THE HIGH COURT

[2022] IEHC 612

2021 No. 3528P

BETWEEN

EAMONN McGIRR and FIONA FLEMING

PLAINTIFFS

AND

EVERYDAY FINANCE DAC and DAVID O'CONNOR

DEFENDANTS

JUDGMENT of Ms. Justice Eileen Roberts delivered on 4 November_2022

Introduction

1. This is an application by borrowers for an interlocutory injunction to restrain the sale of two secured properties by receivers and/or by a mortgagee in possession (to whom the borrowers' loan and mortgages were assigned by the original lender), pending the determination of these proceedings.

2. There have been many injunctions sought from the courts in relation to issues arising in receivership cases. Each case will turn on its own specific facts. Trying to link various court decisions or to establish definite rules to predict whether injunctions will be granted is difficult given the unique set of factors and circumstances at play in each case. However, I have had regard to the following general principles in determining this particular case.

3. If the injunction sought is, in essence, a mandatory injunction, the party seeking it will have to meet the threshold of a strong case likely to succeed, rather than the lower standard of a fair issue to be tried.

4. The reasons advanced by parties to challenge the appointment of receivers and the exercise of their powers must each be considered in the assessment of the relevant threshold and whether it is met in any individual case.

5. Assuming the relevant threshold is met, there are finely balanced considerations in assessing where the balance of convenience or the balance of justice lies in any given case. Damages may be an adequate remedy – indeed perhaps for both parties - or they may not be.

6. The court should consider on the facts on each case the likelihood of a party seeking injunctive relief being able to make good on its undertaking as to damages if it obtains an injunction but does not succeed at trial.

7. Relevant factors in relation to a proposed sale of property may include the level of indebtedness and whether the proposed sale will eliminate or merely reduce that indebtedness or whether a sale may adversely impact on the value of any equity remaining in the property for the borrower.

8. The nature of the property at issue is also relevant. The balance of convenience may favour a borrower where the property is one occupied by the borrower, or one from which the borrower is trading or to which the borrower has a strong emotional attachment. On the other hand, the balance may tilt the other direction for a property which is not occupied by the borrower or is a purely commercial property to which the borrower has no particular emotional attachment.

9. The behaviour of the parties is also a relevant factor in the exercise of the court's discretion as is any delay in seeking injunctive relief.

The facts in this case

10. In the present case, the plaintiffs are a married couple who purchased 10 "buy to let" residential properties with finance provided by AIB plc/AIB Mortgage Bank (**AIB**) with the mortgages secured as first fixed charges on those properties. The relevant facilities and mortgages date between 23 February 1994 and 28 December 2007. The plaintiffs defaulted on their loans and formal demands were issued to them by AIB on dates between March and May 2015. There is a dispute regarding those demands to which I will return, but the plaintiffs accept they were in default of repayments and remain so.

11. On 12 March 2020, AIB appointed the second defendant as receiver over the properties. AIB transferred the plaintiff's loans and mortgages to the first defendant on 13 March 2020 and immediately novated the deed of appointment of the receiver to the first defendant.

12. The present application concerns two of the ten properties purchased by the plaintiffs, namely 99 Stillorgan Road, Co Dublin (the **Stillorgan Property**) and 95 Ballyhooley Road, Fermoy Co Cork (the **Cork Property**). The plaintiffs seek to restrain the sale of those two properties, or either of them, by the defendants. An interim injunction was granted by Allen J on 8 November 2021 restraining the sale by the second defendant of these properties pending the determination of this motion.

13. The remaining eight buy to let properties have already been sold by the defendants. The plaintiffs complain about the lack of information given to them by AIB or the defendants concerning those properties prior to their sale. The plaintiffs also complain about the manner in which those properties were marketed and sold by online auction, which the plaintiffs say did not achieve proper market value for those properties and thus failed to properly reduce the plaintiffs' indebtedness to AIB or the first defendant.

14. The defendants say that the plaintiffs remain indebted to the first defendant in the sum of approximately €1.3 million, despite the sale of the eight properties. The plaintiffs say the market value of the remaining two properties, if correctly marketed and sold by private treaty with vacant possession, should between them make somewhere in the region of €900,000. The plaintiffs say the apparent shortfall in the region of €400,000 would be fully accounted for if all the eight properties had been marketed and sold so as to achieve their full market value. There is a dispute about the correct level of indebtedness but there is agreement between the parties that monies are due by the plaintiffs under the facilities.

Is there a fair issue to be tried?

15. The injunctions sought are prohibitory in nature and so the relevant threshold to be met is that there is a fair issue to be tried. As stated by Barniville J in *O'Gara v. Ulster Bank Ireland DAC* [2019] IEHC 213 at para [42] of his judgment, this is "*generally not a difficult threshold to meet*". There are a number of arguments advanced by the plaintiffs to challenge the entitlement of the defendants to sell the properties. The plaintiffs say these arguments either individually or collectively raise a fair issue to be tried:

16. **(i) Prior demand**: The plaintiffs say that a demand is a condition precedent to the appointment of a receiver. They say that there were no subsisting demands under the relevant loan facilities prior to the appointment of the second defendant as receiver, thereby rendering his appointment invalid. It is common case between the parties that AIB issued demands to the plaintiffs under their several loan facilities on dates between March and May 2015 at a time when the plaintiffs were in default under these various facilities. It is also accepted that no further demands issued to the plaintiffs before the appointment of the second defendant as receiver on 12 May 2020. The plaintiffs argue that the demands issued in 2015 were

extinguished or overtaken by Heads of Terms which were issued by AIB to the plaintiffs in November 2014 which the plaintiffs accepted on 27 May 2015. On foot of that acceptance, the plaintiffs assert that the facilities in question were restructured by agreement between the plaintiffs and AIB. The plaintiffs further claim that the defendants are estopped from reliance upon the demands issued on 31 March 2015, 15 April 2015 and 18 May 2015 by reason of the commitment given by AIB that same would not be pursued if the plaintiffs agreed to the Heads of Terms provided to them on 3 November 2014.

17. The defendants deny that any demand had to issue at all prior to the appointment of a receiver. They refer to the mortgage documents exhibited at Exhibit KD1 to the Affidavit of Kieran Dowling sworn 14 January 2022 which state that "*the loan and all other (if any) of the secured monies (whether demanded or not) shall be deemed to become due within the meaning and for all purposes of the Conveyancing Acts, 1881 to 1911 on the execution of these presents*".

18. Even if a demand was necessary, the defendants argue that the 2015 demands issued by AIB sufficed and that these demands were not set aside by the Heads of Terms. They say that the Heads of Terms document was expressly stated to be a "*non-binding Term Sheet*" which was qualified by a disclaimer clearly identifying the Heads of Terms as "*indicative only*". They say no offer was made in the Heads of Terms and so no agreement could be reached on foot of it alone. No required further documentation was entered into to restructure the plaintiffs' loans. The defendants say that correspondence never issued to suggest that the letters of demand would be withdrawn or not relied upon. In relation to estoppel, the defendants argue that there was no agreement, representation or reliance - all of which are essential features to sustain a valid plea of estoppel.

19. I do not on this interlocutory application have to finally determine whether a demand for payment was necessary in this case prior to the appointment of the second defendant as

receiver and, if so, whether the 2015 demands satisfied this requirement and remained extant up to the date of appointment of the receiver. I believe however that the plaintiffs have raised a fair issue on this point. On 12 May 2015 solicitors representing AIB wrote to the plaintiffs' solicitors complaining that they "*have not accepted the heads of terms which issued to them on 3 November 2014 despite considerable forbearance on the part of the Bank"*. The letter continues:

> "*We note that our instructions are to pursue judgment against your clients, however, if your clients are agreeable to accepting the proposed restructure as set out in the Heads of Terms which issued to your clients on the 3rd November 2014 our clients may consider revisiting their instructions.*
>
> *Please note that we require confirmation that your clients accept in full the Heads of Terms as issued on 3rd November 2014 within 7 days from the date hereof.*
>
> *If we do not receive confirmation that your clients are accepting the Heads of Terms within 7 days we will initiate judgment proceedings*."

20. A further letter from AIB's solicitors dated 21 May 2015 stated, "*We confirm that our clients require a signed unequivocal letter from your clients confirming that they will sign the Heads of Agreement dated 2014*".

21. The plaintiffs each signed a letter dated 27 May 2015 confirming "*Please note that we accept AIB's Heads of Terms Agreement of November 2014*". Their solicitors confirmed to AIB by letter dated 24 June 2015 that the plaintiffs "*have unequivocally agreed the Heads of Terms of November 2014*". No further steps were then taken by AIB against the plaintiffs until a receiver was appointed in January 2016. When that appointment was immediately questioned by the plaintiffs' solicitors it was confirmed by AIB's solicitors by letter dated 26 January 2016 that the appointment "*was an oversight*" on behalf of AIB and that the

appointment was "*in error and the Receiver is being removed*" and that AIB "*apologise for any inconvenience caused*".

22. I believe that all parties placed some reliance on the Heads of Terms (however they were described) and there is an argument therefore as to whether the demands survived the unequivocal acceptance of those Heads of Terms. There is also an argument that a demand was required – this court has not been furnished with copies of the facility letters to confirm otherwise. On that basis, I believe the plaintiffs have raised a fair issue on this point.

23. **(ii) Timing of appointment of the second defendant as receiver**: The plaintiffs argue that it appears that AIB had disposed of its interest in the plaintiffs' loans *prior* to the appointment of the second defendant as receiver. In those circumstances AIB would not have been able to validly appoint the receiver.

24. There is no doubt that a considerable degree of confusion was created by correspondence from the defendants which contained errors regarding the relevant dates. For example, a letter from the second defendant to the plaintiffs dated 15 May 2020 advised that the second defendant had been appointed receiver to the properties in question on 13 May 2020. However, when the plaintiffs were eventually provided with a copy of the deed of appointment it was dated 12 March 2020. Confusion was further compounded by errors in other correspondence which issued by or on behalf of the defendants. On 9 April 2020 Link Asset Services on behalf of the defendants issued correspondence to the plaintiffs which stated that the transfer of the facilities to the first defendant took place on 17 January 2020. That date was also incorrect. The defendants have belatedly exhibited documentation which shows that the relevant transfer to the first defendant took place on 13 March 2020 and on that same date, 13 March 2020, AIB and the defendants entered into the Receiver Novation Deed under which the first defendant was substituted in place of AIB as a party to the

instrument of appointment of the receiver which had been executed by AIB one day previously on 12 March 2020.

25. I am satisfied that the dates communicated to the plaintiffs rightly led to them querying whether the disposal of AIB's interest in the relevant loans and mortgages had taken place before the appointment of a receiver by AIB. Had this been the case, the appointment of a receiver by AIB would have been invalid. Counsel for the plaintiffs argued that he would be entitled at trial to test the credibility of the dates now provided by the defendants. That is of course the case. However, I have no reason at this point to doubt the accuracy of the documentation that has been provided by the defendants and this shows that AIB appointed the second defendant as receiver at a time when AIB still had a lender's interest and entitlement to appoint a receiver over the plaintiffs' properties and that novation occurred after the transfer of the loans and mortgages to the first defendant.

26. On this point therefore and in light of the clarifications provided by the defendants, I do not believe the plaintiffs have met the threshold of a fair issue to be tried. It is regrettable however that such confusion was caused by the defendants and persisted for so long and this undoubtedly in turn caused unnecessary work for the plaintiffs. This issue may in time form a basis of some submissions on legal costs but at this stage I do not believe it meets the relevant threshold – recognising of course that a trial judge will have the benefit of full evidence on this point.

27. **(iii) Power of second defendant to sell the properties**: The plaintiffs argue that the receiver does not have a power of sale under the relevant mortgage deeds. In fact this is not in dispute between the parties. The defendants state that the properties will not be sold by the receiver *qua* receiver. Rather, the second defendant has been appointed by the first defendant as its agent for the purposes of maintaining, marketing and contracting to sell the properties with the intent that the first defendant would ultimately execute the deeds of conveyance in

its own right as mortgagee in possession, having an express contractual power of possession and sale under the relevant mortgages. There is criticism by the plaintiffs of the timing and clarity of that disclosure by the defendants as well as a challenge to the validity of what the plaintiffs describe as this "workaround" arrangement.

28. The defendants rely on the decision of the High Court in *Moorview Developments v First Active* [2009] IEHC 214 which was a challenge by the plaintiff in that case to what it claimed was an inconsistency in the receiver's position as receiver and as agent of the lending institution qua mortgagee in possession. Reliance is placed on the following comments of Clarke J at para 16.62 of his judgment:

> "*As to the second argument the suggestion is that there was, somehow, a legal difficulty in Mr Jackson, as receiver, handing over possession to First Active as mortgagee in possession. It does not seem to me that the passage cited from Barr J in Bula v. Crowley offers Potteridge any assistance in this regard. While it is true to say that the mortgagee has no right to interfere in the receivership in the sense of interfering in the relationships between the receiver and third parties arising out of the receivership, that does not, in my view, provide any support for the proposition that a mortgagee who is entitled, independently of the receivership, to enter into possession itself as a mortgagee in possession, is not entitled to do just that, and to require the receiver to give up possession. The receiver is, of course, in one sense, an agent of the company. However, the company itself was obliged to give up possession to the mortgagee and there was nothing inconsistent, even to the extent that Mr Jackson was receiver of Potteridge, in Mr Jackson giving up possession in that capacity and on behalf of Potteridge in favour of First Active as mortgagee in possession. The fact that Mr Jackson also acted as agent for First Active thereafter seemed to me to be of no*

relevance. I was, therefore, also satisfied that this second ground entirely lacked merit".

29. The defendants argue that the *Moorview* decision establishes that there is no legal impediment to a person appointed as receiver being appointed to simultaneously act as agent of the mortgagee. They say it also confirms that a mortgagee is free, at any time, to decide to change the basis upon which the receiver is in possession by effecting a "*handover"* of possession from the receiver *qua* agent of the mortgagor to the receiver *qua* agent of the mortgagee.

30. They also relied on the comments of Haughton J in the High Court in *Vitgeson v O' Brien* [2017] IEHC 846 where he said "… *I'm quite satisfied that a receiver can undertake other work as agent for a charge holder notwithstanding that this is in apparent conflict with the receiver's deemed agency for the mortgagor in terms of the income and rents qua receiver"*. On appeal to the Court of Appeal ([2019] IECA 184 at para 24) McGovern J held:

"*The appellants argued in the High Court that the receiver acted unlawfully in undertaking tasks related to bringing the properties to market as he was only a rent receiver… The trial judge was satisfied that these tasks were undertaken by the receiver not qua receiver but rather as agent for the charge holder and he notes in his judgment that the receiver was not challenged on this issue. Accordingly, the work fell outside the receivership*."

31. The plaintiffs rely on the fact that the second defendant was appointed receiver only for the purpose of receiving rents, consistent with the Conveyancing Act of 1881. They rely in particular on the provisions of S62(7) of the Registration of Title Act 1964 which provides as follows:

"*When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may*

apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession".

32. Referring to the decision in *Tyrrell v. O'Connor* [2022] IEHC 274 which dealt with materially identical provisions to the mortgage provisions in the present case, the plaintiffs rely on the comments of Stack J where she said:

"*Allen J confirmed in Charlton v. Hassett (at para 56) that a charge holder has the right to apply to the court under section 62 (7) of the 1964 Act in a summary manner for possession. Turning then to the power of a receiver who had also, as in the case here, been appointed as agent of the mortgagee, he stated (at para 57) "Qua mortgagee's agent, the receiver cannot do anything that the charge holder cannot do". It therefore seems that there is at least some argument in this case that PODAC, should apply in a summary manner for possession pursuant to section 62 (7). That is not the procedure which has been invoked here*".

33. The plaintiffs also rely on a recent decision in *Nihill v. Everyday Finance and Tyrrell* [2022] IEHC 484 where the High Court granted an injunction restraining the sale of secured property. In that case a draft contract for sale had been prepared in which the receiver – who was a rent receiver only – was stated to be the vendor on behalf of the borrower. In response to the argument that the receiver was exceeding his powers, the defendants in that case claimed that the intention was for the property to be sold by the receiver as agent of the mortgagee. Dignam J was not convinced by this argument for the following reasons (at paragraphs 53 to 55):

"*However, the Second-named Defendant has not been appointed as agent of the First-named Defendant. As is set out above, that is clear from the instruments of appointment and the position adopted by the Defendants. No other appointment documents have been referred to or exhibited, and the Defendants have not stated that he has been appointed as the First-named Defendant's agent.*

Thus the current state of the evidence/facts is that the vendor is stated in the contract to be the Plaintiff acting through the Receiver and that he, the Receiver, will enter the contract "as agent of the mortgagee" but he has not been appointed as such agent.

In my view, in those circumstances, the plaintiff has established an arguable case that the purported sale is in excess of the Second named Defendant's powers…".

34. The defendants seek to distinguish the facts of *Nihill* from the present case. They say that the evidence of both defendants is that the receiver has been appointed as the first defendant's agent and has been authorised to maintain, market and contract to sell the properties. While they acknowledge that they have not provided the plaintiffs with a copy of any agreement pursuant to which the receiver was appointed as agent of the first defendant (as there is no such document), they say there is no requirement for a written agreement in order for an agent to be appointed and they refer in that regard to *Bowstead & Reynolds on Agency* (para 2-035) to the effect that as a general rule "*an agent may be appointed and authorised by deed, by writing, or by word of mouth".*

35. Reliance is also placed by the plaintiffs on the decision of the High Court in *Taite v. Molloy* [2022] IEHC 308 where the High Court refused an application by the plaintiffs for interlocutory injunctive relief designed to secure vacant possession of a number of secured properties. Two of the plaintiffs were rent receivers who had also been appointed as agents of the charge holder. In refusing the injunction, the court held that there was a "*real dispute*" as to whether the rent receivers were entitled to possession where their intention was not to

collect rent but to deliver vacant possession to the mortgagee for the purposes of sale. Allen J confirmed that the proper course of action for a mortgagee seeking possession prior to the Land and Conveyancing Law Reform Act 2009 (which applies to mortgages created by deed after 1 December 2009) is for an application for possession pursuant to section 62 (7) of the Registration of Title Act 1964. Allen J distinguished the decision of the Court of Appeal in *Vitgeson Ltd v. O'Brien* where he stated (at para 85):

> "*Critically, it seems to me, and by contrast with the instant case, the marketing of the properties in Vitgeson appears to have been undertaken with a view to a sale by the mortgagee on foot of an order for possession which have been claimed by, and was ultimately granted to, the mortgagee to allow the mortgagee to realise the security. In those circumstances, there was no conflict between the role of the receiver in collecting the income and the desire of the mortgagee to sell. The role of the receiver in collecting the rents would come to an end on the execution by the mortgagee of the court order for possession but unless and until then, the receiver's functions and duties were clear*."

36. The defendants have urged this court not to adopt the same analysis. First, they say there is no statement in either the High Court judgment or the Court of Appeal's judgment that the marketing of the properties was carried out in contemplation of an order for possession being granted. On the contrary, the counterclaim for possession was made in response to the borrower's proceedings which themselves were precipitated by the fact that the receiver was *already* marketing the property for sale. Second, they say there is no reference whatsoever in the judgment of Haughton J to the mortgagee's counterclaim for possession and it does not appear to have been relevant to his holding. Third and most importantly, they say that the Court of Appeal specifically referred to the fact that the marketing work, as per the receiver's own evidence, was being carried out in contemplation of a sale on foot of the mortgagee's contractual power of sale. They submit that an

interpretation of *Vitgeson* to the effect that the receiver intended to sell the secured property by executing an order for possession is incorrect and should not be followed. In this regard they stress that the judgement in *Taite* was given on an interlocutory application and by its own terms was "*not to be understood as finally deciding a contested issue of law*" (para 4). By contrast, the judgment of the High Court in *Vitgeson* was handed down following a full trial and was subsequently affirmed on appeal.

37. The defendants say that the facts of the present case are, for relevant purposes, identical to those in *Vitgeson*. In both cases, the receiver was initially appointed as a rent receiver only but was subsequently appointed as agent of the mortgagee to prepare the secured property for sale. In both cases, it was intended that the receiver would prepare the property for sale with the charge holder ultimately executing the conveyance. On any view, they say *Vitgeson* must be understood as confirming the legitimacy of that arrangement and, having been affirmed by the Court of Appeal, this court is bound to follow it.

38. It is not the role of this court at interlocutory stage to determine disputed issues of fact or indeed of law. I accept however that a receiver can undertake work outside the receivership as agent for a charge holder notwithstanding that this may appear to conflict with the receiver's deemed agency for the mortgagor in terms of the collection of rents *qua* receiver. However, there must be some evidence of the appointment of the receiver as the agent of the charge holder for the purposes of marketing and preparing the property for sale as well as evidence of the ability of the charge holder to sell as mortgagee in possession.

39. In the present case one of the motion reliefs seeks production of: (1) the contracts for sale of the secured properties already sold; (2), the agency agreement by which the second defendant was appointed as agent for the first defendant in the terms alleged; and (3) the conveyances entered into by the first defendant as mortgagee in possession for the secured properties already sold.

40. At the hearing of this motion the court was advised that redacted copies of the contracts for sale entered into by the receiver had been provided after the motion issued. They were not however before the court. The defendants say that there is no written contract appointing the receiver as agent of the charge holder but they have confirmed on affidavit that the receiver has been so appointed. Beyond the fact of appointment however there are no details provided, for example, as to when such appointment was made or on what terms it was made, whether as to payment or otherwise. This is surprising in circumstances where it is stated that eight properties have already been sold by the first defendant as mortgagee in possession. The plaintiffs point to correspondence from the second defendant dated 15 May 2020 where he states "*I am the sole agent of this property and as such the only person who may act in relation to the properties*". The plaintiffs say this statement on its face precluded any other party, including the first defendant, from entering into possession of the properties. They also state that contrary to averments made by the second defendant, the plaintiffs never provided keys to the relevant properties.

41. It is my view that a charge holder should provide some evidence to a court, even at interlocutory stage, when faced with a direct challenge to an agency appointment, that it has an entitlement to possession and that the receiver has actually been appointed as its agent for the purposes of marketing the property for sale. There are averments by the defendants on affidavit that the agency arrangement has been put in place orally. I have no reason to doubt those averments but there is an absence of any detail or evidence before this court as to any of the terms of that appointment or even when it was made. The averments appear to contradict statements made by the second defendant in correspondence that he is the only person who may act in relation to the properties. This evidence of the agency arrangements will no doubt be available to the trial judge. Had it been available to this court at the interlocutory hearing I could have dealt with it. Because I do not have any specifics on the agency arrangement

however, I believe there remains some argument about this matter and therefore a fair question be tried on it.

42. **(iv) Housing loan protections**: An argument which was advanced orally by the plaintiffs' counsel (but did not feature in affidavit or written submissions) is that the loan for one of the properties might correctly be described as a housing loan meriting additional protections which would have to be complied with and which would prevent the sale of that property. Counsel for the plaintiffs submitted that the plaintiffs had lived in the Stillorgan Property for a period of five years at some point in the 1990s. There was however no formal evidence of this before the court. Counsel for the defendants submit that this is not a stateable argument. He says that the receiver has possession of the properties and that the current status of the Stillorgan Property is all that is relevant. Counsel for the defendants also pointed to the first affidavit of the first plaintiff which avers that the property in question was an investment property and the same description is applied to it in the statement of claim which states at para 4 that "*[t]he Properties were purchased as investment properties and each were let out*". I believe that this matter does not present a fair issue to be tried in all the circumstances. The plaintiffs must rely on their pleaded case and there was no evidence to the contrary before this court. Accordingly, on this issue the plaintiffs have failed to raise a fair issue to be tried.

43. Having found that the plaintiffs have established a fair issue to be tried on at least some of the arguments advanced by them, I must now proceed to consider the balance of convenience, to include the adequacy of damages.

The balance of convenience – submissions of the parties

44. Not surprisingly, the parties disagree on where the balance of convenience lies in this matter.

45. The defendants highlight the adequacy of damages as "*the most important element*" in assessing the balance of convenience and that in commercial cases, where a breach of contract is claimed, courts should be "*robustly sceptical*" of a claim that damages are not an adequate remedy, quoting from O'Donnell J in the Supreme Court decision of *Merck Sharp & Dohme v. Clonmel Healthcare* [2019] IESC 65 at para 64.

46. The defendants say that if this court were to refuse the interlocutory injunctions and the plaintiffs were to succeed at trial then the plaintiffs would be adequately compensated by an award of damages.

47. Firstly, they say it is not clear that any loss would be suffered by the plaintiffs if the properties are sold. The plaintiffs are heavily indebted to the first defendant and any sale of the properties will stand to their credit by a corresponding reduction in their liability to the first defendant.

48. Second, the defendants submit that even if an injunction was to be granted it would be open to the first defendant to simply reappoint the receiver to act as a rent receiver thus depriving the plaintiffs of any income from the properties. It would also be open to the first defendant to bring possession proceedings in its own right. Thus even if the plaintiffs' arguments were entirely correct, they would still ultimately lose the properties.

49. Third, the defendants say that the interest of the plaintiffs in the properties is exclusively commercial and that the properties are not ones which the plaintiffs are in possession of or to which they have any emotional attachment. A rental income is being derived from the properties. Any loss from being wrongfully deprived of that rent is capable of being easily assessed and compensated in damages.

50. Fourth, the defendants say that to the extent that the plaintiffs are apprehensive about the properties being sold at an undervalue, that is equally something that can be compensated in damages should the plaintiffs succeed at trial.

51. Fifth, the defendants say that the plaintiffs' reliance on the principle that damages will generally not be adequate to compensate a loss of property rights is merely a generalised claim which could be made with equal force by any borrower and is not determinative of the question of the adequacy of damages. They say that every debt enforcement action affects the debtor's property. It does not follow that every debtor is entitled by virtue of that fact to injunctions restraining enforcement. Moreover, just as the refusal of an injunction to any borrower may interfere with any borrower's property rights, the grant of an injunction to any borrower may interfere with the creditor's property rights. The plaintiffs in this case, in executing their mortgages, agreed to confer upon the mortgagee the right to take possession of and sell the properties if the plaintiffs defaulted on their loan repayments. There is no dispute that the plaintiffs have defaulted on their loan obligations.

52. On the other hand, the defendants argue that if this court grants the interlocutory injunctions and the plaintiffs fail at trial, the defendants would not be adequately compensated by an award of damages for any loss suffered between the hearing of the interlocutory injunction and the trial.

53. They say that damages will only be an adequate remedy for one party where the other party would be in a financial position to pay them. They submit that there is no evidence that the plaintiffs in this case have the financial means to discharge any damages award which might ultimately be made against them. In the meantime, if the defendants are prevented from selling the properties, further losses would arise for the defendants in the form of accruing interest, costs of maintaining the properties until trial and any reduction in value which may occur in that period due to a fall in the market.

54. In relation to other matters that this court should consider in determining where the balance of convenience lies, the defendants raise factors such as the initial cooperation of the plaintiffs with the receivership and their belated challenge to the receiver's appointment, as

well as the delay by the plaintiffs in bringing the injunction application 10 months after it was first threatened. The defendants argue that the status quo at the time of the first application for an injunction was that the receivership properties were in the process of being marketed and sold. They say that the injunctive relief now sought would overturn that status quo and is a factor justifying its refusal.

55. The plaintiffs argue that a rigid analysis of the issue of adequacy of damages is no longer the correct approach and they also rely on the decision in *Merck* to support that proposition. They refer to the following comments of O'Donnell J in that case (at para 64):

> "*While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;*
>
> *…While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be to determined.*"

56. The plaintiffs also rely on comments by O'Donnell J in that judgment (at para 35) as cited by Collins J in the Court of Appeal decision in *Betty Martin Financial Services Ltd v. EBS DAC* [2019] IECA 327 (at para 81) in the following terms: "*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."* They say that the greatest risk of injustice is faced by the plaintiffs in the event of the application being refused.

57. The plaintiffs say that if the remaining two properties are disposed of prior to the trial of the action, then the trial itself will lack any reality as all of the properties would in those

circumstances already be disposed of. They submit that there is a far greater risk that the trial will not take place if the remaining properties are disposed of ahead of same.

58. The plaintiffs argue that the sales to date have been made at a significant undervalue due to the hurried nature of the sales by way of auction on the BidX1 website, and to the apparent occupancy of those properties. They argue this has resulted in lower realisation values and has thus prejudiced the plaintiffs in terms of clearing their indebtedness on their loans.

59. The plaintiffs say that if the defendants are permitted to proceed with the sales of the remaining properties it would bring an end to their challenge to the validity of the appointment of the receivers or their entitlement to sell or arrange for sale of the properties. It would effectively grant summary judgment, which the plaintiffs say is not permitted under or consistent with the decision of the Supreme Court in *Charlton v. Scriven* [2019] IESC 28.

60. The plaintiffs say, on the other hand, the prejudicial consequences faced by the defendants in the event that the interlocutory injunction is granted are limited to delay in the sale of the properties and that the defendants will still receive rents pending the determination of these proceedings.

61. The plaintiffs state they have evidence that the sales to date were achieved at an undervalue of €406,000 and that they have suffered this loss due to the failure on the part of the defendants to sell the properties by private treaty and with vacant possession. Further sales on the same basis will increase that loss and expose the plaintiffs to an even greater shortfall and thus a risk of further enforcement by the first defendant. It is argued that the plaintiffs face a far greater risk of injustice in the circumstances than is faced by the defendants.

The decision of this court

62. The challenge for a court in cases of this nature is well set out in the decision of the Supreme Court in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 2 IR 152 where Clarke CJ noted that

> "*the problem stems from the fact that the court is being asked, on the basis of limited information and limited argument, to put in place a temporary regime pending trial in the full knowledge that the court does not know what the result of the trial will be. It seems to me that, recognising the risk of injustice is an inevitability in those circumstances, the underlying principle must be that the court should put in place a regime which minimises the overall risk of injustice."*

63. If this injunction is granted, then the remaining two properties cannot be sold until the determination of these proceedings. In terms of impact on the defendants this will mean they cannot secure the sale proceeds until trial. This will certainly delay matters from their perspective. However, the pleadings are at defence stage and this court can fix directions to minimise the period of delay to trial. The question arises as to whether any loss will be suffered by the defendants as a result of that delay. If the property market falls then the answer is yes. Equally however the market could remain level or strengthen in which case no pecuniary loss of a capital nature would be suffered by the defendants as a result of deferring the sales. There will be ongoing interest and expenses associated with maintaining the properties until trial but these costs must be balanced against any rental that will be earned on those properties which it is accepted the defendants will be entitled to during that period (subject to accounting for same). It is also the case that the defendants will be able to claim for those additional costs and expenses. It is hard to see how damages would not adequately compensate the defendants for any loss that may arise by granting the injunction. There is some significance however in the defendants' concern that the plaintiffs' undertaking as to

damages is not substantiated by evidence of any ability on the plaintiffs' part to pay damages, if ordered to do so.

64. I recognise those concerns which have been expressed regarding the plaintiffs' ability to meet any award. On that point however there is evidence that the plaintiffs are both employed and that they have other property - at least their family home, which they have stated they are keen to safeguard.

65. Insofar as the plaintiffs are concerned, if the injunction sought is not granted then the remaining two properties will be sold by the defendants. The plaintiffs admit they are in default of repayments and that they secured their borrowings on the properties. No evidence was adduced to contradict the defendants' position that the properties are purely investment/commercial properties to which the plaintiffs have no particular emotional attachment. While it was argued that damages would not compensate for breach of the plaintiffs' constitutional property rights, on the facts of this case I accept the defendants' submissions on that point as set out earlier. I believe that the plaintiffs' real issue with the sales is that they fear the defendants will not realise full market value for the properties and that the plaintiffs will then be left in the unenviable position of facing a shortfall on buy to let loans even after all the secured properties have been sold. There are proceedings in relation to the alleged shortfall but the sale of the two remaining properties now may make it more difficult for the plaintiffs to advance those proceedings against the defendants who may, post-sale, have less interest in seeing them progressed.

66. I need to also take into account other relevant considerations. I believe the status quo is the current situation which prevails following the order of Allen J preventing the sale of the properties and that it is not the status quo alleged by the defendants. As Clarke CJ said in *Charlton v. Scriven* at para 7 "*interlocutory injunctions… are designed to do what they say, that is, to hold the situation until there can be full trial*".

67. I am conscious that eight of the ten properties have already been sold by the defendants including property sold at a time after the present motion had issued. While I am not suggesting that there was anything improper in that, it does I believe counter the defendants' suggestion that the injunction should be refused because of the plaintiffs' delay. No doubt the plaintiffs would have moved far more quickly had they been advised by the defendants that sales were taking place. There has been a less than satisfactory flow of information to date between the parties in this case. I believe that refusing the injunction could perpetuate those issues and that the sale of the properties now may make the trial of the action more difficult to expedite as the defendants would then have sold all the secured properties.

68. I believe that, although finely balanced, granting the injunction minimises the overall risk of injustice in this case. I am conscious in that regard that the proceeds of sale of the remaining properties (even on the plaintiffs' own market value figures) will not eliminate entirely the accrued arrears and interest on their loans and so a shortfall will remain which, if pursued by the defendants, could expose the plaintiffs' family home to the risk of a judgment mortgage. This is in circumstances where the current proceedings between the parties seek to address any shortfall. Maintaining the status quo will ensure those issues are addressed together and this court will facilitate the parties in relation to making directions to ensure that these proceedings come to trial in the shortest possible time.

69. I therefore grant the injunction sought by the plaintiffs restraining the sale by the defendants of the Stillorgan Property and/or the Cork Property pending the determination of these proceedings.

70. At the hearing of this injunction I directed the release to the plaintiffs of copies of the conveyances for the properties sold to date (redacted to exclude purchaser information) and,

as the other requested material has already been provided or is stated not to exist, no further order is needed at this time in relation to that aspect of the motion.

71. I will hear the parties in relation to legal costs and any other issue, including further directions, and list this matter for mention on 16 November at 10:30 AM or as may otherwise suit the parties.