THE HIGH COURT
COMMERCIAL

[2020] IEHC 533
[2018 No. 1872 P]

BETWEEN

PAT RYAN

PLAINTIFF

AND
DENGROVE DAC

DEFENDANT
[2020 No. 4756 P]

BETWEEN

PAT RYAN AND PHIL MONAHAN

PLAINTIFFS

AND
DENGROVE DAC AND KEN TYRRELL

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 29th day of September, 2020

Summary

1. This case involves an application by a borrower for an interlocutory injunction restraining a receiver from selling a commercial/development site on the quays in Dublin, pending the trial of the action. It concerns a dispute about the meaning of a Settlement Agreement (the "Settlement Agreement") dated 11th October, 2019 between the first named plaintiff ("Mr. Ryan") and the first named defendant ("Dengrove"). The second named plaintiff ("Mr. Monahan"), while not a party to the Settlement Agreement, avers that he is entitled to benefit from its terms. The dispute between the parties relates to valuable commercial/development sites situated in Dublin 2 which Mr. Ryan estimates to be worth €60 million. The first of these sites is situated at 1-4 City Quay and 23-25 Moss Street and the second is situated at 5-6 City Quay, 2-3 Gloucester Street and 26-30 Moss Street (collectively, the "Site").

2. Mr. Ryan purchased the Site, along with Mr. Monahan and a number of other experienced property developers, through two partnerships (the "Partnerships") with the help of funding in 2007 from Anglo Irish Bank Corporation plc ("Anglo"). The rights to those loans and the related security were assigned to Dengrove in 2017.

3. In these proceedings, Mr. Ryan seeks an interlocutory injunction against Dengrove and against the second named defendant, a receiver appointed by Dengrove over the Site, (Mr. Ken Tyrrell, referred to herein as the "Receiver"). The purpose of the injunction sought by Mr. Ryan is to prevent the Receiver selling the Site.

4. This is a curious 'receiver-injunction' case, since it is not the more usual case, where a borrower, such as Mr. Ryan, wishes to prevent the sale of the Site, while the bank/assignee wishes to sell the Site. In this case, both Mr. Ryan and Dengrove wish to sell the Site. However, the dispute arises because Mr. Ryan wants a sale by the owner of the Site, i.e. the Partnerships, and thus in accordance with the terms of the Settlement Agreement, which make no reference to the Receiver, since he was appointed after its execution.

5. For its part, Dengrove wishes to sell the Site through the Receiver. Dengrove claims that it was entitled to appoint a receiver (when it did on the 25th June, 2020), as it claims that the Settlement Agreement terminated by virtue of the failure to sell the Site in accordance with its terms, by the deadline in that Agreement of the 24th of April, 2020.

6. Within days of the appointment of the Receiver, Mr. Ryan obtained an *ex parte* injunction on the 3rd July, 2020 prohibiting, *inter alia*, the Receiver from selling the Site. Dengrove seeks to have that interim injunction discharged, while Mr. Ryan seeks its continuation until the trial of the action as he claims that a receiver-sale of the Site would be at undervalue. An issue for the trial will be whether, in the light of the terms of the Settlement Agreement, it is lawful for the Site to be sold by the Receiver or whether it must be sold by the Partnerships.

7. The key issue for this court, in these interlocutory proceedings, is to determine whether, on the balance of justice, an interlocutory injunction preventing the Receiver selling the Site should be granted pending the trial.

8. This Court concludes that an injunction preventing the Receiver from selling the Site should not be granted because, *inter alia*:

   - one is dealing with commercial property ('*one of the last remaining office development sites on the south quays, located in a pivotal position where there is an expectation a significant density of development will be sustained'*), and not a family home,

   - money has been owing for over a decade secured on that Site and accordingly the balance of justice favours the bank/assignee selling the Site and discharging the secured borrowings,

   - no compelling evidence has been provided that a commercial/development site in Dublin 2 would be sold at undervalue if sold by the Receiver (rather than by the Partnerships), and,

   - even if this were established at the trial, no compelling evidence was adduced to convince the Court that Dengrove would not be able to meet an award of damages for the alleged undervalue if the Site was sold by the Receiver prior to that trial.

Background

9. The background to the Settlement Agreement is that there was a High Court hearing in October 2019 concerning a dispute between Mr. Ryan and Dengrove. This dispute related to whether the Mortgages dated 17th December, 2003 between Anglo and the Partnerships over the Site were security for just the borrowings of the Partnerships in relation to the acquisition of that Site (a figure of approximately €17 million) or whether the Mortgages were also security for all the other borrowings of the partners in the Partnerships to Anglo/Dengrove, a figure of approximately €440 million.

10. After the parties went into evidence in that litigation, the case was compromised by the execution of the Settlement Agreement, which resolves the dispute by providing for the sale of the Site, with Mr. Ryan getting 20.8% of the proceeds (being his share in the Partnerships), with the balance being used by Dengrove to discharge the borrowings in order to release the security it holds over the Site. The Agreement provides, *inter alia,* that:

"1. Definitions and Interpretation

In this Agreement, unless the context otherwise requires, the following words and expressions have the following meanings:
"Adjourned Date" means 25th October 2019 or such later date as agreed in writing between the Parties;
"Contribution Sum" means €356,700;
[…]
"Requisite majority" means 51% or more of the votes of the Partners cast in \`w accordance with the agreements governing the Partnerships.

2. Settlement

2.1 Subject to receipt of the unconditional written consent of the Requisite Majority, the parties have agreed to an open market sale of the Property by the partners in the Partnerships. […]

2.2 In the event that the unconditional written consent of the Requisite Majority has been received in advance of the Adjourned Date the Parties have agreed that the sale will be conducted on the terms set out below:

2.2a Peter Lynch of Cushman & Wakefield and Tony Waters of HWBC will be appointed as joint selling agents on behalf of the parties on normal commercial terms to be agreed by the Parties.

2.2b The sale of the Property is to be conducted on the open market. The sale to be by way of tender with sealed bids to be delivered by the deadline nominated by the joint selling agents. The tender offers will each be opened in the presence of the Plaintiff or his representative and any of the other partners of the Partnerships or their representatives and the Defendant and/or its representative.

2.2c RDJ solicitors ("the Solicitors") will be jointly appointed by the Plaintiff and the Defendant to have carriage of the sale of the Property on normal commercial terms to be agreed by the Parties;

2.2d The Solicitors will provide an irrevocable undertaking that immediately upon receipt by the Solicitors of the sale proceeds of the Property:

(a) the Solicitors will pay to the Plaintiff from the sale proceeds a sum equivalent to:

(i) 20.8% of the Net Sales Proceeds; and
(ii) The Contribution Sum.

(b) the Solicitors will pay to the Defendant from the sale proceeds a sum equivalent to the balance of the sales proceeds remaining after the payment of 2.2d(a) of this Agreement.

[…]

2.2f The Defendant will release its security on the Property on receipt of the payment at 2.2d(b) of this Agreement. […]

2.4 In the event that the Requisite Majority is achieved by the Adjourned Date (or such later date as may be agreed between the parties which agreement is not to be unreasonably withheld), the parties agree that these proceedings be adjourned for a period of six months for mention only ("the Second Adjourned Date"). In the event the sales process has been completed within the Second Adjourned Date [or such later date as may be agreed between the parties which agreement is not to be unreasonably with held], the proceedings will be struck out with no further order. In the event that the sale process has not been completed within the Second Adjourned Date (or any further adjourned period as may be agreed in writing such agreement not to be unreasonably with held) the parties agree to seek a resumed hearing date and this settlement (and any documents arising therefrom) shall no longer be of any legal effect and shall have the status of a without prejudice document."

11. It is clear from these terms that the sale of the Site was to be approved by the Requisite Majority (51%) by the 25th October, 2019. The sale of the Site was duly approved by the Requisite Majority on the 16th October, 2019, and therefore by the adjourned date of the 25th October, 2019. The Second Adjourned Period for the purposes of the Settlement Agreement was therefore the six-month period ending on the 24th April, 2020. As is clear from the foregoing terms of the Settlement Agreement, the Site was therefore to be sold by the Partnerships by 24th April, 2020 and Mr. Ryan was to get 20.8% of the proceeds of sale (plus a sum of €356,700), with the balance paid to Dengrove, which it could then use to pay off all of the secured liabilities on the Site.

12. Evidence was provided by Mr. Peter Lynch ("Mr. Lynch"), Chairman of Cushman & Wakefield, that the Site was due to go to market at the end of January or early February 2020. However, apart from Mr. Lynch engaging with potential purchasers/contacts, there does not appear to have been any public marketing or advertising of the Site in January or February. In any case, as will be seen, the Site was not sold by the Partnerships by the 24th April, 2020. In this regard, since Mr. Ryan does raise the impact of Covid-19 in this application, it is also relevant to note that the Covid-19 pandemic did not strike Ireland until March 2020. On the 16th March, 2020 the President of the High Court adjourned generally with liberty to re-enter all Commercial Court matters, so that the 'for mention' date of 24th April, 2020 was adjourned generally. Against this background, it is relevant to note that Mr. Ryan did not seek to exercise his right under Clause 2.4 of the Settlement Agreement to seek the '*consent in writing*' of Dengrove to an extension of the

deadline beyond 24th April, 2020, which consent if it had been sought, could not (as *per* the terms of that clause) have been unreasonably withheld by Dengrove.

13. It is also relevant to note that evidence was provided by Dengrove (which was not disputed by Mr. Ryan) that as early as February 2020 Mr. Ryan was aware of the advice of Ronan Daly Jermyn (the independent solicitors overseeing the sale of the Site pursuant to Clause 2.2c of the Settlement Agreement) that the sale of the Site should take place by way of a sale by a mortgagee in possession ("MIP sale"). The fact that Mr. Ryan was given advice prior to the expiration of the Second Adjourned Period is evidenced from the terms of the email from Ronan Daly Jermyn to Mr. Ryan's son, Mr. Padraic Ryan, dated 21st April, 2020, providing a '*more detailed charge-by-charge analysis'* of previously provided advice. This email deals with, *inter alia*, an issue concerning one of the corporate partners in the Partnerships, Pierse Contracting, to which a liquidator had been appointed. Insofar as relevant, this email states:

> "Dear Padraic,
>
> I refer to your email requesting a more detailed charge-by-charge analysis on whether the sale can proceed by means of a sale by the owners or as a mortgagee in possession ("MIP"). […] The outcome of the analysis is that – unless Tom O'Brien (as liquidator to Pierse Contracting) can obtain a deed of release of the floating charges from Bank of Ireland, then the sale must proceed by the MIP route.
>
> […]
>
> The Requirement for an MIP Sale:
>
> The MIP method of sale, if used, would be undertaken as a conveyancing tool in order to address the considerable number of charges that are evident on a registry of deeds search against the property (12) and the CRO search against Pierce Contracting (45). The MIP sale method allows the subsequent-ranking charges to be "overreached" and so brings certainty to a purchaser that these charges no longer affect the property.
>
> Registry of Deeds Search Analysis: On balance, if we can establish that Dengrove has acquired the 12 May 2009 Charge to Anglo and that a purchaser accepts the Law Society Practice Direction that an "all assets" charge is not valid against an individual, then the charges shown registered in the Registry of Deeds do not require an MIP sale. That said, a purchaser's solicitor may take a conservative approach and insist on an MIP sale. In circumstances where this method of sale is very common in the market, combined with the likely value of the property, this would be a difficult approach to resist. […] CRO Search Analysis: The outcome of the analysis here is different. You will note that there are 3 Bank of Ireland ("BOI") charges registered in the CRO that contain "all assets" floating charges. The appointment of the Liquidator has resulted in the crystallisation of these charges such that they now comprise fixed charges over all assets of Pierse Contracting.

That being the case a purchaser will require a deed of release of these charges to be provided by BOI on closing unless the sale proceeds by means of an MIP sale.

In addition, there is an Anglo charge with similar all assets floating charge dating to 2009. If Dengrove have not acquired this charge then again a purchaser will require a deed of release of this charge or the sale to proceed by MIP sale." (Emphasis added)

14. It is clear from this letter that Ronan Daly Jermyn is effectively advising Mr. Ryan that the sale of the Site should be by way of MIP sale ('*the sale must proceed by the MIP route*'). Most importantly, this advice was provided by an *'independent solicitor'* who had been appointed by both Dengrove and Mr. Ryan. This therefore is very significant independent advice regarding the sale of the Site the subject of the Settlement Agreement, which was received by Mr. Ryan prior to the 24th April deadline (in February 2020, it seems), and was then confirmed to Mr. Ryan on the 21st April, 2020, which was four days before that deadline. Despite this advice, Mr. Ryan did not seek an extension of the deadline any time prior to the 24th April. Even more significantly, Mr. Ryan does not appear to have disclosed to Dengrove at this time that he had not agreed with this advice that the sale should proceed by way of an MIP sale. In fact, Mr. Ryan's disagreement with this advice was first disclosed by Mr. Ryan, not in the application for an interim injunction granted by McDonald J. on 3rd July, 2020, but in an affidavit sworn for these interlocutory proceedings on 17th July, 2020 in which he stated:

> "I say that while a mortgagee in possession method of sale was advised in the letter from RDJ on the 21st April at exhibit HB4, same had not been agreed to by the partners."

15. Against this backdrop, Dengrove claims that under the express terms of the last sentence of Clause 2.4 of the Settlement Agreement, as the Site was not sold by the 24th April, 2020, the Settlement Agreement was therefore no longer '*of any legal effect and shall have the status of a without prejudice document'*. On this basis, Dengrove claims there was nothing stopping it from appointing a receiver to the Site, which it did on the 25th June, 2020.

16. For his part, Mr. Ryan claims that notice should have been served on him, before the appointment of the Receiver. However, Dengrove relies on the judgment of Ní Raifeartaigh J. in the case of *Ffrench O'Carroll v. Permanent TSB plc & ors*. [2018] IEHC 794, where a mortgage, in almost identical terms regarding the appointment of a receiver, as the Mortgage in this case, was held not to require a demand be served on the borrower, before the appointment of a receiver.

17. Because of the effects in Ireland of the Covid-19 pandemic in March 2020, Mr. Ryan also claims that *if he had* sought in March or April 2020 an extension of the deadline beyond 24th April, 2020 under Clause 2.4, he would have received such an extension, since consent to that extension could not have been reasonably withheld. This is certainly an arguable point, i.e. that *if* he had applied for and received an extension of say three months beyond 24th April, 2020, then Dengrove would not have been able to appoint a

receiver when it did on 25th June, 2020. While Mr. Ryan was active in one sense during March/April since he obtained (through his son) legal advice from Ronan Daly Jermyn, however, having received this advice, for whatever reason, he not did seek the written consent of Dengrove to an extension of the deadline. This is noteworthy, particularly when he avers that this legal advice on how the Site was to be sold was not accepted by the partners, of which he was one. Clearly the existence of that independent advice and Mr. Ryan's rejection of it were very relevant factors as to when and how quickly the sale of the Site could take place, yet Mr. Ryan did not seek an extension of the deadline for that sale. Furthermore, as previously noted, Mr. Ryan did not communicate to Dengrove his disagreement with that legal advice until almost three months after the deadline had passed (in his affidavit of 17th July, 2020 as part of these proceedings). Nor did he communicate this fact to McDonald J. when he sought and obtained the *ex parte* injunction in this case.

18. Mr. Ryan also makes the argument that time was not made of the essence in the Settlement Agreement. On this basis he claims that Dengrove was not entitled to appoint a receiver without any warning. However, Dengrove point out that while time was not expressed to be of the essence, there were very clear time limits set down in the Settlement Agreement. First there is the time limit by which the approval had to be obtained from the Partnerships for the sale of the Site (i.e. the 25th October, 2019), then there is the time limit for the sale of the Site by a certain date (i.e. the 24th April, 2020), with the proceedings being adjourned for mention only on that date and then there is provision for the proceedings to be struck out once the sale was completed. Against the backdrop of these clear time limits, Dengrove asserts that, for whatever reason (Covid-19 related or otherwise), the facts of the matter are that Mr. Ryan did not seek an extension to that time period and while time was not made of the essence, there was therefore nothing stopping Dengrove appointing a Receiver after the deadline passed and the Settlement Agreement was '*no longer* […] *of any legal effect'*, pursuant to its express terms.

19. Dengrove also points to the inconsistencies between the evidence of Mr. Ryan and the letter of 2nd July, 2020 from the auctioneer who was to sell the Site, Mr. Lynch, regarding the reasons for the delay in its sale by the Partnerships. Mr. Lynch claims in that letter that:

> "The intention was to go to the market at the end of January/early February 2020 but in light of Covid–19 the proposed sale was temporarily deferred.
>
> In the interim, we identified a targeted number of potential purchasers and have been actively engaged with them on the property. For all intents and purposes the marketing and due diligence aspects are complete and the sale can commence immediately and once we are out of the current lockdown" (Emphasis added)

The interim to which he refers, during which the marketing, which was allegedly complete, occurred, appears to be between the end of January/early February and mid-March when businesses began to close due to the Covid-19 pandemic.

However, there is no evidence provided in this letter (which letter supports the claim that there should be a sale of the Site by the Partnerships, rather than by the Receiver) of any progress having been made relating to the sale or marketing of the Site for several weeks after late January, when the Site was to be sold by the Partnerships. Furthermore, despite the fact that the Settlement Agreement was signed in October 2019, Mr. Ryan, in his own affidavit dated 3rd July, 2020, claims that there was no marketing of the Site, since he avers that Mr. Lynch was not in a position to '*start the marketing'* as he was awaiting a title pack from Ronan Daly Jermyn. For this reason, Dengrove claims that the statement in Mr. Lynch's letter that *'[t]he only delay to the sales process commencing was Covid-19'* should be treated with caution.

20. This is the nature of the dispute between the parties which is to be heard at a future date by the trial judge. For the purposes of this application for an interlocutory injunction preventing the sale by the Receiver pending that hearing, it is necessary to next consider the law applicable to such applications.

Law applicable to grants of interlocutory injunctions

21. The law regarding the grant of interlocutory injunctions is well settled and does not need to be restated in great detail. It is clear from the judgment of O'Donnell J. in the Supreme Court case of *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd* [2019] IESC 65 at para. 64, that the following is the approach to be taken:

"(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 upon ending the trial could be granted;

(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the *American Cyanimid* and *Campus Oil* approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;

(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;

(4) The most important element in that balance is, in most cases, the question of adequacy of damages;

(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;

(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to 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 a trial, and recognising the possibility that there may be no trial;

(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with 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."

22. Applying this law to the current facts, the first question therefore is whether, if Mr. Ryan is successful at the trial, a permanent injunction would be granted against the Receiver. If Mr. Ryan is successful at the trial in his claim that time was of the essence and that a demand/notice should have been given by Dengrove to him before the appointment of a receiver whether for Covid-19 related reasons or other reasons, then Mr. Ryan will undoubtedly get a permanent injunction. Hence the answer to this first question is yes.

23. The next issue is if there is a fair issue to be tried. It seems clear to this Court that there is a fair issue to be tried between the parties regarding whether it was lawful for Dengrove to appoint a receiver to the Site after the passing of the deadline for the sale, in circumstances where no application was made by Mr. Ryan for an extension to the deadline, prior to 24th April, 2020, during a period, from mid-March to the 24th April, 2020, when Ireland was affected by the Covid-19 pandemic.

24. Next, is the issue of whether the balance of justice favours the grant of an injunction pending the trial to prevent the Receiver from selling the Site. As is apparent from the judgment of O'Donnell J. in *Merck Sharp & Dohme*, this is a key issue in determining whether to grant an interlocutory injunction. It is also clear from that judgment that, while the adequacy of damages is an important element of the balance of justice, it is not necessarily a determining factor. O'Donnell J. emphasises the essential flexibility of the discretionary equitable remedy of an injunction, whose aim should be to minimise injustice.

Does the balance of justice favour the grant/refusal of an interlocutory injunction?

25. With this in mind, this Court will next consider the factors relevant to the balance of justice test including the issue of whether damages are an adequate remedy.

No valuation evidence of the Site provided by Mr. Ryan

26. The first factor to consider relates to the evidence put forward by Mr. Ryan to support his claim that a commercial/development site in Dublin 2 would be sold at undervalue if sold by the Receiver, rather than the Partnerships. However, in this regard, it is to be observed that Mr. Ryan has produced no valuation of the Site to support his claim that it would be sold at undervalue by the Receiver. It is to be noted that this was also the situation in the Court of Appeal (Baker, Ní Raifeartaigh, and Murray JJ.) case of *Murphy v. McKeown* [2020] IECA 75 in which an injunction against a receiver selling a number of buy-to-let properties was refused. In the course of summarising the reasoning of the trial judge (with which he agreed), Murray J. noted at para. 11(iv) that:

> "Insofar as the defendants had complained that the properties were being sold at an undervalue, the Court (a) observed that if this occurred it was a matter in respect of which a claim for damages for that loss could be brought and (b) that the defendants – although given the opportunity to obtain a valuation – had failed to do this."

So too in this case, it is to be observed that, insofar as Mr. Ryan complains that the Site will be sold at undervalue, no attempt has been made by Mr. Ryan to substantiate this claim, by, for example, producing expert evidence regarding the valuation of the Site, so as to substantiate the claim that a reduction in price would be received by a receiver-sale vis-à-vis a sale by the Partnerships. This absence of evidence weighs in the balance of justice against the grant of an interlocutory injunction, just as it did in the *Murphy* case.

Evidence to support claim that the sale by the Receiver will lead to undervalue

27. Secondly, in the absence of precise valuations, the Court must carefully examine the actual evidence relied upon by Mr. Ryan to support his claim that a sale by a receiver would lead to a lesser price. He relies on the evidence of Mr. Lynch, the 'independent' auctioneer, since he was appointed by both Dengrove and Mr. Ryan. He also relies on the evidence of an experienced liquidator, Mr. Tom O'Brien, who is the acting liquidator of one of the partners in the Partnerships, Pierse Contracting. This Court attaches particular significance to the evidence of Mr. Lynch, Chairman of Cushman & Wakefield, because his area of expertise is property sales. More importantly, Mr. Lynch is not subject to the scepticism (which the Court of Appeal and Supreme Court has referenced) which '*all too often*' applies to expert witnesses, since in this case, the expert witness was engaged by *both* parties to the dispute. In this regard, Irvine J., as she then was, observed in *Byrne v. Ardenheath Company Ltd & Anor*. [2017] IECA 293 at para. 31 that:

> "It was my experience as a trial judge that the effectiveness of the assistance offered by expert witnesses in almost all disciplines, whether that evidence was in respect of the standard of care proposed or a party's compliance therewith, was frequently compromised by the fact that, all too often, their opinions all too often appeared to correspond too favourably with the interests of the parties who retained them. I continue to remain of that view as an appellate court judge where the transcript may lead one to the conclusion that a given expert had become so engrossed in their client's position that they were clearly incapable of providing truly independent guidance for trial judge." (Emphasis added)

28. Similarly, O'Donnell J. in *Hanrahan v. Minister for Agriculture, Fisheries and Food* [2017] IESC 66 stated at para. 4:

> "In considering this matter the Court also cannot ignore the fact that both parties presented expert evidence as to the calculation of damage, which diverged quite dramatically. On behalf of the plaintiff, it was maintained that he had suffered losses in excess of € 834,638 before interest, while the expert retained by the defendant estimated the losses at € 1,979, and in effect virtually nil. Experts are permitted to give evidence of their opinion, while lay people are not. This is because experts are understood to have professional expertise, and to owe an obligation to the Court to give their own expert opinion to the Court. I do not wish to criticize the individuals who gave evidence in this case, since this was a difficult case and in any event the "high ball – low ball" approach which occurred here is only an example of a more widespread phenomenon. However, it is surely not coincidental that it was the independent expert on behalf of the plaintiff whose opinion was that the damages were extremely substantial, and the expert on behalf of the defendant who considered that in effect there was no loss at all." (Emphasis added)

29. Since Mr. Lynch was not engaged by just one of the parties, he is not subject therefore to the caution which applies to 'independent' expert evidence. This is because, in this instance, the Court is in the unusual position of having an 'independent expert' who is not paid by one side only, but by both sides. This means that the expert should seek to ensure that he is scrupulously fair to both parties and in this sense is truly 'independent', (with the threat of being sued by either party for breach of his duty, if he fails to do so). This is not therefore a case of an 'independent' expert simply issuing an opinion which *'too often appeared to correspond too favourably with the interests of the parties who retained them'* per Irvine J. in *Byrne.*

30. For this reason, while Mr. O'Brien's independence and professionalism are not in any way being queried, the Court does however take particular note of Mr. Lynch's opinion for the reason that he has been engaged by both sides. In this regard, Mr. Lynch states in his letter dated 2nd July, 2020 that:

> "The intention was to go to the market at the end of January/early February 2020 but in light of Covid-19 the proposed sale was temporarily deferred. [….] The only delay to the sales process commencing was Covid-19.
>
> Apart from my concerns of the current state of affairs I would maintain serious reservations that the value of the property will be maximised if the property is sold through a receivership or pre-pack arrangement with the inclusion of other assets or in isolation. The asset is unique in terms of being one of the last remaining office development sites on the south quays, located in a pivotable position where there is an expectation a significant density of development will be sustained.

In my own experience, a receivership may disadvantage the value and proceeds obtained by the vendors and a straightforward consensual open market disposal of the property would be a preferred and more advantageous route to all concerned which as I indicated above was what we were led to believe was the agreed format." (Emphasis added)

31. It is to be noted that the most that Mr. Lynch can say is that the sale by a receiver of '*one of the last remaining office development sites in the south quays'* in Dublin *may* lead to a sale at undervalue. It is also to be noted in this letter that his view appears to be based on the sale being by a '*pre-pack arrangement'*, yet there was no evidence provided to support this claim. It is also relevant that he bases this view, it seems, in part, on a receiver sale not being an open market sale. However, there is no evidence that the Site would not be sold on the open market by the Receiver. The evidence of Mr. O'Brien, who is the acting liquidator to one of the partners in the Partnerships, Pierse Contracting (acting under a power of attorney from the official liquidator, Mr. Simon Coyle) was to similar effect. His opinion is that the Site will be sold at undervalue, if sold by the Receiver. However, this appears also to be based on the assumption that the Site would not be sold on the open market. He states that '*the appropriate method of sale to realise the maximum return for the appropriate creditors of Pierse … is by way of an open market sale by the owners. […] A sale by any method other than which has been agreed will damage the interest of the creditors'.*

32. While particular reliance is placed by this Court on Mr. Lynch's evidence for the foregoing reasons, this Court cannot see how the mere *possibility* of a sale at undervalue, if the Receiver sells the site, is such as to justify the exercise of this Court's discretion to grant an interlocutory injunction on the balance of justice, particularly where this is based on the assumption that the Site will not be sold on the open-market, when there is no evidence that this will be the case.

33. Indeed, as noted further below, there are submissions from Dengrove that the risk of a sale at undervalue arises if there is a sale by the Partnerships, since the Site would be sold with the burden of the 12 charges registered in the Registry of Deeds against the property and the 45 charges registered in the CRO against Pierse Contracting, rather than a clean sale of the Site by 'overreaching' all those charges. However, there is no sworn evidence to this effect and thus these amount to submissions only and not sworn evidence to be relied upon by this Court.

A dispute in which a claim for damages for loss can be brought

34. In addition, as occurred in the *Murphy* case, it is also clear that the injunction sought by Mr. Ryan in this case also '*concerns a matter in respect of which a claim for damages for that loss could be brought'*. This is because Mr. Ryan's claim is that the Site would be sold for a greater value if he/the Partnerships were controlling the sales process as distinct from the Receiver. Just as it was in the *Murphy* case, this Court would observe therefore that the dispute in question is solely a monetary dispute for which a claim for damages could be brought by Mr. Ryan, which is a factor against the grant of an interlocutory

injunction. This issue of the adequacy of damages is considered from the perspective of the ability of the parties to meet an award of damages below.

Site is not a family home

35. Also in the *Murphy* case, where one was dealing with buy-to-let properties, it was a factor, against the grant of the injunction, that the properties were not a family home. So too in this case, the Site is not a family home but rather one of the last development sites on the south quays in Dublin and so a 'purely commercial transaction'. As noted by Murray J. in the *Murphy* case at para. 11 (vii):

> "[…] the Court noted, these were purely commercial transactions, there was no family home involved, and very substantial sums of money were due and owing in respect of properties which had been given as security for the loans in question. If it transpired at trial that there were monies due and owing to the defendants, the Court could award damages, and the Bank was a mark for any damages that might be obtained." (Emphasis added)

Accordingly, the nature of the Site, as a commercial site, which was purchased and mortgaged by Mr. Ryan in favour of Anglo/Dengrove weighs in the balance of justice against the grant of an interlocutory injunction.

Substantial sums of money owed on the security of the Site

36. Furthermore, in the *Murphy* case it was a factor in the refusal of the injunction that substantial sums of money were secured on the property in question. At para. 57 (b) of his judgment, Murray J. noted that:

> "Judgment for very significant sums has now been obtained by the Bank against the defendants and upheld by this Court on appeal."

So too it is to be noted that in Mr. Ryan's case very substantial sums of money are due and owing by him and his partners to Dengrove, i.e. €17 million in respect of the acquisition of the Site and non-Site borrowings of the partners of €400 million. This is a further factor which weighs in the balance against the grant of an injunction.

Length of time that borrowings are unpaid

37. Another factor weighing in the balance of justice against the grant of the injunction is the fact that these sums are owing for a particularly long period of time of approximately 12 years. In this Court's view, whether one is dealing with the original lending bank or the assignee of that bank, it is certainly a factor in the balance of justice, that the party, asking the Court to exercise its discretion in its favour, has failed to repay the original lending bank (or its assignee) for over a decade. Furthermore, none of this is disputed by Mr. Ryan. He accepts not only that he owes very substantial sums of money to Dengrove but also that the lending bank/Dengrove has been out of pocket for over a decade. It is also relevant to note that it is in this context that Mr. Ryan refuses to agree to a 'conveyancing tool' to sell the Site (since the MIP sale is described by the independent solicitors, Ronan Daly Jermyn merely as a 'conveyancing tool' for the sale of the Site).

Mr. Ryan does not oppose the sale of the Site, just a sale by the Receiver

38. The next factor to consider is that in the *Murphy* case, there was no indication that the plaintiffs seeking the injunction were open to the sale of the properties and so it seems they did not wish the properties to be sold *at all* (whether by a receiver or anyone else). In this respect, it is arguable that Mr. Ryan's position is not as strong as that of the plaintiffs in the *Murphy* case (where the receiver injunction was refused), since Mr. Ryan has no objection to a sale, he simply wants to control the manner of the sale, solely on monetary grounds, i.e. based on his claim that he would get more money from a sale by the Partnerships.

39. Indeed, this is a peculiarity of this case since in most other receiver-injunction cases, the party seeking the injunction does not want the family home/farm/commercial property sold at all, so it is often not just an issue about money (as in this case, which could be dealt with by an award of damages). This factor, although not determinative, is something which, in this Court's view, weighs in the balance of justice in favour of a refusal of an interlocutory injunction preventing the sale of the Site by the Receiver, since Mr. Ryan clearly has no issue with the sale of the Site *per se*. Thus, the argument for refusing the interlocutory injunction in this case (in this respect at least) is even stronger than it was in the *Murphy* case (although of course, unlike the Murphy case there is a Settlement Agreement in this case, *albeit* one that allegedly has no legal effect).

No quantification of alleged loss by Mr. Ryan

40. The next factor to consider is that Mr. Ryan has made no attempt to quantify what his loss will be if the injunction is not granted. When one considers that he is asking this Court to exercise a significant, but discretionary, power in his favour, one would have thought that he would have outlined in detail, with supporting expert evidence, if relevant, of what his estimate of his loss will be, if the injunction is not granted and the Site is sold by the Receiver. Yet there is no such evidence of this alleged but unsubstantiated loss and so this Court is left to guess what this loss might be – could it be a €10,000 loss or a €10,000,000 loss? All this Court has regarding losses are the submissions of counsel for Dengrove, which are based on the averments of Mr. Ryan that the Site '*could be worth up to €60m'*, without any supporting evidence and that he is, as he avers, '*exposed to a significant loss running to many millions'*. This absence of evidence of the alleged loss likely to be suffered by Mr. Ryan weighs in the balance of justice against the grant of the injunction, particularly as it is clear from the judgment of Cregan J. in *Tola Capital Management LLC v. Linders & Anor*. [2014] IEHC 316 at para. 68, that there is an obligation on a plaintiff in Mr. Ryan's position to provide same:

> "In the present case the plaintiff has accepted that damages are an adequate remedy for the plaintiff. Despite this concession, which in my view was properly made, the plaintiff has not been able to put forward a figure as to what its damages might be. However, given that it has accepted that damages are an adequate remedy, it follows as a matter of logic that the plaintiff should be in a position to assess at least a range of what those damages might be. The burden of proof is on the plaintiff so to do if they wish to argue that the defendants are not in a position to meet such an award. However, given that it has not done so in this case, it

> seems to me that it cannot argue, that the defendants cannot meet an award of damages when that amount is an unknown."

So it is in this case, where Mr. Ryan is not in a very strong position to argue that Dengrove cannot meet an award of damages, when he has made no attempt to make that amount known.

Submissions by Dengrove

41. Dengrove made submissions, which were not put on affidavit, that Mr. Ryan is not primarily concerned, as he suggests, with achieving the best price for the Site for Dengrove and for himself *via* an open market sale. Rather, Dengrove imply in its submissions, that his true concern is to control the sale of the Site so that he can acquire the Site himself at undervalue with a view to developing the Site. In this regard, throughout its submissions, Dengrove referenced several statements made by Mr. Ryan in his sworn evidence to this Court in the proceedings which were settled in October 2019 (the proceedings bearing record no. 2018/1872 P). In those proceedings, Mr. Ryan confirmed in his evidence to this Court that it had always been his intention to purchase the Site with a view to developing it:

> "[I]t was always my intention to buy the site and develop it.
>
> […]
>
> And that would still be my intention."

42. Other sworn evidence given by Mr. Ryan in those proceedings and referenced by Dengrove in its submissions included Mr. Ryan's agreement that he was using the proceedings as a '*vehicle*' to try and get the Site or the security over the Site and Mr. Ryan's statement that his preferred option was to develop the Site. Dengrove also placed reliance on Mr. Ryan's affidavit sworn on 17th July, 2020 wherein he states at para. 101 that one of the rights he has is to develop the Site and that his rights are therefore '*not limited to a sale'*. In the same affidavit, at para. 6, Mr. Ryan refers to the Site as '*my assets'* and avers that '*how I deal with those assets and my interests in them is a matter for me'*.

    On the basis of the foregoing sworn statements and averments made by Mr. Ryan, Dengrove contend that it is '*crystal clear'* that Mr. Ryan wishes to '*be the buyer himself [of the Site]'*. Furthermore, as previously mentioned, the heavy implication throughout Dengrove's submissions is that not merely is it Mr. Ryan's aim to purchase the Site, but it is his desire to control the sale of the Site so that he may then purchase the Site at undervalue.

43. In particular, Dengrove submit that Mr. Ryan rejected the independent solicitor's advice that the Site be sold by way of an MIP sale. Dengrove also submitted that Mr. Ryan seeks to prevent a sale of the Site by the Receiver as an MIP sale, because this would lead to the overreaching of all the 57 charges relating to the Site, i.e. the 12 charges in the Registry of Deeds and the 45 charges in the CRO. An MIP sale would, Dengrove submits,

lead to the best price for Dengrove/Mr. Ryan. Nonetheless, Dengrove submitted that instead Mr. Ryan wishes to ensure that the Site is sold by way of an owners' sale by the Partnerships, which it alleges is likely to lead to a much lesser price, since the 57 charges would not be over-reached and any buyer would have to subsequently arrange for the release of all the security on the Site.

44. Furthermore, if the sale of the Site was controlled by the Partnerships, and Mr. Ryan bought the Site at a lesser price, since it is subject to the 57 charges made by the partners, Dengrove submits that Mr. Ryan would be well positioned, because of his familiarity with his partners and their respective charges over the Site, to negotiate the release of those charges. Dengrove's submissions implied that this all explains Mr. Ryan's refusal to accept the advice of the independent solicitor that the Site should be sold by means of an MIP sale. However, as none of these submissions were put on affidavit, they are not determinative in this Court's finding herein of whether on the balance of justice the injunction should be granted. However, what is put on affidavit in this regard, is Mr. Ryan's averment at para. 78 of his affidavit dated 17th July, 2020:

> "Whilst there were Judgement Mortgages registered on the property, I say, believe and am advised that any potential purchaser in the property could, as is habitually and normally in the case where Judgement Mortgages are registered, chose to purchase the property and discharge the Judgement Mortgages. It does not necessarily follow that where Judgement Mortgages are registered on a Property that the sale of that property must occur by way of mortgagee in possession." (Emphasis added)

However, this averment fails to deal with the advice from Ronan Daly Jermyn that the sale *'must proceed by the MIP route'*. Mr. Ryan also fails to address the obvious fact that a purchaser who agrees to buy the Site subject to 57 charges, rather than free of those charges, is patently going to pay a lot less for that Site, since they will incur the cost of clearing those 57 charges.

Lack of candour by Mr. Ryan in seeking the interim injunction?

45. The next factor in the balance of justice is that Mr. Ryan did not bring the Ronan Daly Jermyn letter to the attention of McDonald J. on 3rd July, 2020 when he was seeking the *ex parte* injunction and in particular he did not bring to McDonald J.'s attention his rejection of the legal advice contained in that letter, which rejection subsequently came to light in Mr. Ryan's affidavit sworn on the 17th July, 2020. This Court is not attaching any blame to Mr. Ryan's lawyers in this regard (particularly since allegations were put on affidavit by Dengrove regarding a lack of candour on the part of Mr. Ryan, but these allegations did not concern the RDJ letter and so Mr. Ryan's lawyers were not in a position to address them). Furthermore, it seems from the email of 22nd April, 2020 from Mr. Ryan's solicitor (Mr. Marc Hickey) to Mr. Simon Murphy of Beauchamps (Dengrove's solicitors), that Mr. Hickey did not have instructions from Mr. Ryan regarding Mr. Ryan's position and it may well be that the first time that Mr. Ryan's lawyers became aware of Mr. Ryan's rejection of the independent legal advice was when he swore his affidavit on

the 17th July, 2020, which was *after* the hearing for the *ex parte* injunction before McDonald J.

46. However, clearly Mr. Ryan himself was aware of the independent legal advice contained in the email dated 21st April, 2020 (confirming the earlier legal advice received around February 2020) and so presumably he was aware of his own rejection of that advice, which was relevant to the *ex parte* application. However, for whatever reason, Mr. Ryan did not bring either the email (or the earlier advice in February) or his rejection of that advice therein to the attention of McDonald J. On the contrary, Mr. Ryan in his affidavit before McDonald J. averred that '*the only matter now outstanding is obtaining the legal pack from [Ronan Daly Jermyn]'.*

47. As previously noted, this advice regarding the manner of the sale of the Site and its rejection by Mr. Ryan was relevant in his *ex parte* application for an injunction restraining the sale of the Site by the Receiver. This is because that injunction sought to undermine the alleged right of Dengrove to sell the Site by a receiver sale, even though the Sale by the Partnerships had not taken place by the time-limit of 24th April, 2020. Yet, in pressing his alleged entitlement to that injunction, Mr. Ryan failed to disclose to McDonald J. the fact that Mr. Ryan himself *might* have had a role in the sale of the Site not progressing by the 24th April, 2020 deadline, by virtue of the receipt of advice in February and again in April from the independent solicitor that an MIP sale was advised, and most significantly his rejection of that advice. On any reading of this situation, the rejection of legal advice by Mr. Ryan of how he, as an owner, was to sell the Site, was a possible factor in the failure of the sale by the deadline, and so relevant to the entitlement of Dengrove to sell the Site using the Receiver because of that failure. Indeed, it is also difficult to see how the Site could be marketed, until Mr. Ryan had agreed to the manner of the sale of the Site and as previously noted, it appears no public marketing took place between January and March. The legal advice contained in that email of 21st April, 2020 and Mr. Ryan's rejection of it, was thus a relevant factor in McDonald J. determining whether an *ex parte* injunction should have been granted.

48. In *EBS Building Society v. Hefferon & Anor*. [2012] IEHC 399 at para. 13, McGovern J. noted in the context of *ex parte* applications that:

> "In *Atkin v. Moran* [1871] I.R.6 E.Q. 79 Lord O'Hagan L.C. stated that the party making the application is not to make himself the judge of whether a particular fact is material or not. If it is a fact that might in any way affect the mind of the court, it is the duty of the applicant to bring it before the court's attention having effective non-disclosure."

49. This was an omission by Mr. Ryan in circumstances where there is an overriding obligation on parties seeking a court order, where the other side is not present, to disclose all relevant matters, even, and perhaps in particular, those matters which militate against the reliefs sought. As noted by Browne-Wilkinson V.-C. in *Tate Access Floors Inc v. Boswell* [1991] 2 WLR 304 at 319:

> "No rule is better established, and few more important, than the rule, "the golden rule", that a plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard."

50. As explained by Clarke J., as he then was, in *F.McK. v. D.C. & Ors*. [2006] IEHC 185 at para. 2.2:

> "The obligation of full disclosure is seen as a quid pro quo for the entitlement of the applicant to obtain what are, frequently, very onerous orders, without affording the person affected by those orders an opportunity to be heard."

51. This non-disclosure by Mr. Ryan in his application for the *ex parte* injunction is therefore a factor in the balance of justice which weighs against the grant of the interlocutory injunction.

Are damages an adequate remedy?

52. As observed by O'Donnell J. in the *Merck Sharp & Dohme* case, the most important issue in the balance of justice in many cases will be the question of the adequacy of damages. However, as noted by O'Donnell J., 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. The within proceedings represent such a commercial case since there is a dispute between an apparently successful property developer, on the one hand, and an apparently successful financial fund, on the other hand, regarding the alleged breach of a Settlement Agreement.

53. In addition, in *Merck Sharp & Dohme* O'Donnell J. observed that it will often be the case that the position of the parties in relation to damages is very similar, since at para. 36 he observed that:

> "[…] save in the simplest cases, both parties will be able to show that they would suffer some damage that cannot be adequately compensated for in damages."

For this reason, the question of whether damages are an adequate remedy will sometimes not be a determining factor. In this case the position of both parties is similar and so the question of whether damages are an adequate remedy is not a determining factor.

54. This is because, first, in relation to Dengrove's ability to meet a claim for damages, Mr. Ryan alleges that if an injunction is not granted, Dengrove is not in a strong enough financial position so as to be able to pay damages to him if the sale of the Site by the Receiver (rather than by the Partnerships) is held by the trial judge to have led to a financial loss to him. Based on Mr. Ryan's guesstimate of the Site's value at €60 million, Dengrove submitted that one was talking of a potential loss (and so damages payable to Mr. Ryan) of approximately €2.5 million, after payment of both the loan attributable to the purchase of the Site and expenses, assuming that it is established that the Site was sold for say 20% undervalue by the Receiver.

55. Against this backdrop, Mr. Ryan argues that damages are not an adequate remedy for him because Dengrove, an entity regulated by the Central Bank, would not, in his view, be able to pay him say €2.5 million in damages.

56. He relies for this claim primarily on an article from *The Irish Times* dated 1st July, 2020 (an updated version of an article originally published on 20th May, 2020). This article states *inter alia* that:

> "US investment firm Colony Capital is believed to have engaged Eastdil Secured to handle the process of disposing of its interest in Irish real estate, which it holds directly and indirectly.
>
> News of the appointment comes just weeks after The Irish Times reported that the Los Angeles-headquartered private equity giant [Colony] had made a number of targeted approaches to potential suitors.
>
> While Eastdil Secured declined to comment on the matter, their track record in the sale of both loans and hard assets gives Colony the option of exploring a loan or an asset disposal.
>
> Colony currently has interest in a number of Dublin's highest-profile office properties either directly or indirectly, and a part of a joint venture with the British property group, U+I. […]
>
> Colony's most significant assets, in its own right, include a 75 per cent stake in the Burlington Plaza office complex on Burlington Road and a 72 per cent share in the headquarters of Three Ireland on Sir John Rogerson's Quay. […]
>
> Outside of its individual Irish interests, Colony's Irish portfolio also includes shares in a number of Dublin office buildings with U+I. Located mainly in Dublin 4, these include Donnybrook House, 23 Shelbourne Road and Carrisbrook House."
> (Emphasis added)

57. Mr. Ryan also relies on other media reports, for example, he exhibits an internet article dated 14th July, 2020 taken from a US-based real estate news website called *TheRealDeal* which is written in largely the same vein as the aforementioned *Irish Times* article. This article is entitled *'Colony may lose control of 2 largest CMBS hotel portfolios'* and insofar as relevant states that:

> "Colony Capital revealed in May that it was in discussions with lenders after having defaulted on $3.2 billion in hotel loans […]
>
> Now, Colony is in jeopardy of losing control of its two largest CMBS-financed hotel portfolios [the Tharaldson portfolio and the Inland portfolio].
>
> […]

[The portfolios] are two of seven portfolios Colony Capital currently owns […].”

58. It is to be noted first that one is dealing with a newspaper article and news website, which, when one considers the various types of evidence that one might rely upon, is not the most compelling type of evidence upon which to support a claim of inability to pay. Secondly, these articles are notable for the fact that they do not mention Dengrove at all, but rather deal with its parent company, Colony Capital. Thirdly, insofar as the *Irish Times* article refers to Dengrove indirectly, (i.e. by referencing Colony Capital’s assets in the State, which might be taken to mean Dengrove’s assets) it lists those assets, which in itself can be regarded as positive financial information regarding Dengrove, since it lists valuable properties e.g. shares in the Burlington Plaza office complex and the headquarters of Three Ireland on Sir John Rogerson’s Quay. Fourthly, that article speculates that Dengrove is seeking to dispose of certain Irish assets by ‘*loan’* or by an *‘asset disposal’*. Fifthly, in relation to the above-mentioned US real estate internet article, insofar as it deals with the financial difficulties of Colony Capital, it refers to just two out of a total of seven portfolio companies owned by Colony Capital which are not in a position to repay their debts. Sixthly, Mr. Haig Bezian (“Mr. Bezian”) of Dengrove avers that these news items deal only with Dengrove’s parent’s financial issues. He avers that Colony’s financial position is irrelevant since Dengrove does not rely on its parent for its solvency. He also avers that Dengrove is able to pay its debts as they fall due and that it was initially capitalised by Colony entities and by a senior debt facility, but that the underlying value of the security held by Dengrove comfortably exceeds the amount outstanding of that facility.

59. If this Court accepts Mr. Bezian’s averment that Dengrove is solvent, damages are an adequate remedy for Mr. Ryan, if the injunction is discharged by this Court and at the trial it is found that it should not have been discharged. It is also relevant to note that, as is clear from the decision of Clarke J., as he then was, in *Sheridan v. Louis Fitzgerald Group* [2006] IEHC 125 at para. 4.3 wherein he referred to the decision of the High Court (Kelly J.) in *Smithkline Beecham PLC v. Gethon BV* [2003] IEHC 623 that:

> “the onus was on the plaintiff, as a matter of probability, to demonstrate the risk that damages would prove to be an inadequate remedy.”

It is this Court’s view that neither the foregoing *Irish Times* article nor the US internet article amount to sufficient evidence to allow this Court to reach the conclusion that damages are not an adequate remedy if the interlocutory injunction were to be refused and Mr. Ryan was then to be granted a permanent injunction at the hearing of the action.

60. In furtherance of his argument that Dengrove will not be able to meet an award of damages, Mr. Ryan draws attention to the drop in the share price of Colony Capital over the past three years as per Stock Exchange figures. In this regard, Mr. Ryan avers that the share price of Colony has suffered a ‘*calamitous*’ reduction in this time period and claims that recent media reporting shows Colony is *‘entirely illiquid’*. Mr. Ryan draws particular attention to the fact that Colony’s share price fell from $5.11 on 20th February,

2020 to $2.31 on 14th July, 2020 as evidence of the inability of Dengrove to meet any future award of damages.

61. However, firstly, Dengrove argues that the fall in the share price of Colony over this five-month period is reflective of index trends generally during this period and is therefore not indicative of Dengrove's inability to meet an award of damages at some future point. Secondly, this Court would note that many of the points relating to the *Irish Times* article mentioned above can be equally applied to the share price argument, since it is not the share price of Dengrove, but its parent, Colony. As noted previously, Mr. Bezian has averred that Dengrove does not rely on its parent company for its solvency and is able to pay its debts as they fall due. This Court does therefore not consider the averments made by Mr. Ryan regarding the share price of Colony to be sufficient evidence to reach the conclusion that damages will not be an adequate remedy if an interlocutory injunction were to be refused and Mr. Ryan was to then win at the trial of his action.

62. Next, this Court will consider Mr. Ryan's ability to meet a damages award if the injunction is granted by this Court, but the trial judge finds that it should have been discharged. In many ways, his position is similar to Dengrove's in the sense that, curiously, he has chosen not to exhibit his bank statements from 2020, but rather he exhibits his bank statements from 2017 and 2018 in support of his claim that he would be able to meet a damages award against him in 2020 (or indeed at a future point, when the judgment of the trial judge is delivered).

63. However, to counter this apparent anomaly, just as Dengrove is asking this Court to rely on its averment that it is solvent, so too Mr. Ryan asks this Court to rely on his averment that his financial position from a couple of years ago, that he has chosen not to update, has not changed.

64. If this Court accepts this averment therefore, it is also the case that damages are an adequate remedy for Dengrove, if the interlocutory injunction is granted and at the trial it is found that it should not have been granted.

65. Accordingly, there is little between the two parties when it comes to considering adequacy of damages. In both instances, there is a suggestion from one party that the financial position of the other is not as sound as it should be, and in both instances the response is an averment, as distinct from evidence, that this is not correct. This Court has adopted, *per* O'Donnell J., a robustly sceptical approach to each claim by one party that the other is not in a strong financial position, particularly in light of the nature of the evidence upon which reliance is placed. Indeed, in light of the limited nature of the evidence regarding the financial position of the parties, the safer route seems to be for this Court to be robustly sceptical of both claims, in line with the judgment of O'Donnell J. above, that damages are not an adequate remedy and instead this Court accepts the averments of both parties that both will be able to meet an award of damages at the trial.

66. Furthermore, this Court notes that, a further factor (in deciding whether to grant an interlocutory injunction) to which O'Donnell J. refers, namely the difficulty in assessing

damages, is not present in this case, since it should be a relatively straight forward task in assessing at the trial, based on expert evidence, what the undervalue, if any, would be of a receiver-sale versus a sale by the Partnerships. Accordingly, an award of damages offers Mr. Ryan a '*precise and perfect remedy*' in the words of O'Donnell J., and so militates against the grant of an interlocutory injunction.

67. For this reason, this Court concludes that when the question of adequacy of damages is weighed in the balance of justice it does not favour the granting of the injunction.

Conclusion

68. For the foregoing reasons, this Court concludes that the balance of justice favours the refusal of an injunction prohibiting the Receiver from selling the Site, because of*, inter alia*, first, the lack of sufficient evidence to support a finding that the sale by the Receiver might lead to a lesser price than if the Site was sold by the Partnerships and, secondly the lack of sufficient evidence to conclude that Dengrove might not be able to meet an award of damages to compensate for the undervalue, if this turned out to be the case.