THE HIGH COURT
COMMERCIAL

[2021] IEHC 115
[2019 No. 3888 P]

BETWEEN

SHANE MCCARTHY AND KIERAN WALLACE

PLAINTIFFS

AND

JOHN (OTHERWISE JONNIE) MCCARTHY AND WENDY MCCARTHY

DEFENDANTS

JUDGMENT of Mr. Justice Quinn delivered on the 19th day of February, 2021

1. The plaintiffs are receivers appointed over a property at 22 Lansdowne Road, Dublin 4. Their claim is for an order for possession of the property, orders restraining the defendants from attempting to carry on, manage or otherwise interfere with the exercise of their functions as receivers and from continuing in occupation of the property and restraining them from refusing access to the property, and related reliefs.

2. The defendants assert that they occupy the property pursuant to a tenancy which has not been validly terminated.

3. This judgment relates to an application for an interlocutory injunction restraining the defendants from remaining on or continuing in occupation of the property and restraining the defendants from refusing access to the property to the plaintiffs.

4. I have concluded that in the events which have occurred an interlocutory injunction should not be granted and the application will therefore be dismissed.

Background

5. By a facility letter dated 7 October, 2004, IIB Bank Limited (which later became KBC Bank and is referred to in this judgment as "KBC Bank" or "the Bank") granted loans to Emerald Properties (Irl) Limited ("Emerald") amounting to a total sum of €10,750,000. Of this amount a sum of up to €9.5 million was for the purpose of refinancing existing borrowings of an equivalent amount with Anglo Irish Bank Corporation plc (as it was then). The balance was intended for use in respect of renovations of property at 24 Lansdowne Road, and for other financing purposes including the service of interest. The loan was stated to be repayable on demand, and in any event on or before 1 November, 2006.

6. The defendants are the directors of Emerald. They personally guaranteed the repayment of the loans.

7. The facility was amended and extended from time to time and ultimately by a facility letter dated 21 June, 2010, the facility was increased to a total amount of €13,271,820, and the maturity date was extended to 1 June, 2011.

8. The facilities were secured by a legal mortgage granted by Emerald on 1 December, 2004. The properties comprised in the mortgage were four houses at Lansdowne Road, namely numbers 18, 20, 22 and 24, two properties at Lansdowne Park, being properties

at the rear of numbers 18 and 22 Lansdowne Road, and three apartments in a development known as The Plantations, Herbert St. These properties had been acquired by Emerald on various dates in 1989 and 1999.

9. It is clear from the mortgage instrument that the parties envisaged that the properties would be the subject of lettings or tenancies. The mortgage contains provisions regarding the treatment of rent, operation of a rent account, notices to tenants, and rent collectors.

10. The mortgage is expressed to extend in the charging clause (Clause 3) to Rent and Rent Accounts.

11. Clause 7 of the mortgage contains standard covenants on the part of the mortgagor, including at Clause 7.19 that the mortgagor will: -

> *"not lease, not without first obtaining the written consent of the Bank, give or agree to give any licence or tenancy affecting any part of the Secured Assets nor exercise the powers of leasing or agreeing to lease or of accepting or agreeing to accept surrenders conferred upon a mortgagor by statute or otherwise or enter into or permit any parting with possession or sharing agreement whatsoever in respect of the Secured Assets".*

12. The mortgage contains standard provisions concerning enforcement on the occurrence of a loan default and conferring on the bank the power to appoint a receiver at any time after the security should become enforceable.

13. It is not disputed that the mortgage is a valid legal mortgage containing these provisions or that the plaintiffs were validly appointed receivers. Nor is it disputed that the plaintiffs have the powers conferred on them by the mortgage, which include taking possession of, securing and selling the charged properties, save for the dispute in these proceedings as to the existence and terms of the tenancy of No. 22 Lansdowne Road asserted by the defendants.

14. In different proceedings before this court issues have been raised by Emerald and the defendants concerning repayment of the loan and I have delivered separately my judgment granting an application for summary judgment. It is not in dispute that the extended maturity date of 1 June, 2011, stipulated in the last amendment to the facility passed without repayment of the debt.

15. On 7 August, 2014, the bank served a demand on Emerald for the sum of €12,238,348.16, which has not been repaid.

16. On 8 August, 2014, the bank served a demand on the defendants pursuant to the guarantee, also for the sum of €12,238,348.16, which sum has not been paid.

17. On 11 August, 2014, the bank appointed the plaintiffs as joint receivers of all of the properties charged by the mortgage. At that time the defendants were residing at the property at No. 22 Lansdowne Road.

18. In November 2018, the loans and the mortgage were sold by KBC to Beltany Property Finance DAC ("Beltany"), and a Deed of Transfer was executed on 30 November, 2018, to give effect to that sale.

19. On the same day, there was executed a Deed of Novation substituting Beltany for KBC in relation to the receivership appointments.

20. On 4 April, 2019, Beltany gave notice to Emerald and its directors of the assignment of the loans and called for payment of the balance then due.

21. On 28 May, 2019, Beltany notified the defendants of the assignment and called on them to pay the amount of €12,308,785 pursuant to the guarantee.

Joint receivers

22. On 17 May, 2018, the plaintiffs' solicitors, Messrs Kane Touhy, wrote to the defendants informing them that the joint receivers wished to secure vacant possession of No. 22 Lansdowne Road. They continued: -

> *"We are instructed that you currently occupy the premises, although it is unclear on what basis you do so. From our instructions, you occupy without written consent, and without paying rent, and that you have no legal entitlement to remain in occupation".*

23. Kane Touhy called on the defendants to hand up vacant possession within 21 days from the date of that letter, failing which the plaintiffs reserved their rights to take such steps as were necessary to secure vacant possession. This is the first demand for possession.

24. On 18 May, 2018, Crowley Millar solicitors replied on behalf of the defendants stating that the defendants have kept the bank informed of the basis upon which they occupied No. 22 Lansdowne Road since 2012. They continued: -

> *"…I note the fact that despite your clients, both KBC and the receivers, have had full knowledge of the position since at least KBC placed the company into receivership in 2014, this is the first occasion on which a demand has been made that the McCarthy's vacate the property. Leaving aside for now the validity of the demand, my clients assert their right to mitigate any loss and damage caused by KBC's acts and the conduct of the receivership".*

25. Crowley Millar continued by stating that their clients had instructed them to offer a sum of €2.3 million for an adjoining property, namely No. 18 Lansdowne Road.

26. On 7 March, 2019, Kane Touhy wrote again to the defendants noting that they remained "*unlawfully in occupation of 22 Lansdowne Road*" and warning them that they had received instructions to proceed to secure vacant possession of the property.

27. On 21 March, 2019, the first defendant emailed the first plaintiff referring to Kane Touhy's letter of 7 March, 2019, expressing his surprise at the threat of legal proceedings in circumstances where he said that he believed there was engagement in relation to an

offer by him to buy the bank's loans, on which he stated he was awaiting a reply. No assertion of a tenancy was made.

28. On 3 April, 2019, Kane Touhy wrote again to the defendants. They made no reference to the replies made to their previous letters. They notified the defendants that they had been instructed to issue court proceedings to secure vacant possession of property.

These proceedings

29. On 16 May, 2019, these proceedings were commenced by plenary summons. The first relief claimed is an order granting the plaintiffs possession of the property described in the Schedule, being premises known as 22 Lansdowne Road and 99 Lansdowne Park. The premises at 99 Lansdowne Park are not the subject of this injunction application.

30. The plaintiffs also claim orders restraining the defendants from interfering with the exercise by the plaintiffs of their functions as joint receivers over the property, restraining the defendants from remaining on or continuing in an occupation of the property, and from refusing access to the property to the plaintiffs.

31. Further reliefs sought include orders directing the defendants to deliver up the keys, alarm codes, locks and other security and access devices and equipment or information, to account to the plaintiffs for rents and other licence fees received since the date of appointment of the receivers, and an order restraining the defendants from preventing, impeding or obstructing the plaintiffs from taking possession of, getting in and collecting the rents and licence fees associated with the property.

This application

32. On 10 July, 2019, the plaintiffs issued a motion, returnable for 15 July, 2019, seeking an order entering these proceedings in the Commercial List and initial directions and an injunction restraining the defendants from remaining on or continuing in occupation of the property and from refusing access to the property to the plaintiffs.

33. On 15 July, 2019, the Court made an order entering these proceedings in the Commercial List. The application for interlocutory relief was adjourned from time to time and ultimately came for hearing before this Court on 12 January, 2021. No affidavit evidence was placed before the court at this hearing updating the court on the position since the exchanges of affidavits in July and September 2019.

34. The application was grounded on an affidavit sworn by the first named plaintiff on 10 July, 2019.

35. The first plaintiff exhibited the facility letters, amendments thereto, the mortgage, the guarantee, the demands served pursuant to the guarantee, the appointments of the receiver, the deed of transfer of the loans and security from KBC to Beltany.

36. The first plaintiff then referred to and exhibited the letters from Kane Touhy dated 17 May, 2018, 7 March, 2019, and 3 April, 2019. Notably, he did not exhibit the replies to these letters, which were exhibited by the defendants.

37. By way of explanation of the lapse of time between his appointment on 11 August, 2014, and the commencement of these proceedings on 16 May, 2019, and the bringing of this application on 10 July, 2019, the first plaintiff said that he had moved to bring this matter before the Commercial Court: -

> *"…at the first opportunity following the irretrievable breakdown in efforts between Beltany and the defendants, and theretofore between the Bank (KBC) and the defendants to resolve all matters relating to the Loan and security herein, including the Mortgage, the Guarantee and Indemnity, the Security Agreement, and the Deed of Confirmation and the borrowings of the Borrower secured thereby and being the background to the present dispute herein".*

38. The plaintiff said that almost immediately after his appointment and up until 21 June, 2019, KBC, Beltany and his office had engaged in extensive correspondence and meetings with the defendants and their legal and financial advisors. He said that KBC in particular had conducted numerous reviews regarding the loans and security and the restructuring thereof, and had held a number of meetings and engaged in proposals and counterproposals for a resolution of the matter.

39. The plaintiff referred to a chronology of correspondence exchanged between various parties to the matter (being KBC, Beltany, the plaintiffs and the defendants and their respective advisors), before and after the issue of these proceedings, between 10 October, 2014, and 21 June, 2019. He said these evidenced efforts to resolve the dispute without recourse to court and thereby showing that the plaintiffs were not guilty of any unreasonable delay. He indicated that some of this correspondence was "*without prejudice*" negotiations and therefore it would be inappropriate to exhibit.

40. It is understandable that the plaintiffs did not exhibit all of this correspondence and the plaintiff cannot be faulted for not having detailed each and every exchange, particularly those which were made without prejudice. Nonetheless, a number of significant intervals in this chronology remain unexplained. In particular, a period of fourteen months passed from 24 February, 2015, to 26 April, 2016, and a period of two years and five months between 6 June, 2016, and 8 November, 2018.

41. The plaintiff then said that the defendants' occupation of the property was preventing the plaintiffs from "*selling or renting out the property which they (the plaintiffs) are lawfully entitled to do*". He said that the plaintiffs are "*concerned that the defendants will not have the capacity to account to them for rent over a prolonged period of time and therefore that it is a matter of urgency that the plaintiffs obtain possession of the property without delay".* Apart from sending three solicitors' letters on 17 May, 2018, 21 March, 2019, and 3 April, 2019, no information was given by the first plaintiff as to what measures were taken by the plaintiffs between the date of their appointment on 11 August, 2014, and the application for the injunction commenced on 10 July, 2019, to secure possession or the payment of rent.

42. The plaintiff said that "*in the event that we obtained possession of the Property on an interlocutory basis prior to the trial of the within proceedings, we will have the option of letting the Property on a short term monthly basis, for a value of potentially up to €5,000 per month, or alternatively, we will have the option to prepare and market the property for sale*" (emphasis added). He continued by stating that it cannot be assumed that the *"relatively buoyant property market in Dublin will continue indefinitely and we are anxious to realise value for the property at the earliest possible opportunity".*

43. In his first affidavit sworn on 10 July, 2019, the first plaintiff said that the plaintiffs were proposing to sell "*in the medium term*" four other properties in this "*connection*" which he said had an estimated value of €8 million. He said that assuming those four properties were successfully sold in the medium term, and the par debt was €12.3 million at the end of May 2019, there will be a very substantial shortfall. He said that he believed that the property was worth €2 million, and therefore the deficit, even if this property were realised at that figure, would be likely in the order of €2.5 million. In his second affidavit, sworn on 13 September, 2019, the first plaintiff puts the estimated shortfall at €2.3 million.

44. Apart from an affidavit of the first plaintiff sworn on 5 October, 2020, exhibiting a further onward sale of the loan to Pepper Finance Corporation in August 2020, the last affidavit before the court on this application, is an affidavit of the first defendant sworn on 27 September, 2019. Therefore, no update is before the court as to the status of the realisations referred to by the first plaintiff in his affidavits.

Defendants' affidavits

45. The first defendant John McCarthy swore replying affidavits on 15 July, 2019, 30 July, 2019, and 22 September, 2019.

46. The first of these affidavits was sworn for the purpose of opposing the application for entry of the proceedings in the Commercial List. The court rejected that opposition and duly entered the matter in the Commercial List.

47. In these affidavits, Mr. McCarthy said the following: -

    (i) That in late 2013 he and the second defendant moved into the property and occupied it with their son as their family home;

    (ii) That they were paying rent to Emerald;

    (iii) That it came as a shock to them, almost five years after the appointment of the plaintiffs as receivers, to now face for the first time an application to court to remove them from the property;

    (iv) That the only "*so-called interference*" in the receivership identified by the plaintiffs was the fact of the defendants occupying the property.

48. Mr. McCarthy continued as follows: -

"The second defendant and I occupied the property as our family home and have done so since before the plaintiffs were appointed.

The borrower charged us rent of €3,000 per month. Prior to the bank placing the borrower into a receivership, we were invoiced on a quarterly basis".

49. Mr. McCarthy exhibited three invoices dated 1 January, 2014, 1 April, 2014, and 10 June, 2014, described as invoices for rent at the rate of €3,000 per quarter.

50. In his second affidavit the first defendant stated as follows: -

"The plaintiffs case is that the second defendant and I are trespassers to our home. They maintain that they are entitled to recover possession from us, without delay and, apparently, without serving a Notice to Quit. I believe and am advised that this is entirely contrary to landlord and tenant law and that, in circumstances where my wife and I are tenants, far from being a strong case, the plaintiff's claim is bound to fail".

51. The first defendant then referred to communications exchanged between him and the plaintiffs' staff immediately following their appointment on 11 August, 2014.

52. He exhibited emails between himself and a Mr. Darren Hough of KPMG, a member of the plaintiffs' staff. In the course of these communications, the first defendant provided to the plaintiffs certain information regarding tenancies of all the mortgaged properties including a schedule identifying against each property the identity of the relevant tenant, rent, deposits paid and any arrears referenced. Included in this schedule is a reference to the property at 22 Lansdowne Road and a "*Tenant: John McCarthy and rent of €3,000 per month".*

53. The exhibits attached to those emails included a statement, the provenance of which was not detailed on this application, identifying transfers by the first defendant to Emerald showing a total balance as at 12 June, 2014, of €514,000.

Further evidence

54. Before appointing the plaintiffs, KBC was aware of the first defendant occupying the property and the basis on which he purported to do so. In particular, the first defendant exhibited an email of 10 January, 2014, to KBC responding to certain queries regarding the property. He said as follows: -

"The disparity between the amounts invoiced out and rents received is made up as follows; (a) rent due from me to the Company (€27,000 as you mentioned) which is contra'd against the balance due back to me as per my personal loan to the Company, the bank knows I made substantial personal loans available to it, supporting interest repayments since 2008". (emphasis added)

55. The director's loan was not secured.

56. On 11 August, 2014, being the morning of the day on which the plaintiffs were appointed receivers, Mr. Paul Quinn of KBC emailed Mr. Hough with information in relation to the mortgaged properties including a copy of the security review, the demand letter, copies of the mortgage itself, guarantee and related material. Mr. Quinn then referred to the property and stated the following: -

> *"The last address we have for Jonnie is no. 22 Lansdowne Road Dublin 4. This is one of the properties under the receiver's control.*
>
> *Jonnie has advised that he is not paying rent; instead he is reducing a liability owed by Emerald to him (from money he has loaned to the business). The bank has not agreed to this".*

57. It is clear from the exhibited correspondence that from at least 10 January, 2014, if not earlier, KBC was aware that the defendants were in occupation of No. 22 Lansdowne Road and that the defendants were treating the rent as being paid by way of periodic offset against the balance of an unsecured loan due by Emerald to the first defendant.

58. It is also clear that the plaintiffs were aware of this position from the day of their appointment.

59. The exhibited communications preceding the plaintiffs' appointment do not in themselves make any express assertion by the defendants of the existence of a tenancy, and this assertion appears to have been made for the first time after the plaintiffs were appointed.

60. Although the letter of 18 May, 2018, from Crowley Millar refers to the defendants having "*kept the bank fully informed of the basis on which they have occupied no. 22 Lansdowne Road since 2012*" it does not assert any tenancy. Similarly, the emails of 21 March, 2019, and which followed do not make such an assertion.

61. In his affidavit of 30 July, 2019, the first defendant states the following: -

> *"I believe and am advised that that a 'written' lease is not essential to the creation of a tenancy and that, in circumstances where I went into possession of the Property with the knowledge and consent of the Borrower and paid rent to it, and it accepted such rent, I held and continued to hold, the Property under a periodic tenancy.*
>
> *While it is more properly a matter for legal submission, I am advised that such a tenancy can only be terminated by service of a valid Notice to Quit giving the requisite notice period, depending on the period of the tenancy, and that the letter of 17 May 2018 was not a valid Notice to Quit".*

62. Nowhere in any of the defendant's affidavits is it asserted that KBC gave express consent to the creation of a tenancy in favour of the defendants. The high point of the defendants' evidence on this subject is that KBC and the plaintiffs have been aware since before the appointment of the plaintiffs of the fact that the defendants were in occupation of the

property and that a rental of €3,000 per month was being accrued and being discharged, on the defendant's account of the matter by a reduction in the director's loan owed by Emerald to the first defendant.

Plaintiffs' submissions

63. The receivers say the following: -

(i) That they have found the defendants to be in possession of the property;

(ii) No consent was ever given by the Bank to the creation of a tenancy in favour of the defendants as would be required by Clause 7.19 of the mortgage, either in writing or otherwise;

(iii) In the absence of prior written consent the tenancy as asserted by the defendant is void and the defendants are trespassers;

(iv) The defendants do not assert a proprietary interest in the property, and acknowledge that the tenancy they assert is capable of being terminated;

(v) The receivers have called for vacant possession which the defendants have withheld;

(vi) The timeline leading up to the bringing of this application shows that there was engagement between the plaintiffs and KBC on the one hand and the defendants on the other hand and that this engagement has now been exhausted;

(vii) The receivers are desirous of offering the property for sale in the market;

(viii) The delay is defeating the sale option which the plaintiffs wish to exercise;

(ix) When all assets in this receivership have been realised there will be a shortfall which the defendants will be incapable of discharging, and accordingly damages would be an inadequate remedy.

Defendants' submissions

64. The defendants submit as follows: -

(i) That a valid tenancy subsists, albeit that it is not in writing, and has not been terminated;

(ii) that s. 3 of Deasy's Act expressly permits the creation of a tenancy otherwise than in writing. They cite s. 3 which provides as follows: -

"The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent";

(iii) That the rent provided for under the tenancy is €3,000 per month and that the reduction of the director's loan by this amount constitutes a valid discharge of such rent;

(iv) KBC have been aware of the tenancy from at the latest January 2014 and have never objected to same or taken any action in reliance on Clause 7.19;

(v) That the charge holder has waived the requirement for written consent;

(vi) In the alternative, the plaintiffs are estopped by their conduct from seeking possession in that they were aware from the day of their appointment of the fact that the defendants had been in possession of the property and of the basis of their occupancy and that in reliance on representations – particulars or evidence which were not given – they have acted to their detriment by spending money on the improvement of the property by repairing leaks and other such works.

Have the plaintiffs made out a strong case for an order for possession?

65. The plaintiffs accept that an order to compel the defendants to vacate the property is in substance a mandatory order and that to grant such an order at the interlocutory stage the court must be satisfied that a strong case has been made out by the plaintiffs (*Maha Lingam v Health Service Executive* [2005] IESC 89).

66. The starting point for this analysis is the principle that where a mortgage contains a prohibition on the grant of a lease or tenancy without the prior consent in writing of the mortgagee, any lease or tenancy granted by the mortgagor in the absence of such prior consent is null and void (see *ICC Bank Plc v Verling* [1995] 1 ILRM 123).

67. It is not in dispute in this case that Clause 7.19 of the mortgage contains such a prohibition and that Emerald never sought or was granted consent to grant a tenancy to the defendants.

68. The case reports are replete with examples of the consistent application of this principle and the grant of injunctions or orders for possession against parties in occupation pursuant to leases or tenancies which are held to be null and void under this principle. See, for example, *Re N17 Electrics Ltd (In Liquidation)* [2012] IEHC 228, [2012] 4 I.R. 634, *Maloney v O'Shea* [2013] IEHC 354, *National Asset Loan Management Ltd and Others v Southlodge Inns Ltd and Another* [2015] IEHC 109, *Havbell Dac. v Dias* [2018] IEHC 175, and *Tyrell v Wright* [2017] IEHC 92.

69. In *Re N17 Electrics Ltd*, Dunne J. analysed this principle in detail and her consideration of some of the older cases is informative. She considered the question of whether and in what circumstances a mortgagee can be found to have waived the requirement for consent or acquiesced in the creation of a tenancy. She referred to the judgment of Monroe J. in *Re O'Rourke Estate* [1889] 23 LRI 497 where he said: -

"I certainly cannot infer the creation of a new tenancy between the tenant and the mortgagee merely because the mortgagee takes no active steps to disavow a tenancy created by the mortgagor".

70. Dunne J. referred also to the judgment in *Taylor v Ellis* [1960] CH 368, [1960] 2 WLR 509 in which there was no evidence that the mortgagee had given written consent to the grant of a tenancy. It was said that there was no positive evidence that the mortgagee had not given such consent and it was admitted that the mortgagee knew of the tenancy. Dunne J. quoted as follows: -

"(i) That the onus was on the tenant to prove that the mortgagee gave written consent to the grant of the tenancy, and, therefore, in the absence of any evidence of such consent, the tenancy was not, to begin with, binding on the mortgagee.

(ii) that the tenancy had not become binding on the mortgagee by reason of the events subsequent to the grant of the tenancy, for it would be wrong to infer merely from the facts that the mortgagee, having knowledge of the tenancy, allowed the tenant to remain in possession, and that no interest had been paid for nine years, that the mortgagee had consented to take the tenant as his tenant. The plaintiff, accordingly, was entitled to possession against the tenant".

71. Dunne J. continued at para. 30: -

"If such prior written consent is not obtained by the mortgagor and the mortgagor proceeds to enter into a lease with a tenant, the lease will be binding on the mortgagor as lessor, but as against the mortgagee, the lease will not be binding. It is also clear that in certain circumstances, the lease may be binding on the mortgagee in circumstances such as those described in the authorities referred, where, for example, the mortgagee "serves a notice on the tenant to pay the rent to him". It is also clear from the authorities referred to above, that the mere fact that the mortgagee is aware of the existence of a tenancy and that a tenant is paying rent to the mortgagor which is being used to pay the obligations of the mortgagor to the mortgagee, is not, of itself, sufficient to create a relationship between the mortgagor's tenant and the mortgagee".

72. In this case it is not contended by the defendants that rent is being paid by them which is then applied by Emerald to service or reduce the debt to KBC or its successors. On the defendants' own account of the matter, the only manner in which the defendant claims that rent is being discharged is by reduction in the first defendant's director's loan.

73. Dunne J. also considered arguments relating to estoppel and found that on the facts of that particular case it was "*inconceivable that the bank would ever have agreed to a lease of the various premises in those terms".*

74. She found that the bank's conduct in continuing to grant loans from time to time without appropriate leases having been put in place by the borrower did not alter the fundamental

that prior consent to the business letting agreements relied on in that case had not been given. In this case, no suggestion has been made even by the defendants that the bank actually granted consent. Although the defendants have suggested in submissions that the interests of KBC were served by the defendants occupying and repairing the property, the basis put forward was not that the loan was being repaid, but that the asset was being preserved or improved.

75. The defendants submit in the alternative that the plaintiffs are estopped from relying on the absence of a consent pursuant to Clause 7.19. No evidence or submissions as to the fundamentals of an estoppel were proffered. No particulars or evidence were put forward of representations which would give rise to an estoppel or of the defendants acting to their detriment in reliance on any such representations.

76. There is a long history to the relationship between the defendants and KBC, and even to the relationship between the defendants and the plaintiffs. At a trial more evidence will emerge which I must not anticipate or p¬¬redict. But on the affidavits before me the following is clear: -

(i) No tenancy was granted in writing;

(ii) The rent the defendants say they pay to Emerald was being discharged only by offset against the first defendant's unsecured directors loan to Emerald;

(iii) No rent was being paid to Emerald which was applied to service or reduce its debt to KBC;

(iv) No consent was sought by or granted to Emerald for the creation of a tenancy in favour of the defendants;

(v) No consent in writing was given;

(vi) No evidence of an express consent has been proffered;

(vii) The assertion that the bank acquiesced in the creation of a tenancy or waived Clause 7.19 is based on the fact that KBC and the plaintiffs were aware that the defendants occupied the property since early 2013;

(viii) No evidence has been given of representations made by KBC or the plaintiffs on which the defendants relied to their detriment.

77. The onus of proving a tenancy, and that Clause 7.19 does not render such a tenancy null and void, rests on the defendants. I cannot preclude the defendants from advancing these assertions at the trial of the action. However, for the reasons summarised above, I find that the plaintiffs have made out a strong case that they are entitled to an order for possession.

Effect of establishing a strong case

78. The plaintiffs submit that in a case where a plaintiff has demonstrated an undisputed interest in real property, he is entitled to an injunction to restrain the trespass *ex debito justiciae*. In this regard, the plaintiffs rely on the judgment of Keane J. (as he then was) in *Keating & Company Ltd v Jervis Shopping Centre Ltd* [1997] 1 IR 512 and the judgment of Birmingham J. (as he then was) in *Ferris v Meagher & Echoforde Ltd* [2013] IEHC 380.

79. In *Keating*, Keane J. emphasised that the court could not on an interlocutory application express any concluded view on the respective contentions of the parties, both in matters of fact and law. In relation to a particular aspect of the case before him, concerning an allegedly offending overhead crane, he said the following: -

> *"It is clear that a landowner, whose title is not in issue, is prima facie entitled to an injunction to restrain a trespass and that this is also the case where the claim is for an interlocutory injunction only. However, that principle is subject to the following qualification explained by Balcombe L.J. in the English Court of Appeal in Patel and Others -v- W. H. Smith (Eziot) Limited and Another (1987) 2 ALL ER 569: -*
>
> > *"However, the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass. Then the court must consider the application of the principle set out in American Cynamid Company -v- Ethicon Limited (1975) 1 All ER 504 in relation to the grant or refusal of an interlocutory injunction.""*

80. Although Keane J. indicated that a landowner whose title is not in dispute is "*prima facie*" entitled to an injunction to restrain a trespass, he took account of other considerations such as adequacy of damages and the behaviour of the parties.

81. In *Ferris v Meagher*, Birmingham J. considered the well-known judgment in *ICC Bank Plc v Verling* [1995] 1 ILRM 123 and continued as follows: -

> *"In the present case the plaintiff argues that he has gone beyond establishing a good arguable case, and has made out a strong prima facie case with a likelihood of success, and indeed has gone further still in that the defendants, and more particularly the second named defendant who is the only defendant to participate in the case has failed to make out even an arguable case. In the circumstances it is said that as the defendant has failed to make out an arguable defence, that the Court can and indeed should grant the interlocutory relief sought without the necessity of applying the Campus Oil Test. However, if the Court chose to or found it necessary to address the Campus Oil principles, then the balance of convenience was in favour of granting the reliefs sought".*

82. Birmingham J. found that the defendant had not made out an arguable defence, had no entitlement to remain in occupation and was a trespasser and therefore the court could make its order without the necessity of considering the *Campus Oil* principles.

83. These cases are authority for the proposition that in a case where no arguable defence has been made out by the defendants, the court may determine that it can proceed to making an order without considering the *Campus Oil* principles. That is a permissive proposition. They are not authority for the proposition that the principles in *Campus Oil*, and other equitable principles which I consider below, including the relevance of such matters as delay, are ousted in a case where the plaintiff has made out a strong *prima facie* case.

Adequacy of damage and the balance of convenience

84. In *Merck Sharp & Dohme Corporation v Clonmel Healthcare Ltd* [2019] IESC 65, O'Donnell J. examined the principles derived from *American Cyanimid* and *Campus Oil*, He considered in particular the question of the balance of convenience and said: -

> *". . . the preferable approach is to consider adequacy of damages as part of the balance of convenience, or the balance of justice, as it is sometimes called. That approach tends to reinforce the essential flexibility of the remedy. It is not simply a question of asking whether damages are an adequate remedy. As observed by Lord Diplock, in other than the simplest cases, it may always be the case that there is some element of unquantifiable damage. It is not an absolute matter: it is relative. There may be cases where both parties can be said to be likely to suffer some irreparable harm, but in one case it may be much more significant than the other. On the other hand, it is conceivable that while it can be said that one party may suffer some irreparable harm if an injunction is granted or refused, as the case may be, there are nevertheless a number of other factors to apply that may tip the balance in favour of the opposing party. This, in my view, reflects the reality of the approach taken by most judges when weighing up all the factors involved".*

85. The reason given by the plaintiffs for their submission that damages would not be an adequate remedy is that when the entire portfolio of properties the subject of this receivership is realised and accounted for there is likely to be a shortfall against the defendant's indebtedness to Beltany and that the amount of such a shortfall is unlikely to be recoverable. No evidence is before the court as to the assets of the defendants.

86. In *Okunade v Minister for Justice and Others* [2012] IESC 49, [2012] 3 IR 152, Clarke J. stated as follows: -

> *"…the court must consider whether, if it does not grant an injunction at the interlocutory stage, a plaintiff who succeeds at the trial of the substantive action will be adequately compensated by an award of damages for any loss suffered between the hearing of the interlocutory injunction and the trial of the action". (Emphasis added)*

87. The plaintiffs were appointed on 11 August, 2014. On 10 July, 2019, they issued this application for an injunction and it was heard on 13 January, 2021. The plaintiffs' evidence, not updated since his second affidavit sworn on 13 September, 2019, is that against a claimed par debt of €12.3 million, depending on the outcome of realisations,

there is likely to be a shortfall of €2.3 million. In accordance with *Okunade*, I must consider the extent to which damages may be an inadequate remedy for losses suffered by the plaintiffs between the hearing of this application in January 2021 and the trial of the action. Even taking the estimated shortfall of €2.3 million, for which no updating evidence has been proffered, I am not persuaded that it can be shown that any ultimate irrecoverability of the shortfall would be attributed to events between the hearing of this application and the trial of the action.

88. If such losses were so attributable, their quantum must be seen in the context of the entire history of the receivership. Nearly five years expired between the plaintiffs' appointment, and the bringing of this application, and a further eighteen months to the hearing of this application. Whilst it is not necessary to quantify what proportion of the losses would be attributable to the period of time between the hearing of the interlocutory injunction and the trial of the action, they are of necessity a limited proportion of any overall loss and this diminishes any weight attaching to this submission.

Delay and claim of urgency

89. The delay on the part of the plaintiffs in applying for an injunction distinguishes this case from the numerous precedents relied on by them.

90. The plaintiffs were appointed on 11 August, 2014. Three years and nine months later, on 17 May, 2018, they first called on the defendants to yield up vacant possession. Ten months later again, a second such call was made on 7 March, 2019. A third call was then made on 3 April, 2019.

91. Although the proceedings were commenced on 16 May, 2019, it was not until 10 July, 2019, that the plaintiffs initiated the application for an injunction, coupled with the application for entry into the Commercial List.

92. From the date of their appointment the plaintiffs were aware that the defendants were in occupation of the property and that rent was not being paid otherwise than by way of reduction of the first defendant's unsecured director's loan.

93. The sale of the loans in November 2018 is not relevant to the chronology of events between the plaintiffs and the defendants for the purpose of assessing the balance of convenience as between these parties. In any event, to the extent that the mortgagee's role is relevant, Beltany "*inherits*" the chronology.

94. There has been protracted engagement between the parties since before plaintiffs' appointment and before and after the commencement of these proceedings. Quite properly, the substance of much of this engagement was not disclosed on this application as many of the communications were said to have been made on a "*without prejudice*" basis.

95. There are a number of long intervals in the chronology in which no activity has been disclosed. This does not mean that there was no engagement or activity during that time, but these intervals have not been explained. I am referring to the interval of fourteen

months between 24 February, 2015, and 26 April, 2016, and an interval of two years and five months between 6 June, 2016, and 8 November, 2018, albeit that on 17 May, 2018, the plaintiffs first made a demand for possession of the property.

96. The plaintiffs say that they moved promptly following the irretrievable breakdown in this engagement or negotiations. They rely on that breakdown to show urgency at the commencement of the proceedings. However, no reference has been made to any sudden or unexpected turn of events in relation to the management of the property itself which create an urgency.

97. In *Lennon v Ganly* [1981] ILRM 84, O'Hanlon J. made it clear that: -

> *"…the Court should be slow to intervene when the Plaintiff has delayed until the eleventh hour before bringing his proceedings and applying for interlocutory relief, whereas a considerable period has elapsed …"*

In this case, no "*eleventh hour*" event has been cited, let alone one which would justify a mandatory injunction. The breakdown of long-running negotiations between the defendants and the plaintiffs' appointer is not such an event. Equity is not a 'tap' which can be opened or closed depending on a plaintiff's state of satisfaction or otherwise with negotiations.

98. It was submitted that the court in entering the proceedings in the Commercial List had ruled that there was no culpable delay on the part of the plaintiffs. The test applied by the court in the exercise of its discretion to enter a matter in the Commercial List is not the same as the scrutiny which must be applied on the hearing of an application for interlocutory relief.

Conclusion as regards delay and role of receivers

99. As a general rule, it is entirely proper that parties should postpone seeking court redress until after alternative solutions have been exhausted.

100. It is always a matter for the discretion of a receiver in the performance of his functions to determine such matters as the method of sale of an asset, the timing of sale, and the manner of the management and preservation of the asset pending a sale.

101. Provided a receiver is not acting in breach of duty then all of these matters fall within the scope of his authority and discretion in the performance of his functions.

102. This range of decision making extends also to determinations made by a receiver regarding the time at which he would seek to assert his right to vacant possession of an asset. Again, as a general rule, delay, if explained and justifiable, may not bar a receiver from the legal remedy of an order for possession. But when he invokes the equitable jurisdiction of the court for an injunction, the court cannot disregard the chronology of events and the history of the matter in assessing whether there has been delay such as would, in and of itself, defeat the equitable remedy (*Lennon v Ganly*). It is this test which the application fails.

103. The plaintiffs were appointed on 11 August, 2014. They made their first demands for vacant possession on 17 May, 2018, followed by repeated demands on 7 March, 2019, and 3 April, 2019. Those demands were not acted on until these proceedings commenced on 16 May, 2019. It then took the plaintiffs until 10 July, 2019, to initiate this application. The only urgency cited is the breakdown of negotiations and a desire by the plaintiffs to have the option of selling the property.

104. Having secured entry of these proceedings in the Commercial List on 15 July, 2019, the plaintiffs could have progressed the action to plenary hearing. Even with the pandemic related restrictions applying to court proceedings, it is possible that the action would have been heard before now, or at least have been progressed to a point of readiness for a hearing. No information is before me as to any steps taken to progress the action to trial, even by so much as the delivery of a statement of claim.

105. As a closing observation, this judgment does not mean that a receiver cannot wait for such time as he determines appropriate before he would seek possession of an asset under his authority or control as a receiver. However, if he elects to wait and at the same time, wishes to preserve the right, as against parties known to be in occupation since long before his appointment, to obtain possession on an urgent basis and at a time of his choosing, there are ways in which this may be achieved, such as the grant a short-term tenancy agreement or a caretaker's agreement the terms of which would regulate the position. The plaintiffs may have had good reason for not making such arrangements in this case, but not having done so, they must take the consequences of the delay. Equally, events may occur which justify the grant of an injunction. For the reasons examined earlier, this is not such a case.

106. For these reasons, I have concluded that the application for an injunction should be refused.

107. I shall hear the parties as to any directions required to progress the action to trial.