THE HIGH COURT

[2020] IEHC 594

[2019/7337/P]

BETWEEN

EMMA THOMPSON

AND

BEAUTIFUL MINDS CRECHE AND MONTESSORI LTD

PLAINTIFFS

AND

STEPHEN TENNANT AND PROMONTORIA (ARAN) LTD

DEFENDANTS

JUDGMENT of Ms. Justice Nuala Butler delivered on the 12th day of November 2020

1. Between 2007 and 2010 the first plaintiff ("the plaintiff") entered into a series of loan facility agreements with the Ulster Bank. The loans advanced were secured by way of a charge created by a mortgage dated 29th November 2007 over two properties, namely no. 2 and no. 4 Upper Eden Road, Glenageary, Co. Dublin which was described in the deed creating the mortgage, collectively, as "the Mortgaged Property". By Global Deeds of Transfer in February 2015 and February 2016 the Ulster Bank transferred its interests in the loan facility and the charge over the Mortgaged Property to the second defendant ("Promontoria").

2. It is undisputed that at the time of this application the plaintiff remained indebted to a significant extent to Promontoria on foot of these loans, although the precise extent of her indebtedness appears to be a matter in dispute between the parties. Consequently, in circumstances where the secured liabilities had become payable by the plaintiff to Promontoria on 10th January 2019, Promontoria appointed the first defendant as a receiver over property identified in the Schedule to the deed of appointment. That property is expressly stated to be "a portion of the Mortgaged Property" and is identified in the Schedule as being the premises at no. 2 Upper Eden Road. As will be seen, issue is taken with the manner in which the first defendant accepted that appointment in that he has expressly agreed to act as a receiver "of the Mortgaged Property in accordance with the terms of this deed of appointment".

3. The application now made to the court arises in circumstances where following an exchange of correspondence, the solicitors on behalf of the plaintiff sought to establish the legal basis for the appointment of a receiver and the solicitors on behalf of the defendants sought certain information including copies of all leases applicable to the premises. The defendants also sought access to the property for the purposes of carrying out an inspection to obtain a BER certificate and a Property Summary Report.

4. On the 12th September 2019, the defendants' solicitor wrote to the plaintiff's solicitor seeking confirmation that the plaintiff would allow the defendants' agent to access the property for the purposes of carrying out an inspection on Saturday 14th September 2019. The plaintiff's solicitor replied expressly refusing such access and advising that if any attempt was made to access the premises the plaintiff would regard it as a criminal act and call An Garda Siochána. In the event, the defendants' agents did attempt to access the premises on the morning of Saturday 14th September 2019, whereupon An

Garda Siochána were called and attended at the scene. In circumstances where access was denied, the defendants' solicitor advised in a letter dated 17th September 2019 that the defendants would attend the property when the business was closed, and seek to take possession without further notice to the plaintiff. The plaintiff's solicitor, by letter dated 18th September 2019, identified the existence of a legal dispute between the parties and sought a series of undertakings from the defendants to the effect that they would neither seek to take possession of the premises nor act on foot of the receivership in any way.

5. In light of this correspondence, the plaintiffs instituted proceedings on the 20th September seeking a series of permanent injunctions against the defendants; an order declaring the appointment of the receiver invalid and orders directing accounts of the sums due under the loan facilities and in particular of an adjustment to the loan balance dated 7th February 2017. The plaintiffs also sought interim injunctions in similar terms. When the matter was returned to the High Court the defendants offered an undertaking to refrain from taking possession of or accessing the premises at no. 2 Upper Eden Road pending the return date for the plaintiffs' motion seeking injunctive relief. That motion was issued on 24th September 2019 and is the application currently before the court.

6. No. 2 Upper Eden Road is a commercial property in which the plaintiff and the second plaintiff ("the company") run the business of a crèche. The precise role of the company in the business is unclear in circumstances where the plaintiff has exhibited a certificate from Tusla, the Child and Family Agency, identifying the plaintiff in her personal capacity as both the registered proprietor of the business and as the "person in charge". The court is advised that some 55 children attend this crèche which employs sixteen members of staff.

7. Clause 10 of the mortgage deed contains a prohibition on the mortgagor (i.e. the plaintiff) leasing the mortgaged property without the written consent of the bank. Notwithstanding this prohibition, on the 10th July 2010, the plaintiff leased no. 2 Upper Eden Road for a period of 25 years to an entity described as "The Magic Roundabout Ltd." being a company through which at that time the plaintiff ran her crèche business. As it happens, it appears that that company was not incorporated until the 30th August 2010 and therefore it did not exist at the time it purportedly entered into the lease. Indeed, when that company was incorporated it was under a different name, namely The Magic Roundabout Crèche and Montessori Ltd.

8. The consent of the Ulster Bank to the creation of this lease was neither sought nor granted. However, the plaintiff in her affidavit avers to the fact that the Ulster Bank and subsequently Promontoria were aware of the lease and she exhibits correspondence addressed to her "care of The Magic Roundabout Ltd" from Ulster Bank and also correspondence seeking management information in relation to the Magic Roundabout. She also avers that the Magic Roundabout paid rent directly to the Ulster Bank and later directly to Promontoria although no evidence is exhibited to support this averment.

9. The plaintiff in her affidavit of 20th September 2019 explains that in 2014 she incorporated another company, the second plaintiff ("the company") Beautiful Minds

Crèche and Montessori Ltd. to run her crèche business and that in early 2017 the Magic Roundabout Crèche and Montessori Ltd. assigned the 2010 lease of no. 2 Upper Eden Road to the company.

10. Notwithstanding the assignment of the unexpired residue of the 25-year lease, in 2017 the plaintiff and her husband granted a 15-year lease to the company at an annual rent of €66,000 ("the second lease"). Although the consent of Promontoria was neither sought nor granted in respect of the second lease, the plaintiff contends that the company paid rent directly to Promontoria which, as mortgagee accepted such payments. Extracts from the company's bank statements covering a period from 1st April 2019 to 11th June 2019 show two payments of €5,500 each, one on 13th May and one on 30th May being made directly to Promontoria. That sum, €5,500, equates to one-twelfth of €66,000, or a months rent.

11. At the commencement of the hearing before me, Counsel on behalf of the defendants advised the court that, regardless of the outcome of the plaintiffs' application, the defendants were prepared to extend the existing undertaking already given by them to 1st February 2021 on condition that they were provided with reasonable access to the premises to conduct an inspection for BER purposes. In the defendant's view, that would provide the plaintiffs with sufficient time to find alternative premises for the crèche business. This was not acceptable to the plaintiffs in part, as I understand it, because the interlocutory relief sought by the plaintiffs is in broader terms than the existing undertaking, and also because the plaintiffs fundamentally dispute the validity of the receiver's appointment.

Applicable legal principles

12. As the application before the court is for an interlocutory injunction, it is one which falls to be decided in light of the principles set out by the Supreme Court in *Campus Oil v. Minister for Industry and Energy (no. 2)* [1983] IR 88, and is further refined by that court in *Okunade v. Minister for Justice* [2012] 3 IR 152 and *Merck Sharp and Dohme Corp v. Clonmel Healthcare Ltd.* [2019] IESC 65. Those principles are well established in Irish law and need only be stated in summary form here.

13. Firstly, a party seeking interlocutory injunctive relief must establish that there is a fair question or a fair issue to be tried between the parties in the substantive proceedings. It is unnecessary for the court to consider at the interlocutory stage what the ultimate outcome of those proceedings might be and a fair issue can be said to arise once the case made is neither frivolous nor vexatious. This standard may, however, be subject to some modification and a higher threshold applied where the results of the interlocutory application will completely or significantly determine the case (*Okunade*) or where the interlocutory application is for mandatory relief (see Clarke C.J. in *Charleton v. Scriven* [2019] IESC 28 applying Fennelly J. in *Maha Lingam v. HSE* [2005] IESC 89). As neither of these circumstances arises here, I do not propose to consider further any higher threshold that might apply as the relevant standard in this case is whether there is a fair issue to be tried.

14. Once it has been established that there is a fair issue to be tried the court should then proceed to consider where the balance of convenience lies in terms of the respective positions of the parties pending the trial of the action. As was made clear by Clarke C.J. in *Okunade*, in circumstances where the court cannot know at the interlocutory stage what the ultimate outcome of the proceedings will be, in carrying out this exercise the overall approach which the court should take is to act to minimise the risk of injustice.

15. Finally, the ultimate outcome of litigation will frequently be an award of damages in favour of one party. If an award of damages adequately compensates the successful party for whatever claim is made, then there may be no need to grant injunctive relief to maintain that party's position whilst the litigation is pending. Whilst previously it was common for courts to consider the adequacy of damages as a discrete issue before addressing the balance of convenience, O'Donnell J. in *Merck Sharp and Dohme* regarded it as preferable to consider the adequacy of damages as part of the balance of convenience. This is because the fact that one party may suffer irreparable harm which cannot be compensated in damages may not of itself be determinative, as a number of other factors may tip the balance in favour of the opposing party. Thus, what O'Donnell J characterised as the "essential flexibility of the remedy" is better served by looking at matters in the round rather than focusing unduly on the question of damages.

Admissibility of evidence:

16. I now proposed to apply these legal principles to the facts of the case and the arguments made on behalf of the parties to the court. However, before I do so, I must address a procedural or preliminary argument made on behalf of the plaintiff to the effect that the evidence adduced on behalf of the defendants was not admissible evidence pursuant to O. 40 r. 4 of the Rules of the Superior Courts.

17. This argument arises in circumstances where the plaintiff, a private individual, dealt firstly with Ulster Bank and then with Promontoria, both of which are large financial institutions. Further, Promontoria appointed a third party, Link Space ASI Ltd. ("Link") to provide a loan administration service to it, which included administration and management of the plaintiff's loan facilities and related security. The deponent of the affidavit sworn on behalf of both defendants, a Mr Ciaran Dowling, is head of Asset Insolvency (Ireland) employed by Link which is not a party to the proceedings.

18. The plaintiff contends, correctly, that Mr Dowling does not have personal knowledge of her affairs and was not personally involved in either Ulster Bank's or Promontoria's dealings with her. Consequently, it is argued that the averments made by Mr Dowling on affidavit, based on his examination of the books and records of the defendants, are inadmissible as hearsay evidence as they comprise statements of fact and not of his belief as to matters of which he does not have first hand knowledge. This argument became somewhat confused when criticism was also made of Mr Dowling giving evidence of his opinion. Opinion evidence is normally only admissible when given by an expert and the person purporting to give opinion evidence may be required to establish his or her expertise to the satisfaction of the court before such evidence will be admitted. I do not think that Mr Dowling in this case was purporting to give opinion evidence on behalf of

the defendants. It may be that in attempting to distinguish factual evidence from evidence of a deponent's belief, the plaintiff has inadvertently confused two discrete, albeit overlapping, concepts. In any event, I propose to deal with the argument as to whether the evidence of Mr Dowling's belief as to the factual matters averred to by him is properly before the court.

19. It might be noted that this argument is not made in respect of the entire of Mr Dowling's affidavit but is directed to particular aspects of the evidence, namely, to Ulster Bank's and Promontoria's treatment of the leases and the to validity of the receivership in respect of which it is pointed out that there is no rebutting averment made by Mr Dowling at all.

20. Hearsay evidence is permitted on an interlocutory application pursuant to O. 40, r. 4 of the RSC which provides as follows:-

> "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted."

21. Thus, what is effectively hearsay evidence of a witnesses' belief as to certain facts is admissible on an interlocutory application provided the grounds for that belief are stated in the affidavit. In this case counsel for the defendant points to the introductory three paragraphs of Mr Dowling's affidavit and in particular para. 3, as establishing his overarching means of knowledge for the purposes of the entire affidavit. In para. 3 of the affidavit Mr Dowling deposes to the fact that he has access to the relevant books and records including electronic records and that he makes the affidavit both from his own knowledge and from a perusal of these books and records.

22. Although traditionally affidavits were drafted in a far more prolix form than is now the practise and in which every paragraph commenced "I say and believe...", I regard it as unnecessary to adopt such a formulaic drafting style when the basis upon which the deponent is swearing as to the matters averred to is readily apparent from the affidavit read as a whole. In this case, the affidavit is clearly sworn on the basis of the examination of the books, records and electronic records held by the defendants in relation to the plaintiff's loan and security. I accept the defendant's argument that para. 3 constitutes the overarching means of knowledge which grounds the deponent's belief as to the thruth of the facts averred to. Consequently, the evidence adduced by the defendant is admissible.

23. However, the fact that evidence is admissible is not necessarily the end of the matter as not all admissible evidence carries equal weight. In this case, counsel for the plaintiff has pointed to averments contained in para. 18 of Mr Dowling's affidavit which contend that Promontoria did not engage in positive conduct such as accepting rent from the company. Given that in her affidavit the plaintiff has averred both to attendance at meetings at which Promontoria was informed that the Magic Roundabout Crèche and Montessori Ltd. was paying rent directly to Ulster Bank and thereafter would be paying it directly to

Promontoria and has exhibited extracts from the company's bank statements showing the payment directly to Promontoria, the evidence adduced on this issue by the plaintiff is clearly better evidence of what may have occurred than Mr Dowling's belief, being an inference drawn from the records, that acceptance of rent directly from the company did not happen. Therefore, although Mr Dowling's evidence on this point is admissible in principle for the purposes of the interlocutory application, the plaintiff's evidence based on her personal knowledge and on exhibited documentary material is clearly stronger on this issue. Further, given that the threshold the plaintiffs are required to meet is that there is a fair issue to be tried between the parties, their evidence on this issue is manifestly sufficient to meet this threshold without it being necessary for them to exclude the defendants' evidence.

24. Finally, although it is a somewhat discrete issue, a complaint is made that as Mr Dowling has not expressly addressed the appointment of the receiver in his affidavit in order to rebut the plaintiff's assertion that the appointment was invalid, there is no evidence to contradict the plaintiff's assertion in this regard. In my view, the argument concerning the validity of the appointment of the receiver is essentially a legal argument. One limb of it queries the legal basis for the appointment of the receiver given the provisions of the mortgage and the relevant statutory provisions and the other limb contents that acceptance of that appointment by the receiver was invalid because of the form in which that acceptance was executed. Both the mortgage and the deed of appointment have been exhibited by the plaintiff. It is open to the defendants to make any legal argument they wish in responswe to the legal arguments made by the plaintiff based on those documents. It is not necessary that legal arguments be formally averred to by a deponent without legal qualifications and indeed it is undesirable in principle that this should be done. In any event, Mr Dowling explains in his affidavit that he is only replying to specific aspects of the plaintiff's affidavit and further states for the avoidance of doubt that he rejects the contentions made by the plaintiff in her affidavit. Consequently, I do not accept that there is any evidential deficit under this heading either.

Fair issue to be tried

25. The plaintiff has identified three issues arising in her proceedings which she contends amount to a fair issue to be tried and most of the argument before the court centred on whether, in fact, these issues met the necessary threshold as discussed earlier in this judgment. In circumstances where I am satisfied that two of the three issues identified by the plaintiff do in fact meet the threshold, any comments made by me in relation to the third issue are necessarily obiter. A finding that a particular issue amounts to a fair issue to be tried is relevant only to the application for interlocutory relief and does not operate as any form of leave to the plaintiff to pursue these issues, nor would the contrary finding operate as any form of prohibition on her doing so at the substantive trial.

26. The first of the three issues raised is whether the company (i.e. the second plaintiff) has a lease or a tenancy in 2 Upper Eden Road which is binding on the defendants. The plaintiff contends that payment by the company of rent directly to Promontoria and receipt of that rent by Promontoria established a relationship between the company and

Promontoria, such that either the existing lease became binding on Promontoria notwithstanding the absence of written consent or, alternatively, the acceptance of rent created an implied periodic tenancy on a yearly basis on the same terms as the existing lease. In addition, the plaintiff also contends that a letter from the defendant's solicitors dated 5th June 2019 which states:-

> "We acknowledge that there may be a tenancy in place and as per our previous correspondence we have requested copies of the alleged lease and details of any rent payable".

amounts to an acknowledgement of the tenancy on the part of the defendants. The defendants, in contrast, argue that the only evidence offered to support the existence of a new tenancy is the bank statements showing payments by the company to Promontoria and that the inference sought to be drawn from those payments is inconsistent with the express terms of correspondence sent by the plaintiff's solicitor at the same time, in which it is asserted that the first plaintiff, personally, had been in a "de facto alternative repayment arrangement" since 2016 relying, *inter alia*, on the same payments. It is argued that the plaintiffs can not simultaneously contend that the payments in issue represent repayments of the loan being made by the first plaintiff and also payment of rent by the second plaintiff. Further, the defendants rely on the judgment of Keane J. in *Cotter v. Landscape House Golf and Leisure Ltd*. [2015] IEHC 128 as supporting the proposition that a request for information about a tenancy cannot be read as acquiescence or an acknowledgement of the lease so as to bind the party seeking information. The defendants also point to some technical flaws in the lease including, most significantly, that the schedule in which the demised premises are to be described is left blank – although as the plaintiff points out the lease itself is entitled an occupational lease of no. 2 Upper Eden Road. Finally, the defendants reject the notion that they would have consented to a 15-year lease, as to do so would effectively neuter their security over the property.

27. Both parties rely on the judgment of Dunne J. in *Fennell v. N17 Electrics Ltd*. [2012] IEHC 228 to support certain of the arguments made under this heading. In particular, I note the reliance placed by the defendant on the observations made by Dunne J. at para. 44 of the judgment and their application, by analogy, to the facts of this case. I accept, to paraphrase Dunne J., that it would be inconceivable that Ulster Bank or Promontoria would have agreed to a lease of the premises on the particular terms of the second lease as that would have been entirely contrary to their interests. However, I think the real issue is less whether Promontoria agreed to the existing lease and more whether a new lease or tenancy can be said to arise by virtue of the payment by the company of rent directly to Promontoria. In this regard, the plaintiff relies on the apparent approval by Dunne J. of the comments of Monroe J. in In *re O'Rourke's Estate* [1889] 23 LR Ir. 497 at p. 500 as follows: -

> "It is open, however, to the mortgagee and the tenant by agreement, express or implied, to create a new tenancy; and the question which always arises is the mere

question of fact, whether such an agreement has been made in the particular case. If the mortgagee enters into the receipt of the rents and continues to take them from the tenants, this is almost conclusive evidence of an agreement between the mortgagee and the tenant for a new tenancy from year to year on the terms of the old tenancy; or, if the mortgagee served notice on the tenant, requiring him to pay his rents direct to the mortgagee, and the tenants do not dissent, these are facts from which a jury may, and probably ought, to infer the existence of such a contract of tenancy."

28. In this case, there is evidence before the court of the payment of rent by the company directly to Promontoria and the acceptance by Promontoria of that rent. Although the defendant disputes the existence of a tenancy binding on the defendants, Mr Dowling has not expressly engaged with the evidence adduced by the plaintiff on this issue save to deny the taking of any positive action. Whilst the plaintiff's evidence in this regard is undoubtedly stronger than the defendants, at this stage it is not necessary for the court to make any finding as regards whether a new lease can be implied as existing between the company and Promontoria in all of the circumstances. It is sufficient that the plaintiff has established that there is a fair issue to be tried under this heading.

29. The second issue which the plaintiff contends amounts to a fair issue to be tried concerns the validity of the appointment of the receiver. I have considerable concerns in light of the authorities opened by the defendant whether this issue would of itself be sufficient to meet the necessary threshold of being a fair issue. However, in circumstances where I am satisfied that the other issues raised by the plaintiff do in fact meet that threshold, the observations made below are necessarily obiter. The plaintiff contends, correctly, that the mortgage deed itself does not contain any express power for the appointment of a receiver. Consequently, the plaintiff contends that the only basis upon which a receiver can be appointed is under s. 19(1)(iii) of the Conveyancing Act, 1881. This provision provides a mortgagee with a statutory power to appoint a receiver when the mortgage money has become due. However the plaintiff contends that the text of s. 19(1)(iii) only allows for the appointment of a receiver over "the income of the mortgaged property, or of any part thereof" and not over the property itself. Thus, it is contended that Promontoria did not have the power to appoint the first defendant as a receiver over the property, but merely over the income from the property and consequently the receiver could not purport to take possession of the premises.

30. In responding to this aspect of the case, the defendant's counsel drew the court's attention to two authorities namely *Dowdall v. O'Connor* [2013] IEHC 423, McDermott J., and *Woods v. Ulster Bank* [2017] IEHC 155, Baker J. As it happens, both of those cases involved the appointment of receivers on foot of charges created by Ulster Bank in apparently identical terms to the mortgage in this case. As in this case, Clause 8 of the mortgage excluded the application of ss. 17 and 20 of the Conveyancing Act, 1881 but provided that "other powers" which must encompass at least the other statutory powers conferred upon a mortgagee under the 1881 Act "shall be exercisable any time after demand". In *Dowdall*, McDermott J. (at para. 24) expressed himself satisfied that the

power to appoint a receiver under s. 19(1)(iii) was one of the powers contemplated in Clause 8 and noted, as here, that Clauses 11 and 12 also make specific reference to the appointment of a receiver. The specific issue in *Dowdall* concerned whether the power to appoint a receiver under s. 19 of the 1881 Act subsisted by virtue of the contractual relationship between the parties, notwithstanding the fact that s. 19 of the Conveyancing and Law of Property Act 1881 had been repealed by s. 8 of the Land and Conveyancing Law Reform Act 2009. On that specific issue, McDermott J. held that as the agreement between the parties was made by reference to the provisions of the 1881 Act at a time when that Act was of full force and effect, the proper construction of the mortgage which required the relevant provisions of the 1881 Act be read into the mortgage agreement meant that they had been incorporated as part of the terms of the agreement and, thus, the subsequent repeal of those sections did not have an effect on the proper interpretation of the contract between the parties.

31. Counsel for the plaintiff sought to distinguish *Dowdall* on the basis that the real issue in the case concerned whether the provisions of s. 19(1)(iii) could continue to be read as part of the agreement between the parties, notwithstanding their repeal from the statute book. This is correct, but only to a limited extent because the subsequent decision of Baker J. in *Woods v. Ulster Bank* which approved McDermott J.'s judgment was given at a time subsequent to the Land and Conveyancing Law Reform Act 2013, s. 1 of which restored the applicability of s. 19 of the 1881 Act to mortgages created prior to 1st December 2009. Therefore, Woods is approval for the broader principle that the statutory power to appoint a receiver under s.19(1)(iii) of the 1881 Act applies under the terms of a deed identical to that in issue here. Thus the basis for the distinction sought to be drawn is not valid.

32. The defendant argued that it is apparent from the facts of both *Dowdall and Woods* that although the power to appoint a receiver derived from s. 19(1)(iii) of the 1881 Act, once appointed, the receiver also had the other powers conferred on a receiver by virtue of the terms of the mortgage itself and notes that in *Woods,* in particular, the power exercised by the receiver was a power of sale derived from the contract. As against this, the plaintiff relies upon the recent judgment of McDonald J. in *McCarthy v. Moroney* [2018] IEHC 379. The deed in issue in *McCarthy* allowed the mortgagee to appoint a "receiver and manager" and conferred certain powers on a "receiver and manager" so appointed. The deed also made clear that this power of appointment was in addition to the statutory powers of a mortgagee under the 1881 Act. Thus, McDonald J. accepted that it would have been in order for the mortgagee to appoint a person as a receiver for the purposes of exercising powers under the 1881 Act. However, given the distinction drawn between the contractual power to appoint a "receiver and manager" and the statutory power to appoint a receiver, a person purportedly appointed as a receiver under the 1881 Act could only exercise the statutory powers under that Act, and could not also exercise powers conferred by the contract on a "receiver and manager". Thus, the observations of McDonald J. at para. 162(e) noting the limited statutory powers of a receiver and the fact that an implied power for such a receiver to take possession of the property would only arise where it was necessary for the receiver to take possession in order to collect the

rents, do not operate as a general restriction on the contractual powers of a receiver, albeit a receiver appointed pursuant to s. 19(1)(iii) of the 1881 Act.

33. Based on these authorities, it would seem that once a receiver is validly appointed pursuant to the statutory power contained in s. 19(1)(iii), that receiver may then exercise such other powers as the parties have agreed might be exercised by a receiver pursuant to the contract between them. On this basis, were this the only issue in the case I would have some considerable hesitation in finding that there was a fair issue to be tried. However, given the findings I have already made in relation to the lease and those which follow in relation to acceptance of the reciever's appointment, it is not in fact necessary for me to formally make a finding in this regard and indeed any finding so made would not limit the entitlement of the plaintiffs to pursue this argument at the trial of the substantive issue.

34. The third and final issue raised by the plaintiff concerns the acceptance by the receiver of his appointment. This argument focuses on the fact that the mortgage deed identifies the mortgaged property as being both no. 2 and no. 4 Upper Eden Road. The deed of appointment of the receiver specifically relates only to the premises at no. 2 Upper Eden Road. However, the acceptance by the receiver of his appointment, on the face of the same deed, is expressed to relate to an appointment "as receiver of all of the Mortgaged Property" and an agreement to act as a receiver "of the Mortgaged Property" in accordance with the terms of the deed of appointment. The plaintiff argues that the receiver has effectively consented to act as a receiver over property that is different to and greater in extent than that in respect of which he was appointed. The defendant argues firstly that it is clear from the deed read as a whole that the receiver is agreeing to act in accordance with the terms of the deed and, consequently, that as the deed relates only to no. 2 Upper Eden Road he is not in fact purporting to accept any greater authority or authority over any greater property than that which the deed actually confers. In more general terms the defendant argues that acceptance of something greater than that which is offered does not invalidate the acceptance of the lesser.

35. Whilst on a purely pragmatic basis the defendant's argument seems the more attractive, at this stage the only task facing the court is to determine whether the plaintiff has raised a fair issue to be tried on this point. Given the rigour with which the courts have interpreted deeds creating charges and allowing for the appointment of receivers thereunder (see for example McDonald J. in *McCarthy* above and Gilligan J. in *The Merrow Ltd. v. Bank of Scotland* [2013] IEHC 130) it could not be said with confidence at an interlocutory stage that the plaintiff's argument in this regard is frivolous or vexatious. I note the defendant suggests a distinction on the basis that these cases relate to the formal deeds of charge or of appointment and not to the receiver's acceptance thereof. Whilst this may ultimately be found to be correct, in the absence of authority on this point, I do not think the potential distinction deprives the point of its character as a fair issue to be tried.

Balance of convenience

36. As the plaintiff has established that there is a fair issue to be tried in the proceedings the court must now consider where the balance of convenience lies, including whether damages would be an adequate remedy for the defendants if they are restrained from acting upon the security pending the trial of the action and the plaintiff does not succeed at trial. Although the balance of convenience is not limited to a consideration of the adequacy of damages, the argument before the court focused significantly on this issue.

37. The plaintiffs argue that any losses which will be sustained by the defendant will be purely financial and thus compensable in damages, and will be adequately covered by the undertaking as to damages provided by both plaintiffs. In contrast, it is contended that there are two elements of the plaintiff's claim for which damages would not be an adequate remedy. The first is that the plaintiffs are claiming an infringement of their constitutionally protected property rights and although damages might be awarded, they can never compensate for such an infringement in full. Secondly, it is pointed out that if the defendants take possession of the property the crèche business currently run by the plaintiffs in that premises could not continue. Apart from the financial losses which would arise, there would be a significant degree of inconvenience for the children attending the crèche and the parents of those children in sourcing alternative childcare which may or may not be available in the locality. Additionally, the staff currently employed by the plaintiffs at that location would lose their jobs.

38. Against this, the defendants argue that the defendants are clearly in a position to pay any damages that might be awarded to the plaintiffs but question the substance of the undertaking as to damages offered by the plaintiffs. Although it is identified that the first plaintiff is the owner of three properties, the defendants point out that two of those properties are already charged to meet her significant indebtedness to Promontoria. Further, notwithstanding the defendant questioning on affidavit the substance of the plaintiff's undertaking, no financial information has been put before the court attesting to the ability of either plaintiff to meet such an undertaking. In particular, there is no information before the court as to the financial position of the company. It is clear from the approach taken by the defendants that they regard the plaintiff's proceedings as purely technical in nature and taken with a view to "putting off the inevitable" in circumstances where there is no substantive dispute as to the fact that monies are owing or that the defendants hold a valid security in respect of the property. Further, the defendants contend that the undertaking offered by them to date, and the extension of that undertaking to 1st February 2021, allowed the plaintiffs sufficient time to find alternative premises for their crèche business.

39. To a certain extent the evidence before me as to the adequacy of damages as a remedy is unsatisfactory. Whilst the plaintiffs rely on the first plaintiff's ownership of three properties and the company's operation of a crèche business, no information is provided as to the value of those properties, unencumbered or otherwise, and no financial information is provided in relation to the company's affairs save the snapshot that is evident from the two and a half months covered by the exhibited bank statements. As against this, the defendants have not given any estimate as to the likely losses to be

sustained by it by virtue of any delay in the realisation of its security as a result of these proceedings, nor, in circumstances where it holds a charge over two of the properties owned by the first plaintiff, has they given any indication of the value of those properties, nor the extent of the first plaintiff's indebtedness to Promontoria relative to that value.

40. Therefore, the court largely has to proceed by way of first principles in determining whether damages would be an adequate remedy and where the balance of convenience might lie. In this regard I am conscious of the comments made by O'Donnell J. in *Merck Sharp and Dohme* (above) in which, when considering the adequacy of damages, he looks at the relationship between the possibility of an award of damages and the grant of a permanent injunction at the substantive hearing. It is relevant that in this case, the plaintiff seeks permanent injunctions to prevent the receiver from purporting to exercise powers which are predicated on there being a valid receivership in place and/or the company not having a tenancy which binds the defendants. If the plaintiff succeeds in establishing either of these matters then it follows that the defendants could not validly enter into possession of or sell the property, or at least could not do so on foot of the actions taken to date. Further, although it would no doubt be possible to formulate an award of damages for the plaintiffs in those circumstances, particularly as regards the business losses that might be sustained, there are elements of the plaintiffs' claim which are more inchoate and in respect of which it would be more difficult to calculate and assess appropriate damages. As against this, any losses to be sustained by the defendants can be readily assessed and compensated for in damages, the only issue being the extent to which the plaintiffs would be able to meet any award of damages made against them. As previously noted, the evidence in this regard is somewhat unsatisfactory, but it is unsatisfactory on both sides of the case. In circumstances where the first plaintiff is the owner of three properties and the second plaintiff is currently operating what is apparently a viable business, I am not prepared to conclude on the basis of the evidence before me, that the undertakings offered in respect of damages are insufficient.

41. In conclusion, in circumstances where the plaintiffs have established that there is a fair question to be tried in the proceedings brought by them, the balance of convenience in the sense of minimising any potential injustice in circumstances where the legal rights of the parties have yet to be determined lies in favour of granting the plaintiffs interlocutory relief pending the trial of the action. I propose granting Orders in terms of paragraphs 1, 5 and 6 of the Notice of Motion. I regard the reliefs at paragraphs 2, 3 and 4 as unnecessary since all of the matters addressed in those paragraphs (attempting to sell, holding themselves out as having an entitlement to sell or to possession of the premesis and making contact with prospective purchasers) are covered by the injunction on taking any steps pursuant to the purported appointment as revciever over the property. However I will hear the parties if necessary on the form of the Order.

42. Finally, it should be noted that in granting this relief I do not in any way preclude the possibility that the defendants might, as they are entitled to, issue separate proceedings seeking to enforce their security against the first plaintiff. I am conscious that whilst the

grant of an interlocutory injunction in these particular circumstances does not effectively determine the proceedings between the parties, it may act as a significant disincentive for the plaintiffs to pursue the proceedings with any degree of urgency. Therefore, the injunctive relief which I propose to grant is expressly without prejudice to any separate proceedings that Promontoria might take seeking to enforce its security.