THE HIGH COURT

2022 No. 751P

BETWEEN

PATRICK DOWNEY and ELIZABETH (otherwise LILLIAN) DOWNEY

PLAINTIFFS

AND

EVERYDAY FINANCE DESIGNATED ACTIVITY COMPANY, LUKE CHARLETON, ANDREW DOLLIVER, BCMGLOBAL ASI LIMITED, BLACKWATER ASSET MANAGEMENT LIMITED and BNP PARIBAS REAL ESTATE ADVISORY AND PROPERTY MANAGEMENT IRELAND LIMITED.

DEFENDANTS

JUDGMENT of Ms. Justice Eileen Roberts delivered on 3 March 2023

Introduction

1. This judgment deals with the plaintiffs' application for an interlocutory injunction restraining the defendants from offering for sale and/or engaging in any actions relating to the sale of certain mortgaged properties until the determination of these proceedings.

2. The notice of motion also seeks an order restraining the defendants from trespassing on or otherwise interfering with those mortgaged properties pending the trial. Other orders are also sought to restrain the defendants from preventing access to one of the

properties by the plaintiffs and an order is sought to restrain the fifth named defendant from threatening and/or intimidating the plaintiffs or either of them.

3. The central relief sought however is the first relief identified above which seeks to restrain the defendants from progressing any sale of the mortgaged properties (which are identified below as the '**Mortgaged Properties**') until these proceedings are determined. This dispute at its heart concerns the sales strategy for the Mortgaged Properties and whether the plaintiffs or the defendants should have control of that process.

4. There are a number of issues agreed between the parties and these are set out below in this judgment given their importance to the matters at issue.

5. The plaintiff's plenary summons was issued on 24 February 2022 and an appearance was entered on behalf of the defendants on 28 March 2022. The pleadings have not been advanced since that date.

6. The plenary summons seeks injunctive relief against the defendants but also seeks a number of other reliefs including a declaration that the plaintiffs have an enforceable agreement dated 23 April 2021 with the fourth named defendant, the terms of which are discussed below. The plaintiffs seek specific performance of that agreement and a declaration that the defendants are estopped from denying it. The plaintiffs also seek a declaration that

> "*in accordance with its duty to its to (sic) maximise the value of any asset under its assignation, the Defendants are obliged to consider and fully evaluate any proposal from the Plaintiffs to enhance their assets and value and in particular the proposal to convert the 16 holiday home assets into individual private residential properties and in doing so maximise their value*".

The parties and the Mortgaged Properties

7. The plaintiffs are a married couple. They jointly own the following properties which are described collectively in this judgment as the '**Mortgaged Properties**' and these are the properties the sale of which is at issue in these proceedings:

No.4 Artillery Place - this property is secured by mortgage dated 20 April 1993. It is a residential property in Newbridge which was occupied by the first named plaintiff's father until his death on 8 January 2022. This property is currently vacant. It is now in the possession of the second and third named defendants as joint receivers who were appointed under deed dated 14 June 2019.

The Secured Holiday Homes - this property is secured by mortgage dated 7 August 2007. The property is registered in folio 4961F Co Carlow and comprises 16 residential units in a courtyard configuration. There are eight mid-terrace three bed units and eight end of terrace two bed units. Numbers 1 - 12 have current planning status as holiday homes. Numbers 13 - 16 have planning as residential homes. Some units are unoccupied, some have full-time tenants and others are let out on a weekly basis. The second and third named defendants are appointed as joint receivers under deed dated 14 June 2019 and they have changed the locks to 2 units (numbers 10 and 13). The plaintiffs continue to manage the holiday homes and receive all rents generated.

The Public House - this property is secured by mortgage dated 20 April 1993. It comprises the public house known as the Garrison Bar registered in folio 27829F Co Carlow. The second and third named defendants were appointed joint receivers over this property on 3 November 2022. Due to an error in that deed of appointment no

steps have been taken by the joint receivers since 14 November 2022 as confirmed in the second affidavit of Luke Charleton sworn 24 January 2023.

8. The plaintiffs entered into five separate lending facilities with Allied Irish Banks plc (who subsequently assigned their interest to AIB Mortgage Bank in November 2017). These facilities were secured on the Mortgaged Properties. The facilities went into default and AIB obtained judgment against the plaintiffs in the amount of €3,451,120.13 plus costs pursuant to an order of the High Court (Noonan J) dated 8 November 2018 (the '**2018 Judgment**'). The plaintiffs consented to the 2018 Judgment and it remains unsatisfied.

9. AIB sold its interest in the plaintiffs' facilities and related securities to the first named defendant by deed of transfer dated 14 June 2019. The first named defendant is an Irish registered company regulated by the Central Bank of Ireland.

10. The second and third named defendants (together the '**Joint Receivers**') were appointed by the first named defendant as joint receivers on 14 June 2019 in respect of 4 Artillery Place and the Secured Holiday Homes. On 26 October 2021 the first named defendant appointed the second and third named defendants as joint agents to provide a range of services in respect of the Secured Holiday Homes and 4 Artillery Place including to act as agents of the first named defendant for the purposes of exercising the powers conferred on it pursuant to the relevant mortgages.

11. The fourth named defendant provides loan administration and asset management services to the first named defendant in respect of the loans and related security of the plaintiffs. It is not however a subsidiary of or part of the same corporate group as the first named defendant. This named defendant ought to have been named as Link ASI Limited instead of Link Fund Administrators (Ireland) Limited which entity appears to

have been named as a defendant in error. Link ASI Limited changed its name to BCMGlobal ASI Limited with effect from 25 March 2021 and, by consent of the parties, an order was made at the hearing of this application permitting the substitution of the fourth named defendant to BCMGlobal ASI Limited.

12. The fifth named defendant was appointed as property agent of the Secured Holiday Homes by the Joint Receivers (acting as the joint agents) on 26 October 2021.

13. The sixth named defendant was initially appointed by the Joint Receivers as property manager for the Secured Holiday Homes on behalf of the Joint Receivers. The sixth named defendant was originally engaged to liaise with any occupiers and secure any rental income from the Secured Holiday Homes. The evidence is that they have not been actively involved in this role for some time.

The matters agreed between the parties

14. There is no dispute between the parties on the following matters: –

(1) The Mortgaged Properties are validly secured.

(2) The plaintiff's loan facilities and related security in the Mortgaged Properties were validly transferred to the first named defendant. The first named defendant is now the party to whom all loan repayments are due and it has the benefit of the 2018 Judgment against the plaintiffs.

(3) As at 16 March 2022 a sum of €3,484,694.18 was due and owing by the plaintiffs to the first named defendant. Interest continues to accrue on that sum at a rate in the region of €10,000 per quarter.

(4) There has been no payment made by the plaintiffs in respect of the 2018 Judgment save for the application of the proceeds of sale of a property known as

7 Ferryview Cottages, Kinsale Co Cork. The current indebtedness figure reflects the application of those sales proceeds towards the 2018 Judgment.

(5) The second and third named defendants were validly appointed as Joint Receivers on 14 June 2019 in respect of the Secured Holiday Homes and 4 Artillery Place.

(6) On 26 October 2021 the first named defendant appointed the Joint Receivers as joint agents of the first named defendant in its capacity as mortgagee of the Secured Holiday Homes and 4 Artillery Place. At paragraphs 19 and 20 of the first named plaintiffs supplemental affidavit sworn 12 July 2022, Mr Downey notes that Mr Charlton has failed to furnish evidence as to his right and entitlement to act as joint agent on behalf of the first named defendant. The point was not pressed as a point of dispute however by the plaintiff's counsel in submissions to the court. I accept however that there may not be express agreement on this particular point.

(7) The plaintiffs have continued to collect all rents on the Secured Holiday Homes and to manage and pay outgoings on the Secured Holiday Homes. No rents have been received by the Joint Receivers in respect of the Secured Holiday Homes.

(8) There is currently no receiver validly appointed in respect of the Public House.

The matters in dispute

15. The central issue in dispute is who should control the strategy and process for the sale of the Mortgaged Properties. Analysis of that issue includes consideration of the nature of the duty of care owed by the Joint Receivers to the plaintiffs in selling the Mortgaged Properties and, in particular, whether the plaintiffs can require the Joint

Receivers to themselves apply (or allow the plaintiffs to apply) for planning permission for change of use of the Secured Holiday Homes in advance of any sale.

16. The scope of the duty of care is alleged to be further impacted in this case by reason of an alleged agreement reached between the plaintiffs and the fourth named defendants on 23 April 2021. This agreement is denied by the defendants.

17. There is also a dispute between the parties regarding the value of the Secured Holiday Homes. This is evident from the property valuations which each party has obtained from independent valuers. Those valuations differ not just on market value figures but they also appear to have each been prepared on a different basis and with inconsistent assumptions. They are therefore not easily comparable.

18. The plaintiffs have obtained two valuations. The first valuation is from Sherry FitzGerald McDermott and is dated 20 November 2019. It provides alternative valuations for the Secured Holiday Homes. One valuation is based on their current status (12 holiday homes and 4 residential units). The alternative valuation assumes a value that all 16 units would have if they received planning permission for change of use to residential user and a proper management company was put in place and some access issues were resolved. The valuation attributes a figure of €1.25 million to the 16 residential units with their current status and assuming that the properties were offered for sale by public auction in a single lot with a minimum marketing period of two months prior to any auction sale. The alternative valuation assumes a staged release of the units in not more than four units to the market at any time. The valuers state that they expect the 16 units would be absorbed by the market within a 12 month window. The two bedroomed houses were each valued on that basis (assuming change of use) at €150,000 while the three bedroomed houses were each valued at €180,000. The valuers noted that this strategy had a capacity to generate value in the region of €2.65 million.

19. Sherry FitzGerald McDermott advised the plaintiffs by letter dated 30 January 2020 that "*lot sales of residential stock to date in the general area have resulted in performance in the range of 60% of expected individual market values*".

20. An updated valuation was obtained by the plaintiffs from Sherry FitzGerald McDermott on 18 January 2023. This valuation, which assumed vacant possession in all cases, provided a higher valuation of €200,000 for the two bedroomed houses and €230,000 for the three bedroomed houses. This strategy had in their view, the capacity to generate value in the region of €3.44 million. This valuation does not expressly state that it assumes individual sales of the properties nor does it expressly state that this value is the value if the planning permission for change of use was obtained. However, the report does reference 12 of the units as being subject to a planning application for change of use and therefore it would appear that the value assumes that change of use has been granted. It would also appear that the valuation assumes the sale of properties on an individual basis given the "lot sales" discount which Sherry FitzGerald McDermott had previously advised to the plaintiffs.

21. Sherry FitzGerald McDermott valued the Public House for the plaintiffs by letter dated 30 January 2020 in the sum of €220,000. There does not appear to have been a valuation obtained by the defendants on the Public House.

22. The only valuation for 4 Artillery Place is one obtained by the Joint Receivers from BV Residential who, by letter dated 24 February 2022, advised a market value of between €155,000 - €165,000 and recommended a sale by private treaty.

23. The Secured Holiday Homes were valued on behalf of the defendants by Wilsons Auctions in reports dated 15 February 2022 and 22 February 2022. The entire development of secured holiday homes was not valued-rather two particular properties

were valued in each report. The report dated 15 February 2022 relates to 2 units namely numbers 10 and 13. Number 10 is a 3 bedroomed unit which has holiday home planning user while number 13 is a 2 bedroomed property with full residential user. The Wilsons Auctions' report however appears to deem the subject properties "*a holiday home*" and it does not therefore provide an alternative valuation for the units depending on their planning status. Rather, the price differential depends on whether or not vacant possession can be achieved for each property. Wilsons advised putting the properties up for sale by auction in two lots. They suggested listing the three bedroomed property at no. 10 at €125,000 assuming vacant possession and at €95,000 if it were occupied. The valuation for the two bedroomed property at No 13 was suggested at €105,000 subject to vacant possession or at €80,000 if occupied.

24. The letter from Wilsons Auctions dated 22 February 2022 values two other properties within the Secured Holiday Homes, namely numbers 11 and 16. Number 11 is a three bedroomed unit with holiday home consent. Number 16 is a two bedroomed property with full residential user. The report however says that "*the subject properties are deemed a holiday home*". The report values the 3 bedroomed unit number 11 at €120,000 subject to vacant possession and at €90,000 if occupied. The two bedroomed unit at number 16 is valued at €100,000 subject to vacant possession or €75,000 if occupied. Wilsons advised putting the properties up for sale in two lots and said they believed the best route to dispose of the properties would be by auction.

25. It is not clear why different valuations were given for two and three bedroomed properties in both reports as in some cases, for example units numbers 10 and 11, these should be virtually identical properties as they are adjoining units in the same terrace. Applying the figures in the Wilsons Auction report dated 15 February 2022 and assuming all similar properties had that valuation then the overall valuation for the 16

units (comprising 8 x 2 bedroomed and 8 x 3 bedroomed units) would be €1.84 million (assuming vacant possession of all units), or €1.4m if all were occupied.

26. Applying the figures in the Wilsons auction report dated 22 February 2022 on the same basis the overall valuation for the 16 units would be €1.76 million (with vacant possession) or €1.32 million if all were occupied.

27. An up-to-date valuation was obtained by the defendants from Wilsons Auctions who by letter dated 24 January 2023, advised that they would expect the Secured Holiday Homes if sold individually on the open market to achieve a total value in the region of between €1.68-€2.24 million. They stated that they believed the values suggested by Sherry FitzGerald McDermott to be "*highly unlikely to be achievable in the current market*".

28. It is readily apparent that there is significant divergence between the various valuations of the Secured Holiday Homes put forward by the parties in evidence at the interlocutory hearing. This court is not of course deciding any issues of fact on this interlocutory application and therefore does not need to resolve this conflict of evidence or express a view on the valuations per se. It is however notable that the valuations do not speak to each other in terms of assumptions or methodology and there appears to be a very wide gap between the figures in each case. The true value will of course only be confirmed once a property is sold. The most recent valuation is of some importance from the plaintiffs' perspective in that the figure comes very close to their current level of indebtedness. This, the plaintiffs say, puts an even greater onus on the defendants to ensure that the plaintiffs achieve full value for the Mortgaged Properties as it may not be necessary for all of them to be sold to discharge the 2018 Judgment and therefore there is a possibility that some equity will remain for the plaintiffs' benefit if the Mortgaged Properties are disposed of for maximum value.

The plaintiffs' submissions

29. The plaintiffs are seeking an injunction restraining the defendants from progressing any sale of the Mortgaged Properties until these proceedings are determined. The plaintiffs are aggrieved that they have advanced proposals which they believe will greatly enhance the market value and marketability of the Mortgaged Properties and they say that their proposals have been wrongly ignored or rejected by the defendants. The plaintiffs say that this is in breach of the duty of care owed to them by the defendants, and, in particular, by the Joint Receivers. They also say that this behaviour breaches an oral agreement the plaintiffs reached with the fourth named defendants in April 2021, which is binding on all but particularly the first named defendants.

30. The plaintiffs say that in light of the most recent valuation of the Secured Holiday Homes, the asset value is now approaching parity with the 2018 Judgment and that there is a possibility that some equity may remain for the plaintiffs. They argue that it may be necessary only for the Secured Holiday Homes to be sold in order to discharge the 2018 Judgment and because of that, the court ought not to permit the sale of the other two properties comprised in the Mortgaged Properties.

31. The plaintiffs say on 21 April 2021 agreement was reached with the fourth named defendant whereby the defendants would vacate the receivership and allow the plaintiffs to pursue the planning change of use so that the value of the Mortgaged Properties would be increased for the benefit of all parties. The plaintiffs say that in pursuance and in reliance upon that agreement they carried out substantial works on the boundaries and access to the Secured Holiday Homes to further enhance their value and that they paid for these works out of monies derived from the property rentals.

32. The plaintiffs say there is a duty on the defendants to realise the greatest possible value for the mortgaged assets and that this requires the defendants to cooperate with the plaintiffs to explore and/or advance the planning proposal and to maximise the market value of the Mortgaged Properties.

33. The plaintiffs say that they have raised a fair issue to be tried. They say that their property rights are at stake and that an injunction should be granted to them for that reason. They argue that what they are seeking to enforce by way of the April agreement is akin to a negative covenant (in this case not to sell without exploring the planning upgrade). They fear that if this court does not restrain the defendants, the defendants may dispose of the Mortgaged Properties in a single job lot sale at a considerable undervalue. They argue that no actual sales strategy has been advanced by the defendants who have merely rejected the plaintiffs' strategy.

34. They say that the balance of convenience clearly favours granting the injunction as what the court is being asked to do is essentially to preserve the status quo. They argue that the defendants will not be prejudiced by a further delay in selling the Mortgaged Properties and say that the plaintiffs will cooperate to achieve as early a trial date as possible. They say that damages would not be an adequate remedy for them in circumstances where their property rights are involved. They say it would be difficult to quantify any loss if their preferred sales strategy opportunity is lost and they ultimately succeed at trial.

The defendants' submissions

35. The defendants argue that no injunctive relief should be granted in this case. They say it is a case where damages are an adequate remedy for the plaintiffs and that the balance of convenience weighs against interfering with the rights of a mortgagee and validly

appointed receiver pending the hearing of the mortgagor's action disputing only the sales strategy and manner of realising the secured assets.

36. The defendants reject the suggestion that the plaintiffs have or may have an equity in the Mortgaged Properties and say that the reality is that on any version of events there will remain a substantial unsecured debt owed to the first named defendant after all the Mortgaged Properties are sold. Even on the most recent plaintiffs' valuation (which is not accepted by the defendants) the defendants say that significant costs would be associated with a change of use application and satisfying any planning conditions. The defendants put in evidence a planning report prepared by RDF Architects & Planning Ltd dated 30 August 2022 giving an estimate of €215,000 for this work. Other costs such as the costs of receivership and the costs of disposal of the Mortgaged Properties would be in addition.

37. The defendants say that the plaintiffs' case is not aptly characterised as invoking property rights. They say this is an action for breach of contract entirely in monetary terms turning, as it does, on a claim about the different financial outcomes for the plaintiffs as between different strategies for disposing of commercial/investment properties which are indisputably secured and in respect of an unpaid debt due and owing to the first named defendant in respect of which judgment has been obtained. They say there is no disregard of the plaintiffs' property rights in this case.

38. The defendants point out that the Mortgaged Properties are commercial/investment properties and should be distinguished from cases in which, for example, a residential property is involved. The property at 4 Artillery Place was previously occupied by the first named plaintiff's father but, since his death, it has remained unoccupied and is currently vacant. The defendants at the hearing of this action strongly opposed an attempt by the plaintiffs' counsel to introduce evidence in his oral submissions that the

Public House was trading and that the plaintiffs relied on it for their livelihood. As there was no averments or evidence to this effect in any affidavits filed by the plaintiffs, I will not take it into account and will instead deal with this application on the basis of the affidavit evidence regarding the Mortgaged Properties. I note in any event that there is no receiver currently validly appointed over the Public House.

39. The defendants deny the existence of any agreement on 23 April 2021 as alleged by the plaintiffs or that this is a case akin to those in which a party seeks to enforce a negative covenant. The defendants deny that there was any clear and unequivocal promise or assurance as alleged by the plaintiffs. They deny that the fourth named defendant had any authority to bind the first named defendant and say that, in any event, an agreement was not reached as alleged by the plaintiffs. Furthermore, the defendants note that by letter dated 27 May 2021 it was very clear that any promise or assurance given had been unequivocally withdrawn. They say there is no evidence of any reliance by the plaintiffs on the alleged promise in the period from 23 April 2021 to 27 May 2021 such as would create an estoppel. They further say that the purported agreement of 23 April 2021 would, in any event, be unenforceable because its terms were so uncertain, imprecise and/or incomplete.

40. The defendants deny that there are any fair or bona fide issues to be tried.

41. They reject the plaintiffs' submissions and the claim in the plaintiff's plenary summons that there is a duty on mortgagees and receivers to "*maximise the value*" of property subject to a receivership. They also state that the court should not assume that but for the injunction being sought, the defendants would proceed with any realisation of the Mortgaged Properties in a negligent way. They say this is not a case where they have failed to consider or engage with proposals.

42. The defendants say that while damages would be an adequate remedy for the plaintiffs, it would not be an adequate remedy for the defendants. They question the value of the undertaking as to damages given by the plaintiffs and point to the significant indebtedness of the plaintiffs.

43. The defendants say that the balance of convenience clearly favours refusing the injunction sought. They point to the commercial nature of the properties and to the fact that no payment has been made to the first named defendant despite the fact that the plaintiffs continue to receive rental income from the Secured Holiday Homes. They say that the 2018 Judgment remains unsatisfied and that interest continues to accrue. They say that the plaintiffs have not cooperated in providing information in respect of the Secured Holiday Homes and that this position will continue if the injunction is granted.

The Court's analysis of the pleaded arguments by reference to the principles applicable to interlocutory injunctions.

44. The principles applicable to introductory applications of this nature have been set out on many occasions by the courts. The principles have recently been summarised by the Supreme Court in *Merck Sharp & Dohme Corp v Clonmel Healthcare Ltd* [2019] IESC 65, [2020] 2 IR 1 at page 36 (para 65) of the judgment of O'Donnell J (as he then was) in the following terms:

> *"(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..... [I]f 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 the 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 the 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 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 a 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."

45. I am satisfied in this case that the injunction sought is in the nature of a prohibitory rather than a mandatory injunction insofar as it seeks primarily to restrain property sales pending trial. That being so, the relevant threshold is that the plaintiffs must establish a fair question to be tried rather than the higher threshold of establishing that they are likely to succeed at trial. As noted by Barniville J in *O'Gara v Ulster Bank Ireland DAC* [2019] IEHC 213 in identifying the relevant threshold of a fair question to be tried: –

> "*It may be helpful to view the threshold in terms of requiring a plaintiff who seeks an interlocutory injunction to demonstrate that there is a question or issue which would withstand an application to dismiss… as disclosing no reasonable cause of action or as being frivolous or vexatious. The threshold is of that order and so unless the case is unstateable, it is generally not a difficult threshold to meet*".

Is there a fair question to be tried?

46. The plaintiffs argue that there is clearly a fair question to be tried in this case. The defendants dispute this. While there is a significant level of agreement between the parties on issues that might typically raise a fair question to be tried in injunctions sought against receivers, there remain- two particular issues which the plaintiffs rely on in this case which they say individually or in combination raise a fair question to be tried.

47. The first issue relates to the agreement which it is alleged by the plaintiffs they reached with the fourth named defendant on 21 April 2021. From this argument flows a related argument that the defendants are estopped from denying that agreement due to the

plaintiffs' reliance on it. There is also a related argument that the agreement reached is akin to a negative covenant which should be enforced by this court.

48. It is pleaded that this agreement was an oral one reached by the plaintiffs with the fourth named defendant on behalf of the first named defendant. It is alleged that the agreement was to the effect that the receivership would be vacated and the plaintiffs could proceed with the planning permission applications and subsequently sell the Mortgaged Properties with the proceeds thereof being remitted to the first named defendant. The plaintiffs say they relied on that agreement to undertake additional works to further enhance the value of the Mortgaged Properties.

49. On the evidence before the court there is clearly a dispute as to the existence of this agreement and, even it is accepted as having been made, a dispute as to its terms and the level of reliance (if any) which the plaintiffs put on it. This is evident from the following averments in affidavits produced to the court.

50. Mr Downey in his affidavit sworn 7 March 2022 exhibits correspondence between his solicitors and representatives of the fourth named defendant throughout 2019 and 2020 in relation to the plaintiffs' efforts to secure change of use planning permission for the Secured Holiday Homes. He alleges that the agreement was reached with a Ms Sarah O'Donoghue, then an employee of the fourth named defendant, and he avers at paragraph 24 of his affidavit how he was present at his solicitor's office when Ms O'Donoghue contacted his solicitor by phone. It is not clear whether the plaintiffs themselves heard the conversation (for example on a speakerphone) but the affidavit confirms that Ms O'Donoghue advised the plaintiff's solicitor

> "*that having regard to the situation with the properties and the endeavours made by us in relation to maximising the sale thereof the best course of action would be to*

> *withdraw the receivers and allow us to proceed with the proposed conversion of the properties to private dwelling houses and the subsequent sale of all the properties as previously outlined herein. I say that while our solicitor was on the phone to Sarah O'Donoghue this proposal was readily accepted by I (sic) this deponent and my wife and it was agreed with my solicitor that Sarah O'Donoghue would write during the coming days and confirm the terms as discussed and agreed with our solicitor and indeed with us*".

Similar averments are repeated in Mr Downey's supplemental affidavit sworn 12 July 2022.

51. Further evidence of the alleged agreement is provided in the affidavit of Gerard Burns, the solicitor for the plaintiffs, in his affidavit sworn 12 July 2022. Referring to the phone call, he avers at paragraph 7 that Ms O'Donoghue

> "*stated that the best way forward was to vacate the receivership and allow the plaintiffs to make their application for change of use of the properties and then have the properties sold. I so advised my clients who were delighted and accepted the proposal made and it was agreed that Ms O'Donoghue would email me possibly the following day and confirm the matters discussed.*"

He confirms at paragraph 10 of his affidavit that he "*was subsequently advised that the Receivers would not be removed*".

52. The affidavit of Kieran Dowling on behalf of the defendants sworn 17 June 2022 denies that any such agreement was made (at para 45). He says that the fourth named defendant does not have and never had authority of any kind from the first named defendant to conclude any agreement with the plaintiffs which would compromise in any way the rights of the first named defendant (at para 46). He notes at para 62 that

there is no note or record in respect of the alleged phone call and he refers to an email dated 27 May 2021 from Mr Kevin Rogers of the fourth named defendant to the plaintiff's solicitors in which it was clearly stated that the first named defendants "*are unwilling to discharge the receivership appointments but are seeking engagement from your clients to bring the properties to market and achieve the optimal sales proceeds to reduce your client's debt exposure*". The defendants say that following that letter there could be no credible understanding on the plaintiffs' part that they had any agreement to discharge the Joint Receivers.

53. The second named defendant in his affidavit sworn 17 June 2022 denies that any agreement was made on 23 April 2021 on behalf of the Joint Receivers or at all and he confirms (at paras 68 and 69) that the fourth named defendant does not have and never had authority of any kind from the Joint Receivers to conclude an agreement with the plaintiffs as alleged.

54. The affidavit of Sarah O'Donoghue sworn 28 June 2022 notes that she ceased employment with the fourth named defendant on 12 May 2021. She avers (at para 7) that the fourth named defendant had no authority to bind the first named defendant and that all she could do was to make recommendations to the first named defendant but she could not bind them to a decision. She avers (at para 9) that "*I have no recollection of the specific phone call referred to by Mr Downey*". She sets out what would be her normal practice on calls with borrowers but she does not recall the specific engagement relied on by the plaintiffs.

55. The second issue argued by the plaintiffs is that if the defendants are allowed to sell the Mortgaged Properties in their current state, this will not only breach the April 2021 agreement but would also cause the first named defendant and the Joint Receivers to be

in breach of the duty of care they owe to the plaintiffs to maximise the return on the Mortgaged Properties.

56. I do not need in this application to determine the scope of the duty of care owed by the defendants to the plaintiffs in respect of the disposal of the Mortgaged Properties. However, I am satisfied that this duty is not an open ended one to "*maximise the value of any assets under its assignation*" as pleaded by the plaintiffs in their plenary summons. Were that to be the case it would simply be impossible for receivers to dispose of mortgaged assets without taking every step possible to maximise their value.

57. Rather, the duty of care owed by a receiver to a mortgagor is to exercise all reasonable care to obtain the best price reasonably obtainable for the property at the time of sale. Whether this duty has been discharged will depend on the specific facts in each case. A receiver may weigh up a proposition that it could incur additional delay or expense and opt instead for a more expeditious sale at a lower price. In doing so however he may be faced with a claim for breach of duty if he fails to consider an alternative approach that would have obtained a better price and was reasonable in all the circumstances.

58. At this interlocutory stage it is neither appropriate nor necessary for the court to make any findings of fact on the above issues. As Murray J noted in the decision of *Ryanair Designated Activity Company v Skyscanner Ltd* [2022] IECA 64 at para 75, quoting with approval a passage from *Lopes v. Minister for Justice* [2014] IESC 21, [2014] 2 IR 301 at para. 19 (Clarke J, as he then was), where a plaintiff is applying for a prohibitory injunction,

> "*the threshold imposed on the plaintiff in seeking such an injunction is a low one and the issue before the court is not whose case is likely to prevail at trial, but whether there is an arguable basis for the plaintiff's claim. That requires no more*

than that the plaintiff establish a plausible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary to establish its legal claims".

59. I find that the plaintiffs have met the threshold of a fair issue to be tried in light of the above arguments it has advanced.

60. That being the case, I will consider the balance of convenience and, in particular, the adequacy of damages in determining whether an injunction should be granted as sought.

Would an award of damages adequately compensate the plaintiffs if the injunction was refused?

61. The plaintiffs say that damages would not adequately compensate them were an injunction to be refused and they ultimately succeeded at trial. They argue, firstly, that this injunction concerns their property rights and that where an applicant seeks to restrain an interference with their property rights, an injunction is more likely to be granted. They rely on the comments of Clarke J (as he then was) in *AIB plc v Diamond* [2011] IEHC 505, [2012] 3 IR 549 where (at para 96) he stated:

"*The courts have always been anxious to guard property rights in the context of interlocutory injunctions.... The reason for that is clear. Even though there may be a sense in which it may be possible to measure the value of property lost, declining to enforce property rights on the basis that the party who has lost its property can be compensated in damages would amount to a form of implicit compulsory acquisition. If someone could take over my house and avoid an injunction on the basis that my house can readily be valued and he is in a position to pay compensation to that value (even together with any consequential losses), then it*

would follow that that person would be entitled, in substance, to compulsory acquire my house. The mere fact that it may, therefore, be possible to put a value on property rights lost does not, of itself, mean that damages are necessarily an adequate remedy for the party concerned is entitled to its property rights instead of their value".

62. The plaintiffs also rely on the following passage from the decision of Clarke J in *Metro International SA v Independent News and Media* [2005] IEHC 309 where he said (at para 4.6):

> "*Similarly in Dublin Port and Docks Board v Britannia Dredging Company Limited [1968] IR 136 the Supreme Court, following Doherty v Allman 3 App Cas 709 accepted that where it is established that a party has agreed to a negative covenant a court, at least at the trial of an action, will prima facie enforce that covenant even though it may be possible to measure the loss that would be attributable to its non performance in monetary terms. Thus enforcement of a negative covenant may be another type of case where the court leans in favour of enforcement by injunction rather than compensation*"

63. The plaintiffs argue that the promise they reached with the fourth named defendant to suspend the receivership and permit the plaintiffs to control the development and subsequent sale of the Mortgaged Properties represents precisely the type of negative covenant envisaged in *Metro International* and that an injunction is *prima facie* appropriate. They also refer to the comments of Murray J in *Ryanair* where he stated at para 33 (vii):

> "*…there are some categories of case in which a plaintiff who establishes a clear claim on the merits will obtain an interlocutory injunction for that reason alone.*

> *This is the position in relation to certain claims for the enforcement of undisputed negative contractual stipulations*".

It is worth noting the reference in that passage to "undisputed" negative contractual stipulations. Here there is a clear dispute and accordingly no such undisputed negative contractual stipulations exist.

64. The defendants say that the plaintiffs' case is not aptly characterised as invoking *property rights* and it can be distinguished on the facts from the cases they rely on. The defendants say this is an action for breach of contract entirely in monetary terms. It turns on the different financial outcomes for the plaintiffs between different strategies for disposing of commercial/investment properties which are indisputably secured and arise in respect of an unpaid debt which is acknowledged to be due and owing to the first named defendant.

65. The defendants rely on the decision of Keane J in *Tennant v McGinley* [2016] IEHC 325 where the court granted the plaintiff receiver an interlocutory injunction preventing the defendant property owner from interfering with the receiver's possession of mixed residential/commercial property. At para 54 of his judgment Keane J stated as follows in relation to the adequacy of damages to compensate the defendant property owner:

> "*… I am conscious that the rights in dispute in these proceedings are property rights and that an entitlement to damages is often considered insufficient protection where property rights may be lost. However, it is a particular feature of this case that the dispute between the parties concerns which of them is to have control of the process of sale of the development properties at issue. I consider that a fundamental distinction between this case and the situation posited by Clarke J in AIB plc v Diamond…*".

66. The defendants also rely on *Gilead Sciences v Mylan S.A.S*. [2017] IEHC 666 where McGovern J said (at para 21) that "*there are cases where an injunction will not be appropriate even where it is alleged a property right is being infringed*" and where he observed that even if a case

> "*involves a property right vesting in the plaintiffs it is not determinative of whether or not an injunction should be granted. It is no more than a factor to be taken into account in applying the principles to be found in Campus Oil and Okundae*".

67. The defendants also stress the importance of the nature of the properties involved. The Mortgaged Properties are investment/commercial properties. They are not the plaintiffs' family home and Mr Downey senior no longer resides in 4 Artillery Place, which is a vacant residential investment property. The plaintiffs' legal submissions note that the borrowings at issue were to finance a number of "*property investments acquisitions and developments*". While the plaintiffs conceived the idea of developing the Secured Holiday Homes and did so in 2005, these remain investment/commercial properties from the plaintiffs' perspective. The Public House is clearly a commercial property.

68. The defendants also rely on the High Court decision in *Ryan v Dengrove DAC* [2020] IEHC 533. In that case Twomey J placed particular emphasis on the fact that the property at issue was commercial property and not a family home. He also noted that no compelling evidence had been provided to him that the commercial/development site at issue in those proceedings would be sold at an undervalue if sold by the receiver rather than by the plaintiff. I believe there is a similar lack of evidence in the present case. The defendants have instructed experts to advise on valuations, sales strategy and, for the Secured Holiday Homes they have also instructed experts to advise on the costs of complying with likely planning requirements for a change of use. The defendants

have never confirmed that they intend to sell the Secured Holiday Homes without obtaining planning permission. They have engaged, to at least some degree, with the plaintiffs regarding the idea of obtaining planning for change of use. While the allegation was made, I was not provided with evidence of a flagrant disregard of the plaintiffs' property rights in the present case.

69. The conflict between the competing arguments that property rights generally raise for a court is well set out by Stewart J in *Whelan v Promontoria (Finn) Ltd* [2017] IEHC 739 where she observed:

> "*In assessing the law in relation to the adequacy of damages, the Court is cognisant of two opposing legal rules of thumb: damages aren't an adequate remedy for trespass and damages are an adequate remedy for commercial investments… In attempting to reconcile the above, the emerging analytic theme is to use a fact-based approach. The property rights at stake in this case relate to real property. Each parcel of land is unique and, where a defendant has improperly disposed of that land it is impossible to fully compensate for the loss suffered because no other piece of land is identical to the one that was lost. However, where the land is involved in some commercial or monitory venture and the predominant feature of the plaintiff's investment in the land is for some financial purpose, it is quite correct for a court to conclude that such loss can be compensated with an award in damages, as the predominant feature of the plaintiff's investment in the land does not touch upon any of the aspects of that land which make it unique*".

70. In the present case I believe this dispute is not about property rights *per se* but is rather about how the Mortgaged Properties should be sold so as to achieve the best price for them. The plaintiffs have already agreed that their properties are subject to valid mortgages and that these mortgages are now subject to enforcement by the defendants

and that the Mortgaged Properties (or at least some of them) need to be sold to satisfy the 2018 Judgment. What is at issue is the mechanism, control, strategy and process to dispose of those properties – not whether there is some interest in the properties that should prevent their sale.

71. The defendants also argue that damages are not adequate for them in the event that the injunction is granted to the plaintiffs. The plaintiffs belatedly gave an undertaking as to damages confirmed in the supplemental affidavit of Patrick Downey dated 23 January 2023. The plaintiffs rely on the valuation from Sherry FitzGerald McDermott dated 18 January 2023 valuing the mortgaged properties at €3.44 million. There is no other evidence of assets that would be available to satisfy the undertaking as to damages. There is a corresponding debt for that amount due by the plaintiffs to the first named defendant.

72. O'Donnell J in *Merck* observed (at para 61) that

> "*the question of the adequacy of damages to either party and the capacity of the parties to pay them is often the largest single element in the balance of convenience, and will often be decisive in most cases*".

73. It falls to the defendants of course to demonstrate that the undertaking as to damages which is provided by the plaintiffs is or would be inadequate in relation to the losses which the defendants are likely to suffer if this injunction was granted. In that regard the losses which the defendants would suffer have been identified as the increased debt (by way of accumulating interest on the loan during the injunctive period and pending the determination of the action in which it is noted the plaintiffs have not yet delivered a statement of claim). The defendants say that this is particularly prejudicial as the

current debt (on their view) already exceeds the value of the Mortgaged Properties and therefore represent further "unsecured debt" to that extent.

74. While the value of the undertaking as to damages given by the plaintiffs must be questionable in light of the significant unsatisfied monetary judgment against them, it has to be weighed against the likely losses that might be claimed on foot of it, being the continued accrual of interest at a rate of approximately €10,000 per quarter. If the proceedings were to be brought on quickly the period during which interest continues to accrue could be limited, thus reducing the level of potential loss for the defendant. There are other properties within the Mortgaged Properties that have an additional value beyond the value of the Secured Holiday Homes and which could be available to defray the accruing interest. In the circumstances the defendants have not convinced me that the undertaking as to damages given by the plaintiffs in this case is of no value.

75. In *Lambert Jones Estates Ltd v Donnelly* (unreported High Court, 5 November 1982, O'Hanlon J) the High Court was faced with a similar factual scenario to the present case. The plaintiff in that case sought an interlocutory injunction to restrain the defendant, in his capacity as receiver, from proceeding with the sale by tender of a development site which the plaintiff alleged should be disposed of in several smaller lots over a period, with planning permission having first been obtained for the development of such smaller units. Both parties in the present case relied on that decision, although for different reasons. The court refused the plaintiff's application finding that the plaintiffs did not have any real prospect of succeeding in their claim for a permanent injunction at the trial in light of the evidence adduced. The court went on to comment in the following terms at page 14:

> "*It also appears to me that the claim for an interlocutory injunction may not lie in the present case… If the Plaintiffs are correct in their argument, and the receiver is*

proceeding to sell in the manner involving negligence and breach of duty on his part, then the only damage that can thereby be caused to the Plaintiffs is financial loss – the difference between what will be realised on a sale by this method and what could be realised by some other method. The plaintiffs contend that such loss is not quantifiable, – that it would be too difficult to determine how much had been lost in the process. Where a claim for damages arises, however, the Court is not deterred from assessing damages by the difficulty of the task."

76. I believe that the plaintiffs' claim is one in respect of which they could be adequately compensated in damages were the injunction refused and the plaintiffs ultimately succeeded in challenging the manner in which the defendants had disposed of the Mortgaged Properties. While I acknowledge that it may be difficult to determine what price could have been obtained in a hypothetical scenario, this difficulty would not prevent an award of damages being made to the plaintiffs if they established a breach of duty by the defendants in how the Mortgaged Properties were disposed. In that eventuality, if the Joint Receivers sell the Mortgaged Properties (or any of them) at an undervalue in a manner involving negligence and breach of duty on their part, the plaintiffs will be entitled to damages referable to the difference between what was realised on that sale and what could have been realised by some other method. It is well established that where a claim for damages arises the court is not deterred from assessing damages by the difficulty of the task.

77. My finding regarding the adequacy of damages is a factor which weighs heavily in favour of refusing the injunction sought by the plaintiffs. I propose however to also now consider the other aspects of the balance of convenience.

Assessment of the balance of convenience in this case

78. In general terms this court must seek to ensure the least risk of injustice to the parties pending the hearing of the plenary action.

79. The plaintiffs say that the balance of convenience favours maintaining the status quo which in the present case is that the properties are not under any sales process by the Joint Receivers. They say that the defendants will suffer no prejudice if the injunction is granted whereas the plaintiffs may lose forever the opportunity to realise the maximum value for their assets and make good on their debt to the defendants.

80. The defendants say that the balance of convenience favours refusing the injunction. They say that the status quo in this case is highly prejudicial to the defendants who have received no rents or other payments towards the 2018 Judgment. Meanwhile, the plaintiffs are retaining all rents and a yearly management fee. They say that the plaintiffs have not advanced the sales of the Mortgaged Properties – there is no clear indication of the timelines the plaintiffs propose or the costings they expect to incur in relation to planning. The initial planning application has been stalled because the plaintiffs have not responded to queries from the County Council. This situation prevails they say despite there being no challenge to the validity of the appointment of the Joint Receivers or the debt due to the first named defendant. The defendants say that the debt in this case continues to increase with accruing interest. They say that allowing the plaintiffs to control the sales process will result in continued delay and there is no evidence that this would result in a more beneficial outcome. The defendants say they have a duty to dispose of the Mortgaged Properties for the best available price and that if they fail to do so they will be open to challenge by the plaintiffs and that this is the appropriate remedy rather than preventing the defendants from selling the

Mortgaged Properties as validly appointed receivers or mortgagees. The defendants say they are experienced in property disposals, will instruct professionals as required and that there is no evidence they will dispose of the Mortgaged Properties at an undervalue.

81. I believe the balance of convenience favours the defendants in this case. I also believe that damages will adequately compensate the plaintiffs for any loss they may sustain if they are successful at trial in establishing that the defendants were negligent in how they disposed of the Mortgaged Properties.

82. In reality, there is considerable alignment between the objectives of the parties in these proceedings. The greater the sum that is realised from the disposal of the Mortgaged Properties, the better it will be for both parties. The defendants may have the 2018 Judgment satisfied in full from the sales proceeds. The plaintiffs will reduce the risk of any unsecured indebtedness for the plaintiffs to discharge. Indeed, the plaintiffs may, on their figures, retain some equity following the discharge of the 2018 Judgment.

83. In many respects therefore this case is, in my view, of a type where the granting or refusal of an injunction is more in the nature of a tactical advantage to one or other party as identified by O Donnell J in *Merck*. In truth, whether or not the injunction is granted, the parties in this case both recognise that the Mortgaged Properties must be sold to discharge the 2018 Judgment. If they were to cooperate it is likely that the Mortgaged Properties would be sold on the best available terms. In the absence of cooperation a lesser result may be achieved and this outcome could be to the prejudice of both parties.

Conclusion

84. For the reasons set out above I propose to refuse the plaintiffs' application for an injunction restraining the sale of the Secured Holiday Homes by the second and third named defendants. I find that while the plaintiffs have established a fair issue to be tried, damages would be an adequate remedy for them in the event that the Secured Holiday Homes are disposed of by the second and third named defendants in a negligent manner or in breach of their duty of care owed to the plaintiffs.

85. I further find that the balance of convenience favours allowing the validly appointed receivers and the first named defendant to dispose of the Secured Holiday Homes (and indeed 4 Artillery Terrace) in discharge of the 2018 Judgment and they must account fully to the plaintiffs for that disposal process.

86. There is no receiver validly appointed over the Public House and so this judgment does not authorise any disposal of same by the defendants.

87. This court strongly recommends that the parties seek to cooperate with each other on the disposal process as same is likely to result in the best achievable price for the Mortgaged Properties, to the benefit of all parties, and may avoid the need for costly litigation.

88. I will list this matter for mention on Thursday 16 March at 10.45am to agree the final form of order, to deal with submissions on legal costs and further directions that will expedite the timetable for the trial of these proceedings. I would ask the parties to engage on a proposed trial timetable in advance of that date. Failing agreement between the parties I will make an order for directions as appropriate on 16 March 2023.