[2020] IEHC 628

THE HIGH COURT

[2019 No. 4318 P]

BETWEEN

TMT DIGITAL CENTRE LIMITED AND DOCMAY LIMITED

PLAINTIFFS

AND

RAY GREHAN, DANNY GREHAN, GLENKERRIN HOMES UNLIMITED COMPANY (IN RECEIVERSHIP), MICHAEL MCATEER AND PAUL MCCANN

FIRST TO FIFTH DEFENDANTS

AND

MAYNOOTH BUSINESS CAMPUS OWNERS' MANAGEMENT COMPANY CLG

SIXTH DEFENDANT

AND

JOMAIJO TRADING LIMITED

SEVENTH DEFENDANT

JUDGMENT of Mr. Justice Twomey delivered on the 27th day of November, 2020

SUMMARY

1. This is a case in which, the fourth and fifth named defendants, who are receivers (the "Receivers") appointed by National Asset Loan Management Limited ("NAMA"), seek to have the proceedings issued by the plaintiffs (collectively referred to as "TMT") struck out pursuant to the inherent jurisdiction of the court, on the grounds that they are bound to fail.

2. TMT has its registered office at 12 Camden Row, Dublin 8 and operates a business whereby it offers high specification office space and ancillary services. The dispute between the parties concerns the purchase by TMT of an office block for its business in Maynooth, Co. Kildare.

3. The dispute centres around the relocation of car parking spaces, which had been granted by the Receivers to TMT in a business campus in Maynooth. TMT claims that the relocation of these car parking spaces, from a surface car park to a basement car park, has resulted in the parking spaces being unusable.

4. The key issue, for this strike-out claim, is whether in light of the clear contractual exclusions of liability and the statutory exclusions of liability for the receivers referenced below, the proceedings should be struck out as bound to fail. A key factor in this Court's determination that the proceedings are not bound to fail is the fact that there is a High Court decision, *albeit* reversed on appeal, in which a similar claim regarding the same receivership regarding similar car park spaces was upheld.

BACKGROUND

5. TMT's proceedings against the Receivers relate to TMT's purchase of a Unit ("Block B" or "Unit B") and associated car parking spaces in Maynooth Business Campus (the "Business Campus") from the receiver of the first named defendant, ("Mr. Ray Grehan"). This receiver, who is not a party to these proceedings, is Mr. Martin Ferris ("Mr. Ferris"). He was appointed by Bank of Scotland Ireland. The contract for the sale of Block B is dated

23rd December, 2014 and is between TMT and Mr. Ray Grehan acting through his receiver, Mr. Ferris.

6. The Receivers, who are the subject of these proceedings, were appointed as Statutory Receivers on the 3rd May, 2011 over certain assets of Mr. Ray Grehan, the second named defendant ("Mr. Danny Grehan") and the third named defendant ("Glenkerrin"), together the "Developers". The sixth named defendant ("The Management Company") is the management company for the common areas in the Business Campus.

7. Since the Developers owned certain common areas in the Business Campus, over which the Receivers had been appointed, the Receivers granted to TMT, on 17th February, 2015, the Lease of Easements (the "Lease of Easements") which included the grant of 212 parking spaces. The Receivers agreed to do this in order to facilitate the sale of Block B in the Business Campus by Mr. Ferris to TMT. On 31st December, 2018, Docmay Limited, the second named plaintiff acquired the title and interest in Block B and the related car parking rights.

8. In particular, the dispute between the parties centres around the terms of this Lease of Easements between the Receivers and TMT. This is because on 22nd May, 2019, pursuant to Clause 10 of the Third Schedule of the Lease of Easements, the solicitors for the Receivers gave notice to solicitors for TMT of the relocation of some of the 212 car parking spaces, i.e. 94 surface car parking spaces, to a basement car park in the Business Campus, in the following terms:

> "On behalf of Glenkerrin Homes Unlimited Company (in receivership), Raymond Grehan and Daniel Grehan all parties acting by Michael McAteer and Paul McCann in their capacity as Statutory Receivers only, we hereby formally notify you and your client that the car parking spaces allocated to Block B are now relocated to the spaces as identified on the attached surface car park map and basement car park maps and thereon marked with the colour orange ("Notice").
>
> Please treat this correspondence as Notice in accordance with clause 10 of the Third Schedule of the Lease of Easements dated 17 February, 2015."

9. While this notice is dated 22nd May, 2019, it is relevant to note that the Receivers had, on 29th September, 2016, allocated these same 94 surface car parking spaces to the seventh defendant ("Jomaijo") as part of the sale of Units D & E of the Business Campus pursuant to the terms of a separate lease of easements dated 29th September, 2016.

10. However, in separate proceedings heard in the High Court, i.e. *Ray Grehan, Danny Grehan, Glenkerrin Homes Unlimited Company (In Receivership), Michael McAteer and Paul McCann v. Maynooth Business Campus Owners' Management Company CLG* [2019] IEHC 829 (the "*Unit C Proceedings*"), the High Court found that the Receivers knew that the basement car park was unusable (para. 48), that the car park was not compliant with Building Regulations as constructed (at para. 117), that the Receivers were aware of the structural issue (para. 107), and that that there is a probability that the entire structure

will become unsafe in 10 years or so (para. 114(e)). Although the High Court decision was reversed on appeal ([2020] IECA 213), this finding regarding the structural state of the basement car park was not reversed by the Court of Appeal (Costello, Noonan and Murray JJ.), which noted at para. 2 of its judgment that:

> "The underground car park on the campus requires extensive work to remedy serious deficiencies in its current condition."

11. Against this background, TMT's substantive proceedings against the Receivers are based on its claim that the relocation of the car parking spaces should be to a location of '*equal amenity and value to'* TMT's pre-existing spaces and which '*has been certified as structurally sound and safe and fit for purpose*' and not to an unusable basement. Accordingly, it seeks declaratory and injunctive relief to this effect.

12. The Receivers' application to strike out TMT's proceedings is based on the claim that, even if TMT has a cause of action regarding the relocation of the car parking spaces to an unusable basement (which is denied by the Receivers on the basis, *inter alia*, of *caveat (or lessee) emptor*), TMT's remedy is against the Developers, for whom the Receivers are agents. In particular, the Receivers rely on the express exclusions of personal liability for the Receivers contained in the Lease of Easements as well as the exclusions of liability contained in s. 149 of the National Asset Management Agency Act 2009 (the "NAMA Act") referenced below. On this basis, they claim that the proceedings should be struck out as bound to fail.

13. As this application relies on, *inter alia*, the interpretation of the Lease of Easements, it is necessary to set out the provisions of the Lease of Easements, which was executed by the Receivers, in some detail. Before doing so, reference will be made to the Contract for Sale in relation to Block B, executed by Mr. Ferris as receiver of the assets of Mr. Ray Grehan.

DETAILED BACKGROUND

The Contract for Sale

14. The Contract for Sale of Block B is dated 23rd December, 2014 (the "Contract") and is between TMT and Mr. Ray Grehan, who is stated to be '*acting by his receiver Martin Ferris'*. The Lease of Easements executed by the Receivers, to which reference has already been made, is document number 17 in the list of title and planning documents in Section A of the Documents Schedule to the Contract. In addition, the Deed of Appointment of the Receivers dated 3 May 2011 is listed in Section B of the Documents Schedule to the Contract.

15. Section 4.3 of the Contract explains that the original grant of easements was, through an apparent oversight, not signed by Mr. Ray Grehan and Mr. Danny Grehan and therefore:

> "it is being proposed by [Mr. Ferris] and agreed with the other parties on title to surrender both the Grant of Easements and Deed of Covenant and grant new forms of both documents to join in the legal owners in the form of documents listed at A17 – A19 of the Documents Schedule. The Purchaser shall accept the form of the

documents as furnished and shall not raise any further query or requisition in relation to same."

16. Clause 4.4 of the contract states:

> "Copies of the documents referred to in the Documents Schedule have been made available for inspection by the Purchaser or the Purchaser's solicitors prior to the Closing Date and the Purchaser, whether availing of such opportunity of inspection or not, shall be deemed to have purchased the Subject Property with full knowledge of the contents of the documents furnished."

17. Clause 6.7 states that:

> "Subject as hereinafter provided the Purchaser shall be deemed to have satisfied itself prior to the Date of Sale in relation to the actual state and condition of the Subject Property including all easements, rights, reservations, exceptions, privileges, covenants, restrictions, rents, taxes, incidents of tenure and other liabilities affecting the Subject Property and shall raise no objection, requisition or enquiry in this regard."

18. Clause 12 states:

> "CAR PARK SPACES
>
> The Purchaser shall have the exclusive use to 212 car parking spaces (Spaces) within the Estate the location of which can be varied from time to time. The Purchaser is referred to the letter from Grant Thornton as receiver of Glenkerrin Homes at A14 of the Documents Schedule which confirms approval of the current location of the Spaces on behalf of Glenkerrin Homes and to the plan confirming the current location of the Spaces at A 20 of the Document Schedule."

19. This letter referred to in Clause 12 which was scheduled at item 14 of the documents schedule is dated 17th October, 2013 and is from Grant Thornton, the firm of the Receivers, on behalf of Glenkerrin (In Receivership), to A & L Goodbody, solicitors for Mr. Ferris in the following terms:

> "RE: CAR PARKING PLANS – BLOCKS A&B, MAYNOOTH BUSINESS CAMPUS, MAYNOOTH, CO. KILDARE
>
> Further to your email dated 10th September 2013 we wish to confirm our approval with the car parking layout and spaces designated for Blocks A & B, Maynooth Business Campus.
>
> Please note as per the terms of the lease Glenkerrin Homes and Maynooth Business Campus Management Company reserve the right to alter or relocate these spaces if required in the Campus."

The main document to consider is however the Lease of Easements.

The Lease of Easements

20. This document is dated 17th February, 2015 and is between the following parties:

- Mr. Ray Grehan and Mr. Danny Grehan, who are stated to be "*acting by Michael McAteer and Paul McCann as Joint Statutory Receivers*" and are defined as the "*Registered Owners*" in the Lease of Easements,
- Glenkerrin, who is stated to be "*acting by Michael McAteer and Paul McCann as Joint Statutory Receivers*" and which is defined as the "*Lessor*" in the Lease of Easements
- Mr. Michael McAteer and Mr. Paul McCann of Grant Thornton, who are "collectively called the 'Joint Statutory Receivers'",
- The Management Company, which is defined as the "*Management Company*" in the Lease of Easements, and,
- TMT which is defined as the "*Lessee*" in the Lease of Easements.

21. Clause 1.3 defines "Car Parking Spaces" as those car parking spaces specified in Clause 5 of the Second Schedule of the Lease of Easements.

22. Clause 1.6 defines the "Estate Common Areas" as including parking spaces.

23. Clause 1.19 defines the "Premises" as the land more particularly described in the First Schedule of the Lease of Easements.

24. Clause 2.1:

> "Any reference to the Lessor shall mean the Lessor and/or the Management Company wheresoever same is applicable throughout the within Lease."

25. Clause 3.3:

> "The Lessor has developed the Estate Common Areas for the amenity and use of the owners and occupiers of the Units within the Estate and to this end the Lessor has procured the incorporation of the Management Company, with, *inter alia*, the object of acquiring the Estate Common Areas and assuming responsibility for the Estate Services pursuant to the terms of the Management Agreement."

26. Clause 3.7:

> "The Lessor has agreed with the Lessee to join in these presents for the purposes of granting to the Lessee the easements rights and privileges set out in the Second Schedule herein, excepting and reserving unto to Lessor the easements rights and privileges as set out in the Third Schedule herein."

27. Clause 3.8:

> "The Registered Owners acting by the Joint Statutory Receivers have agreed to join in these presents as the registered owner of the Estate and for the purpose of confirming the within demise."

28. Clause 4:

> "For the consideration appearing in the Transfer and in consideration of the covenants on the part of the Lessee as hereinafter set out, the Lessor acting by the Joint Statutory Receivers HEREBY DEMISES and the Registered Owners acting by the Joint Statutory Receivers HEREBY DEMISES AND CONFIRMS and the Management Company HEREBY DEMISES AND CONFIRMS unto the Lessee ALL THAT AND THOSE the easements, rights and privileges specified in the Second Schedule hereto […]"

29. Clause 6:

> "Notwithstanding that the Estate is in the process of being developed as a commercial business campus and in the manner hereinbefore recited, neither the Registered Owners, the Lessor nor the Joint Statutory Receivers shall be under any obligation to complete or cause to be completed such development or may alter such development as the Lessor may wish [….]"

30. Clause 11:

> "The demise herein is made subject to the provisos, covenants and the matters set out in the Sixth Schedule now agreed and declared by and between the Registered Owners, the Lessor, the Management Company and the Lessee."

31. Clause 15:

> "It is hereby expressly agreed and declared that nothing in this Lease shall prejudice or affect the estate, person or properties of the Joint Statutory Receivers who join in this Lease solely in their capacity as Joint Statutory Receiver aforesaid and not otherwise."

32. Clause 16:

> "The Lessee hereby acknowledges and accepts that the each of the Joint Statutory Receivers is executing this Lease in their capacity as Joint Statutory Receiver only. For the avoidance of doubt, the Lessee hereby acknowledges and agrees that the Joint Statutory Receivers shall not have any personal liability under or in connection with this Lease or under any document executed pursuant to this Lease in any respect."

33. Clause 17:

"The Lessee conclusively accepts that Michael McAteer and Paul McCann have been validly appointed as Joint Statutory Receivers of the Lessor by NAMA and that they have all necessary capacity to execute this Lease and all ancillary documents."

34. First Schedule:

"The Premises

ALL THAT AND THOSE the hereditaments and premises comprising of the 'commercial unit known as Block B, Maynooth Business Campus, Maynooth, County Kildare been the property comprised in Folio 57168F Co. Kildare."

35. Second Schedule:

"Easements, Rights and Privileges granted to the Lessee for the benefit of the Premises

[….]

5. CAR PARKING SPACES

The exclusive use of 212 car parking spaces, as shown delineated in purple and red on the Plan annexed hereto (the Car Spaces) for identification purposes only, for the sole purpose of use as car parking spaces only and for no other purpose for the term of this Lease."

36. That Plan which is annexed to the Lease of Easements states:

"Allocated Surface Car Parking Spaces, Maynooth Business Campus, Straffan Road, Maynooth, Co. Kildare."

However, in the legend on the plan it provides in relation to the 212 car parking spaces as follows:

"[118] Block B Parking Spaces (Orange)
[+94] Block B Temporary Spaces (Blue) Relocated from Basement."

37. Third Schedule:

"Easements, Rights & Privileges excepted and reserved unto the Registered Owners, the Lessor and the Management Company and their respective servants, agents, licensees, under-tenants, invitees and workmen out of these presents

[….]

9. ESTATE COMMON AREAS

9.1. The full right and liberty to designate, alter, vary or change the use of, close or control access to the whole or any part of the Estate Common Areas PROVIDED

THAT the Lessor or the Management Company as appropriate, provide reasonable alternative access to the Premises and the Car Spaces.

[…]

10.1. The full right and liberty for the Lessor/Management Company at any time on giving written notice to the Lessee, to alter or vary the location of the car parking spaces allocated to the Lessee to some other part of the Estate Common Areas designated by the Lessor/Management Company for car parking

10.2 The full right and liberty for the Lessor/Management Company at any time on giving written notice to the Lessee, to alter or vary the location of the car parking spaces in the Estate to some other part of the Estate Common Areas designated by the Lessor/Management Company for car parking."

38. Particular significance is attached by the Receivers to the fact that, on the Plan referenced in the Second Schedule, the 94 surface car park spaces are stated to be temporary and it is stated that they have been relocated from the basement and thus the Receivers claim it is clear that they are to be relocated back to the basement, which is disputed by TMT. The Receivers also claim that, for this reason, TMT should have satisfied itself regarding the structural state of the basement and in this regard the Receivers refer to pre-contract emails (i.e. from December 2014 prior to the execution of the Contract and the Lease of Easements on 17th February, 2015) between solicitors for Mr. Ferris and solicitors for TMT in which reference is made to the basement car parking. In particular, the Receivers reference that the solicitor for TMT, upon receipt of the map showing only surface car park spaces asks "*Is there a map for the basement? This is only for the surface spaces*" to which the solicitor for Mr. Ferris replies that "*You will note from the plan I sent you that the 212 spaces seem to be all surface spaces currently." To this the solicitor for TMT replies "they have moved since the last time? Previously only 118 were on this level with the rest in the basement."*

APPLICABLE LAW FOR APPLICATIONS TO STRIKE OUT

39. The law applicable to the striking out of proceedings is well settled and does not require to be restated in any detail. However, a number of the principles are particularly relevant to this application.

40. First, it is clear from the decision of Clarke J. (as he then was) in the Supreme Court case of *Keohane v. Hynes* [2014] IESC 66 at para. 6.6 that:

> "the jurisdiction is to be *sparingly exercised and only adopted when it is clear that the proceedings are bound to fail* rather than where the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law." (Emphasis added)

41. Secondly, it is clear from the judgment of Clarke J. (as he then was) in the Supreme Court decision in *Moylist Construction Ltd v. Doheny* [2016] 2 I.R. 283 at 291 that:

> "A court should not entertain an application to dismiss where the legal issues or questions of construction arising are themselves *complex and such as would require the type of careful analysis* which can only be carried out safely at a full trial and in circumstances where the facts can be fully explained." (Emphasis added)

42. Thirdly, it is clear from the decision in the Supreme Court case of *Jodifern Ltd v. Fitzgerald* [2000] 3 I.R. 321 at 334 per Murray J. (as he then was) that:

> "The object of such an order is *not to protect a defendant from hardship* in proceedings to which he or she may have a good defence but *to prevent the injustice to a defendant which would result from an abuse of the process of the court* by a plaintiff. Clearly, therefore, the hearing of an application by a defendant to the High Court to exercise its inherent jurisdiction to stay or dismiss an action cannot be of a form of summary disposal of the case either on issues of fact or substantial questions of law in substitute for the normal plenary proceedings." (Emphasis added)

THE CLAIMS BY TMT AND THE RECEIVERS

43. TMT claims that its forced relocation by the Receivers of its 94 surface car park spaces to 94 underground car parking spaces, which are unusable, breaches the terms of the Lease of Easements. It relies in particular on its claim that the right on the part of the Lessor, pursuant to Paragraph 10.1 of the Third Schedule to '*vary the location of*' TMT's car parking spaces, is subject to Paragraph 9.1 of the same Schedule, which states that the right of the Lessor to vary any part of the Estate Common Areas (which includes car parking spaces) is subject to the proviso that it must '*provide reasonable alternative access to the Premises and the Car Spaces'*.

44. TMT also claims that the relocation of TMT's 94 car park spaces was done to facilitate the sale of those 94 surface car park spaces to the purchaser, i.e. Jomaijo, of other Units in the Business Campus (Units D & E). TMT describes what happened as the 're-selling' of the 94 spaces. It is alleging that the Receivers' actions in relocating TMT's 94 surface car park spaces to the unusable basement car park, combined with the allocation by the Receivers of those 94 surface car park spaces to Jomaijo, amounts to a derogation from the Receiver's previous grant of the 94 surface car park spaces to TMT.

45. In addition, on the basis that the Receivers thereby received money for car park spaces that TMT alleges were already sold to it, TMT claims that the Receivers acted outside the scope of their authority and otherwise than in good faith and have been unjustly enriched.

46. However, the Receivers claim first that it was for TMT to satisfy itself as to the state of the basement car park, particularly as it was aware from pre-contract enquiries that the allocation of some of the car park spaces to the surface car park was temporary, as these were to be allocated to the basement, and so it is a case of *caveat (or lessee) emptor*. In addition, the Receivers point out that under the express terms of the Lease of Easements, the Lessor was entitled to alter the location of the car park spaces.

47. Most significantly of all, the Receivers claim that even if TMT claim that the Lessor (which is defined in the Lease of Easements as Glenkerrin, *albeit 'acting by'* the Receivers) breached the Lease of Easements by this relocation of car park spaces, TMT has no claim against the Receivers. This is because of the exclusion of personal liability for the Receivers contained in the Lease of Easements and in particular Clause 15, which states that the Receivers join in the Lease of Easements solely in their capacity as joint statutory receivers and Clause 16, which states that the Receivers shall not have any personal liability under the Lease of Easements or under any document executed pursuant to that Lease.

48. Furthermore, the Receivers rely on s. 149 of the NAMA Act, where it is stated that statutory receivers, (and it is not disputed that the Receivers are statutory receivers) are not liable for any acts or omissions of the chargor, in this case the Developers. This section, insofar as relevant, states:

> "(1) A statutory receiver shall be taken to be the agent of the chargor for all purposes.
>
> (2) The chargor is solely responsible for the remuneration, contracts, engagements, acts, omissions, defaults and losses of a statutory receiver and for liabilities incurred by a statutory receiver. NAMA does not incur any liability (to the chargor or to any other person) by reason of the appointment of a statutory receiver or for the actions or inactions of a statutory receiver."

On this basis, the Receivers claim that they (and NAMA) have no liability for their actions, for which the chargor/the Developers are solely liable.

49. They also point to the recent Court of Appeal decision in the *Unit C Proceedings* ([2020] IECA 213), which relates to the same receivership, as in this case. In that case, which concerned another unit in the Business Campus, Unit C, Costello J. nonetheless expressly referred, at para. 66, to the Lease of Easements in this case, i.e. relating to Unit B, which had been proved in evidence before the High Court in that case:

> "During the course of this receivership, the Receivers have entered into a number of contracts for the sale of units and for Leases of Easements. In respect of each of those contracts, they have excluded their personal liability on foot of the contracts for sale and the Leases of Easements. Some examples of the Leases of Easements entered into during the receivership were proved in evidence and in each of them the Receivers expressly excluded personal liability in respect of the contract to which they were a party."

50. It is clear therefore that the Court of Appeal has concluded that the Lease of Easements in this case '*excluded personal liability'* for the Receivers. Clearly this conclusion by the Court of Appeal is strongly supportive of the Receivers' claim in the proceedings before this Court that they have no personal liability to TMT.

51. On this basis, the Receivers argue that they are not liable for the alleged acts or omissions which they committed, in acting as the agents of Glenkerrin, in obliging TMT to relocate to the unusable car park spaces. Rather the Receivers claim that it is the insolvent Developers which TMT must pursue. Accordingly, the Receivers say that these claims instituted by TMT should be struck out as bound to fail.

52. In reply, TMT claims that if this analysis is correct, the Receivers are claiming that they can have no liability for what TMT describes as '*expropriating TMT's property rights'*. In particular, TMT argues that it would be extraordinary if the Receivers could have what TMT describe as '*superpowers'* to relocate its car park spaces to an unusable basement and not be liable for that action, because of the contractual and statutory exclusions of liability.

53. Yet this, at face value, appears to be what the Lease of Easements and the NAMA Act states, such that the Receivers (and therefore NAMA) is not fixed with any liability for acts or omissions when its Receivers are seeking to recover as much as possible for the State from secured assets which were purchased by NAMA after the collapse of the property market over a decade ago.

54. It is for this reason that the Receivers claim that TMT, when agreeing to buy Block B, was subject to the principle of *caveat* (*or lessee*) emptor, i.e. it signed up to the very wide ranging exclusions in the Lease of Easements (and it would have, or should have, been aware of the very wide ranging exclusions in the NAMA Act) to the effect that the Receivers are not personally liable and so TMT cannot now claim that, despite these contractual and statutory exclusions, the Receivers are in fact personally liable.

55. The Receivers point out that TMT was not forced to purchase Block B and the associated car parking spaces from an insolvent vendor. Indeed, it may well be the case that TMT, in deciding to purchase from an insolvent developer, with these exclusions of liability for the Receivers, factored that into the purchase price that it was willing to pay. The bottom line is however that the Receivers are relying on their claim that TMT cannot now seek to attach liability to the Receivers, after agreeing to these exclusions, just because matters did not turn out as TMT had hoped regarding the car park spaces.

ANALYSIS

56. TMT has put some emphasis on its claim that there are certain accepted, albeit rare, instances in which the Receivers will not be able to rely on the exclusions of personal liability. In this regard, it is clear from para. 53 of the judgment of Costello J. in the *Unit C Proceedings* that if the Receivers acted otherwise than in good faith or outside the scope of their authority then they cannot rely on an immunity from personal liability:

> "The receivers can adopt or decline to adopt a contract which the company has entered into and which is unexecuted. It follows from this, and the agency clause, that the agent is personally immune from claims for damages for breach of contract or procurement of breach of contract. The agent has an immunity from a claim for inducing breach of contract unless he has not acted *bona fide* or acted outside the

scope of his authority, i.e. he has not acted as agent." [quoting Sir Neil Lawson in *Lathia v. Dronsfield Bros. Limited* [1987] BCLC 321 at p. 324]

57. In this context, TMT claims that the Receivers received money for the 94 car park spaces from Jomaijo (even though TMT claims that these spaces were already located to or 'sold' to TMT) and that in order to facilitate the sale of Units D & E to Jomaijo, the Receivers moved TMT to a basement car park. TMT points out that the High Court in the *Unit C Proceedings* found this basement car park to be unusable (para. 48), not to be compliant with Building Regulations (of which the Receivers were aware since 2017 – para. 211), with a probability that it will become unsafe in 10 years or so (para. 114(e)).

58. On this basis therefore, TMT alleges that the Receivers, by allocating the 94 surface car park spaces to Jomaijo and relocating TMT's 94 surface car park spaces to the basement, were acting outside the scope of their authority and otherwise than in good faith, thereby rendering them liable to account for the unjust enrichment of the monies obtained from Jomaijo, notwithstanding the contractual and statutory exclusions of liability.

59. However, it does seem to this Court, based only on the documentary evidence before it, that, at face value, the Receivers do appear to have a strong case that both the contractual provisions and the statutory provisions explicitly provide that they have no liability whatsoever and TMT entered this contract with its eyes open and aware of those exceptionally strong contractual and statutory provisions, and that as a matter of law, TMT's remedy is not against the agent (the Receivers), but against the principal/the chargor (the Developers).

60. Nonetheless, it is this Court's view that a conclusion in this regard by a court should not be made summarily, but only should be made after a consideration of all the evidence. This is because, despite the apparent strength of the Receivers' claim in light of the wording of the contractual and statutory exclusions of liability, this Court does not believe that it can conclude that TMT's proceedings are '*bound to fail'*. In particular, this Court does not believe that it would amount to an injustice or an abuse of process for the Receivers to have to defend TMT's claims in all the circumstances. In addition, the matters in dispute are not capable of '*easy resolution'* and require careful analysis, as highlighted by the decisions in the *Unit C Proceedings.* All of this militates against the grant of an order for strike-out as sought by the Receivers in the instant application.

The *Unit C Proceedings* in the High Court and the Court of Appeal

61. This Court's conclusion that, even though the Receivers have a strong case, it cannot find that TMT's case is '*bound to fail'*, is supported by the fact that the High Court and the Court of Appeal in the *Unit C Proceedings* reached different conclusions regarding the issue of whether, in the case of Unit C, the Receivers had 'double-allocated' the car park spaces (the same allegation as in the proceedings before this Court).

62. The background to that case is that it related to the interpretation of a management agreement between the Developers and the Management Company, which, as previously noted, is the management company for the common areas in the Business Campus. The

Developers and the Receivers sued the Management Company to compel it to execute a lease of easements to facilitate the sale of the last Unit on the Business Campus, i.e. Unit C. The Management Company maintained that it should not be required to pay for the remediation of the car park, since it claimed that this was the obligation of Glenkerrin, and it sought declaratory relief to that effect. The key issue in the *Unit C Proceedings* was whether the management agreement gave the Management Company the right to require the proceeds of the sale of Unit C to be used to remediate the car park or whether they should be remitted to the party that had appointed the Receivers, i.e. NAMA.

63. The High Court ordered Glenkerrin and the Receivers to carry out remedial works to the car park of the campus, utilising the net funds arising from the sale of Unit C. This decision was reversed on appeal to the Court of Appeal.

64. However, one issue in the High Court relating to Unit C (which is also an issue in this case in relation to Unit B) was the allegation that the Receivers allocated some surface car park spaces twice to different purchasers. It is significant, in this Court's decision, as to whether to strike out TMT's proceedings against the Receivers as bound to fail, that the High Court held that there was such double-allocation, even though this conclusion was reversed by the Court of Appeal.

65. In the High Court at para. 48, the trial judge stated that:

> "I find from the foregoing evidence that because the basement car parking has not been usable the Receivers/their solicitors in undertaking sales of units have deliberately allocated more surface parking spaces than originally planned for particular units, notwithstanding that some of these spaces have previously been allocated to other purchasers."

66. Although the High Court's conclusions relate to Unit C, it is relevant to note that the '*foregoing evidence'* upon which the trial judge relied, related, in part, to Unit B. For example, just a few paragraphs earlier, at paras. 43 to 45, he refers to the Lease of Easements in this case:

> "With regard to Block B and the Link Building, this was originally the subject of a Lease of Easements dated 2nd May, 2001 made between Glenkerrin, the [Management Company] and Ray Grehan, and gave him exclusive use of 212 car parking spaces. Before the completion of the sale of Block B and the Link Building to TMT (pursuant to Contract of Sale dated 23rd December, 2014 made between TMT Digital Centre Limited and Martin Ferris as Receiver over certain assets of Raymond Grehan), the Lease of Easements originally entered into by Ray Grehan and dated 2nd May, 2001 was surrendered and the new Lease of Easements - being that referred to above - was provided by the Receivers in favour of TMT.
>
> It appears that in pre-contract inquiries on behalf of TMT, Mr Ferris's Solicitors A&L Goodbody confirmed that all 212 spaces were located at surface level, as distinct from basement level, in the car park at issue in these proceedings. The position of

the car parking spaces has become contentious, and the subject of correspondence between TMT's solicitors Mullany Walsh Maxwells, and Gartlan Furey acting on behalf of the Receivers. In her witness statement [the conveyancing solicitor in Gartlan Furey] states: –

> "8. It appears from the documents reviewed by me that it was at all times intended that a number of the car spaces to Block B were to be located in the basement car park. An allocation of surface spaces was included in the Lease of Easements but same were at all times intended to be allocated on a temporary basis pending completion/commissioning of the basement carpark. A significant number of spaces currently allocated to Block B are located on the upper deck of the basement carpark and I am advised that the same are being utilised by the occupiers of Block B."
>
> [The conveyancing solicitor in Gartlan Furey] presented plans indicating that Block B is currently allocated 118 spaces on the surface carpark and 94 in the basement."

67. The High Court conclusion that there was a deliberate double-allocation of surface car park spaces relating to Unit C was reversed by the Court of Appeal. At para. 133, Costello J. refers to the High Court's analysis of the evidence and conclusions as follows:

> "The basis for his conclusions is set out in the preceding paras. 44-47 of his judgment. The solicitor acting for the [Developers/Receivers] in the sale of Unit C referred to the temporary allocation of car parking spaces on the upper deck of the basement car park to one unit owner. The Leases of Easements entered into during the receivership included a right to alter or vary the location of the car parking spaces allocated to each unit holder to "*some part of the Estate Common Areas designated by the Lessor/Management Company for car parking*". The unit owner was assured in pre-contract enquiries that all of the allocated space were on the surface. The presented allocations of car parking spaces between unit holders overlapped and the unit owner was disputing the proposed reallocation of car parking spaces and threatening litigation.
>
> In reaching his conclusion, the trial judge failed to address the right of the lessor (acting through the Receivers) to vary or alter these allocations of parking spaces and of the possibility that the solicitors acting for the Receivers, and the Receivers acting on their advice, genuinely believed that they were entitled to reallocate the parking spaces to the underground car park. He did not explain why he concluded that they had "*deliberately*" allocated surface car park spaces to more than one unit holder, or why he reached that conclusion in the absence of any allegation to that effect. This is aside from the fact that he did not forewarn the witnesses for the plaintiffs of the possibility that he might draw this conclusion, or afford them the opportunity to comment on it and, if possible, rebut it."

68. It is relevant therefore to note that the reason that this High Court conclusion, that there had been a deliberate double-allocation of car park spaces, was reversed, was because

the trial judge had not set out his reasons for his conclusion that it had been 'deliberately' done and because he should have given the conveyancing solicitor an opportunity to rebut that conclusion.

CONCLUSION

69. It does seem that the Receivers have a strong case based on the contractual exclusions in the Lease of Easements, the statutory exclusions in the NAMA Act and the Court of Appeal finding in the *Unit C Proceedings* that the Receivers expressly excluded personal liability in the Lease of Easements in this case (*albeit* that TMT was not party to the *Unit C Proceedings*).

70. However, it is this Court's view that the claim, that the Receivers double-allocated car spaces, cannot be said to be bound to fail. This is because there is a High Court decision, in relation to the same Receivers, in the same receivership, regarding the same basement (and in reliance on evidence regarding Unit B car park spaces), to the effect that there was double-allocation of car park spaces in Unit C. This High Court decision is not by any means strong evidence in support of TMT's claim, since it was unanimously overturned on appeal and since it concerns car park spaces relating to Unit C (and not Unit B). However, the fact, that a High Court judge concluded that there was such double-allocation in Unit C in very similar circumstances to the current claim in Unit B, does lead this Court to conclude that it cannot be said that TMT's case regarding Unit B is bound to fail or that it would be an injustice to the Receivers, or an abuse of process, for them to have to defend TMT's claims at a plenary hearing.

71. For this reason, this Court concludes that this is not a matter which should be dealt with summarily and so the proceedings should not be struck out.

72. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. If it is necessary for this Court to deal with final orders, this case will be put in for mention one week from the date of delivery of judgment, at 10.45 am.