earlier in this judgment.

According to the plaintiffs, there is nothing in the ECHR Act 2003 to exclude the court from exercising what is described as its inherent jurisdiction to grant injunctive relief. The plaintiffs submit that the relief provided for in s. 3(2) of the ECHR Act 2003, whilst it refers to damages only, was never intended to exclude an injured party from maintaining an application for a remedy such as an injunction and they rely upon Collins and O'Reilly, *Civil Proceedings and the State* in this regard. They also rely upon similar sentiments expressed by Dr. Oran Doyle, in a recent paper entitled “*Procedures, Remedies and the Place of the ECHR Act within the existing Constitutional System*” delivered to the Irish Centre for European Law on 20<sup>th</sup> November, 2007 where, on the question of remedies pursuant to s. 3 he stated as follows:-

“However, remedies are also available in the general law. In particular, s. 3 represents a limitation on *vires* no different from limitations existing elsewhere in the law. As such, breaches of s. 3 may be remedied in the

same way as breaches of any other legal obligation on a public body: by way of a declaration, an order for *certiorari*, *mandamus* or injunction. Obviously, the circumstance in which a mandatory order may be granted will be as limited as they are in law generally. However, it is an order that remains – in principle – open to a court. The nub of this point is as follows: some have read the Act as excluding remedies other than the damages claimed under section 5. In my view, this is incorrect. The Act provides a specific remedy in s. 3 presumably to avoid any doubt as to whether an action for breach of statutory duty could lie in respect of a human rights obligation owed to all persons. The Act provides a specific ‘remedy’ in section 5 presumably because a situation in section 5 has no counterpart in the general law. These two specific instances cannot be interpreted in such a way as to exclude the other remedies that would normally be available under the general administrative law of the State.”

The plaintiff’s submit that s. 3(2) of the ECHR Act 2003 is a provision which is merely confirmatory of the availability of damages as a remedy in all cases where an organ of the State is found to be in breach of its obligations as provided for in section 3(1). Section 3(2) is not prescribing a sole remedy for such breach. Section 3(1) establishes, according to the plaintiffs, a statutory obligation/duty which is intended to benefit all citizens and consequently any action for the breach of that duty attracts all normal remedies including relief by way of injunction. This is to be contrasted with the provisions of s. 5 of the Act which, in providing for a declaration of incompatibility, introduced into Irish law a concept which was unknown before the ECHR Act 2003 and to which the legislature was



entitled to attach a special and particular remedy i.e. the declaration of incompatibility, consequential notification to the Taoiseach and potentially the right of a plaintiff to apply for an *ex gratia* payment of compensation if they sustained loss or damage.

Consequently, the plaintiffs submitted that the court should take no guidance from the special and particular remedies which were provided for in s. 5 when seeking to interpret the extent of the reliefs available to the court consequent upon a breach of section 3(1).

The plaintiffs rely upon the decision in *Klass & Ors v. Federal Republic of Germany*, (Series A, No. 28) [1979-80] 2 EHRR 214, 6<sup>th</sup> September, 1978 in support of their submission that Article 13 must be interpreted as guaranteeing an “effective remedy before a national authority” to everyone whose convention rights have been violated. The plaintiffs urge that the right created by Article 13 is a substantive right capable of violation independently of any other right. This interpretation, they state, is consistent with the need to give Article 13 rights real meaning and effect, as was found in the case of *Plattform “Arzte fur das Leben”* ECHR, Ser. A, No. 139 judgment of 21<sup>st</sup> June, 1988 where the court, in rejecting a submission that Article 13 applied only where a substantive provision of the Convention had been infringed stated:-

“Under its case law, Article 13 (Art. 13) secures an effective remedy before a national ‘authority’ to anyone claiming on arguable grounds to be the victim of a violation of his rights and freedoms as protected in the Convention; any other interpretation would render it meaningless.”

The plaintiffs submit that the incorporation of Article 13 in the ECHR Act 2003 places a significant obligation on the domestic court to provide an appropriate remedy. They say that if the court does not grant the injunction sought, that it will be

countenancing the ongoing breach of a clear Convention right as the defendant will be in a position to enforce the warrant for possession which it obtained in breach of its obligations under s. 3 of the Act 2003. Further, the court in such circumstances would be failing to insure that the plaintiff's Convention rights were secured as required by Article 1 by the provision of an effective remedy as required by Article 13.

In terms of the Article 13 obligation, the plaintiffs relied upon a decision of the New Zealand Court of Appeal in *Simpson v. Attorney General* (Baigent's case) [1994] NZLR 667, a case in which the New Zealand Court of Appeal examined the extent of the court's obligations in relation to the New Zealand Bill of Rights Act 1990. Based upon the decision of Casey J., the plaintiffs contended that a liberal and purposive interpretation of the ECHR Act 2003 would lead the court to conclude that s. 3(2) did not limit the plaintiffs to the remedy of damages in respect of the breach of duty provided for in section 3(1).

The plaintiffs submit that there is no basis for distinguishing the court's power to grant injunctions in Convention cases from the court's right to grant such relief in constitutional cases and they contend that the court can by injunction suspend the operation of a statute. In this regard, they rely upon the decision of the Supreme Court in *Pesca Valentia Limited* [1985] 1 I.R. 193. The plaintiffs also rely upon the decision of Murphy J. in *Byrne v. Dublin City Council* (Unreported, High Court, 18<sup>th</sup> March, 2009) where he granted an interlocutory injunction in a case where the substantive relief in the proceedings included a claim for a perpetual injunction to restrain a breach of the duty provided for in s. 3 of the ECHR Act 2003 in proceedings pursuant to s. 62 of the Act of 1966.

### **The Defendant's Submissions**

The defendant submits that the court has no jurisdiction to grant an injunction notwithstanding its finding that the defendant was in breach of its obligations under s. 3(1) of the ECHR Act 2003. The plaintiffs' remedy for such breach is, according to the defendant, confined to a remedy in damages as provided for in s. 3(2) thereof. According to the defendant, s. 3(2) does not contemplate the granting of any alternative relief such as the permanent injunction now sought by the plaintiffs.

The defendant maintains that this court must respect and uphold the provisions of s. 62 of the Housing Act 1966. That legislation is constitutional and valid. If the court were to grant the injunction sought, it would be making an order the effect of which would be to suspend a statutory provision for reasons other than its constitutionality. To grant an injunction would therefore offend in principle the doctrine of the separation of powers enshrined in the Constitution. In this regard the defendant relies upon an interplay between ss. 2 and 5 of the ECHR Act 2003, to demonstrate what it contends was the clear intention of the legislature, namely, to incorporate Convention rights into Irish law in a manner that would not impinge upon the doctrine of the separation of powers.

The defendant submits that the court should attach significance to the fact that the legislature did not choose to incorporate the provisions of the Convention directly into Irish law and that consequently, the extent to which organs of the State are bound to act in a manner compatible with the Convention and the extent and nature of the remedy available for any breach of a "Convention right" are circumscribed by the terms of the ECHR Act 2003.

The defendant asserts that there is nothing in the ECHR Act 2003 to support the plaintiffs' contention that the court should fashion remedies, other than damages, on a case-by-case basis. The defendant relies upon the fact that the plaintiffs elected to pursue a claim to contend for a breach by the defendant of its obligations under s. 3(1) of the ECHR Act 2003 thus confining their claim, if successful, to a right to damages. The plaintiffs might have maintained proceedings seeking to challenge the validity of the managerial order and the decision by the defendant to serve a notice to quit which, if successful, would have led to the order of the District Court and the Circuit Court on appeal being quashed. In such circumstances, the plaintiffs could have sought an injunction under domestic law to curtail any efforts on the part of the defendant to deprive them of their right to occupy their home. Having elected to pursue their claim under s. 3(1), the plaintiffs are, according to the defendant, affixed with the remedy provided for that breach in s. 3(2) which does not include an injunction.

The defendant relies upon the general rule of construction that where a statute provides a remedy for breach of a particular obligation that no other remedy exists. They rely upon the decision of Wright J. in *Cleggs Parkinson and Company v. Earby Gas Company* [1896] 1 QB 592, the 7<sup>th</sup> Ed. of Craies *Statute Law*, *Stevens v. Evans* [1976] 2 BURR 1152 and *Siney v. Dublin Corporation* [1980] I.R. 400.

In relation to Article 13, the defendant submits that Article 13 does not guarantee any specific remedy. The Oireachtas has provided effective remedies for persons whose rights under the Convention have been breached. Those who have suffered loss and damage arising from a breach of s. 3(1) of the ECHR Act 2003 may pursuant to s. 3(2) obtain redress by an award of damages. If a plaintiff finds that they have no other legal

remedy which is adequate or available to them, they can apply under s. 5 of the ECHR Act 2003 for a declaration that the relevant statutory provision is incompatible with the State's obligations under the Convention. If successful such a party may then make an application in writing to the Attorney General for an *ex gratia* payment of compensation in respect of any injury, loss or damage suffered by him/her as a result of the incompatibility concerned.

In relation to the separation of powers, the defendant submits that the sole and exclusive power to make and revoke or amend legislation is expressly entrusted by the Constitution to the Oireachtas in Article 15.2.1. To grant a permanent injunction to restrain the defendant taking any further steps on foot of a District Court order obtained pursuant to the provisions of s. 62 of the Act of 1966, in circumstances where the validity and constitutionality of that legislation is not in question, would amount to an interference by the court with the legislature's sole and exclusive power to make, revoke or amend legislation. The court must give effect to an order lawfully obtained pursuant to such legislation.

#### **Submission of the Attorney General/Notice Party**

The submissions made on behalf of the notice party mirrored those advanced by the defendant and accordingly do not need to be recorded in this judgment. Particular emphasis was however placed upon the scheme of the 2003 Act which counsel described as a sophisticated means devised by the legislature to comply with the Convention at a sub-constitutional level. He emphasised what he described as the clear intention of the legislature best demonstrated by the clear wording of s. 5(2)(a) of the Act, that any declaration of incompatibility would not effect the validity, continued operation or

enforcement of the statutory provision concerned. He submitted that it would be incongruous if the plaintiffs could, as a result of a finding of a breach of statutory duty under s. 3(1) of the 2003 Act, obtain an order which would have the effect of interfering with the enforcement of the order obtained by the valid use of s. 62 of the 1966 Act.

The notice party submitted that the effect of the court acceding to the plaintiffs' present application would be to displace a valid provision of national law and its operation and enforcement in favour of the Convention, something which could never have been intended by the legislature.

### **Conclusion**

This judgment is concerned with whether or not a permanent injunction is an available remedy to the plaintiffs, having regard to the earlier findings of this court to the effect that the defendant, in obtaining a warrant for possession of the plaintiffs' premises, performed its functions in a manner incompatible with the State's obligations under the Convention as was required by s. 3(1) of the Act 2003. The nature of the injunction sought is particularised at para. 23(i) of the statement of claim, namely:-

“(i) An injunction restraining the defendant from taking any further steps to recover possession from the defendant on foot of any order made pursuant to s. 62 of the Housing Act 1966.”

Given that a warrant for possession was obtained from the District Court on 30<sup>th</sup> November, 2006 the injunction, if granted, would be to restrain the execution of that warrant.

The court concludes that the plaintiffs' submission that the court now has the power to grant a permanent injunction in respect of the defendant's breach of its

obligations under s. 3(1) of the ECHR Act 2003 is difficult to reconcile with the general scheme of that Act.

### **The Scheme of the ECHR Act 2003**

The long title makes it clear that the purpose of the ECHR Act 2003 was to enable further effect to be given to certain provisions of the Convention, subject to the Constitution. The legislature chose not to incorporate the provisions of the Convention directly into Irish law. It opted, as an alternative, for a sub-constitutional method of incorporation in which Convention rights are given limited effect in the Irish legal order with a high degree of legislative sovereignty being maintained.

The issue that the court is now being asked to decide is one which centres upon an interpretation of the provisions of s. 3 of the ECHR Act 2003. In approaching this task, the court believes it is important to briefly reflect upon the scheme of the Act as a whole and in particular ss. 2 and 5 thereof.

Section 2 of the ECHR Act 2003 requires the court to interpret Irish law “insofar as it is possible” in a manner compatible with Convention rights. The ECHR Act 2003, clearly anticipates that this will not always be possible and in such circumstances the High Court or the Supreme Court (on appeal), may pursuant to s. 5(1), where no other legal remedy is adequate and available, declare a statutory provision incompatible with the State’s obligations under the Convention. What is of particular significance in such circumstances is the express provision in s. 5(2)(a) that such a declaration of incompatibility will not effect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made. The section goes on to give the court a mechanism whereby it can notify the Taoiseach of its findings and he in

turn is obliged to make known the court's findings to the Oireachtas in the time limits prescribed. Accordingly, the overall effect of s. 5 of the ECHR Act 2003 is that the legislative provision declared incompatible with the Convention retains its validity whilst the court's views are brought to the attention of the legislature so that it may consider legislative amendment. This procedure very much embraces and upholds the doctrine of the separation of powers.

The court accepts the submissions made on behalf of the defendant and the notice party that the provisions of s. 5 of the ECHR Act 2003 give good guidance to the court as to the extent of the relief which the legislature intended to make available to any plaintiff who establishes that an organ of the State has acted in breach of its obligations under section 3(1). Having regard to the continued validity and enforceability of a provision which the court has declared to be incompatible with the Convention under s. 5, this court believes that it would be inconsistent to conclude that the legislature intended to give a party who established a breach of statutory duty under s. 3(1) a right to relief the effect of which would be to invalidate an order obtained on foot of a valid statutory provision, i.e. s. 62 of the Act of 1966, and render that order unenforceable. In other words, the court concludes that it could never have been the intention of the legislature, having regard to the entire scheme of the Act, to allow a plaintiff achieve by, so to speak, the backdoor under s. 3(2) a remedy which it could not have obtained following upon a declaration of incompatibility under s. 5.

Looking at the ECHR Act 2003 as a whole, the power of the court is effectively restricted to making a finding that an organ of the State acted in a manner incompatible with the State's obligations under the Convention or a declaration that a statutory



provision or rule of law is incompatible with the State's obligations under the Convention. Other than declarations pursuant to ss. 3(1) and 5(1), the only remedy provided for in the ECHR Act 2003 is that of damages pursuant to s. 3(2) and the possibility of an *ex gratia* payment of compensation under s. 5(4). The consistency of the legislation in terms of the remedies provided supports the defendant's contention that the legislature did not intend to provide any remedy that would have the effect of displacing or curtailing the operation or enforcement of any constitutionally valid provision of national law.

### **Separation of Powers**

Article 34.3.2 of the Constitution confers jurisdiction on the High Court to question the validity of any law having regard to the provisions of the Constitution. Section 62 of the Act of 1966 has withstood constitutional challenge and accordingly remains valid. This being so the defendant in the present case has obtained an order from the District Court on foot of a legislative provision which is valid and constitutional. If the court in such circumstances were to grant to the plaintiffs the injunction which they seek, that order would constitute an infringement by this Court on the role of the legislature. The court in making its order would be transgressing upon the sole and exclusive power to make, revoke and amend legislation which has been entrusted to the legislature pursuant to Article 15.2.1 of the Constitution. It is simply not open to the court, when s. 62 remains valid and constitutional, to make an order which has the effect of invalidating and/or rendering inoperable the statutory provision. Accordingly, whilst the court has an inherent jurisdiction to grant whatever relief may appear appropriate on concluding that a statutory provision offends the Constitution, a breach by the defendant

of its statutory obligations under s. 3(1) of the ECHR Act 2003 does not admit of the court granting relief which would have the effect of preventing the execution of a court order validly obtained under a lawfully enacted provision. To grant such relief would offend against the principle of the separation of powers. In this regard, the notice party's reliance upon the decision of O'Flaherty J. in *McDonnell v. Ireland* [1998] 1 I.R. 134 is apt. At p. 143 he stated:-

“The correct rule must be that laws should be observed until they are struck down as unconstitutional.”

Later in his judgment, he advised upon the onus upon citizens and the judiciary once a Bill has become law when he stated as follows:-

“From that date, all citizens are required to tailor their conduct in such a way as to conform with the obligations of the particular statute. Members of society are given no discretion to disobey such law on the ground that it might later transpire that the law is invalid having regard to the provisions of the Constitution. Every judge on taking office promises to uphold ‘the Constitution and the law’; the judge cannot have a mental reservation that he/she will uphold only those laws that will not someday be struck down as unconstitutional. We speak of something as having ‘the force of law’ as such, the law forms a cornerstone of rights and obligations which define how we live in an ordered society under the rule of law. A rule of constitutional interpretation, which preserves the distinct status of statute law which, as such, is necessitated by the requirements of an ordered society and by ‘the reality of situation’ (to adopt Griffin J’s phrase),

should have the effect that laws must be observed until struck down as unconstitutional.”

The sole and exclusive power to make and revoke or amend legislation is expressly entrusted by the Constitution to the Oireachtas in Article 15.2.1. The only exception to this rule is to be found in the Constitution which empowers the judicial organs of the State to declare unconstitutional any law or legislative provision which is repugnant to the Constitution. If this Court were grant an injunction now sought by the plaintiffs, the effect of that order would be treat s. 62 of the Act of 1966, as if it was inoperable and/or invalid. By so doing, the court would clearly involving itself in the making of an order which offended the doctrine of the separation of powers.

#### **Rules of construction**

The court rejects the plaintiffs’ submission that the reference to a remedy in damages as referred to in s. 3(2) of the ECHR Act 2003 is merely a provision confirming the availability of damages as a remedy in addition to all other remedies open to the court under its inherent jurisdiction in the event of a breach of duty being established under section 3(1). The court further rejects the plaintiffs’ argument that, in the absence of any specified curtailment of the court’s jurisdiction to grant relief other than damages, that the court should presume it was the intention of the legislature that all such remedies would be available.

Both the defendant and the notice party rely upon the general rule of construction which is that where the legislature provides a specific remedy in a statute, no other remedy is available. They rely upon the decision in *Clegg Parkinson & Company v. Earby Gas Company* [1896] 1 Q.B. 592 at 595, where Wright T.J. stated:

“The general rule of law (or rather of construction) is that where a general obligation is created by statute and a specific statutory remedy is provided, that statutory remedy is the only remedy. The scope and language of the statute and considerations of policy and convenience may, however, create an exception showing that the legislature did not intend the remedy to be exclusive.”

In *Clegg Parkinson and Company v. Earby Gas Company*, the plaintiffs claimed damages from the defendants due to their failure on certain days, to provide them with a sufficient supply of pure gas at a prescribed pressure as a result of which they sustained damage to the extent of £50. There was a statutory obligation upon the defendant pursuant to the Gasworks Clauses Act 1871 to provide such a supply. The Act provided that the consumer’s remedy for any breach of the statutory duty was to proceed for penalties under s. 36 of the Act which the plaintiffs alleged were not a sufficient remedy for the loss suffered by them as consumers.

Willis J. concluded at p. 594:-

“In my opinion this is one of those cases in which the principle applies, that, where a duty is created by statute which affects the public as the public, the proper remedy if the duty is not performed is to indict or take the proceedings provided by the statute.”

The defendant submits that the plaintiffs in the present case are in the same position as the plaintiffs in *Clegg Parkinson and Company v. Earby Gas Company* insofar as they do not have cause of action at common law. Their rights are confined to the breach for which they contended under s. 3(1). That section created a new right of action and s. 3(2)

specifies the only relief available, namely damages. In this regard, the defendants support their interpretation of s. 3(2) by relying upon the fact that a person who has suffered loss by reason of a contravention of s. 3(1) may claim damages in respect of the contravention only “if no other remedy in damages is available”. The reference to damages in the preceding phrase, the defendant maintains, makes it clear that the section only admits of damages as a remedy for a breach of section 3(1).

The court is satisfied, having regard to the long title and general scheme of the 2003 Act, that the legislature intended the remedy of damages provided for in s. 3(2) to be the exclusive remedy for the breach of the statutory duty concerned. In this case, s. 3(1) provides a new cause of action whereby an organ of the State may be held liable for failure to comply with the State’s obligations under the Convention. The court accepts that in circumstances where the same section identifies the remedy for that breach, that the court should not construe the section so as to permit of any additional remedy. Accordingly, the court rejects the plaintiff’s submissions that s. 3 permits the court to fashion a remedy other than that provided for in the section on a case by case basis.

The court’s conclusions appear to be fortified by the guide given in Craies’ *Statute Law* (7<sup>th</sup> Ed.) as to how a statutory provision should be construed. At p. 274, Craies states:

“If a statute creates a new duty or imposes a new liability and prescribes a specific remedy in case of neglect to perform the duty or discharge the liability, the general rule is ‘that no remedy can be taken, but the particular remedy prescribed by the statute’ [citing *Stevens v. Evans* [1976] 2 Burr. 1152].”

What the legislature appears to have done in the present case is to have created a private law right to an action for damages where an organ of the State has been found to be in breach of the State's obligations under the European Convention. A breach of a statutory duty, *per se*, does not necessarily give a party a right to a claim for damages in respect of a breach of that statutory duty. In these circumstances, the fact that both the right and the remedy are specified in s. 3 is a good indicator that the legislature intended to protect the right by the provision of the specific remedy referred to in the section, but not by any other means.

#### **Relevant Decisions of the Irish Courts**

In coming to its conclusions, the court has considered the decision of Smyth J. in *Gifford v. Dublin City Council* (Unreported, High Court, 20<sup>th</sup> November, 2007). In that case, the learned trial judge refused an application for an interlocutory injunction to restrain the Council from enforcing a warrant for possession in a case where the plaintiffs had sought a declaration that the provisions of s. 62 of the Housing Act 1966 were incompatible with the State's obligations under the Convention. In refusing the plaintiffs' application, he concluded:

“Even if the plaintiffs were ultimately successful in obtaining a declaration that s. 62 is incompatible with the State's obligations under the Convention provisions, the declaration will not affect the validity, continuing operation or enforcement of s. 62, or the validity and enforcement of the warrant for possession obtained by the Council. In the circumstances, the granting of the interlocutory relief sought by (*sic*) the court would be futile.”

Whilst *Gifford* differs from the present case insofar as it related to proceedings brought pursuant to s. 5 of the ECHR Act 2003, the court rejects the plaintiffs' submission that in some way a distinction can be drawn as to how the court should interpret that section in terms of the relief available to a successful plaintiff from the relief available to a plaintiff who succeeds under section 3(1). The plaintiff argued in the course of the hearing that s. 5 introduced into Irish law a cause of action and/or concept which was unknown before the ECHR Act 2003. Accordingly, it was legitimate to consider the relief available to a successful plaintiff under s. 5 to be confined in the manner outlined at section 5(4). Mr. Ó Dúlacháin, S.C. on behalf of the defendant referred to the remedy as being "special and particular". He argued that s. 3(1) in contrast to s. 5(1) created a broad reaching statutory duty and that there was accordingly no reason to believe that the reference to the remedy of damages in s. 3(2) was anything other than confirmatory that an award damages was available as one of the many heads of relief open to a plaintiff who established a breach of section 3(1). Counsel asserted that there was nothing special or particular about the remedy so provided.

The court rejects the distinction which counsel for the plaintiffs sought to make in respect of the rights and remedies provided for in ss. 3 and 5 of the ECHR Act 2003. The court concludes that both ss. 5(1) and 3(1) introduced new liabilities for which specific remedies were provided and that there is no basis for concluding that remedies other than those prescribed in the Act itself are available.

The plaintiffs have sought to rely upon the decision of Murphy J. in *Byrne v. Dublin City Council* (Unreported, High Court, 18<sup>th</sup> March, 2009) in support of the proposition that a permanent injunction is available as a remedy in circumstances where a breach is

established under section 3. However, Murphy J., in granting an interlocutory injunction, specifically stated that he was not deciding whether or not it was possible to obtain a perpetual injunction to restrain a breach of the s. 3 duty, a determination, he stated, that would have to be made by the judge at the trial of the action. The fact that he granted the interlocutory injunction, on the balance of convenience, to allow that argument take place at the trial of the action, adds no weight to the plaintiffs' claim that such a remedy is available.

In *Donegan v. Dublin City Council* (Unreported, High Court, 8<sup>th</sup> May, 2008), Laffoy J. was asked to consider whether or not the provisions of s. 62 of the Act of 1966, were compatible with the State's obligations under Article 8 of the Convention. The learned trial judge declared that s. 62 of the Act of 1966 was incompatible with the State's obligations and made the relevant declaration under s. 5 of the ECHR Act. She declined to grant to the plaintiffs the permanent injunction sought and ruled that:

"The plaintiffs are not entitled to a stay on the District Court proceedings or an injunction in the terms sought."

Adopting the rules of construction referred to above and having regard to the decisions of the court in *Gifford* and *Donegan*, this Court concludes that the plaintiff's right to relief on a proper interpretation of s. 3(2) is confined to a claim in damages.

### **Article 13 of the Convention**

The plaintiffs rely upon Article 13 to support their contention that the court should conclude that it has a right to grant a permanent injunction in the terms sought having regard to the defendant's breach of its obligations under section 3(1) of the ECHR



Act 2003. The plaintiffs assert that damages are not an effective remedy for the violation committed by the defendant.

The plaintiffs relied upon the decision of the New Zealand Court of Appeal in *Simpson v. Attorney General (Baigent's case)* [1994] NZLR 667 in which the New Zealand Court of Appeal considered the extent of the court's obligations in relation to the New Zealand Bill of Rights Act 1990.

That legislation incorporated into New Zealand law the International Covenant on Civil and Political Rights (ICCPR), which contains analogous rights to those in the European Convention. Article 3 of the ICCPR places on signatory States obligations equivalent to those provided for in Article 13 of the Convention. Article 3 states that each State party to the present convention undertakes:

*“(a) To ensure that any person whose rights or freedoms as herein recognised are violated have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”*

The New Zealand Bill of Rights Act contained no express remedy/remedies for any infringement of the ICCPR but the Court of Appeal nonetheless held that remedies were available for breaches of the Bill of Rights and that the court had a positive duty to provide for the same. Casey J. stated as follows in relation to the absence of remedies provided for in the Act:

*“I do not regard the absence of a remedies provision in the Act as an impediment to the court's ability to ‘develop the possibilities of judicial remedy’ as envisaged in Article 3(b). The rights and freedoms affirmed are fundamental to a civilised society and justify a liberal purposive*

interpretation of the Act, even though it has not been constitutionally entrenched and has the same status as ordinary legislation. Its purpose being the affirmation of New Zealand's commitment to the covenant (including Article 3(b)), it would be wrong to conclude that parliament did not intend there to be any remedy for those whose rights have been infringed."

He went on to state as follows:-

"I do not accept that parliament intended it to be what most would regard as no more than legislative window dressing, of no practical consequence, in the absence of appropriate remedies for those whose rights and freedoms have been violated."

He concluded at p. 692 as follows:-

"I am satisfied that the purpose and intention of the Bill of Rights is that there be an adequate public law remedy for infringement obtainable through the courts which, as noted above, are already according it in the sphere of criminal law. In some it may be that already obtainable under existing legislation or at common: in other words, where such remedies are unavailable or inadequate, the court may award compensation for infringement, or settle on some non-monetary option as appropriate."

The court concludes that it should not place significant reliance upon the decision of the New Zealand Court of Appeal in circumstances where the New Zealand Bill of Rights Act contains no express remedies for infringement of its protected rights, being entirely silent as to the question of remedies. By way of contrast, the ECHR Act 2003

clearly provides a significant remedy i.e. that of damages for a breach of the rights protected by section 3(1). Such a remedy could never be described as “legislative window dressing, of no practical consequence”. The same is a significant remedy even if it be the case that it is not the preferred remedy of the plaintiffs. The fact that the plaintiffs in the present case would opt for a permanent injunction rather than a right to damages could not justify this Court reaching a conclusion that the State intended that such a relief would be available to a plaintiff under s. 3(2) by virtue to the obligations placed upon it pursuant to Article 13. There is no cross referencing of Article 13 to s. 3 in the legislation.

The plaintiffs have failed to demonstrate that the State’s obligations which exist by virtue of Article 13 should drive the court to conclude that it intended that the equitable remedy of an injunction would be available to a plaintiff who was successful in establishing a contravention of the provisions of s. 3(1) in addition to the relief of damages provided for in section 3(2). In this regard, the authorities opened to the court and referred to by the defendant and the notice party in their submissions support the view that Article 13 is about guaranteeing a process within the national legal order by which a remedy for a violation can be provided. In particular, they relied upon the decision of the Strasbourg Court in *Krasuski v. Poland* App. 61444/00 judgment of 14<sup>th</sup> June, para. 65 where it was determined that:-

“Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a

domestic remedy to deal with the substance of an ‘arguable complaint’ under the Convention and to grant appropriate relief. The scope of Contracting States’ obligations under Article 13 varies depending on the nature of the applicant’s complaint...”

The defendant also relied upon *Kudla v. Poland* [2002] 35 EHRR 198 and *James and Others v. United Kingdom* App. 8793/79 and *O.F. v. Judge Hugh O'Donnell and Ors* [2009] IEHC 142 in support of their contention that Article 13 merely requires that a victim of a violation of Convention rights has guaranteed to him the availability within the national legal order of an effective remedy to enforce the Convention rights and freedoms in whatever form they happen to be secured. In the circumstances of the present case, the defendant submits that reparation is secured by way of a right to damages in respect of a breach of s. 3(1) and that Article 13 does nothing to guarantee the availability to the plaintiffs of a permanent injunction. Neither does Article 13 convince the court that it should interpret the remedies available for a breach of s. 3(1) to include any remedy other than that specifically provided for in section 3(2).

### **Summary**

The ECHR Act 2003 came into force on 31<sup>st</sup> December, 2003. The Convention provisions are not directly incorporated into Irish law but rather are given effect to by indirect or interpretative incorporation. The ECHR Act 2003 gives the courts no power to strike down legislation that offends against the provisions of the Convention.

In the present case, the court has been asked to decide whether or not, having found the defendant in breach of its obligations under s. 3(1), it can now grant a permanent injunction to restrain the defendant from executing an order for possession

obtained by it pursuant to s. 62 of the Act of 1966. Section 3(2) provides that a person who has suffered injury, loss or damage as a result of a contravention of s. 3(1) may institute proceedings to recover damages in respect of such contravention. However, the plaintiffs insist that the court has an inherent jurisdiction to grant other remedies including that of an injunction.

The court concludes that it has no jurisdiction to grant any relief other than an award of damages in the event of proceedings being instituted wherein it is established the plaintiffs have suffered injury, loss or damage arising from the defendant's contravention of their obligations under section 3(2). The court believes that its decision in this regard is consistent with the overall scheme of the Act and is one which upholds the doctrine of the separation of powers. Further, the court believes that the general rule in respect of statutory interpretation namely *expressio unius est exclusio alterius* precludes the court from concluding that the plaintiffs are entitled to any relief by way of injunction. To grant an injunction would be to grant a relief not provided for in s. 3(2) of the ECHR Act 2003 and would be an order that would conflict with the clear provisions of s. 3(2), would offend the doctrine of the separation of powers and would be against the canons of construction already referred to.

May J  
28<sup>th</sup> May 2009.