[2020] IEHC 170

THE HIGH COURT

[RECORD NO.: 2020 47 CA]

CIRCUIT APPEAL
SOUTH WESTERN CIRCUIT
COUNTY OF CLARE

BETWEEN:
PADDY BURKE (BUILDERS) LIMITED (IN LIQUIDATION AND IN RECEIVERSHP)
PLAINTIFF

AND
TULLYVARAGA MANAGEMENT COMPANY LIMITED
DEFENDANT

AND BY ORDER DATED 27TH NOVEMBER, 2019
STEPHEN TENNANT & PROMONTORIA (ARROW) LIMITED
DEFENDANTS TO COUNTER CLAIM

AND
MINISTER FOR JUSTICE AND EQUALITY
RESPONDENT

Judgment of Mr. Justice Denis McDonald delivered on 8th April, 2020

The Appeal before the Court

1. This is an appeal from an order made by the Circuit Court on 29 January, 2020, under which, at the suit of the above named defendant, Tullyvaraga Management Company Limited, ("the management company"), the above named Stephen Tennant, ("the Receiver"), and Promontoria (Arrow) Limited, ("Promontoria"), were restrained pending the trial of these proceedings, from completing the sale of certain property, (described in more detail below), to Double S Housing Limited ("the purchaser"), unless the following was done:-

    (a) The terms of the contract for sale to the purchaser are varied and amended, (and accepted by the purchaser as so varied and amended in writing) in the following respects, namely, that the purchaser accepts and agrees:

        (i) to abide in full with the terms of certain management agreements (described below) which were entered into in the course of 2005 and 2006 between the plaintiff and the management company;
        (ii) that line 4 of Clause 4.9 of the contract for sale be amended by deleting the words "… *insofar as the Subject Property is concerned* ";
        (iii) that the title to the property sold be in similar form (999 year leases) to the title of other units in the development;
        (iv) that the purchaser will become a member of the management company;
        (v) that the purchaser will ensure that the title to all external and internal common areas is transferred to the defendant as required by the management agreements;

    (b) That the sale proceeds be held by the Receiver in escrow pending the trial of the proceedings, and not released to, or placed at the disposal of, Promontoria.

2. In order to understand the nature and effect of the order made, it is necessary to outline the relevant facts.

Relevant Facts

3. The property, the subject of the contract of sale to the purchaser, comprises a number of blocks of apartments, one commercial unit, and several common areas in a development in Shannon, County Clare, known as Brú na Sionna. It is important to note that the property to be sold to the purchaser is not the entire of the Brú na Sionna development. The only parts of the development which are to be sold to the purchaser are those over which the Receiver was appointed by Promontoria, pursuant to a deed of appointment dated 3 May, 2018. The receiver was not appointed over the property comprised in Blocks B, C, A, F and G of the development. Those blocks are, therefore, not the subject of any sale to the purchaser.

4. The Brú na Sionna development was carried out by the plaintiff with the assistance of loan finance provided by Anglo Irish Bank plc. ("Anglo"). These facilities were secured by:

   (a) A deed of mortgage dated 28 April 2004 made between the plaintiff and Anglo, which included all of the lands comprised in Folios 27854R and 22667F County Clare, as were transferred to the plaintiff by deeds of transfer dated 28 April 2004 made between a number of parties, including the Shannon Free Airport Development Company Limited ("SFADCO"), together with the easements, rights and privileges granted to the plaintiff over part of the lands comprised in Folio 27854R County Clare by SFADCO, in connection with the construction and use of a car park and associated services for the benefit of the lands transferred;

   (b) A further deed of mortgage dated 4 April 2006 made between the plaintiff and Anglo in respect of part of the lands comprised in Folio 27854R of the Register, County Clare, more particularly set out on a map which outlines the extent of the development of Phase 2 of the development;

   (c) A mortgage debenture dated 26 June 2003 between the plaintiff and Anglo in respect of a property known as Mountain View situated at Lisdoonvarna, County Clare. However, no issue arises in these proceedings in relation to this debenture.

5. The Anglo facilities and related security were subsequently transferred to National Asset Loan Management Limited ("NALM"). Unfortunately, as a result of the recession, the plaintiff defaulted in its obligations to NALM. This led to the appointment in 2010 by NALM of Eoin Ryan as statutory receiver over all of the assets of the plaintiff secured by the mortgages described above. In the following year, the plaintiff was ordered to be wound-up by the court.

6. Prior to the appointment of Mr. Ryan as receiver, the plaintiff had entered into a number of agreements with the management company which was established for the purposes of taking over the maintenance and management of the common areas of the development. Three agreements were entered into as follows:-

   (a) The first agreement is dated 22 August 2005. It relates to the development insofar as it is comprised in Folios 38832F and 28834F County Clare. These folios appear to

contain lands that were derived from those contained in the folios described in para. 4 (a) above. No case has been made that the lands comprised in Folios 38832F and 28834F are not subject to the mortgages in favour of Anglo. The first agreement contains a number of relevant terms:

(i) under Clause 1, the company is to sell and the management company is to purchase for €10 the "Estate" which is defined as the mixed residential and commercial estate known as Brú na Sionna comprised in Folio 38832F and 38834F County Clare, subject to and with the benefit of the leases to be granted by the plaintiff in relation to individual units to be sold and with the benefit of a lease in respect of the carpark;
(ii) under Clause 2.3, the plaintiff reserved full right and liberty to extend the estate;
(iii) under Clause 10, the 2001 edition of the Law Society General Conditions of Sale are incorporated, save to the extent that they are inconsistent with the express terms of the agreement.

(b) The next agreement is dated 14 December 2005. It describes the estate in similar terms to the agreement at (a) above, save that it also now extends to additional lands the subject of Dealing No. D2005CR002550A. Again no issue has been raised that these lands are not caught within the ambit of the mortgage described in para. 4 (a) above in favour of Anglo. This management agreement contains the following relevant terms:-

(i) under Clause 1, the plaintiff is required to sell and the management company to purchase the common areas in fee simple. This was stated to be in consideration of the management company assuming liability for the management of the common areas and also liability to the apartment owners for the performance of the covenants and obligations contained in the apartment leases and "in further consideration of the sum of €10 …"
(ii) Clause 6 of the agreement requires the plaintiff to maintain and procure the maintenance of the common areas in a proper state of repair up to the Completion Date;
(iii) There is no equivalent reference to the Law Society General Conditions to that contained in Clause 10 of the agreement dated 22 August 2005;

(c) A further agreement was entered into on 24 September 2006 dealing with that part of the development comprised in Folio 27854R County Clare. Again, no issue has been raised suggesting that these lands are not covered by the mortgage in favour of Anglo (as described in para. 4 (a) above). This agreement contains a number of relevant clauses as follows:-

(i) Clause 1 is in similar terms to the equivalent clause in the agreement of 14 December 2005 at (b) above;
(ii) Clause 5 provides that the purchase by the management company is to be completed on the expiration of 28 days from the date of execution of the last

of the leases of the apartments or the expiration of 28 days from the service of notice by the plaintiff on the management company requiring completion, (whichever is the earlier);

(iii) Clause 6 is in identical terms to Clause 6 of the agreement of December 2005 at (b) above;

(iv) For the purposes of the present application, the management company draws attention to the provisions of Clause 9, which the management company suggests envisages a single transfer of the entire development to the management company. Clause 9 is in the following terms:-

> *"9. The Transfer to the Management Company of the Common Areas shall be engrossed in triplicate … The said Transfer will be registered in the Land Registry at the expense of the Management Company."*

(v) There is no equivalent provision to Clause 10 of the agreement dated 22 August 2005 at (a) above, incorporating the Law Society General Conditions of Sale.

7. On 10 April 2015 the present proceedings were instituted. At that time the only parties were the plaintiff and the defendant. The proceedings were instituted at the behest of Mr. Ryan, as statutory receiver appointed by NALM. In the proceedings, the plaintiff made the case that the failure of the defendant to take a transfer of the common areas was frustrating sales of units at the development. The plaintiff relied, in particular, on the agreement of 24 September 2006 (described in para. 6 (c) above) and sought an order compelling the defendant to take such steps as might be necessary to allow the transfer of the common areas to the defendant to proceed. In addition to relying on contractual rights, the plaintiff also invoked ss. 4, 5, 7, 24 and 27 of the Multi-Unit Development Act, 2011 ("the 2011 Act").

8. A defence and counterclaim was delivered on behalf of the management company in November 2015. In that defence and counterclaim, the management company made the case (*inter alia*) that the plaintiff had failed to complete the common areas or to put in place the finance necessary for such completion. Among the relief claimed in the counterclaim was an order requiring the plaintiff to complete the common areas of the development.

9. On 7 December, 2017 the Fire Officer of Clare County Council served a series of fire safety notices relating to significant defects in the development. As I understand it, a substantial number of compartment walls separating one apartment from another and walls separating apartments from common stair areas do not extend to the underside of the roof. There were also problems with the fire rating of door sets and smoke shafts together with a number of other difficulties. All of this will be expensive to remedy. In addition, the management company says that it has been necessary to engage fire marshals on a round the clock basis at a cost of €4,153.00 per week since October 2017.

10. Following delivery of the defence and counterclaim in November 2015, there was very little activity in the proceedings in the Circuit Court until November 2019. At that point,

an application was made to the court to join the Receiver and Promontoria as defendants to the counterclaim. In the intervening period, the debt owed by the plaintiff to NALM had been assigned to Promontoria on 15 May, 2015 together with the related security. Following this assignment, Mr. Ryan resigned as statutory receiver and, on the same day, Promontoria appointed Mr. Tennant as receiver. This appointment was more limited than the appointment previously made by NALM of Mr. Ryan. In particular, this appointment by Promontoria of the Receiver excluded Blocks A, B, C, D, E, F and G together with the common areas in respect of those blocks. Instead, the Receiver's appointment is limited to the commercial unit and to apartments 57, 83, 86, 88-92, 94-99, 102-103 in Block D, apartments 150 and 159 in Block H, apartments 169-170, 176 and 179 in Block J, apartment 189 in Block K, apartments 197, 208-212, 214-218, 221, 223 and 225 in Block L and apartments 231-238 in Block N.

11. On 22 July 2019, the Receiver caused the plaintiff to enter into a contract with the purchaser for the sale to it of the property over which he had been appointed to include the 44 unsold residential apartments and the unsold commercial unit subject to the leases of any sold units and subject to the management company agreements described above. Clause 4.9 of the special conditions further provides that the purchaser takes the subject property subject to those management agreements and it further provides as follows: -

    "4.9 …The Purchaser shall assume all obligations under the said management company agreements on Completion and no further objection requisition or inquiry shall be raised by the Purchaser in relation thereto".

12. Clause 6.1 of the special conditions provides that Promontoria is to execute the necessary assurance of the subject property on completion and Clause 6.1.1 provides that the purchaser conclusively acknowledges and accepts that Promontoria has a power of sale as mortgagee. Furthermore, Clause 6.2 provides that, if the Receiver joins in the assurance of the property to the purchaser then he does so "*for the sole purpose of covenanting that the Receiver has not knowingly done or suffered or been party or privy to any act or thing whereby…the Vendor is in anyway hindered from transferring the Subject Property, and for the purpose of giving a receipt for the consideration*…".

13. Clause 7.1 discloses that the property is subject to the mortgages described above which are to be redeemed out of the proceeds of sale insofar as they relate to the property the subject of the contract. In addition, Clause 7.2 provides that Promontoria will execute the assurance as mortgagee such that, by virtue of s.21 of the Conveyancing Act 1881, s.62 of the Registration of Title Act 1964 and s.104 of the Land and Conveyancing Law Reform Act 2009 (as amended by the Land and Conveyancing Law Reform Act 2013), Promontoria shall sell the property free from all estates, interests and rights to which the mortgages have priority.

14. Clause 14.5 discloses the existence of these proceedings in the Circuit Court and records that the vendor does not make any representations or give any warranty in relation to the outcome of the proceedings.

The application to the Circuit Court for an interlocutory injunction

15. As noted above, subsequent to delivery of the defence and counterclaim in November 2015, the proceedings in the Circuit Court effectively lay dormant until November 2019. At that point, an application was made to the Circuit Court to join the Receiver and Promontoria as defendants to the counterclaim. Thereafter, an application was made to the Circuit Court for an interlocutory injunction directing that the proceeds of any sale of the development should be held in escrow and applied in discharge of the obligation to complete and maintain the common areas of the development including the common areas in Blocks A, B, C, F & G which are not subject to the contract for sale with the purchaser. The terms of the notice of motion were subsequently amended in December 2019 to reflect the terms of the order ultimately made by the Circuit Court on 29th January, 2020.

16. It is clear from para. 8 of the grounding affidavit of John Callinan sworn on behalf of the management company that he became aware in the summer of 2019 that an agreement had been reached with the purchaser. The existence of the sale was confirmed in a letter dated 2 August 2019 sent by the solicitors for the purchaser which is exhibited by Mr. Callinan to his affidavit. The management company has sought to explain the time lag in seeking an interlocutory injunction on the basis that, prior to the decision of Haughton J. in *Grehan v. Maynooth Business Campus Owners Management Company* [2019] IEHC 829, there was insufficient *"legal certainty"* in respect of the entitlement of the management company to maintain these proceedings. In his affidavit sworn on 13th December, 2019, Mr. Callinan explains the time lag in the following terms: -

> *"15. …I do not accept that the Defendant has been guilty of any delay…. As appears from the correspondence exhibited in my first affidavit, the Defendant engaged in reasonable correspondence to ascertain the factual position before moving its application for urgent interim relief.... Further, the finding of the High Court in the Grehan Case has established a degree of certainty in respect of the legal rights and entitlements of the Defendant to maintain these proceedings which did not exist theretofore. The lack of certainty as to the rights of an Owners Management Company in such circumstances afforded a reasonable basis for the Defendant exercising caution before instituting these proceedings, having regard to the fact that the costs of these proceedings, if lost, will require to be borne and discharged by the members and occupiers of the Development. In the absence of the legal certainty created by the Grehan Decision, it was reasonable for the Defendant to delay bringing its within application. Given that the sale was due to complete on 29 November, 2019, the defendant had no alternative but to apply when it did to this Honourable Court…."*

17. It will be noted that, in addition to relying on the *Grehan* decision, Mr. Callinan also refers to correspondence which he says was exhibited to his first affidavit. Insofar as I can see, the only correspondence that exists relevant to the application for the injunction is the letter of 2nd August 2019 from the purchaser's solicitors (mentioned above) and a subsequent letter dated 25th November 2019 in which, in reliance on the decision in

Grehan an injunction was threatened in the absence of confirmation from the Receiver that he would hold the proceeds of sale and apply them in the remediation of the defects both in relation to the lands to be sold to the purchaser and also all of the common areas.

18. In *Grehan*, Haughton J. held, on the facts of that case, that the receivers of the development company (who were named as plaintiffs to the proceedings) had adopted and benefitted from the relevant management agreement (which the receivers sought to enforce against the management company concerned) and could not therefore disclaim or repudiate the obligations owed by the development company under the management agreement. At para. 210, Haughton J. explained the rationale for his decision as follows:

> *"210. As stated earlier, I am satisfied that the Receivers have adopted and benefitted from the Management Agreement, and cannot now disclaim obligations of Glenkerrin arising under the…Agreement. The…Agreement is extensively referenced in the Statement of Claim. It is also of significance that the 2003 Debenture was executed post the… Agreement, and accordingly the security thereby obtained is subject to the performance of the Management Agreement. I accept the defence submission that in order to maximise the value of such security it was necessary to build, and complete the Campus, including the Estate Common Areas. Since their appointment in 2011, the Receivers have sought to sell the remaining units, and in every case in so doing have relied upon the common areas, including the carpark… and the Management Agreement as a document of title. It is clear that in selling these secured assets the Receivers are doing so on the promise of use of the common areas including the carpark and thereby achieving and benefitting from a higher sale price. Mr. Murphy accepted in his evidence that the sale price obtained in respect of Block C/the Link Building was greater than it would have been had the building been sold without the right to any car parking spaces, and that the inclusion of car parking spaces was required in order to maximise the price obtained…".*

19. Haughton J. also drew attention to the fact that the receivers in that case were named as parties to the leases of easements executed from July 2011 onwards and that they had in fact carried out works to the carpark (which formed part of the common areas) in 2016 and 2019. Haughton J. concluded that this indicated an acceptance on the part of the receivers of "*some responsibility for the condition of the carpark".* It further appears from para. 211 of the judgment, that several hundred thousand euro was spent on the carpark by the receivers in that case.

The appropriate test to be applied

20. Before attempting to consider the issues debated in the course of the hearing before me, I must first address the question of the appropriate test to be applied in respect of the application for an interlocutory injunction. Ordinarily, in accordance with the principles established in *Campus Oil v. Minister for Industry and Energy* [1983] I.R. 88 (as updated by the Supreme Court in *Merck Sharpe & Dohme Corporation v. Clonmel Healthcare Ltd* [2019] IESC 65), the first hurdle that an applicant for an injunction would have to establish is that there is a serious issue to be tried. Once the plaintiff surmounts that first

hurdle, the court will then go on to consider the balance of convenience including issues relating to the adequacy of damages. However, in this case, the Receiver and Promontoria contend that the relief sought by the management company is, in substance, mandatory relief. If the Receiver and Promontoria are correct in that contention, then the management company will have to surmount a higher hurdle than the *Campus Oil* requirement to establish a serious issue. Instead, the management company will have to establish that it has a strong case. This is clear from the decision of the Supreme Court in *Lingam v. Health Service Executive* [2005] IESC 89. In that case, Fennelly J. observed at p.p. 4-5:-

> *"In substance what the plaintiff … is seeking is a mandatory interlocutory injunction and it is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such a case it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action. So it is not sufficient for him simply to show a prima facie case…".*

21. The approach taken in *Lingam v. Health Service Executive* was subsequently reiterated by the Supreme Court in *Okunade v. Minister for Justice* [2012] 3 I.R. 152 at p.p. 182-183 where Clarke J. (as he then was) referred to the observation made by Megarry J. in *Shepherd Homes Ltd v. Sandham* [1971] Ch. 340 at p. 351 where he said:-

> *"…on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."*

22. In the present case, it appears to me that the relief sought is, in substance, mandatory in nature. In effect, the relief sought by the management company requires that a number of very significant steps must be taken if the sale to the purchaser is to be completed. As noted in para. 1 above, the injunction sought (and granted by the learned Circuit Court judge) will require:-

(a) that the purchaser is to accept and agree to abide in full with the terms of the three management agreements entered into between the plaintiff and the management company;

(b) that the purchaser is to agree to the amendment of clause 4.9 of the sale contract by deleting the reference to the "*Subject Property*" in line 4. The effect of this proposed amendment is that the purchaser would assume all obligations under the agreements between the plaintiff and the management company on completion. Its obligations would not be limited to the property to be sold to it under the contract for sale;

(c) the purchaser would also be required to agree and accept that the title of the units sold to it would be disposed of on 999 year leases in similar form to the remaining units in the development. It would also be required to become a member of the management company;

(d) Under para. (e) of the order, the purchaser would also be required to ensure that the title to all the external and internal common areas is transferred to the defendant in accordance with the terms of the management agreements of 2005 and 2006 entered into between the plaintiff and the management company. This would have a very significant impact on the purchaser since it would require the purchaser to assume all of the obligations under those management agreements (including the obligation to ensure that the common areas of the entire development – not just the property to be acquired by the purchaser) would be in a proper state of repair prior to transfer. This is a requirement of clause 6 of the management agreements described in para. 6 (b) and (c) above.

(e) In addition, the Receiver would be required to hold the sale proceeds in escrow pending the trial of the proceedings and not release any part of those monies to Promontoria.

23. The effect of the order sought by the management company (and granted by the learned Circuit Court judge) is therefore to require the purchaser to put all of the common areas into a state of repair in accordance with clause 6 of the management agreements of 14th December, 2005 and 24th September, 2006. In my view, the substance and effect of the order is therefore mandatory and, in those circumstances, I have come to the conclusion that the management company must demonstrate that it has a strong case against both the Receiver and Promontoria. It is not sufficient that the management company merely establishes a serious issue to be tried.

24. In considering the issues, I must bear in mind also the rationale for requiring this higher standard where mandatory relief is sought. The underlying rationale was very clearly explained by Clarke J. (as he then was) in *Allied Irish Banks Plc v. Diamond* [2012] 3 I.R. 549 at p. 572 where he said:-

"53. It is now well settled that in cases involving a mandatory injunction the court will normally require a higher level of likelihood that the plaintiff has a good case before granting an interlocutory injunction (see for example Lingam v. Health Service …). It may well be that the logic behind that departure from the normal rule can be found in the added risk of injustice that may arise where the court is asked not just to keep things as they were by means of a prohibitory injunction but to require someone to actively take a step which may, with the benefit of hindsight after a trial, turn out not to have been justified. The risk of injustice in the court taking such a step is obviously higher. In order to minimise the overall risk of injustice the court requires a higher level of likelihood about the strength of the plaintiff's case before being prepared to make such an order…".

25. Those principles appear to me to apply in the context of the relief sought in this case where the order sought by the management company would require the purchaser to undertake very onerous obligations in relation to the entire development. To paraphrase Clarke J., there is a real risk of injustice if it subsequently transpires, after a full hearing, that the assumption of those obligations is found not to be justified.

26. In this case, the Receiver and Promontoria both argue that the management company has not established that it has any cause of action against either of them and that, accordingly, there is no basis on which an injunction should be granted. They argue that, not only has the plaintiff failed to meet the *Lingam v. Health Service Executive* standard, but it has not even established a serious issue to be tried in accordance with *Campus Oil* principles.

27. Accordingly, before I come to consider any issues in relation to the balance of convenience, it is necessary, in the first instance, to address the nature of the case made by the management company and whether that case has been established to be of sufficient strength to warrant the grant of a mandatory injunction (assuming that the balance of convenience also favours the grant of such an injunction). If I am not so satisfied, it will be unnecessary to consider any issues that arise in relation to the balance of convenience or the adequacy of damages.

The case made by the management company

28. As outlined by counsel for the management company in the course of the hearing on 11th March, there are four aspects to the case which it makes against the Receiver and Promontoria. These are:-

    (a) In the first place, the management company argues that the management agreements of 2005 and 2006 constitute contracts for the sale of land which envisaged a single transfer of the common areas to the management company. These contracts predate the coming into force of s. 52 of the Land and Conveyancing Law Reform Act, 2009 ("*the 2009 Act*") such that, in accordance with the decision of the Supreme Court in *Tempany v. Hynes* [1976] I.R. 101 the management company became beneficially entitled to the common areas to the extent it has paid the purchase price under the management agreements. In this context, the management company argues that it has substantially paid the purchase price in that it has, in accordance with the 2006 management agreement, assumed liability for the management of the common areas notwithstanding that it has not received a conveyance of them. It levies and collects service charges and generally attends (insofar as it is able to do so) to the management of the development (including the retention of fire marshals). In those circumstances, the management company argues that the plaintiff is a trustee for it of the legal and beneficial estate. While the management company acknowledges that the management agreements of 2005 and 2006 post-date the 2004 mortgage in favour of Promontoria, it is contended that the management agreements were entered into with the consent of Anglo (the predecessor in title to Promontoria) and were intended to give effect to and to perfect that security by enabling the finished

apartments and dwelling houses to be sold to end users. In that way, it is submitted that the secured rights of Promontoria must be regarded as subject to the rights and entitlements of the management company under the 2005 and 2006 management agreements;

(b) Secondly, the management company argues that it is entitled to relief under the provisions of the 2011 Act. The management company relies in particular on s.s. 3, 5 and 24 (5) of the 2011 Act. It is submitted on its behalf that the sale of the common areas to a purchaser can only be construed as an attempt by the plaintiff to avoid its statutory obligations under s. 5 (1) of the 2011 Act;

(c) It is also alleged that the plaintiff cannot assign the burden of its obligations under the management agreements without the consent of the management company. On this basis, it is submitted that any purported assignment by the plaintiff of part of its interest in the common areas to the purchaser without the consent of the management company is invalid, unlawful and of no effect;

(d) Fourthly, the management company, relying on the decision of Haughton J. in *Grehan*, submits that the Receiver has adopted and benefitted from the management agreements such that the Receiver is not bound by them and is not entitled to disclaim the obligations of the plaintiff thereunder to keep the common areas in a proper state of repair. On that basis, it is argued that the management company has the right to prevent the common areas being disposed of to any third party and the right to insist that the sale proceeds arising from the sale to the purchaser should be retained to be applied in remedying the defects in all of the common areas including the defects in the common areas referable to Blocks A, B, C, E, F and G.

29. I now deal, in turn, with each of these issues.

The *"contract for sale"* argument

30. As noted in para. 28 (a) above, the management company argues that the management agreements of 2005 and 2006 create a contract for sale of land to the management company which envisaged a single transfer of all of the common areas in the entire estate and did not envisage a transfer of part only of the common areas (as is now contemplated under the contract for sale with a purchaser). In addition, it is argued that, in accordance with the principles set out in the judgment of the Supreme Court in *Tempany v. Hynes*, a substantial beneficial interest in the development has already passed to the management company such that the legal and beneficial interest in the development is held on trust for the management company by the plaintiff. Insofar as the position of Promontoria is concerned, it is submitted that the management agreements had been entered into with the consent of Anglo (the predecessor in title to Promontoria).

31. At this point, it should be noted that there is no evidence (beyond the assertion of Mr. Callinan) that Anglo consented to the management agreements put in place or to their specific terms. In this context, Mr. Callinan, in his second affidavit (sworn on 13th

December, 2019) noted, at para. 11 (o) (iii) and (iv), that part of Promontoria's security (namely the mortgage dated 4th April, 2006) post-dated the management agreements of 22nd August, 2005 and 14th December, 2005. This is not disputed by Promontoria or the Receiver. They rely on the 2004 mortgage which includes the same land.

32. Mr. Callinan also asserted that the entry by the plaintiff into the management agreement of 2006 with the management company was "*clearly assented to by the original Secured Lender at the time*". In my view, that is no more than an assertion on the part of Mr. Callinan. It does not constitute evidence of consent and in particular does not constitute evidence of consent by Anglo to the specific terms of the management agreements. It is true that the mortgage dated 4th April, 2006 post-dated the two earlier management agreements of 22nd August, 2005 and 14th December, 2005. However, in my view, nothing turns on this. It is clear from the first schedule to the 2004 mortgage that it extends to the lands (namely the relevant portion of lands comprised in folio 27854R) which are separately mentioned in the first schedule to the 2006 mortgage. Thus, Promontoria and the Receiver are entitled to rely on the 2004 mortgage as prior in time to all three management agreements.

33. With regard to Mr. Callinan's assertion that Anglo consented to the execution of the three management agreements in issue, the receiver, in his affidavit sworn on 9th January, 2020, specifically highlighted that no evidence had been advanced to support this assertion. By way of response, Mr. Callinan stated as follows in para. 9 of his affidavit sworn on 13th January, 2020:-

> *"9. Mr. Tennant complains that I have advanced no evidence to support my assertion in my Second Affidavit that the management agreement of 2006 was clearly assented to by the original secured lender. I say that this assertion was based on my many years of experience of such matters, from which it appeared to me and still appears to me that it would be inconceivable that such assent was lacking. Further, the proposed sale, whereunder title might be passed per Clause 6 by PARL as mortgagee, is subject to the OMC Agreement. Clearly, PARL appears to be thereby accepting that it cannot sell without the purchaser being required to take subject to the OMC Agreement".*

34. The point made in the last sentence of that paragraph is referable to the argument made by the management company in these proceedings by reference to the decision of Haughton J. in the *Grehan* case (which I address further below). Insofar as the balance of para. 9 of Mr. Callinan's affidavit is concerned, it seems to me to constitute an acknowledgment that, other than his own surmise, Mr. Callinan has no evidence to place before the court that Anglo actually consented to any of the management agreements or to their specific terms. While I fully appreciate the difficulty in which the management company now finds itself, I am of the view that the assertion made by Mr. Callinan falls far short of providing evidence of assent by Anglo to the agreements in question.

35. In my view, there is a clear parallel between the facts of this case and the facts considered by Laffoy J. in *Moylist Construction Ltd v. Doheny* [2010] IEHC 162. In that

case, the fourth named defendant was the owner of a development site comprising eighteen holiday homes in Ballybunion, County Kerry. The fourth defendant, in June 2006, executed a mortgage in favour of the third named defendant, Ulster Bank Ltd, over the lands on which the development was subsequently constructed, as security for loan finance. Subsequent to the creation of the mortgage, a building agreement was entered into between the fourth defendant and the plaintiff under which the plaintiff was retained to construct the development at a contract price of €2.672 million. Regrettably, the recession resulted in a default by the fourth named defendant in his obligations on foot of the loan. Ulster Bank Ltd, in October 2009, called in the loan secured by the mortgage. When the loan was not paid by the fourth defendant, the third defendant appointed the first defendant as receiver over the property. At the time of his appointment, the eighteen holiday homes had been substantially completed. The plaintiff brought proceedings claiming that the receiver was trespassing on the property and it sought an interlocutory injunction requiring the defendants to relinquish possession of the development. In its statement of claim, the plaintiff also sought a declaration that the sums owed to it as a building company ranked in priority to the mortgage granted by the fourth defendant to the third defendant. At the same time, the second defendant (the receiver) and the third defendant (the bank) brought an application to strike out the proceedings on the basis that they were bound to fail. At para. 32 of her judgement, Laffoy J. approved of the approach taken in England by Vinelott J. in *Astor Chemicals v. Synthetic Technology* [1990] BCLC 1. Laffoy J. said:-

"Having quoted from Buckley on the Companies Acts (14th Ed., 1981), that a receiver appointed by a debenture holder is not under any personal liability on the company's contracts current at the date of his appointment, as they are not his contracts and as between himself and the other parties he has an undoubted right to decline to fulfil them, although in so doing may render the company liable in damages for breach, Vinelott J. stated (at p. 9):

> *'To that extent the receiver is in a better position than the company. Similar statements will be found in other leading textbooks. The principles are most fully stated in a passage in Lightman and Moss in 'Law of Receivers of Companies' (1986) .... It is in these terms (at p. 81):'*

(1) If a person is granted a charge on property with actual knowledge of a contractual obligation in favour of another person inconsistent either with the grant or enforcement of the charge, the grant or enforcement will constitute a tort and an injunction may be granted to restrain its commission.

(2) In the absence of such knowledge, the chargee (and the receiver as his agent) is free (vis-à-vis the third parties) to cause the company to repudiate or ignore its outstanding contractual obligations to third parties, though this course may give rise to a claim in respect of the loss occasioned by the company if involving an unnecessary and unreasonable exercise of their powers.

(3) The receiver as agent for the company is equally free of liability to third parties for causing the company to breach its contracts with them, for no person can be liable for the tort of interference with contractual relations if he acts as agent for one of the contracting parties.....

(4) Neither the receiver nor the debenture holder can interfere with existing equitable rights of third parties over property of the company having priority to the charge. A threat of such action may be restrained by injunction …"

36. In the Moylist case, the plaintiff sought to suggest that the case fell within para. (1) of the quotation from Lightman and Moss. He submitted that Ulster Bank knew or ought to have known that the building agreement was about to be entered into between the fourth defendant and the plaintiff. On the same basis, counsel for the plaintiff submitted that there was no absence of knowledge such that para. (2) had no application. Laffoy J. rejected both of those submissions. At paras. 34-35 of her judgment, she explained her rationale in the following terms:-

"34. First, paragraph (1) applies where the mortgagee has 'actual knowledge' of the contractual obligation to the third party. On the facts before the Court, there is no evidence that the third defendant had actual knowledge before the mortgage was created that the fourth defendant would enter into a building agreement with the plaintiff. Neither the loan sanction on foot of which it was created, which was dated 16th September, 2005, nor the charge itself, nor any other evidence adduced establishes, or even gives an impression of, actual knowledge.

35. Secondly, paragraph (1) preserves a contractual obligation which is inconsistent either with 'the grant or the enforcement of the charge'. For example, an enforceable contract by the fourth defendant to sell the development to a third party, which pre-dated the charge and of which the third defendant was aware, would be inconsistent with a subsequent attempt by the third defendant to enforce the charge by selling it, say, by auction. In such circumstances, the third defendant would be bound and the third party would be protected both by paragraph (1) and paragraph (4). The building agreement between the fourth defendant and the plaintiff, in my view, could not be said to be inconsistent with either the grant or the enforcement of the charge over the development in favour of the third defendant. Moreover, it did not create any equitable right in favour of the plaintiff."

37. In my view, those observations apply with equal force to the present case. Here, there is no evidence that Anglo had actual knowledge, before the 2004 mortgage was created, that the plaintiff would enter into a management agreement with the management company on the terms set out in any of the management agreements of 2005 or 2006. In the absence of such knowledge - and in circumstances where the 2004 mortgage pre-dates the management agreements of 2005 and 2006 – Anglo was not bound by the terms of any of the management agreements. Furthermore, as the passage from Laffoy J.'s judgment highlights, there is nothing inconsistent between the creation of the management agreements and the pre-existing mortgage. The management agreements,

like the building agreement in Moylist, remain fully enforceable against the plaintiff but they do not have priority over the 2004 mortgage in the absence of Anglo's consent or, at the very least, Anglo's pre-existing knowledge of their terms at the time of execution of the 2004 mortgage. In the absence of evidence of such consent or pre-existing knowledge on the part of Anglo, Promontoria (as successor in title to Anglo) is entitled to proceed to enforce its rights under the 2004 mortgage in priority to any claim that the management company may wish to pursue under the management agreements.

38. Crucially, the contract with the purchaser provides that Promontoria is to execute the necessary assurance to the purchaser. Such an assurance falls within the ambit of s. 104 (1) of the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act") which (like the Conveyancing Act 1881 before it) makes clear that, where a mortgagee, exercising its statutory power of sale, conveys property to another, it has power to do so *"freed from all estates, interests and rights in respect of which the mortgage has priority".* Subject to consideration of the remaining issues in this case, on the basis of the state of the evidence currently before the court, Promontoria is therefore free to transfer the property, the subject of the contract for sale, to the purchaser, free from any subsequently acquired equitable or beneficial interest which the management company may assert in the property as a consequence of the application of the principles derived from *Tempany v. Hynes* (on which the management company seeks to rely).

39. I have not lost sight of the argument made by the management company that the management agreements envisage a single transfer only, and that it is not possible to transfer only part of the proposed developments. However, in circumstances where there is no evidence that the mortgagee ever consented to the management agreements, or even knew of their terms in advance of execution of the 2004 mortgage, it seems to me that this argument does not assist the management company. The position is that the 2004 mortgage takes priority over the management agreements. Under the terms of the 2004 mortgage, Promontoria is clearly entitled to dispose of part of the property. It is not confined to a sale of the entire development. This is clear from the provisions of Clause 9.1 of the 2004 mortgage, under which Promontoria is entitled, without consent from or notice to the plaintiff or any other person, to sell the mortgaged property "*or any part or parts thereof*". Similarly, under Clause 10.1 of the 2004 mortgage, Promontoria is entitled to appoint a receiver over the property "*or any part thereof*".

40. I have also not lost sight of the argument made by the management company that it is entitled to specific performance of the management agreements, and that this entitlement is not affected by the appointment of a receiver. However, it seems to me that this argument is misconceived. It is clear from the judgment of Laffoy J. in *Moylist*, that neither a receiver nor a mortgagee can interfere with existing equitable rights of third parties over property of a mortgagor, where those rights have priority over the relevant mortgage. As Laffoy J. made clear in para. 35 of her judgment, (quoted above), if an enforceable contract is executed by a mortgagor which pre-dates the mortgage, and of which the mortgagee is aware, the mortgagee will be bound by that contract, and the third party will be protected. However, for the reasons discussed above, that principle is

of no avail to the management company in circumstances where, as explained above, the 2004 mortgage has priority over the management agreements, and in circumstances where there is no evidence of any consent by the mortgagee to the management agreements, or any knowledge, at the time of execution of the mortgage, of the terms of the proposed management agreements.

41. In this context, the management company has sought to rely on an English decision, namely, *Freevale Ltd. v. Metro Store Holdings Ltd*. [1984] 1 Ch. 199, which is cited by Forde Kennedy & Simms in "*The Law of Company Insolvency*", 3rd Ed., 2015, at para. 5-32. However, in my view, that decision does not assist the management company. It is simply an application of the principles discussed in *Moylist* that a right to specific performance which accrues prior to the appointment of a receiver under a floating charge, continues to subsist even after the receiver is appointed and is not defeated by the appointment of the receiver. It is important to bear in mind, in this context, that, in the case of a floating charge, the chargor remains free to use the assets charged in the usual course of its business until the charge crystallises. Thus, in such cases, the date of appointment of the receiver is relevant rather than the date of creation of the floating charge. In contrast, the chargor, under a fixed charge (such as the 2004 mortgage here) has no equivalent ability to deal with assets, the subject matter of the charge. In such cases, it is the position at the date of creation of the charge that is relevant.

42. Although the report in *Freevale* does not expressly say that the charge considered by the trial judge there was in the nature of a floating charge, this seems to me to be the only way in which the decision can be understood. It explains why the judge examined the position as at the date of appointment of the receiver rather than at the date of creation of the debenture. Otherwise, the decision would be inconsistent with the approach taken by Vinelott J. in *Astor Chemicals v. Synthetic Technology*, which was followed, in turn, by Laffoy J. in Moylist. In any event, the decision in *Freevale* is clearly not binding on me. The decision which does bind me (in accordance with the well-established *Worldport* principles) is the decision of Laffoy J. in *Moylist*, and I can see no proper basis on which I could possibly distinguish the present case from *Moylist*.

43. In these circumstances, I have come to the conclusion that, on the basis of the evidence currently before the court, the management company has failed to establish a strong case, on this ground, sufficient to satisfy the first leg of the test for the grant of an interlocutory injunction of the kind sought here. Having regard to the state of the evidence, I would go further and hold that the management company has not even established a serious issue to be tried on this ground.

The Claim under the 2011 Act

44. The 2011 Act created a new statutory regime relating to the ownership and management of common areas of multi-unit developments, of which apartment blocks are the most common example.

45. The management company has sought to rely on a number of provisions of the 2011 Act. In the first place, it makes the case that, pursuant to s.3(1), there can be no sale of any

residential units to the purchaser without ownership of the common areas being transferred to the management company, and without a certificate from a suitably qualified person that the relevant parts of the development have been constructed in accordance with a fire safety certificate. However, in my view, s.3(1) has no application to the present case. It is clear from s.3(2) that s.3 applies to a multi-unit development *"in which a residential unit has not previously been sold".* In the present case, it is clear that units were sold prior to the commencement of the 2011 Act on 20th April, 2011. At this point, it should be noted that it is accepted by all parties that there were no sales of apartments since Mr. Ryan was appointed as the first receiver in July, 2011.

46. There was, however, an obligation under s.5(1) of the 2011 Act to arrange for the transfer of the ownership of the common areas to the management company within six-months of the coming into operation of s.4. Section 5(1), (on which the management company relies), provides as follows:

> "*5(1) Where, before the coming into operation of section 4, a multi-unit development has been substantially completed by or on behalf of the developer, and the ownership of the relevant parts of the common areas or the reversion in the units concerned has not been transferred to the owners' management company concerned, the developer shall within 6 months of such coming into operation arrange for the transfer of such ownership to the owners' management company concerned of the lands referred to in section 3 (1)(b), without the reservation of any beneficial interest."*

47. Section 5(2) makes clear that, for the purposes of the operation of s.5(1), a multi-unit development is to be regarded as being "*substantially completed*" if sales of not less than 80% of the residential units in the development have been closed. It was confirmed to me, during the course of the hearing, that the parties are agreed that the *"substantially completed"* requirement is satisfied in this case. Accordingly, there was an obligation on the plaintiff to arrange the transfer of the common areas to the management company within 6 months from 20th April, 2011.

48. It was submitted on behalf of the management company that the obligation imposed by s.5(1) is an "*entrenchment*" on the rights of the mortgagee. However, counsel for the Receiver and Promontoria argued that the obligation imposed on the developer does not purport to extend to a mortgagee, or to a receiver appointed by a mortgagee. It was accordingly submitted that there is nothing in the terms of s.5(1) which suggests that the obligation imposed on the developer by that sub-section takes priority over the rights of a mortgagee. In this context, counsel for the Receiver and Promontoria relied on the decision of Baker J. in *Lee Towers Management Company Ltd. v. Lance Investments Ltd. (In Liquidation*) [2018] IEHC 444.

49. In the *Lee Towers* case, the Circuit Court had granted an injunction in proceedings brought by the plaintiff management company in respect of a residential apartment complex on the Lee Road in Cork. In the Circuit Court proceedings, the plaintiff sought mandatory orders directing the defendants (who were the developers of the development

and were now in liquidation) to transfer to the plaintiff the common areas and the reversions of the leases of individual apartments previously sold. By an order made on 5th July, 2017, the Circuit Court directed the transfer of the common areas to the plaintiff company and made mandatory orders directing the companies to complete the development in accordance with the development agreement to an appropriate standard. The works that were directed to be carried out to the common areas included works to the internal and external walls of the apartment complex to deal with the requirements of the Cork Fire Officer. Subsequently, the Circuit Court, on 5th July, 2017, granted a mareva injunction by way of ancillary relief. The liquidator of the development companies, Mr. Karl Dillon, appealed the order of the Circuit Court and also applied to the High Court for directions pursuant to s. 631 of the Companies Act, 2014. The appeal and the application for directions were heard together by Baker J. Among the directions sought by the liquidator was a direction as to whether the mandatory orders granted by the Circuit Court operated to displace the statutory scheme of priority of payments in a company liquidation as set out in s. 621 of the 2014 Act. The liquidator argued that the effect of the winding up of the companies was that the assets of the companies were held on a statutory trust for the benefit of the creditors of the company and he was concerned to know whether the 2011 Act altered that general statutory scheme. In response, the plaintiff argued that the orders of the Circuit Court and the provisions of the 2011 Act must be complied with and that the orders made by the Circuit Court took priority over the statutory scheme of distribution on a liquidation. The plaintiff relied, *inter alia*, on s. 24 of the 2011 Act which empowers a court to make an order requiring the developer of a multi-unit development to complete that development in accordance with any contract (such as a contract with a management company).

50. At para. 68 of her judgment, Baker J. accepted that the development companies did have an obligation to complete the works to the common areas in accordance with the development agreement and that the application to the Circuit Court had been made for the purposes of enforcing pre-existing rights. However, Baker J. did not accept that s. 24 took priority over the statutory trust pursuant to which the assets of an insolvent company will be distributed to its creditors. There are a number of observations made by Baker J. in her judgment which are important for present purposes. In the first place, she said, in para. 72 of her judgment:-

> *"72. The MUD Act creates a form of statutory injunction by which a developer can be compelled to carry out works of repair to comply with planning and building Regulations requirements. That is, in effect, a statutory form of specific performance. But the availability of the remedy does not mean that a person seeking an order under s. 24 … has, on account of the statutory entitlement to seek a remedy, an entitlement which is akin to a trust or which creates a proprietary interest which might give rise to an argument that the remedy lies in rem."*

51. At para. 75 of her judgment, Baker J. accepted that there was an obligation to transfer the common areas. However, in the same paragraph she made clear that this did not mean that the development company must "*complete the common areas to the*

appropriate statutory standard prior to the transfer … if, by doing so, they must expend monies over which they no longer have control as the result of the liquidation, and where the assets are fixed with the statutory trust".

52. At para. 77 of her judgment, she stressed that the management company in that case was no more than an unsecured creditor and she continued:-

"No provision exists to elevate a remedial order under s. 24(5) to preferential status or to displace the scheme of distributions on an insolvent liquidator. The making of a court order does not in itself give such a priority".

53. Furthermore, at paras. 79-80 of her judgment, Baker J. drew attention to the absence of anything in the 2011 Act which gives any priority to orders made under the Act. Counsel for the Receiver and Promontoria in this case made particular emphasis on what was said by Baker J. in these paragraphs:-

"79. Further, I accept the argument of counsel for the liquidator that the MUD Act does not give any express priority to remedial orders made by the Circuit Court, which has exclusive jurisdiction under the Act.

80. While it may have been socially desirable to offer comfort to an owners' management company or to purchasers of residential units within a multi-unit development by offering some means by which the obligation to complete a development could be enforced, the MUD Act does not offer in any of its express terms an entitlement by which a person or body who has obtained a remedial order thereby gains priority against creditors of a company in liquidation. It would seem, from the absence of any indication in the MUD Act from which such priority or preference could be derived, that the intention of the Oireachtas is that an order made under the MUD Act is, in suitable cases, to be treated as an unsecured debt in the liquidation and one that would rank pari passu with other unsecured creditors".

54. Counsel for the management company in this case has sought to distinguish those observations of Baker J. on the basis that they were made in the particular context of company liquidations and he submitted that there was nothing in the judgment to support the view that the observations had any relevance to the present case. While I have every sympathy for the position in which the management company finds itself, I do not believe that the principles outlined by Baker J. can validly be distinguished. While I fully accept that the issue which arose in that case related to the order of priority in a company liquidation, it seems to me that the following aspects of the judgment are equally applicable here:-

(a) In the first place, Baker J. confirmed, in para. 77 of her judgment, that the management company in that case was an unsecured creditor. This is important in the context of the issue of priority as between the claim of the management

company in this case, on the one hand, and the rights of Promontoria, as a secured creditor, on the other.

(b) Secondly, in the same paragraph of her judgment, she confirmed that no provision exists in the 2011 Act to elevate a remedial order to any preferential status. She also made clear that even the making of a court order under s. 5 does not elevate the right of the management company. Again, this is important in the context of the issue of priority as between the management company and Promontoria.

(c) Crucially, in paras. 79-80 of her judgment, Baker J. also highlighted the absence of any express provision in the 2011 Act which purports to give any priority to the position of a management company in its favour when an order is made under s.25. In my view, that observation applies with equal force in the present case. As noted above, the proposed assurance to the purchaser here is to be executed by Promontoria in exercise of its power of sale. In my view, it would require very clear words in the 2011 Act if it had been intended that the Act was to interfere with the rights of a secured creditor (having priority over the management company's rights under the management agreements) to effect a sale in pursuance of its statutory powers. This is reinforced by the provisions of s. 104 of the 2009 Act under which a mortgagee, exercising the power of sale, has power to convey the property the subject of the mortgage freed from all estates interests and rights in respect of which the mortgage has priority. In my view, it would require express provision (or, at minimum, a very clear inference) in the 2011 Act that it was the intention of the Oireachtas to interfere or override the rights available to secured creditors (such as Promontoria) under the 2009 Act. I can see nothing in the language of the 2011 Act that could plausibly be so construed.

55. Accordingly, I do not believe that it is possible to disapply or distinguish the principles which emerge from the judgment of Baker J. in *Lee Towers.* To my mind, the judgment makes crystal clear that the 2011 Act did not go so far as to confer any priority status on a claim by a management company of a multi-unit development or on an order made by the Circuit Court under s. 24 (5).

56. In these circumstances, I have come to the conclusion that the management company has failed to demonstrate that it has a strong case to make that it is entitled to relief under the 2011 Act as against Promontoria and the Receiver. In my view, the management company has not even made out, on the *Campus Oil* standard, a serious issue to be tried.

The case made by the management company that it is not possible to assign the burden of the developers obligations under the management agreements

57. The management company emphasises that the management agreements create both benefits and burdens. In particular, it is argued that the right of the plaintiff to require the management company to take a transfer of the common areas is inextricably linked with the burden imposed on the plaintiff to complete the common areas. It is therefore submitted that the plaintiff cannot now, whether acting by a receiver or otherwise, seek

to divest itself of the benefits and burdens of the 2006 agreement by purporting to assign only part of those benefits and burdens to the purchaser. It is argued that this could only be achieved if the management company agreed to the arrangement. In support of this submission, counsel for the management company referred to the observations made by the authors of McDermott & McDermott in "Contract Law" (2nd ed., 2017), at para. 19.148 where they refer to the *dictum* of Lord Collins MR in *Tolhurst v. Associated Portland Cement Manufacturers* (*1900) Ltd* [1902] 2 KB 660 at p. 668 where he said:-

> *"A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to someone else; this can only be brought about by the consent of all three, and involves the release of the original debtor".*

58. Counsel for the plaintiff also referred to the following extract from "*Chitty on Contracts*" (32nd ed., 2015, vol. 1) at para. 19.078 where the authors say (again citing Lord Collins MR in *Tolhurst*):-

> *"Everybody has a right to choose with whom he will contract and no one is obliged without his consent to accept the liability of a person other than him with whom he has made his contract. Consequently, the burden of a contract cannot in principle be transferred without the consent of the other party, so as to discharge the original contractor".*

59. The principle invoked by the management company is well established and cannot be disputed. However, the question which arises here is whether it is capable of applying at all to the contract with the purchaser. There is nothing in the terms of that contract which purports to assign both the benefit and the burden of the management agreements entered into between the plaintiff and the management company. What is proposed to be assigned is the property described in the particulars on page 3 of the contract. It is true that those particulars describe the property in terms which makes it clear that the transfer is *"subject to the management company agreements as contained in the Booklets of Title … and any other management company agreements that may exist in respect of the Subject Property*".

60. It is also true that both Clause 4.9 and 12.3 of the special conditions to the contract provide that the purchaser is to assume all obligations under the management company agreements on completion and Clause 4.9 further provides that it is a matter for the purchaser to comply with the terms of the management agreements insofar as the subject property is concerned. However, while those provisions make clear that the purchaser takes with notice of the management agreements and agrees (as between itself and the plaintiff) to assume the obligations under those agreements, the contract does not purport to relieve the plaintiff of its liabilities to the management company in respect of the common areas. That is for the simple reason that, in the absence of consent of the management company, the plaintiff cannot be released from those obligations. It therefore remains the case that the management company continues to have a claim in damages against the plaintiff company (albeit an unsecured claim which ranks after the mortgage in favour of Promontoria).

61. It will be seen from the extract from the judgment of Lord Collins MR in *Tolhurst* (quoted above) and the extract from Chitty that the relevant principle is that a debtor cannot relieve himself of liability to a creditor by assigning to someone else the burden of the obligation owed to the creditor. In circumstances where the plaintiff remains liable under the management agreements to the management company, I cannot see any scope for the application of this principle. In the course of the hearing, it was acknowledged by counsel for the Receiver and Promontoria that the plaintiff remained liable.

62. Furthermore, as discussed in paras. 72 -75 below, in the absence of the adoption of the management agreements by the Receiver, neither he nor Promontoria can have any liability themselves in respect of those agreements.

63. Thus, I cannot see any basis on which the management company can be said to have any cause of action against the Receiver or Promontoria in respect of the proposed contract with the purchaser on this ground. I must therefore hold that not only has the management company failed to establish a strong case on this ground but also that it has failed to establish a serious issue to be tried within the meaning of *Campus Oil*.

The management company's reliance on the decision of Haughton J. in *Grehan*

64. The Grehan decision concerned a commercial development comprising light industrial units and office accommodation which had been developed by Glenkerrin Homes in Maynooth, County Kildare. There was a management agreement in place between the developer and the management company in that case which was similar, in substance, to the agreements in issue here. In 2011, statutory receivers were appointed pursuant to the National Asset Management Act, 2009 over six blocks (some of which were tenanted or partially tenanted) and the undeveloped site on which it was proposed to construct two further blocks. The appointment did not extend to most of the common areas. Thereafter, the receivers secured the sale of a number of units and were continuing to sell others. The receivers joined as plaintiffs in the proceedings seeking to compel the management company to perform their obligations under the management agreement.

65. An issue arose as to whether the receivers had become liable to carry out repairs to a defective surface and underground car park in the development. As para. 207 of the judgment makes clear, in contrast to the present case, the management agreement in question in those proceedings predated both the appointment of the receiver and the debenture pursuant to which the receivers were appointed.

66. In the particular context of that case (where the receivers were plaintiffs to proceedings seeking to enforce the management agreement against the management company concerned), Haughton J., at para. 208, referred, with approval, to the views expressed by the authors of Forde Kennedy and Simms "*The Law of Company Insolvency*" (3rd ed.) at para. 5-29 where they said:-

> *"5-29. A Receiver will not be permitted to enforce a contract concluded with a company if, at the same time, he is not prepared to cause the company to honour its side of the bargain. He cannot obtain the benefit of the contract*

[while] simultaneously denying the other party any rights which it may have under it. For instance, if the company agreed to buy land, but the conveyance has not yet been executed, the Receiver will not be allowed to claim specific performance or damages for breach of the contract unless he causes the company to tender the outstanding price".

67. The contrast with the present case will immediately be seen. Here the Receiver, unlike his predecessor, Mr. Ryan, has not sought to enforce the management agreements. Subject to what I say below, the principle outlined by Forde, Kennedy & Simms is not engaged here.

68. At para. 209, Haughton J. identified that the issue which arose for consideration was whether the receivers had adopted the management agreement and were liable to perform it. At para. 210, he came to the conclusion that the receivers had adopted the management agreement. The text of para. 210 has previously been set out at para. 18 above. In coming to the conclusion that the receivers had adopted the agreement, Haughton J. highlighted the fact that the agreement was a focus of the claim made by the plaintiffs in those proceedings. He also noted that it was significant that the 2003 debenture (under which the receivers were appointed) post-dated the management agreement. In addition, Haughton J. placed some emphasis on the fact that the receivers had been involved in a significant number of sales of units on terms that relied on the management agreement.

69. Furthermore, at para. 211 of his judgment, Haughton J. drew attention to the fact that the Receivers had also carried out works in the car park between 2016 and 2019 and that these were ongoing at the time of the hearing. In the same para., he continued:-

"In any event these interventions in themselves indicate acceptance on the part of the receivers of some responsibility for the condition of the car park. Mr. Murphy agreed that in 2016 they engaged John Hoare to go to tender and to provide a scope of works 'to be able to commission the car park for use as part of our requirement'….in response to the court Mr. Murphy accepted that the work done on commissioning the car park was being done with a view to selling it so that the car park could be used immediately by the purchaser and would be fit for purpose and 'to provide car spaces for the three blocks'. He accepted that the Receivers were 'spending money, spending a couple of hundred thousand in getting the car park up to speed'".

70. Counsel for the Receiver and Promontoria pointed to a number of important distinctions between the *Grehan* case and the present case:-

(a) In the first place, the receivers were plaintiffs in the proceedings in the Grehan case seeking to enforce the terms of the management agreement in issue in those proceedings as against the management company. Thus, the principle identified in the extract from Forde Kennedy & Simms was engaged in *Grehan*. In contrast, the

Receiver here has not sought to enforce the management agreements against the management company;

(b) Secondly, the relevant debenture under which the receivers were appointed post-dated the management agreement. Thus, unlike the present case, the security obtained under the debenture was subject to the performance of the management agreement. That is consistent with the principles outlined by Laffoy J. in *Moylist* (discussed above);

(c) Thirdly, it is clear that the receivers in the Grehan case had sold a number of units and had relied on the provision of the common areas for that purpose. In contrast, in the present case, neither the current receiver nor the previous receiver has sold any of the individual units during the course of either receivership;

(d) It is also clear from the extract from the judgment of Haughton J. quoted in para. 69 above, that the receivers in the *Grehan* case had spent significant sums on works to part of the common areas and had thereby, in Haughton J.'s view, accepted some liability for the state of repair of the common areas.

71. None of those four factors, on which Haughton J. relied, arise in this case. However, counsel for the management company here stressed that Haughton J. also relied on the fact that the management agreement was relied on in the chain of title to the property of the units sold in that case and counsel identified that the management agreements here are included in the booklets of title in relation to the contract with the purchaser. I do not believe that this can be said to be determinative. In the first place, this factor seems to me to have been very much a secondary consideration in the *Grehan* case. I do not believe that one could plausibly form the view that this was in any way central to the decision in *Grehan*. Secondly, I am not persuaded that the point has the same traction in this case. It appears to be clear that, in *Grehan*, the relevant agreement with the management company was an important asset that the receivers relied upon in order to cement sales of units. It could not be said in the present case that the management agreements are relied upon in the same way in the contract with the purchaser. On the contrary, the way in which the agreements are addressed in the special conditions demonstrates that the plaintiff's obligations under those agreements are seen as burdensome rather than as advantageous.

72. Counsel for the Receiver and Promontoria also drew attention to a number of authorities which make clear that a receiver is not liable on foot of past contracts entered into by a company (over which he has been appointed receiver) unless he has chosen to adopt those contracts. This is consistent with s. 438 (4) of the Companies Act, 2014 which provides that a receiver of the property of a company: "*shall be personally liable on any contract entered into by him or her in the performance of his or her functions (whether such contract is entered into by the receiver in the name of such company or in his or her own name as receiver or otherwise) unless the contract provides that he or she is not to be personally liable on such contract".*

73. Counsel for the Receiver and Promontoria referred, in particular, to the decision of the Court of Appeal of England & Wales (cited by Courtney in "*The Law of Companies*", 4th ed., 2016, at para. 21.043) namely *Nicoll v. Cutts* [1985] BCLC 322 which dealt with a claim by an employee against a receiver for payment of wages earned prior to the appointment of the receiver. The employee in question had been kept on following the appointment of the receiver and had been paid his salary from the date of the receiver's appointment. This claim was rejected by Dillon L.J. who, having referred to the then UK equivalent to s. 438 (4) of the 2014 Act, continued as follows at p.p. 324:-

> *"The plaintiff submits that there is no distinction to be drawn between contracts entered into by a receiver and contracts continued by the receiver; the effect is the same. It is to be noted, however, that the wording of the subsection refers only to contracts 'entered into' by the receiver in the performance of his function. The provisions of this subsection were first introduced into company law by s. 87 (2) of the Companies Act, 1947. … the subsection has been described in Kerr on Receivers … at p. 371 … as making a radical departure in the law, since before it a receiver was not, in general, personally liable in contract, such liability being the liability of his principal. That the receiver was, before the subsection came along, not in general personally liable on his contracts is borne out by the observations of Rigby L.J. in Owen & Co. v. Cronk [1895] 1 QB 265 at 275. It is impossible in my judgment to construe the subsection as meaning that a receiver is personally liable on any contract which in the performance of his functions he allows to continue after his appointment...".*

74. Counsel for the management company sought to distinguish *Nicoll v. Cutts* on the basis that its effect has since been reversed by statute in the United Kingdom (at least in the context of employment contracts). I do not believe that this is material. In my view, the principle established in that judgment is entirely consistent with the statutory provision now contained in s. 438 (4) of the 2014 Act. Thus, the fact that the management agreements have continued in being since the Receiver was appointed does not make him liable on foot of them. He will not be liable on foot of them unless he has adopted them in some way.

75. I can see nothing in the evidence in this case which provides any basis to suggest that the Receiver has adopted the management agreements. As para. 70 above records, there are a number of very significant points of distinction which, in my view, clearly differentiate this case from *Grehan*. In particular, the Receiver here has not sought to enforce the management agreements. That was a centrally important factor in *Grehan*, and was the basis on which Haughton J. cited (and applied) the extract from Forde Kennedy & Simms quoted in para. 66 above. The fact that the management agreements are included in a booklet of title seems to me, for the reasons set out in paras. 71-73 above, to fall short of any act of adoption of the agreements by the Receiver. Secondly, the Receiver has not carried out any works to the common areas. Nor has the Receiver been involved, in the past, in sales of individual units on terms that rely on the management agreements. Thirdly, and most importantly, there is nothing in Grehan to suggest that, in the absence

of attempts by a receiver to enforce a management agreement, such an agreement can take priority over the rights of a mortgagee under a prior mortgage entered into without any knowledge, on the part of the mortgagee, of the terms of the management agreements.

76. In these circumstances, I have come to the conclusion that the management company has failed to establish a strong case that the decision in *Grehan* should be applied here. I have also come to the conclusion that, even if the lower *Campus Oil* standard applies, the management company has failed to establish a serious issue to be tried.

77. In light of the fact that the management company has failed to meet the *Lingam v HSE* standard or even the *Campus Oil* standard, it must follow that the appeal should be allowed and that the application for an interlocutory injunction should be dismissed

Balance of convenience

78. Lest I am wrong in my conclusion that the management company has failed to succeed on the first limb of the test for the grant of an interlocutory injunction, I will, for completeness, also consider the balance of convenience. It is clear from the decision of the Supreme Court in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd* [2019] IESC 65 that the questions of adequacy of damages and balance of convenience should be considered together. In his judgment in that case O'Donnell J. made clear that the most important element in assessing the balance of convenience, in most cases, is the question of adequacy of damages. He also made clear that, in commercial cases, where a breach of contract is claimed, courts should be *"robustly sceptical of a claim that damages are not an adequate remedy"*.

79. In my view, the claim made by the management company as against the Receiver and Promontoria (on the assumption that it has a cause of action against the Receiver and Promontoria) is plainly capable of being satisfied by an award of damages. What the management company seeks to achieve is to have the defective aspects of the common areas remediated. That is something which obviously costs money and is beyond the means of the management company itself. A money judgment against Promontoria and the Receiver will clearly satisfy the claim of the management company (if it has a good claim). There is nothing to suggest that Promontoria or the Receiver would not be in a position to meet that claim particularly in circumstances where, as a professional accountant, the Receiver would be required to have appropriate professional indemnity insurance in place and also in circumstances where, in any event, it is clear that Promontoria is itself a mark for damages. No suggestion has been made that Promontoria would not be in a position to meet an award of damages.

80. It was suggested by counsel for the management company that the Receiver is not a mark for damages since he does not contract with personal liability. This is on the basis that there is a special condition to that effect in the contract with the purchaser. However, if the management company has a claim against the Receiver, then the existence of a special condition in the contract with the purchaser cannot affect the

management company's claim against the Receiver. The special condition in the contract with the purchaser cannot bind the management company.

81. The management company has also sought to make the case that it will suffer irreparable harm if, pending the trial of these proceedings in the Circuit Court, a second management company were to be established by the purchaser. At a recent general meeting of the management company, a suggestion of that kind was made by one of the attendees. I cannot, however, see how that issue arises on the present application or how it is relevant to the relief claimed in this application. If the purchaser purports in the future to act in a manner which the management company suggests is unlawful, an application can be made at that time for appropriate relief against the purchaser, if such relief is warranted at that time. It is not a matter that can be taken into account at this point in an application against the Receiver and Promontoria.

82. On the other side of the equation, there is a real concern about the ability of the management company to honour an undertaking as to damages in the event that the sale to the purchaser were to fall through as a consequence of the grant of the injunction. In this context, the injunction which is sought seeks to interfere in the contract with the purchaser and to impose terms on the purchaser which the purchaser has not agreed. In those circumstances, there is a very obvious risk that the purchaser will not be prepared to proceed in the event that an injunction is granted. If the sale is lost, and if the Receiver and Promontoria ultimately successfully defend the claim made against them by the management company, there is no evidence available to suggest that the management company will be in a position to meet its liability under the undertaking as to damages. While it has been suggested that the management company would be in a position to satisfy its liability on the undertaking as to damages by levying a charge on each of the individual owners of the apartment blocks, the court has no information about the ability of those owners to meet an increased levy (which is likely to be substantial). Nor has the court any information as to whether the management company could lawfully impose such a levy under the terms of the relevant leases or other contractual arrangements that exist with the individual apartment owners.

83. Thus, on one side of the equation, it appears to me to be clear that damages would adequately compensate the management company. On the other hand, there is a real doubt as to whether the management company would be in a position to honour its undertaking as to damages. In these circumstances, it seems to me that the balance of convenience very clearly favours the refusal of the injunction.

84. I also believe that a relevant factor in the balance of convenience is the delay on the part of the management company in pursuing the application for an injunction. While the management company has sought to explain the delay by reference to the emergence of the *Grehan* decision in November 2019, I do not believe that a party seeking interlocutory relief is entitled to hold back its application in that way. The management company was aware of the existence of the intention of the Receiver to sell several months before the present application was made. This is a particularly relevant consideration in

circumstances where at least three of the grounds on which relief was sought by the management company arose quite independently of the Grehan decision. The observations of Keane J. (as he then was) in *Nolan Transport (Oaklands) Ltd v. Halligan* (High Court, unreported, 22nd March, 1994) are clearly apposite:-

> *"In all cases of this nature where interlocutory relief is sought the courts expect the parties to move with reasonable expedition where they are seeking interlocutory relief because it is of the essence of such relief that if it turns out that it has been wrongly granted one party has suffered an injustice. It is therefore a remedy which should not be lightly invoked; and if invoked, it should be invoked rapidly and where a party simply awaits events as they unfold he cannot expect to find the court amenable to the granting of this relief, as it would where a party moves expeditiously to protect his rights".*

85. Thus, in the present case, the delay on the part of the management company in seeking interlocutory relief is an added reason why, in my view, the balance of convenience favours the refusal of the injunction.

Conclusion

86. In light of the considerations outlined above, I am of the view that the appeal brought by the Receiver and Promontoria should be allowed and that the injunction granted by the learned Circuit Court judge should be set aside. In its place, I will make an order dismissing the application for an interlocutory injunction.

87. In making that order, I should make clear that it will be for the trial judge in due course to make final findings on each of the issues which the management company has sought to argue on this interlocutory application. The findings which I have made in this judgment are reached on the basis of the evidence as it currently stands and on the basis of the arguments which I have heard. Unlike *Moylist*, there was no application made here to dismiss the management company's claim on the basis that it is bound to fail.

88. I will invite the parties to make submissions in writing as to what should occur in relation to the costs of this appeal. I direct that the parties should submit their observations in writing by email within fourteen days from today, following which I will issue, by email, a written ruling in relation to costs. In the meantime, if either party wishes to have an order perfected on foot of the ruling made in para. 86 above in advance of the ruling on costs, that party is free to apply by email to the registrar for that purpose.