THE HIGH COURT

[2021] IEHC 6

[2019 No. 9227P.]

BETWEEN

MICEAL SAMMON AND CATHY SAMMON

PLAINTIFFS

AND

KEN TYRRELL AND EVERYDAY FINANCE DAC

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 15th day of January, 2021

Overview

1. This is an application by the registered owners of lands for an interlocutory injunction restraining the registered owner of a charge on the lands, and a receiver appointed by the charge holder, from marketing, taking possession of, or selling the lands. The plaintiffs' case is that their liabilities to the charge holder are not secured by the charge and they want their case heard and decided before the lands are sold. The defendants' case is that the plaintiffs' liabilities are secured by the charge and they want to sell the lands now on the basis that the court will decide later how the proceeds of sale should be dealt with.

2. The plaintiffs, Mr. and Mrs. Sammon, live in a house called Boragh Farm, Killeighter, Kilcock, County Kildare, which they built about twenty years ago and where they have lived ever since. The cost of building the house was partly funded by money borrowed in 2000 from Allied Irish Banks plc, the repayment of which was secured by a charge over the substantial site of about ten acres or so, which Mr. and Mrs. Sammon already owned. That loan has since been repaid.

3. In 2002, a couple of years after they built their house, Mr. and Mrs. Sammon bought a holding of about seventeen acres immediately to the east of their home, which has since been used as a hobby farm. The purchase of those lands was funded by a loan from AIB, the repayment of which was secured by a charge over those lands and that loan has since been repaid.

4. Mr. and Mrs. Sammon were, or at least Mr. Sammon was, the owner of a substantial construction business called Sammon Group, which also banked with AIB. When, in 2007, and again in 2009, AIB extended or renewed a number of facilities to a number of the companies in the Sammon Group, Mr. and Mrs. Sammon signed a number of personal guarantees. In 2014 the Sammon companies got into financial difficulties. In early 2015 AIB called up the loans and Mr. and Mrs. Sammon's guarantees, and on 20th July, 2015 recovered judgment against them for €2,654,523.43 and costs.

5. In 2018 the liabilities of the Sammon companies and the security held in connection with them were transferred by AIB to Everyday Finance DAC.

6. The core dispute between the parties is whether Mr. and Mrs. Sammon's liabilities on foot of the guarantees which they signed in 2007 and 2009 are secured by the charges they signed in 2000 and 2002. On their face, the charges are for "*all sums due*" but Mr. and Mrs. Sammon contend that the charges, properly construed within the factual matrix in

which they were given, extended only to the borrowings made at the time they were given, which, it is common case, have been repaid. The defendants' position on the motion is that the case which Mr. and Mrs. Sammon make is not even arguable and, in any event, that the balance of convenience is overwhelmingly against postponing what they say is the inevitable and unavoidable sale of the lands.

The proceedings to date

7. The action was commenced by plenary summons issued on 29th November, 2019 and the statement of claim was delivered on 2nd March, 2020. The defendants agreed to stay their hand for the duration of the first COVID-19 lockdown but declined to do so pending the trial of the action and the motion for interlocutory relief now before the court was issued on 3rd July, 2020. In the meantime a notice for particulars was served and replied to.

8. The defendants, of course, were perfectly entitled to take the course which they did but the almost inevitable consequence has been that the action has not progressed for six months. The plaintiff's motion which, following a very efficient exchange of affidavits in the first half of July, and an exchange of careful and thoughtful legal submissions in the first half of November, came on for hearing on 17th November, 2020. The motion was prepared with great care and diligence and was argued, on both sides, with skill, learning and erudition. I cannot forbear to observe that if all that time and effort had been directed to the progress of the action, rather than the motion, the parties might very well by now have been in a position to apply for a trial date.

9. The plaintiffs' case in the action is that the charges over the lands, properly construed, do not secure their liabilities to the second defendant. For the purposes of this application, the plaintiffs say that they have a good arguable case that the defendants are not entitled to sell their lands. The defendants argue that the terms of the charges are clear and unambiguous. Moreover, and in any event, it is said, the plaintiffs are heavily indebted to the second defendant and there is no prospect of the debt being paid otherwise than by the sale of the lands, so that sooner or later they will be put out and the land sold.

10. The net issue on this application is whether the defendants should be allowed to sell the land now on the basis that the court will decide later whether it should or should not have been sold. I do not believe that it is inconsistent with my duty to come to the case with an open mind and to carefully listen to and consider the arguments on both sides to say that it is not immediately a particularly attractive proposition.

The evidence

11. The extensive site on which the Sammon family home was built in 2000 was a rough square, made up of two parcels of land, being the lands in Folios 43308F and 43309F, County Kildare, which Mr. and Mrs. Sammon had bought in about 1998 without finance. In the extensive grounds of the house there were outbuildings, a yard, sheds, lawns, a vegetable garden and so on, which were subsidiary and ancillary to the house. If there has been any further development in the meantime, I do not understand that the basic general layout on the ground has changed but in 2013 the house and some of the nearest

outbuildings were carved out (mostly out of Folio 43308F) and a new Folio 61758F opened which Mr. and Mrs. Sammon transferred to their children. According to the affidavit of Mr. Sammon grounding this application, he and Mrs. Sammon have since paid rent to their children but the folio shows that they reserved a right of residence in the house. Nothing, I think, turns on the precise basis on which Mr. and Mrs. Sammon occupy the house but the manner in which the house was carved out means that the gardens and outbuildings theretofore and since used for the amenity of the house are in different ownership. For example, one of the doors in the house opens onto a lawn which is in different ownership, the house and the sewage treatment plant are in different ownership, and so on.

12. On or about 5th March, 2000 Mr. and Mrs. Sammon borrowed IR£147,000 from Allied Irish Banks plc ("*AIB*"). The purpose of the advance was to part fund the cost of construction of Boragh Farm and the loan was repayable over 15 years by instalments of combined principal and interest. That loan was secured by a charge which it appears had already been executed on 27th January, 2000 and was registered on 15th March, 2000 on the then newly opened Folios 43308F and 43309F, County Kildare.

13. In 2002 Mr. and Mrs. Sammon bought a significant holding, of about seventeen acres or so, immediately to the east of Folio 43308F, County Kildare. On the ground, this is a rough rectangle which is perhaps about half as big again as the square and straddles the Kildare / Meath county boundary. On paper, the rectangle is made up of the lands in Folio 54410F, County Kildare and Folio 54148F, County Meath.

14. On or about 22nd March, 2002 Mr. and Mrs. Sammon borrowed IR£180,000 from AIB. The purpose of this advance was to fund the purchase of the rectangle of lands adjacent to their home and that loan, too, was repayable over 15 years by instalments of combined principal and interest. That loan was secured by a charge dated 22nd March, 2002 which was duly registered on both folios on 20th June, 2002.

15. The charges were both in AIB's printed standard form "*Mortgage/Charge and Indenture of Confirmation Indorsed and Deed of Full Release Indorsed*" and provided:-

> *"3.01 The Mortgagor hereby covenants with the Bank on demand to pay to the Bank all moneys and discharge all obligations and liabilities whether actual or contingent now or hereafter due owing or incurred to the Bank by the Mortgagor in whatever currency denominated whether on any current or other account or otherwise in any manner whatsoever (and whether alone or jointly and in whatever style name or form and whether as principal or surety) when the same are due …"*

and so on and so forth.

16. In 2000 and 2002 Mr. and Mrs. Sammon were customers of AIB at its branch in Crumlin, Dublin, and it was there that the borrowings were initially arranged. Mr. Sammon has deposed that in 2005 the loans were transferred to the AIB Bank business office at Naas Road, from where the Sammon Group corporate business was managed. This, it is said,

was done by the issue and acceptance in March, 2005 of two facility letters for the balances then outstanding on each of the accounts and for a term equivalent to the remainder of the original 15 year terms. Mr. Sammon was able to exhibit a copy of a facility letter of 9th March, 2005 for €183,000 repayable by 145 monthly payments until 22nd March, 2017 – which is surely the second facility – but this letter was issued from the Crumlin Road branch. Later Mr. Sammon exhibits a letter of 16th January, 2007 from the Naas Road Business Bank branch confirming that two accounts previously held at Crumlin Road had that day been transferred to Naas Road. One of those accounts was the subject of a facility letter of 9th March, 2005 – which is surely the second facility. The other is said to have been the subject of a facility letter of 19th July, 2005. That 2005 facility was a three month bridging facility which, according to Mr. Sammon, was repaid in full on 14th October, 2005. Moreover, neither of the Crumlin Road loan account numbers referenced in the letter of 16th January, 2007 match the number shown on the letter of 9th March, 2005 but a copy bank statement of 10th April, 2006 is page 8 of a half yearly statement, which suggests that there was no new account opened in 2005. The contemporary documentation does not quite match Mr. Sammon's narrative but for present purposes it is not obvious that anything turns on the detail. The point is that the 2000 and 2002 loans were in due course paid in full.

17. The Sammon Group, which banked with AIB at Naas Road Business Bank, was a group of companies in the construction industry, of which Mr. Sammon was a director. In 2007 and 2009 AIB extended or renewed a number of facilities to a number of those companies, which Mr. and Mrs. Sammon guaranteed. The letter of sanction in respect of some of the facilities stipulated, as part of the security, for "Personal Guarantee in favour of the Bank for the obligations of [the borrower] [for a specified amount] to be signed by Miceal & Cathy Sammon." In other cases, the letter of sanction stipulated for "*Personal Guarantee in favour of the Bank for the obligations of [the borrower] [for a specified amount] to be signed by Miceal & Cathy Sammon*. *Supported*."

18. In 2014 or so the Sammon companies got into financial difficulties and in early 2015 AIB called up the loans and Mr. and Mrs. Sammon's guarantees. On 16th March, 2015 AIB issued a summary summons against Mr. and Mrs. Sammon and on 20th July, 2015 recovered judgment against them for €2,654,523.43 and costs.

19. In May, 2018 AIB gave notice to the various Sammon companies of its intention to transfer what Mr. Sammon has referred to as the corporate facilities to Everyday Finance DAC. Mr. Sammon makes much of the fact that he and Mrs. Sammon received no such notice in relation to their personal loans but the fact is that the personal loans had by then been repaid. The 2000 loan was repaid, apparently in time, by 25th June, 2015. The balance of €13,352.29 on the 2002 loan was repaid on 7th February, 2018.

20. By letter dated 6th November, 2018 Cullen & Co., solicitors, on behalf of Mr. and Mrs. Sammon, wrote to AIB asking for the discharge of the charges in favour of the bank. By then the charges had been transferred to Everyday Finance and by letter dated 27th

November, 2018, the solicitors were directed to Everyday's service agent who, it was said, would be able to assist them with their request.

21. The transfer by AIB to Everyday was effected by a deed of transfer dated 2nd August, 2018 which was amended by a deed of amendment and restatement dated 22nd October, 2018 and on 5th December, 2018 Everyday was registered as the owner of the 2000 and 2002 charges on the Kildare folios and on 7th January, 2019 of the charge on the Meath folio.

22. On 22nd July, 2019 Everyday applied to the High Court *ex parte* for an order pursuant to O. 17, r. 4 of the Rules of the Superior Courts for an order substituting Everyday for AIB as the plaintiff in the action in which judgment had been given, and such an order was made.

23. On 26th July, 2019 Link ASI Limited, as attorney for Everyday, wrote three letters to each of Mr. and Mrs. Sammon referring to the deeds of transfer to Everyday and demanding payment on foot of the three guarantees of three large sums by no later than 5.00 p.m. on 1st August, 2019.

24. There is no evidence of what engagement otherwise there may have been between the parties or their solicitors in the year or so after Cullen & Co. asked for the discharges but on 30th October, 2019, in exercise or purported exercise of the powers contained in each of the charges, Everyday executed two deeds appointing Mr. Ken Tyrrell as receiver over the four folios. By letters dated 1st November, 2019 Mr. Tyrrell notified Mr. and Mrs. Sammon of his appointment.

25. On 8th November, 2019 Eversheds Sutherland, solicitors, for Mr. and Mrs. Sammon wrote to Mr. Tyrell challenging the validity of his appointment on the ground that the facilities for which the charges had been given as security had been repaid and asking for an undertaking that he would not enter the properties. The letter also suggested, without prejudice to the contention that his appointment was invalid, that the receiver was bereft of any meaningful powers in respect of the property, specifically that he had no power to take possession. It was furthermore said that the lands in Folios 43308F and 43309F had been leased to a company called Leinster Woodcraft and Aluminium Limited, which would continue to pay the rent to Mr. and Mrs. Sammon. There is no evidence that there was an answer to that letter. The plaintiffs issued their plenary summons on 29th November, 2019 and an appearance was entered on behalf of both defendants on 20th December, 2019 by Beauchamps, solicitors. The statement of claim, as I have said, was delivered on 2nd March, 2020.

26. On 19th March, 2020 an estate agent erected one or more "*For Sale*" signs at the property. Eversheds Sutherland wrote a letter of complaint on the following day calling for an undertaking that the defendants would not enter or re-possess the property or take any steps to market or sell it pending the determination of the proceedings. Beauchamps replied on 23rd March, 2020 undertaking not to enter a binding agreement for four

weeks. That undertaking was later extended, as to its scope, to the removal of the signs and the progress of the sales process, and as to its duration until 17th May, 2020.

27. By letter dated 18th June, 2020 Beauchamps insisted that Mr. Fennell had been validly appointed as receiver; declared that they failed to understand the basis on which Mr. and Mrs. Sammon were contending otherwise; rejected the characterisation of the receiver's powers in Eversheds Sutherland's letter of 8th November, 2019; and invited the discontinuance of the action. As to the position of Leinster Woodcraft and Aluminium Limited, it was said to be a matter for that company to assert any rights it might claim to have on foot of a purported lease made in breach of the negative pledge in the charge.

28. In his affidavit grounding this motion Mr. Sammon has clarified that the lease to Leinster Woodcraft and Aluminium Limited was in respect of storage sheds and yards and that the rent was €4,000 per annum.

29. In response to the grounding affidavit of Mr. Sammon, a replying affidavit was sworn on behalf of both defendants by Mr. Darren Das, a senior asset manager of Link ASI Limited. Mr. Das deposed to a belief, based on legal advice, that the plaintiffs' contention that the security was limited to their personal borrowings is untenable. He suggested that it is not credible for Mr. and Mrs. Sammon to assert that they did not understand the "*all sums due*" nature of the mortgages. He pointed to the reference in the 2005 facility letters to "*All sums mortgage/charge*" and suggested, by reference to the letter of 16th January, 2007, which referred to standing order payments from two of the companies into Mr. and Mrs. Sammon's loan accounts, that those loans were serviced by the companies which, he suggested, betrayed any suggestion that there was clear delineation between personal and corporate finances.

30. Mr. Das acknowledged that what he referred to as the mortgaged property might very well, as Mr. Sammon deposed, be used by Mr. and Mrs. Sammon and their adult children for various recreational activities such as gardening and farming but declared that he did not see the relevance of this. He said that Everyday was a stranger to any lease to Leinster Woodcraft and Aluminium Limited which, on the basis of the negative pledge, would not be binding against either defendant.

31. Mr. Das suggested that the plaintiffs' undertaking as to damages was inadequate in view of their liabilities to Everyday which, he said, underlined "*the commercial unreality*" of the injunction sought. He suggested that Mr. and Mrs. Sammon have no basis to object to the registration of a judgment mortgage over the property and can ultimately have no defence to bankruptcy proceedings. Mr. Das portended a legal submission to be made at the hearing of the motion "*as to what the court should make of the fact that the plaintiffs have sufficient resources to instruct senior and junior counsel, together with a leading law firm, to bring legal proceedings with the objective of impeding Everyday from enforcing security it holds in support of such a substantial judgment."* By contrast, he said, damages would be a perfectly adequate remedy for the plaintiffs if they succeeded at the trial. The status quo, he suggested, was the continuation of the receivership which had commenced on 30th October, 2019. The only effective purpose of the injunction, he said,

would be to delay the defendants in enforcing the judgment against the mortgaged property which, at worst, could be accomplished by way of the registration of a judgment mortgage.

32. On 15th July, 2020 Mr. Sammon swore a supplemental affidavit explaining, and exhibiting a plan illustrating, the interconnection between the house, in Folio 61758F, and the surrounding lands, in Folios 43308F and 43309F. He also dealt with some issues of detail raised by Mr. Das, upon which it is not necessary to dwell.

The arguments

33. Mr. Lewis S.C. and Mr. Gorman, for the plaintiffs, make a straightforward argument. The plaintiffs, they say, have established that there is a fair question to be tried. The plaintiffs, they say are the owners of the land, which is an integral part of their family home and to which they have an emotional attachment. Damages, they submit, would not be an adequate remedy. If the property were to be sold *pendente lite* it would be lost to them forever. By contrast, it is said, it is by no means clear that that the defendants would suffer any loss by what, if the action were to fail, would be the postponement of the sale.

34. In support of their argument that there is a *bona fide* question to be tried, counsel refer to the judgment of Young J. in the Supreme Court of New South Wales in *Estoril Investments Pty. Ltd. v. Westpac Banking Corporation* (1993) 6 BPR 13, 146, the judgment of Slattery J. in the same court in *Meldov Pty. Ltd. v. Bank of Queensland* [2015] NSWSC 378, and the judgment of Mr. Michael Harvey Q.C. sitting as a deputy judge of the Queen's Bench Division in *ING Lease (UK) Ltd v Harwood* [2008] 2 BCLC 57 which set out guidelines there for the construction of "*all sums due*" clauses in New South Wales mortgages and English guarantees. In oral argument, counsel for the plaintiffs also relied on the decision of the Supreme Court in *Bank of Ireland v. McCabe* (Unreported, Supreme Court, 19th December, 1994), to which reference had been made in the defendants' written submissions.

35. In support of their argument that damages would not be an adequate remedy for the plaintiffs, counsel refer to the judgment of Clarke J. in *Allied Irish Banks plc v. Diamond* [2012] 3 I.R. 549 as to the importance attributed by the courts to property rights and as to the importance in the balancing of the parties' interests of assessing where the greater risk of injustice might lie. Reference was also made to the decision of Gearty J. in *O'Flaherty's (Nassau Street) Limited v. Setanta Centre* [2020] IEHC 272, in which the judge quoted the *canticum* of Mr. Neil Diamond, and the cases there referred to.

36. In anticipation of the defendants' argument that damages would not be an adequate remedy for them if the action were to fail, counsel referred to the decision of the Supreme Court in *Dunne and Lucas v. Dún Loaghaire Rathdown Co. Co*. [2003] 2 I.L.R.M. 147 in which Hardiman J. observed that:-

> *"In my view it is not sufficient, either from the point of view of establishing a balance of convenience or attacking the undertaking, simply to mention huge sums*

of money without relating them either to the specific relief sought or the specific liability for which the plaintiffs, by virtue of their undertaking, may become responsible".

37. In this case, it is said, the defendants have not even put a figure on the losses which they say would be suffered if – again on the premise that the action might fail – the sale were to be postponed.

38. In anticipation of the argument on behalf of the defendants, portended by the affidavit of Mr. Das, that the plaintiffs' financial circumstances were such that their undertaking as to damages was useless, reference was made to the judgment of Lord Denning M.R. in *Allen v. Jambo Holdings Ltd*. [1980] 1 W.L.R. 1252. That was a case in which, as the Master of the Rolls began, *"A man's head got caught in a propeller*." The man's widow obtained an *ex parte Mareva* injunction against the Nigerian owner of the aircraft which had no other assets within the jurisdiction restraining the removal of the aircraft from the jurisdiction, but it was later discharged *inter alia* on the grounds that the widow's undertaking as to damages was worthless. The *Mareva* injunction was discharged by the High Court on 27th June, 1979. The Court of Appeal heard and allowed the appeal on 20th July, 1979. Lord Denning M.R. said at pp. 1256 and 1257:-

> *"There is one other point I must mention. It is said that whenever a Mareva injunction is granted the plaintiff has to give the cross-undertaking in damages. Suppose the widow should lose this case altogether. She is legally aided. Her undertaking is worth nothing. I would not assent to that argument. As Shaw L.J. said in the course of the argument, a legally aided plaintiff is by our statutes not to be in any worse position by reason of being legally aided that any other plaintiff would be. I do not see why a poor plaintiff should be denied a Mareva injunction just because he is poor, whereas a rich plaintiff would get one. One has to look at these matters broadly. As a matter of convenience, balancing one side against the other, it seems to me that an injunction should go to restrain the removal of this aircraft."*

39. Mr. Lewis also referred to the judgment of Kelly J. (as he then was) *in Harding v. Cork County Council* [2006] IEHC 80 which touched on the question of fortified undertakings as to damages.

40. Mr. Fanning S.C. and Mr. Niall Ó nUiginn, for the defendants, emphasise the size of the plaintiffs' liability on foot of the guarantees and the fact that nothing has been paid on foot of the judgment obtained by AIB. Incidentally, the assertion in the written submissions that Everyday had the benefit of that judgment rather evaporated in argument when it was more or less conceded that the order made *ex parte* under O. 17, r. 4 did not entitle Everyday to issue execution, but that does not go to the essential argument that the plaintiffs have a very large personal liability.

41. In the written submissions filed on behalf of the defendants the assertion in the affidavit of Mr. Das that the plaintiffs' position was untenable was somewhat tempered to the

proposition that it was surely to be doubted that the plaintiffs had raised a fair question to be tried. In oral argument, the defendants' position was further modified to the argument that the plaintiffs must struggle fairly significantly to establish a fair question.

42. Counsel stress that an applicant for an interlocutory injunction bears the onus of establishing not only that there is a *bona fide* question to be tried but also, as a matter of probability, that damages would not be an adequate remedy – *Curust Financial Services v. Loewe-Lack-Werk* [1994] 1 I.R. 450; that cases involving commercial property are viewed differently to cases involving the family home – *O'Gara v. Ulster Bank DAC* [2019] IEHC 213; and that the fact that an injunction would serve no practical purpose is a factor that militates strongly against the granting of an injunction – *Vieira v. Ulster Bank Ireland Limited* [2014] IEHC 591.

43. As to the balance of convenience, it was submitted that any loss that might be suffered by the plaintiffs by reason of the disposal of what were said to be non-essential assets was readily capable of being compensated in damages; that the plaintiffs lacked the means to make good their undertaking as to damages; and that the grant of an injunction would be futile in circumstances in which Everyday has already applied to have a judgment mortgage registered over the lands, which irrespective of the outcome of this action would be sold.

44. Mr. Fanning analysed the cases upon which the plaintiffs' case is founded.

45. The decision of the Supreme Court in New South Wales in *Meldov*, he said, simply followed the decision of that court in Estoril. The foundation of the judgment in *Estoril*, he said, was an American textbook, *Nelson and Whitman, Real Estate Finance Law* and the purposive approach advocated by the principles there suggested sit uneasily with our rules of construction of contracts. While steadfastly maintaining his argument that the plaintiffs' case was flatly against clause 3.01 of the charges, Mr. Fanning argued that at its height, the plaintiffs' case was fairly weak. On the authority of the decision of the Supreme Court in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Limited* [2019] IESC 65, the strength – Mr. Fanning would say, the weakness – of the plaintiffs' case is something which the court is entitled to have regard to where the application is otherwise finely balanced.

Discussion and conclusions

46. I have to say that I am by no means clear as to the reality of this application. Mr. Tyrrell was appointed, or purportedly appointed, as receiver by the exercise, or purported exercise, by Everyday of its statutory power under the Conveyancing Acts to appoint a receiver over the income of the mortgaged property. He does not have a power of sale. He has no interest in collecting the rent payable by Leinster Woodcraft and Aluminium Limited in respect of the sheds which it occupies, the lease or letting of which, according to Everyday, was invalid because it was made in breach of the negative pledge. Although it is acknowledged that Mr. Tyrrell does not have a power of sale, all the appearances are that it was he who had the signs erected. If that is so, Mr. Tyrell can only have had the signs erected in a separate capacity as agent of Everyday.

47. If Everyday is correct in its contention as to the correct construction of the charges, it has a power of sale, but is does not have possession and its right to possession is contested. If, technically, Everyday could sell the lands without possession, it is difficult to imagine who would buy them, *a fortiori* with litigation pending challenging the existence of the power of sale. This was touched upon in argument but not fully argued. It was suggested that the dual appointment of an insolvency practitioner as receiver and as agent of the mortgagee is a commonly used "*workaround*" to supply a deficiency in the mortgagee's power, but I do not understand how any deficiency in the mortgagee's power might be met by the appointment of an agent to do on behalf of the mortgagee what the mortgagee cannot do by itself. The proposition in Eversheds Sutherland's letter of 8th November, 2019 to Mr. Tyrrell that he is bereft of all meaningful powers in respect of the property has not in terms found its way into the statement of claim and is not obviously correct but what does rather appear is that all that has been done by him has been done *qua* agent of Everyday and not *qua* receiver. I do not believe that it is objectionable in principle that a person appointed as receiver should undertake a dual role as agent of the mortgagee, but it seems to me that there is a difference between a receiver with a dual role and a double agent.

48. As I have said, while the issue as to how the defendants if not restrained by order might sell the land was touched upon it was not fully argued and I decide the case on the basis on which it was argued, namely, that the plaintiffs apprehend that the defendants will sell the land before their action is heard, and that the defendants threaten and intend to do so.

49. I am satisfied that the plaintiffs have established that there is a fair question to be tried as to the correct construction of the charges.

50. Clause 3.01, as Mr. Fanning submits, says what it says: but so did the clause in the guarantee given by the Messrs. McCabe which the Supreme Court (long before the speech of Lord Hoffman in *Investors Compensation Scheme v. West Bromwich Building Society* [1996] A.C. 261 and its own decision in *Analog Devices BV. v. Zurich Insurance Co*. [2005] 1 I.R. 274) found was limited to the specific transaction for which it was given.

51. Mr. Fanning offers a persuasive argument that the so-called *Estoril* principles are not really *Estoril* principles at all but *Nelson and Whitman* principles, and that they are not really New South Wales principles but American principles, and that there is a difference between the American law on which they are based and Irish law. Mr. Fanning emphasises that *Estoril* has not been adopted here or in England, but neither has it been rejected. I am not on an interlocutory motion to finally decide that argument.

52. It is uncontested, as Egan J. put it in *Bank of Ireland v. McCabe* that the law of contract depends on the agreement between the parties. It is uncontested that the factual matrix in which a contract is to be construed is that which pertained at the time the contract was made. I understand it to be common case that the object of construing a contract is to divine the presumed intention of the parties, which must be distinguished from the subjective intention of either, or even both, of the parties. If it might be said that the

plaintiffs are facing an uphill battle to persuade the court that the covenant was not intended to do what it said, the court at this stage is not to attempt to assess the strength of the case unless the case for and against the granting of an injunction is finely balanced. On the one hand the language in clause 3.01 appears clear but on the other the charges were in a pre-printed standard form and were signed at a time at which the only liabilities of the plaintiffs to the bank were those which had recently been sanctioned by a retail branch for the purposes for which they had been sanctioned. It is unquestionably the fact that the charges were intended to secure the loans recently approved but the question is whether the parties presumed intention extended beyond those facilities to potential future liabilities not then contemplated.

53. Mr. Sammon has sworn that there was a clear delineation between his and Mrs. Sammon's personal borrowings and those of the companies. Everyday disagrees, but that is not an issue that can be decided at this stage. Mr. Sammon has sworn that neither he nor Mrs. Sammon ever agreed to *"secure the Sammon Group borrowings against the mortgages*" which is rather confusing. Mr. Sammon has deposed that when, in 2007, the corporate loans were first drawn down, he and Mrs. Sammon were assured by an identified bank manager that the lands would not underpin the corporate borrowings as security. Something may ultimately turn on the fact that this evidence was first given in Mr. Sammon's second affidavit, but I am not on this application to attempt to weigh the evidence. It occurs to me indeed that there may very well be a debate as to the relevance, or even admissibility, of the evidence of the opinion of the bank manager who was not involved in the taking of the charges.

54. It is well established that the bar which a plaintiff must cross to establish the existence of a fair question to be tried is a fairly low one. If the converse is whether it is clear that the plaintiff's case is bound to fail, this, in my firm view, is certainly not such a case.

55. The status quo is that the plaintiffs are in possession of the lands. The object of the order sought is not to restrain the receiver from exercising his powers as such but to restrain the sale of the land by Everyday, whether directly or by its agent.

56. As to the adequacy of damages, this is not, from the plaintiffs' perspective, a commercial case. I cannot accept the defendants' argument that the subject lands are *"non-essential assets*" or that the lands can properly be seen as similar to a commercial investment property. I think that there may very well be a difference between the lands surrounding the house which were part of the large site on which it was originally built, and which are more closely connected with the amenity of the house, and the adjacent seventeen acres which are used as a hobby farm but neither side suggested that it might be appropriate to make an order in the terms sought in respect of some but not all of the subject lands. In any event, if the amenity of the seventeen acres is less obvious than the lands surrounding the house, the evidence is that those lands were bought and have since been used for recreational purposes by the Sammon family. The fact that two of the sheds are rented at €80 per week is not significant in the overall assessment of the nature of the lands. If the lands were now sold and the plaintiffs won their case, the plaintiffs would

have been permanently – and wrongly – deprived of their property. If, for the sake of argument, the defendants were called upon to account for their wrongful action they would surely seek to set off the plaintiffs' damages against their liabilities, in which event the plaintiffs would never see any compensation.

57. I accept Mr. Lewis's submission that the defendants' argument that they are entitled to have the lands sold by hook or by crook is wrong in principle. Every creditor is entitled to his remedies in law, but is confined to his remedies in law. Equally, every debtor is entitled to due process. It cannot be right to balance against the threat that a creditor will purport to exercise a power which he does not have the prospect that the creditor may otherwise and by quite different means achieve the same end. I do not believe that it matters much, if at all, that Mr. and Mrs. Sammon have already been decreed. What the defendants' argument boils down to is the proposition that in dealing with this action the court should presume the outcome of separate proceedings which not only have not been commenced but for which – the judgment not having been registered as a judgment mortgage – the ground has not been laid and which – if the land were now to be sold – would never arise.

58. Apart from principle, the assumption which the defendants invite the court to make – if it could be made and could safely be made – would accelerate Mr. and Mrs. Sammon's loss of the lands, possibly by years. If the possibility mooted by Mr. Lewis that the plaintiffs' circumstances might change sufficiently to allow them to pay the debt in full appears rather remote, I do not see why they should be deprived of that possibility, however remote.

59. As to the adequacy of damages as far as the defendants are concerned, I am satisfied that Mr. Lewis is right to say that while the defendants have questioned the ability of the plaintiffs to make good on their undertaking, they have not identified what their loss would be if the order sought were to be made. Plainly, the effect of the order would be to delay the threatened sale and so, if it were to be found that the defendants are entitled to sell, keep Everyday out of its money for as long as it would take to dispose of the action but there has been no attempt to quantify any apprehended loss. In these times of negative deposit interest rates Everyday might be better off in the event of a sale later rather than sooner. There is no evidence as to the value of the land or of any trend in land prices. There is no evidential basis for any apprehension that if the action were to fail the land would realise less than it would now. I cannot see how the costs of the receivership might increase if it is suspended.

60. In any event, I would have taken a lot of persuading to deprive the plaintiffs of their effective right of access to the court by reason of their straightened circumstances.

61. I pause here to say that – rather to my disappointment – there was no argument as to what the court should make of the fact that the plaintiffs are represented by expensive solicitors and counsel.

62. I have had no difficulty in identifying the lesser risk of injustice. If the plaintiffs win, they get to keep their garden and hobby farm. Whether later and by some other means the defendants can establish that they are entitled to a court order for sale is another day's work. If the defendants win, they will get to sell the lands. The balance is between the inevitable postponement of the exercise of the defendants', specifically Everyday's, right to sell and the risk of extinguishment of the plaintiffs' rights as the owners of the land.

Order

63. On the plaintiffs' undertaking as to damages, there will be an interlocutory injunction in the terms of paras. (a), (b) and (c) of the notice of motion restraining the defendants, whether by themselves, their servants or agents or otherwise, from advertising for sale, taking possession of, or entering any agreement to sell or selling the lands in Folios 43308F, 43309F and 54410F, County Kildare, and Folio 54148F, County Meath.

64. The issue in the action as to whether the charges extended beyond the 2000 and 2002 loans remains to be decided but the issue on the motion was whether the defendants should be free to sell the lands before the substantive claim is decided. Before making this application, the plaintiffs called on the defendants to undertake that they would not enter, market or sell the property pending the final determination of the proceedings and the defendants refused to do so. Subject to any submission otherwise, to be made in writing within fourteen days, it seems to me that the plaintiffs have been entirely successful and should have the costs of the motion. The trial judge will decide who is right and who is wrong on the substance of the dispute but will not revisit the issue as to what was to happen between now and then. Again subject to any submission otherwise, I am disposed to stay execution on foot of the order for costs pending the final determination of the action.