THE COURT OF APPEAL
UNAPPROVED

UNAPPROVED
NO REDACTION NEEDED
Record Number: 2022/153
High Court Record Number: 2022/1195P

Costello J. **Neutral Citation Number [2023] IECA 10**

Noonan J.

Butler J.

BETWEEN/

PLUS DEVELOPMENT LLC AND COOPER PLUS HOLDINGS LIMITED

PLAINTIFFS/RESPONDENTS

-AND-

LENS MEDIA LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 23rd day of January, 2023

1. This appeal is brought by the appellant (the defendant or "Lens") against an order of the High Court (Twomey J.) granting the respondents (the plaintiffs or "Plus" and "Cooper") an interlocutory injunction restraining the defendant from excluding the plaintiffs from a project to acquire and develop lands in Clondalkin as a media park ("the Lands").

Background

2. The defendant has for some years sought to acquire a site comprising approximately 48 acres at Grange Castle Business Park from South Dublin County Council ("SDCC") for the purpose of developing an international media park comprising, *inter alia*, film and television studios. The principals of Lens, including Mr. James Morris, have extensive experience in the film, television and entertainment industry. Plus is an American entity involved in commercial development in the United States whose principals have Irish backgrounds. Cooper is an Irish company formed as an investment/finance vehicle for the purposes of the project by Mr. Matthew Cooper, his brother Mr. David Cooper and other private individuals, also based in the United States.

3. It appears that Mr. Matthew Cooper was introduced to Mr. Morris and his colleagues in or about June 2019 by a mutual connection and although there were some initial broad discussions, matters did not progress at that time. However, contacts were renewed in September 2019 and on or about the 11th December 2019, the principals of Plus were introduced to the other parties as a potential partner in the venture.

4. On the 13th December, 2019, Lens furnished a confidentiality agreement to the plaintiffs and discussions began in earnest. Lens for some time had been in negotiations with SDCC and had a tentative oral agreement with the Council to purchase the Lands by way of a 999 year "Master Lease" for the sum of approximately €26.5m. Initially, the discussions between the plaintiffs and the defendant progressed to the point where two documents were executed by the parties, both described as a "Memorandum of Understanding". The first Memorandum of Understanding ("MOU 1") was signed on the 30th April, 2020 and the second ("MOU 2") on the 3rd June, 2020. The impetus for MOU 2 appears to have come from the fact that at a meeting of SDCC on the 11th May, 2020, the Council approved in principle a sale of the Lands to Lens for approximately €26.4m.

MOU 1

5. MOU 1 is in letter format from Plus to Lens and dated 30th April, 2020. In the introductory paragraphs, Plus describes itself as having reached a commitment with *"our joint venture partners"* including Cooper and Lens on a single entity company to own the land, the real estate and operating company for what is described as Phase One of the project, the production studio facility. It refers to the key stakeholders as Investor 1 being Plus and Cooper and Investor 2 being Lens, again describing them as joint venture partners. The document outlines in broad terms the key understandings of the parties including that Plus and Cooper, being Investor 1, propose to raise 100% of the equity, mezzanine debt and senior bank debt required to complete the acquisition and development of the project through to operational handover to an entity comprising the plaintiffs and defendant.

6. That joint entity would be operated on a 50/50 basis as between Investor 1 and Investor 2 after Investor 1's equity had been repaid at a multiple of four times, being described as the equity *"hurdle"*. The letter attached a number of investment documents and concluded by indicating that it provided a starting position towards agreeing the *"cornerstone deal points"* on the acquisition, development and operation of the Phase One development, being the media park. Phase Two which is also mentioned in the document relates to a possible second project involving an adjoining parcel of lands of about 50 acres.

7. In the concluding paragraph, the letter states that it is an indicative summary but that the final sentence of the second paragraph of the letter was to be legally binding – this related to the earlier non-disclosure agreement which continued in force and effect. The final

paragraph suggests that whilst MOU 1 was intended to represent the respective parties' understanding of the broad parameters of the agreement that had been reached, it was not, at that juncture at any rate, intended to constitute a binding contract with the sole exception of the non-disclosure element. The letter was signed by the various principals.

MOU 2

8. While MOU 1 was in letter format as described, MOU 2 is a more formal document. The parties to MOU 2 are Plus, Lens and "Cooper Investment Group entities". The latter is not a legal entity but rather describes the Cooper interest pending Mr. Matthew Cooper and his co-investors deciding on the appropriate legal vehicle by which to structure their participation, which subsequently became the second plaintiff herein, Cooper, which was formed on the 27th August, 2020, approximately three months post MOU 2.

9. In the second paragraph, MOU 2 states that Plus, Cooper and Lens intend to engage in a joint venture to acquire the Lands and develop and operate a media park outlined in MOU 1. It goes on to state:

> *"The parties intend this MOU 2 to be binding and enforceable."*

10. The agreement provides that the parties intend to form a limited liability company ("LLC") to take an assignment of the property from SDCC and notes that the parties are currently negotiating the terms and conditions of an operating agreement for this company. Until the investment hurdle is passed, the membership interests in the LLC were to be held 100% by Plus and Cooper and thereafter, 50% to Plus and Cooper and 50% to Lens. The obligations and responsibilities of the parties are then set out in seven separate and relatively short paragraphs which state that Plus and Cooper are to be responsible for all aspects of the

development and financing, whereas Lens will be primarily responsible for the operation and management of the media campus after it is constructed and ready for occupancy.

11. Until then, Plus was to be responsible for the day to day management of the LLC and MOU 2 at para. 5 provides, *inter alia* as follows:

> *"The parties hereto agree not to take any action in contravention of any clause in MOU 1 and/or MOU 2 without the written consent of all of the other parties, from the date of the execution of this Document and execution of an Operating Agreement signed by all of the parties."*

12. The parties agreed to negotiate the terms of the operating agreement in good faith and MOU 2 goes on to provide:

> *"The parties specifically agree that none of them will seek to pursue the project without the others (unless the others voluntarily agree to withdraw), and that no party will take any actions to exclude or circumvent the participation by the other parties, or to bring in other persons or entities in place of the parties hereto, without the written consent of the remaining parties.*
>
> *This MOU 2 is intended to be temporary in nature and to cover the period between the date hereof and the entry into the Operating Agreement and therefore will expire on the entry into the Operating Agreement…*
>
> *This MOU 2 shall be binding upon and enure to the benefit of the parties hereto…"*

13. MOU 2 then continues that it may not be amended, modified or altered except by consent in writing of all the parties and stipulates that rights under the agreement may not

be assigned without the consent of the other parties. An entire agreement clause is included which states:

> *"This MOU 2 and MOU 1 constitute the entire agreement of the parties relative to the subject matter hereof."*

14. The document is signed by all parties and executed on behalf of *"Cooper Investment Group"* by Mr. Matthew Cooper and his brother, Mr. David Cooper.

Events after MOU 2

15. Following the execution of MOU 2, it became evident that there were certain difficulties with the terms upon which SDCC proposed to dispose of the lands. In particular, SDCC proposed that title to the lands would not transfer to Lens until practical completion of the development. This, according to the plaintiffs, rendered the project unfinanceable as no lender would be prepared to advance the necessary funds without being able to take security over the property. This led to further protracted negotiations and ultimately to an alteration of this requirement to all parties' satisfaction.

16. It took a year to reach a resolution of this critical issue and thereafter, following the agreement of SDCC to revised terms, the parties began discussions to agree a Shareholders Agreement ("SHA"). In referring to an SHA, the parties were in substance using that term interchangeably with the operating agreement contemplated by MOU 2. Almost immediately on the commencement of the negotiation of the SHA, it became apparent that there were serious differences between the parties as to its proposed terms, in consequence of which inter party relations began to significantly deteriorate.

17. As it began to become clearer that the parties might not end up agreeing terms, what was to happen in that event was discussed in the course of extensive email engagement, in

particular in September and October of 2021. Some of these exchanges become relevant in the context of the dispute that now arises.

18. On the 10th September, 2021, in concluding a lengthy email on proposed terms for the SHA, the defendant said:

> *"If, however, we all fail to achieve the agreement between us within this timeline then we shall all have to face up to the fact that the project will not be achieved and we will need to agree that we will all be released from the obligations of the MOU's which would be deemed as terminated. On this final point, we feel we do all need to be sure that the potential exit route for all is agreed among us now …"*

19. The defendant accordingly recognised that the MOU's were binding and the agreement of the parties would be required to terminate the obligations thereunder. In a marked-up response to the latter email, on the 13th September, 2021, the plaintiffs said they:

> *"…concur with the focus on resolving deal points for the* [heads of agreement], *however in the event that* [plaintiffs/defendant] *cannot agree on terms, we can outline a back up termination/breakup agreement."*

20. On the 9th October, 2021, the defendant sent an email to the plaintiffs making further detailed proposals, which concluded:

> *"In the event you do not agree our position on the points herein, which we regard as essential, we believe we shall have to agree to part company so that we may look elsewhere for financial commitment so as to save the project. In such circumstances we would endeavour to ensure any new financial commitment included funds so as to pay you the monies you have expended to date together with a multiple along the lines suggested in connection with the call option as noted above."*

21. In response to this, the plaintiffs said on the 16th October, 2021 that *"It remains our position that neither of us is entitled to proceed with the project without the other"* and *"... if there's no path forward together, then we must agree a way to separate".*

22. On the 22nd October, 2021, the defendant responded saying *"Equally we are prepared to discuss an agreed way to separate if we cannot agree how to work together on the project."*

23. On the 22nd October, 2021, the plaintiffs made clear that their final terms would not be negotiated forward and said:

> *"However any discussion at this point should centre around the next steps should Lens accept those terms, or how to accomplish a fair and orderly partnership buyout."*

24. In a response of the same day, the defendant said:

> *"The intention of my email was however to accept your invitation to engage in without prejudice talks to establish the best route to separate.*
>
> *If that was not clear then please accept this email as confirmation that we would like to proceed accordingly and we remain willing to discuss in good faith whether we can amicably separate in a way that would work for both parties."*

25. When it became clear that the dispute had become intractable, the parties agreed to a mediation which took place in early March 2022 and was ultimately unsuccessful. Thereafter, the plaintiffs' solicitors, William Fry LLP ("Frys"), wrote on the 24th March, 2022 to the defendant's solicitors, Patrick F. O'Reilly & Company ("PFOR"), drawing attention to the terms of MOU 2 and confirming that their clients remained ready, willing

and able to comply with their obligations under it. At that point, there was a suggestion that the option to acquire the Lands from SDCC would expire on the 4th April, 2022 and the purpose of the letter was to call on the defendant to exercise the option and to confirm by 1pm on Friday 25th March, 2022 that it would do so.

26. In the absence of such confirmation being received by the deadline, Frys indicated that the plaintiffs would issue proceedings seeking specific performance of MOU 2. Alternatively, the solicitors indicated that the plaintiffs would *"seek an order pursuant to s. 35 of the Partnership Act, 1890 dissolving the partnership that exists between the parties."* Attached to the letter was a document setting out what the plaintiffs perceived to be the respective obligations of the parties under MOU 2. A reply was not received by the stipulated deadline of Friday 25th March and accordingly a plenary summons was issued in the within proceedings on the following Monday, the 28th March, 2022.

27. PFOR responded by letter of the 29th March, 2022 suggesting that the proposed proceedings would be *"misconceived and vexatious."*. The basis for this assertion was:

> *"The operating agreement is the central and foundational document governing the agreement between the parties; if, despite the parties' good faith efforts to agree an operating agreement, such agreement cannot be reached, the agreement to negotiate in good faith is at an end.*
>
> *It is our client's position that despite good faith negotiations on both sides, it has not been possible to agree the terms of the operating agreement. Indeed, open correspondence between the parties shows this. It is noteworthy that as early as October 2021, in open correspondence, our respective clients were discussing break up talks.*

The proceedings now issued by your clients and this letter confirm that it has not been possible to agree the terms of the operating agreement. Consequently the 'joint-venture' between the parties which was to be governed by the operating agreement cannot proceed.

It is our view and our client is so advised, that where an obligation to negotiate in good faith exists and where it is impossible, despite the parties' good faith efforts, to reach such agreement, a court will not enforce inter partes, an indefinite obligation to remain locked in the agreement contained within the MOU's. The relevant Irish jurisprudence confirms this point."

The letter went on to deny that any partnership existed between the parties.

Pleadings and evidence in the High Court

28. The primary relief sought in the plenary summons is *"specific performance of the partnership agreement whereby the defendant agreed with the plaintiffs that they would jointly develop a media park on certain lands …"*. In addition, further orders are sought seeking to compel the defendant to take the necessary steps to acquire the Lands and transfer the 50% agreed shareholding in Lens to the plaintiffs. In the alternative, dissolution of the partnership is sought as well as damages for breach of fiduciary duty, breach of contract and misrepresentation.

29. On the 6th April, 2022, the plaintiffs issued a motion seeking entry into the Commercial List and interlocutory injunctions restraining the defendant from taking any steps to pursue the project without the plaintiffs, or excluding the plaintiffs or bringing in new parties to replace the plaintiffs. Orders are also sought requiring disclosure of any discussions with

other financing partners in relation to the project and requiring the defendant to complete the acquisition of the property.

30. Two affidavits were sworn on each side, by Mr. Matthew Cooper and Mr. James Morris respectively.

31. In his first affidavit, Mr. Cooper sets out the background to the matter as I have outlined it. He avers that it was the role of Cooper to finance the acquisition of the Lands and given that Lens is evidently continuing with the process of acquiring the Lands, it follows that the defendant is pursuing the project without the plaintiffs and has secured or intends to secure finance and/or support from another party or parties. He says that the plaintiffs have expended considerable time, money and effort in connection with the project to date.

32. In his replying affidavit, Mr. Morris says that the plaintiffs' case centres around MOU 2 from which they seek to infer a legal partnership. His fundamental contention is that the parties to MOU 2 were obliged to negotiate in good faith and having done so, by then for some 22 months, the failure to agree on the terms of the operating agreement means that MOU 2 and any commercial relationship between the parties has now come to an end.

33. He says that given that Cooper was incorporated some months after the execution of MOU 2, it has no standing to pursue these proceedings. Mr. Morris outlines the inception of the project in the years leading up to the involvement of the plaintiffs. In a section of his first affidavit dealing with the current status of the contract to purchase the lands, Mr. Morris says that the defendant is continuing the process of acquiring the lands and draft contracts are at an advanced stage of negotiations between the solicitors for the defendant and the solicitors for SDCC.

34. It appears therefore that these negotiations are being pursued without the involvement of the plaintiffs. At para. 73 of his first affidavit, Mr. Morris discloses the fact that the defendant has engaged in discussions with three interested parties although those discussions had not progressed to business plans or investment proposals to the point where alternative financing is now available. In addition to these three parties, Mr. Morris says that in early 2022, Lens was introduced to another potential investor *"who we have met and set out a very general plan for the studios".*

35. In a replying affidavit, Mr. Cooper characterises the disclosures by Mr. Morris as amounting to an admitted breach of the agreement between the parties and the specific terms of MOU 2. He also complains of an alleged lack of candour by Mr. Morris concerning the discussions and the fact that he does not identify the parties concerned or the nature of their involvement. He goes on to say that at no stage were the plaintiffs aware that the defendant was in discussions with four other potential investors and the *"revelations"* in Mr. Morris' affidavit come as a significant shock to the plaintiffs.

36. With regard to the inability of the parties to agree on the terms of an SHA, Mr. Morris avers that the defendant repeatedly maintained that it would not enter into such an SHA, or that any such SHA would not take effect, until planning had concluded and that the plaintiffs were to fund the planning process on a speculative basis while simultaneously raising the balance of the equity and debt funding – *per* the defendant's letter of the 26th May, 2021. Mr. Morris says that it was always understood that the mezzanine finance and senior bank debt would be raised after the acquisition of the Lands and the obtaining of planning permission. Accordingly, up to that point in time, the project fell to be funded exclusively by the plaintiffs.

37. At para. 35 of his affidavit, Mr. Cooper avers that the plaintiffs have to date expended €968,302.89 on the project. It was agreed between the parties at the hearing in the High Court that approximately €600,000 of this amount was directly attributable to the project whereas the balance related to the plaintiffs own professional advisors and their fees. Mr. Cooper also says that the plaintiffs were also committed to an equity investment in the project of approximately €18.8m. At para. 42, Mr. Cooper says that he has reviewed the most recent publicly available financial statements for the defendant which show that as of 31 December 2020, the defendant was balance sheet insolvent with net liabilities of €228,871 and he exhibits these documents.

38. Mr. Cooper's affidavit was again responded to in the second affidavit of Mr. Morris which does not dispute the plaintiffs' expenditure on the project and its equity commitment, or the financial position of the defendant. He reiterated the defendant's perspective as to why negotiations between the parties on the SHA had broken down and expressed concern as to a lack of insight on the defendant's part as to the financial status of the US-based plaintiff given the potentially large losses that the defendant would suffer if it is unable to complete the contract for the purchase of the Lands from SDCC.

Judgment of the High Court

39. At the outset, the trial judge identified the central legal issue (at para. 5):

> *"The question of whether an injunction will be granted pending the trial will be determined on the basis of the law relating to the granting of interlocutory injunctions, as clearly outlined in Merck Sharpe & Dohme v Clonmel Healthcare [2019] IESC 65* ['Merck']. *The plaintiffs must therefore establish:*

" • if they were to succeed at the trial, a permanent injunction, in the same form sought pending the trial, might be granted by the trial judge;

- *that there is a fair issue to be tried (in this case, regarding the applicability of the negative pledge covenant to Lens Media);*

- *if so, that the balance of justice favours the grant of an injunction pending the trial and, in this regard, the most important element is usually the question of the adequacy of damages."*

40. The negative pledge referred to by the judge is that contained in Clause 7 of MOU 2 above. The judge went on to refer to other clauses in MOU 2 which he considered to be relevant, including those I have mentioned. He noted that it was not in dispute that the plaintiffs had invested €968,000 in the venture which, when their own solicitors' fees and other costs were factored in, left a balance of circa €600,000 directly invested. He noted that the plaintiffs had provided proof of funds in the sum of $35m to enable SDCC to agree in principle to sell the lands. The judge then said (at para. 17):

> *"However, as noted, the parties have failed to reach agreement on the terms of the operating agreement/shareholders agreement and it is on this basis that Lens Media says that its obligations to the plaintiffs (and thus its obligations under the negative pledge covenants in Clause 7) are at an end."*

41. The first question to which the judge turned his attention was whether it had been established by the plaintiffs that there is a fair issue to be tried. He said in this regard that the issue was not whether Lens was correct in its contention that MOU 2 was at an end but rather

whether the contrary position taken by the plaintiffs is arguable. He considered that it was arguable and gave his reasons for that conclusion.

42. He considered that the defendant's case depends on the court implying a term into MOU 2 stating that after some period of time, it will come to an end if the parties fail to reach agreement on the operating agreement. He gave a number of reasons why in his view, such a term ought not be implied.

43. He then turned to the contention of Lens that there was no fair issue to be tried *vis á viz* Cooper given that it was not in existence at the time MOU 2 was entered into. The judge considered that there was at least an arguable case in this regard against the Lens argument and in any event, Plus clearly was a party to MOU 2. He noted that Lens did not raise any issue regarding the substitution of Cooper for *"Cooper Investment Group entities"* into the draft SHA and he felt the plaintiffs' position was consistent with Mr. Cooper's averment that it was at all times the intention to insert into the arrangements a company created by the Cooper Investment Group entities.

44. The judge considered the Lens argument that the injunction being sought was mandatory in nature and therefore the appropriate test to be applied at the interlocutory stage was that set out in *Maha Lingham v HSE* [2005] IESC 89. This test posits the requirement for the plaintiff to demonstrate a strong case that is likely to succeed before a mandatory interlocutory injunction will be granted. The judge however concluded that the reliefs being sought by the plaintiffs were clearly prohibitory in nature and the corresponding test reflecting the lower threshold of a fair question to be tried therefore applied.

45. Because the orders sought are not mandatory in nature, the judge was of the view that a permanent injunction in the form of the interlocutory injunctions being sought might be granted at trial. He considered that the orders being sought would not oblige Lens to enter

into or continue a business venture with the plaintiffs against its will. Lens may decide to continue or not continue and in the latter event, orders may be necessary to unwind the alleged partnership by the sale or realisation of its assets. The interlocutory injunction would merely preserve the status quo pending trial of these issues.

46. On the balance of justice question, the judge noted Mr. Cooper's uncontroverted averment that Lens is balance sheet insolvent and consequently damages would not provide the plaintiffs with an adequate remedy. In contrast, he said, Mr. Cooper had provided sworn evidence regarding the financial status of Plus which enjoyed annual profits in excess of $1M. On this basis, he was of the view that the balance of justice favoured the grant of the injunction.

The Appeal

47. The central contention of Lens on appeal is that the trial judge gave no consideration to whether a fair question had been raised by the plaintiffs concerning whether a partnership existed between the parties as a matter of law. The plaintiffs' case is premised solely on the basis of such a partnership existing and seeks specific performance of it. Further, the judge failed to have regard to the principles upon which specific performance of a partnership agreement might be granted. Lens contends that there could not be a partnership in circumstances where both MOU's expressly envisage that the project was to be carried out by a limited liability company to be formed. It is also said that the judge erred in concluding that there could be any privity of contract between Cooper and Lens in circumstances where the former had only come into existence some months after MOU 2.

48. It is also said that the judge erroneously concluded that the orders sought were prohibitory rather than mandatory in nature and thus applied the wrong test. What was being sought in fact was to compel the defendant to enter into an enforced liaison with the

plaintiffs, even though all attempts at doing so had failed. Lens contends that the judge also erred in his approach to the balance of justice by concluding that damages would not be an adequate remedy for the plaintiffs in circumstances where, if Lens were allowed to proceed, it would ultimately be in a position to meet such damages. It is also said that the judge failed to attach sufficient weight to the defendant's concerns as to the ability of Plus to fulfil its undertaking as to damages.

49. The central feature of the defendant's written and oral argument on the appeal was that there was no, or no sufficient, evidence of a partnership having existed at any time between the parties as a matter of law and, as this was core to the plaintiffs' case, no fair issue to be tried had been raised. The judge was criticised for failing to consider whether a partnership in fact existed or if he did consider it, he gave no reasons for his conclusions.

50. It was said that the judge considered MOU 2 in isolation without first considering whether there was a partnership arrangement underlying it. Another factor to which it was said the court failed to have regard was the inherent unlikelihood of specific performance of a partnership agreement being ordered. The judge, it was said, failed to give weight to factors which clearly militated against the existence of a partnership, in particular the fact that the parties had chosen to have their legal relationship governed by a corporate structure and as evidenced by the fact that extensive attempts were made to negotiate the SHA.

Legal principles

51. The proper approach of an appellate court to appeals from discretionary interlocutory orders, including injunctions, was considered by this court in *Betty Martin Financial Services Ltd. v EBS DAC* [2019] IECA 327. There, Collins J., speaking for the court, approved the earlier observations of the court in *Collins v Minister for Justice, Equality and Law Reform* [2015] IECA 27 where Irvine J. (as she then was) said at para. 79:

"... while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any a priori rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed."

52. In referring to this passage, *inter alia*, Collins J. said:

"39. Accordingly, while as a matter of principle 'great weight' is to be given to the views of the High Court judge, the ultimate decision on this appeal is for this court. It is also clear that the EBS is not required to establish any error of principle as a prerequisite to this court coming to a different conclusion to the judge.

40. ... Where the High Court does not explain its basis for taking a particular view on a contested issue and/or fails to engage appropriately with the arguments made to the court by one or other party on that issue, that will necessarily affect the weight to be attached to the courts view on appeal. An obvious parallel is provided by the appropriate approach to findings of fact made by the High Court. In general, such findings will bind an appeal court: Hay v O'Grady [1992] 1 IR 210. That will not be the case, however, where the judge fails to engage with the evidence of both sides and explain why one side or the other has been preferred: Doyle v Banville [2012] IESC 25; [2018] 1 IR 505.

41. Separately, it is clear that a judge must give sufficient reasons for his or her decision such that the parties can understand the basis for that decision: see, for example, the decision of this court in Law Society v Callanan [2017] IECA 217; [2018] 2 IR 195, at paras. 80-8 – (per Hogan J.)"

53. Particular reliance was placed by the defendant on the by now well-known propositions referred to in *Merck* at the conclusion of O'Donnell J.'s judgment, so it is appropriate that I should set them out:

> *"(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief pending the trial could be granted.*
>
> *(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the approach in American Cyanamid v Ethicon Limited [1975] AC 396* ['American Cyanamid'] *and Campus Oil v Minister for Industry (No. 2) [1983] IR 88 will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit.*
>
> *(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice.*
>
> *(4) The most important element in that balance is, in most cases, the question of adequacy of damages.*
>
> *(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy.*

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

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

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

54. The applicable principles in applications for interlocutory injunctions were most recently considered by this court in *Ryanair DAC v Skyscanner Limited & Ors.* [2022] IECA 64 in a judgment delivered by Murray J. with which the other members of the court agreed:

"30. The principles governing the determination of an application for interlocutory injunctive relief have been re-stated by the Supreme Court in [Merck], *that decision being explained and applied by this court in* [Betty Martin], *Ryan v. Dengrove DAC [2021] IECA 38 and, most recently, O'Beirne v. Bank of Scotland and anor. [2021] IECA 282. For present purposes they can be summarised as follows.*

31. There is one – and only one – fixed precondition to the grant of an interlocutory injunctive order, this arising from the obvious and uncontroversial requirement that the plaintiff establish (as it is variously described) a 'fair question' a 'bona fide issue' or a 'serious issue to be tried'. Each of these is akin to the threshold that applies where a party seeks to dismiss a claim against it pursuant to the inherent jurisdiction of the court ([Betty Martin] *at para. 42). Indeed, in* [American Cyanamid], *Lord Diplock implied the equivalence of the threshold to dismiss a claim and that for the grant of a prohibitory injunction as requiring that 'the claim is not frivolous or vexatious; in other words that there is a serious issue to be tried' (at p. 407). Save in the most exceptional of circumstances, the plaintiff must also establish that if it succeeded at trial a permanent injunction would be granted (Merck at para. 64 (1)). After that, the court's focus is upon where the risk of least injustice lies in the grant or refusal of an order. The case-specific factors relevant to the determination of that issue include the adequacy of damages in the event that the injunctive relief is not granted and the plaintiff prevails at trial, the decision in Merck making it clear that this is not a free standing, determinative inquiry (Ryan v. Dengrove at para. 49).*

32. To assist in that exercise, the law has developed a series of guidelines which will usually enable the identification of where that risk of least injustice lies in a particular case. However, these are all subject to the over-riding consideration that the remedy is flexible, and that the underlying objective in the resolution of any such application is to minimise injustice in circumstances where the legal rights of the parties have yet to be determined.

33. In that regard, the following are relevant here — each being subject to the critical proviso that they are statements of the general, and are neither set in stone nor required to be applied without regard to the legal and factual context of a particular claim:

(i) As the law presently stands in this jurisdiction in a normal case, a mandatory order will be made only if the court is satisfied that the plaintiff has established that it has a strong case that he (sic) is likely to succeed at trial (Maha Lingham v. Health Service Executive [2005] IESC 89 (at para. 10)).

(ii) In determining whether an order is 'mandatory' for this purpose, the court is concerned to identify the substance of the relief sought, the matter therefore not being judged on the basis of the phraseology of the order. Any positive assertion can be expressed as a negative. The converse is also true, so that a technically mandatory order which involves little intrusion on the affairs of a defendant may not fall to be determined by reference to the 'strong case' test (Charlton v. Scriven [2019] IESC 28 at para. 4.6).

(iii) If all other matters are evenly balanced, the court in deciding whether to grant or refuse interlocutory injunctive relief should lean in favour of the maintenance of the status quo ante (B. & S. Auto Ltd. v. Irish Auto Trader Ltd. [1995] 2 IR 142, at p. 146 per McCracken J.). This is because it will usually be less unjust to keep the parties in the position they occupied prior to the application, than to enable one to unlawfully disrupt the pre-existing legal relationship between them.

(iv) The status quo ante is also relevant to the standard applied to the grant or refusal of a mandatory order. An action requiring an affirmative step which was being undertaken by the defendant prior to the application may fall to be determined according to the fair question standard because although the injunction may be mandatory in form, it does not require the defendant to do anything it was not already doing (Ó Murchú t/a Talknology v. Eircell Ltd. [2001] IESC 15 at p. 6)."

55. On the question of the adequacy of damages, Murray J. said the following at p. 23:

"(vi) Central to the determination of many applications of this kind is the question of whether in the event the plaintiff does not obtain the interlocutory relief sought but prevails at trial, damages will be an adequate remedy and, conversely, whether in the event that the injunction is granted and the defendant prevails at trial it will be possible to compensate the defendant for any loss caused by the fact of the injunction. This is likely to be a decisive factor in many commercial disputes between solvent parties (Merck at para. 64 (4) and (5)). However, as I have noted, this should be viewed not as a free standing test, but as a factor relevant to the assessment of the balance of justice."

Conclusion

56. The starting point is of course the order of the High Court against which this appeal is brought. The relevant portions of the order are as follows:

"**IT IS ORDERED** that the defendant its servants or agents be restrained pending the trial of the action from taking any steps to pursue the project the subject matter

of these proceedings without the plaintiffs their servants or agents save where the plaintiffs or the defendant voluntarily agree to withdraw.

AND IT IS FURTHER ORDERED that the defendant its servants or agents be restrained pending the trial of the action from taking any action to exclude or circumvent the participation by the plaintiffs or either of them in the project the subject matter of these proceedings and/or from bringing in other persons or entities in place of the plaintiffs"

57. The defendant in its submissions places considerable emphasis on the first of the *Merck* propositions in submitting that the plaintiffs have failed to establish that a permanent injunction might be granted at the trial for the same relief as was granted by the High Court on an interlocutory basis. In fact, the defendant draws attention to the fact that no injunction of any description is actually claimed in the plenary summons. Whilst that is perhaps on a strict view technically correct, it appears to me to misunderstand what is claimed by the plaintiffs in these proceedings.

58. The plaintiffs say they have an agreement with the defendant whereby each party will do certain things. Evidence of that agreement is to be found in MOU 1 and in particular MOU 2. The latter contains what the trial judge described as a negative pledge not to do certain things. One of those things was not to pursue the project without the other party or parties. Another was not to bring in other persons or entities in place of the existing parties. These constitute clear obligations to refrain from certain conduct. The plaintiffs seek specific performance of the partnership agreement which they contend is reflected in MOU 1 and MOU 2. The plaintiffs contend that the parties are already engaged in business together pursuant to this agreement, albeit the agreement envisages that it will ultimately be replaced by a shareholders' agreement on terms to be agreed between the parties. An order

for specific performance is in substance and effect a form of mandatory injunction and in the present case, while the making of such an order would oblige the defendant to do certain things, it would equally oblige the defendant not to do the converse of those things.

59. As Murray J. pointed out in *Ryanair v Skyscanner*, any positive assertion can be expressed as a negative and the converse is also true. Therefore, the fact that an injunction is framed in prohibitory language is not conclusive that it is in fact a prohibitory order. Again, as pointed out by Murray J., it is the substance of what is sought that matters, not the words used.

60. In the present case, if the plaintiffs succeed at trial, I do not think it can be gainsaid that they *might*, at minimum, obtain an order for specific performance. While that order might not in terms enjoin the defendants from taking a certain course of conduct, it would in practice have that effect. The specific enforcement of MOU 2 would necessarily preclude the defendant both from excluding the plaintiffs from the project and from pursuing the project with any other persons or entities (unless the plaintiffs voluntarily withdraw). In fact, what is being sought in this application is a more limited form of relief to preserve the *status quo ante* pending determination of the plaintiffs' rights at trial. By way of example, if A sues B for specific performance of an agreement to sell a house, if B proposes selling the same house to C, A may seek to restrain the sale to C pending the determination of A's right to specific performance against B. The fact that A might not be seeking a permanent injunction restraining the sale to C as a primary relief does not affect A's entitlement to interlocutory relief.

61. That being so, the second *Merck* proposition falls to be considered and the threshold requirement is dependent on whether what is sought is in substance prohibitory or mandatory in nature. It seems to me that on any realistic appraisal of the matter, what is sought here by

the plaintiffs is a prohibitory order aimed at preserving the *status quo* until the trial. The plaintiffs seek to prevent their exclusion from the project by the defendant. Insofar as the defendant is continuing the acquisition process by negotiating contractual terms with SDCC, the plaintiffs do not seek to interfere with that process, quite the opposite, as the order for specific performance sought at paragraph B of the plenary summons requires the defendant to complete that acquisition. The only practical difference, at this juncture at least, is the source of the funding to pay the deposit and fund the requirement to obtain planning permission.

62. In that regard, it was not disputed at the hearing of the appeal that the plaintiffs would be required to put up approximately €2.5m by way of deposit on the contract for sale of the Lands and a further approximately €1.5m being the likely cost involved in the planning application. The plaintiffs accept that they are obliged to fund this outgoing of circa €4m to get the project to the point of the execution of the Master Lease on the closing of the sale.

63. It seems to me clear therefore that what is sought by the plaintiffs herein is properly characterised as an interlocutory prohibitory injunction to which the lower threshold applies as opposed to the *Maha Lingham* requirement to show a strong case that is likely to succeed. As the authorities show, the hurdle that the plaintiffs must surmount in this regard is a relatively low one in showing either a fair question, *bona fide* issue or serious issue to be tried. This amounts to no more than demonstrating that the claim is not, in the words of Lord Diplock in *American Cyanamid*, *"frivolous or vexatious"*. The test is, as described in *Betty Martin*, analogous to that which would apply in an application to dismiss a claim pursuant to the court's inherent jurisdiction.

64. Lens says that the plaintiff's claim is in fact frivolous and vexatious and that no serious issue arises. That is premised on the proposition that the plaintiffs have failed to establish,

even on an arguable or statable basis, that there now exists a partnership between the parties which the plaintiffs seek to specifically enforce.

65. The difficulty with that contention appears to me to be that it must follow that if there is no partnership, MOU 2 is not binding. Indeed, counsel for the defendant in oral submissions advanced precisely that proposition. At the same time however, Lens also submitted that, as its solicitors made clear from the outset, MOU 2 continues to be binding only until either an operating agreement/SHA is arrived at or the parties fail to agree terms having made *bona fide* attempts to do so. In its terms, MOU 2 makes provision for its expiration on the parties entering into the Operating Agreement which under clause 4 of MOU 2 is to be executed and signed by all parties. It does not make provision for its expiration in circumstances where the parties fail to agree an Operating Agreement nor crucially when such failure might be deemed to have crystallised.

66. These contentions appear to me to be contradictory in positing MOU 2 is both binding (at least until the parties have "failed" to reach agreement or replace it with a new agreement) and non-binding at the same time. One of the central tenets of the defendant's case is that it submits that the plaintiffs seek to wrongly characterise the parties' legal relationship prospectively as a partnership when in fact the parties had clearly agreed that that relationship would be governed by a corporate structure.

67. That again, with respect, appears to me to misunderstand the case that is made by the plaintiffs. It has never been in dispute that the operating agreement or SHA will only come into effect after the planning permission has been obtained and the sale is to be closed with the Master Lease being taken in the name of Lens, under a new shareholder structure, or some other corporate entity. Either way, it is clear in the interim that the parties have a legal relationship which will subsist up to that point in time. The plaintiffs say that that present

subsisting legal relationship is that of a partnership and that relationship will continue until a point in time is reached where the corporate structure will take over.

68. I cannot see how this can be regarded as other than at least an arguable proposition and certainly one that is not frivolous and vexatious. The parties specifically and expressly agreed that MOU 2 was to be binding and enforceable. They agreed that neither party would take any action in contravention of either MOU 1 or 2. They agreed that neither party would exclude the other(s) or seek to replace them. While it is correct to say that MOU 2 was intended to be temporary and to subsist during the period between the date of MOU 2 and the commencement of the operating agreement/SHA, it is at a minimum arguable that it does not simply "expire" on the failure to enter into such operating agreement/SHA. Indeed, it appears to me that the defendant expressly recognised this in the above correspondence.

69. The PFOR letter of the 29th March, 2022 to which I have referred sought to suggest for the first time that MOU 2 was then at an end by virtue of the parties' failure to agree the terms of the SHA or its equivalent. That appears to be entirely in the teeth of the prior correspondence which explicitly recognised the necessity for the parties to come to agreed terms as to how they would end their relationship. There was never any question of the agreement somehow simply evaporating, leaving Lens free to pursue the project on its own and the plaintiffs to simply absorb their own losses, then of at least €600,000.

70. It is to my mind of some significance that counsel for the defendant candidly conceded in the course of submissions on the appeal that whatever about specific performance, the defendant might have greater difficulty in defending a contractual claim for damages. Here again, I fail to see how that logically can be the case if the defendant is correct that MOU 2 was either never binding, or if it was, it has expired without further obligation on either side. That concession was buttressed at the conclusion of counsel's submissions by the making of

an open offer by the defendant to repay the sum of €600,000 to the plaintiffs together with Courts Act interest on the execution of the Master Lease with SDCC.

71. As previously noted, one of the principle criticisms of the trial judge is that, it is said, he failed to consider whether in fact a partnership arguably existed between the parties, or if he did reach that conclusion, he gave no reason for it. I think this is a somewhat unfair criticism. The plaintiffs' case is that if MOU 1 and 2 do not constitute the entirety of the partnership agreement, MOU 2 is at least the central feature of it. The High Court judgment was clearly focused on the terms of MOU 2 and their consequences and the fact that the judge may not have expressly adverted to the word "partnership" in reaching his conclusions does not in any sense rob them of validity.

72. Indeed, although the plaintiffs' claim is pleaded in terms of partnership, it does not seem to me to matter a great deal if one were to characterise MOU 2 as part of a partnership agreement, a joint venture agreement or simply an agreement. It was at all events a contract that was intended to be binding as its terms make clear and which provides for specific obligations equally intended to be binding. I cannot see how it could be said in those circumstances that it is not at least arguable that as a contract simpliciter, it binds the parties. That is what the judge held, I believe correctly, and it is neither here nor there that he did not go on to separately consider whether this might be regarded as amounting to a partnership in law.

73. Several of the defendant's grounds of appeal relate to the alleged lack of privity between Cooper and Lens, the latter having been incorporated subsequent to MOU 2. In my view, there is little merit in this argument. Messrs. Matthew and David Cooper signed MOU 2 on behalf of what is described as *"Cooper Investment Group entities"*. As Mr. Matthew Cooper makes clear in his second affidavit, this term does not describe a legal entity and was

deliberately used to allow him and his brother decide on an appropriate corporate vehicle through which to invest in the project.

74. He says that Lens was always aware that this was the intent and points to the fact that Cooper was the entity named in the draft SHA's exchanged between the parties. In his responding affidavit, Mr. Morris does not contradict these assertions but says they will be addressed by way of legal submissions at the hearing. In their statement of claim, the plaintiffs plead, in the alternative, that the Coopers had an implicit right to nominate a corporate entity through which to invest, or alternatively the Cooper brothers' rights were assigned to Cooper or in the further alternative, Lens is estopped from disputing Cooper's rights to enforce MOU 2. Each of these propositions appears to me to be at least arguable and thus to satisfy the threshold requirement for interlocutory relief.

75. Turning finally to the balance of justice, as *Merck* and the other authorities discussed make clear, the adequacy or otherwise of damages will often, if not usually, be decisive. That component of the test is, in the present case, reasonably straightforward. It is not in dispute that Lens is balance sheet insolvent. As matters stand, it is plainly unable to meet any award of damages that might be obtained by the plaintiffs. The suggestion that if it is allowed to proceed alone with the project, it may ultimately be in a position to meet such award is, to put it mildly, highly speculative and falls far short of establishing anything approaching a likelihood that Lens will be able to pay damages.

76. On the other side of the equation, Lens complains that there is a dearth of information on the financial strength of Plus and none at all as regards Cooper. Lens thus says that if the injunction is ultimately found to have been wrongly granted, it faces, at minimum, considerable uncertainty as to whether it may recover on the plaintiffs' undertaking and has in fact sought security for costs in a separate application. Lens points to the fact that

notwithstanding that Mr. David Cooper may be an individual of considerable substance, he is not a party to the proceedings. These arguments appear to me to be deprived of much force in circumstances where, as counsel for the plaintiffs pointed out, Lens did not seek a fortified undertaking as to damages in a timely fashion in the High Court and it is too late to do so now.

77. In the event, I am therefore satisfied that the balance of justice is firmly in favour of the grant of the injunction.

78. Murray J. in *Ryanair v Skyscanner* observed:

> *"While this court must make a de novo assessment of the legal issues around the test for the grant or refusal of any particular type of injunction and the question of whether the plaintiff has established a serious issue or, as the case may be, a clear and strong case that is likely to succeed, the findings of, and analysis by, a trial judge as to the balance of justice is a matter to which great weight must be given, and which should be reversed only if the appellate court is satisfied that there was an injustice (Betty Martin Services Ltd. v. EBS DAC at para. 35)."*

Order

79. In the light of the foregoing, I am satisfied that the trial judge correctly analysed the balance of justice in this case and Lens has failed to establish that any injustice has resulted from the order of the High Court.

80. I would accordingly dismiss this appeal and affirm the order of the High Court.

81. With regard to costs, my provisional view is that as the plaintiffs have been entirely successful, they should be entitled to the costs of the appeal. Should the defendant wish to

contend for an alternative order, it will have liberty to deliver a written submission not exceeding 1,000 words within 14 days of the date of this judgment and the plaintiffs will have a similar period to respond likewise. In default of such submission being received, an order in the terms proposed will be made.

82. As this judgment is delivered remotely, Costello and Butler JJ have authorised me to record their agreement with it.