THE HIGH COURT

[2023] IEHC 304

2022 No. 2013P

BETWEEN

IRENE CONNOLLY

PLAINTIFF

AND

BRGA LIMITED t/a BRG GIBSON AUCTIONS, KEN FENNELL, JAMES ANDERSON and START MORTGAGES DESIGNATED ACTIVITY COMPANY

DEFENDANTS

JUDGMENT of Ms. Justice Eileen Roberts delivered on 7 June 2023

Introduction

1. This is the plaintiff's application for interlocutory relief against the defendants concerning a property in Monaghan comprised in Folio MN7213F (the "**Property**"). There is also a second motion before the court in relation to the plaintiff's failure to deliver a statement of claim. In circumstances where a statement of claim was delivered the day before the hearing, that second motion did not trouble the court. The focus of this judgment therefore relates to the plaintiff's application for interlocutory relief.

2. It is common case that the Property is not the plaintiff's family home. It is one of a number of residential investment properties owned by the plaintiff and was, until March 2022, occupied by a tenant. The Property has remained unlet since that date.

3. In 2004, the plaintiff, who is now retired, borrowed €77,400 from Irish Life and Permanent plc ("**PTSB**") on foot of a loan offer letter dated 12 February 2004 (the "**Loan**") secured by a mortgage dated 29 March 2004 (the "**Mortgage**"). The plaintiff was registered as owner of the Property on 3 June 2010 and the Mortgage was also registered as a charge in favour of PTSB on the folio for the Property on 3 June 2010.

4. In February 2019, PTSB transferred its interest in the Loan and Mortgage to the fourth named defendant who, on 27 March 2019, became the registered owner of the former PTSB charge on the Property, with the entry on the folio noting that "*the ownership of this charge has been transferred*".

5. On 26 May 2021, a letter of demand was sent by the fourth named defendant to the plaintiff calling for payment in the sum of €32,912.64, representing the outstanding balance on the Loan as at 30 April 2021. No payments were made by the plaintiff on foot of that letter of demand.

6. By deed of appointment dated 4 November 2021 (the "**Deed of Appointment**"), the second and third named defendants (the "**Receivers**") were appointed by the fourth named defendant as receivers over the Property. The Receivers accepted their appointment on 30 November 2021.

7. Subsequently, the Property was marketed for sale by the Receivers in a public auction commencing at noon on Thursday, 26 May 2022 for the sum of €100,000. The first named defendant is the firm of auctioneers who were involved in that auction process. On 25 May 2022, the plaintiff applied *ex parte* for an injunction to prevent the sale, which application was refused by O'Moore J. The court however gave the plaintiff liberty for short service of a Notice of Motion for an interlocutory injunction returnable for the following morning at 10am. On 26 May 2022 that motion was heard by Dignam

J in circumstances which will be set out in more detail in this judgment. The hearing obviously took place with some considerable degree of urgency given that the auction was to commence at 12 noon that day. While the defendants' solicitors had been served with papers by email the previous afternoon and had prepared an unfiled replying affidavit for the purpose of the court hearing on 26 May, it was not possible on timing grounds for them to have comprehensive evidence before the court on 26 May 2022. Dignam J granted the plaintiff injunctive relief and the Property was withdrawn from auction immediately thereafter.

8. In those circumstances, while both parties were represented before Dignam J, the hearing before him was in reality an interim hearing. Further affidavits were exchanged between the parties following the Order of Dignam J. The interlocutory application proper was heard by this court on 18 May 2023, and is the subject of this judgment.

The plaintiff's application

9. The Order of Dignam J made on 26 May 2022 is in the following terms: –

> *"...that the defendants and each of them their servants or agents be restrained until further Order of the Court from taking possession and/or marketing for sale and/or entering into contract for sale and/or completing any sale and/or selling [the Property]…*".

10. The Order reflects the usual undertaking as to damages by the plaintiff but also includes an additional undertaking by her "*…to pay €400 per month on the first day of each month to the Fourth Named Defendant*".

11. There was some debate at the outset of the interlocutory hearing as to whether the plaintiff had complied with the terms of that undertaking. This would be of some importance in circumstances where the plaintiff was seeking to invoke the equitable

jurisdiction of this court. While it is clear that there were some missed monthly payments, the affidavit filed by the plaintiff and sworn on 12 May 2023 provided an explanation for those delays and, importantly, confirmed that as at the date of the hearing of the interlocutory application all payments specified in the order of Dignam J had been made in full by the plaintiff. This court therefore proceeded on the basis that the plaintiff was not in breach of the Order of Dignam J.

12. The plaintiff seeks interlocutory relief in the same terms as sought before Dignam J. In general terms, the relief sought is for an injunction restraining the defendants from taking possession of the Property and/or marketing for sale and/or selling or taking any steps to sell the Property pending the trial of this action.

There is one practical issue in relation to the Order currently in place and what is in fact the *status quo*. It appears to this court that the parties have, in reality, treated the Order as one solely directed to preventing the sale of the Property. It appears that the Receivers are in fact in possession of the Property albeit that strictly the Order prevents this. The Property has been unlet since March 2022 and remains vacant. The Receivers cannot do anything with the Property as the Order in place restrains the defendants from taking possession of it. On the other hand, the plaintiff is not in fact in possession of the Property. The plaintiff's counsel indicated that the plaintiff would not object to the Property being rented out by the Receivers, but it is not clear to this court whether that concession had previously been made by the plaintiff to the defendants. It appears that the Receivers have control of the Property and so have "possession" of it in that sense of the word. This is a matter to which I will return. However, mindful of the rental income that could be generated and balancing that against the level of arrears, I do not believe it is in the interests of either side to have the Property remain unlet while interest continues to accrue and no rental income is generated.

The relevant legal principles for interlocutory relief.

13. It is not proposed to set out in detail the relevant well known legal principles the court must consider in applications of this nature.

14. These principles are well summarised in the following framework set out by O'Donnell J (as he then was) in *Merck Sharp & Dohme Corporation v Clonmel Healthcare Ltd* [2019] IESC 65, [2020] 2 IR 1 at pp. 36-37 of his judgment:

"*(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief pending the trial could be granted.*

(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the approach in American Cyanamid v. Ethicon Ltd. [1975] A.C. 396 and Campus Oil v. Minister for Industry (No. 2) [1983] I.R. 88 will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit.

(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice.

(4) The most important element in that balance is, in most cases, the question of adequacy of damages.

(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy.

(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it may be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial.

(7) 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 in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial.

(8) 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 determined*."

15. The plaintiff also relies on the case of *AIB V Diamond* [2012] 3 IR 549 with its emphasis on the court taking into consideration the outcome which achieves the least risk of injustice pending a full hearing of the issues at trial.

16. The defendants agree with the legal principles for interlocutory relief set out above. However, they disagree with the plaintiff as to how these principles should be applied to the facts of the present case. Furthermore, the defendants strongly urge this court to refuse relief on the grounds of delay.

17. I propose in those circumstances to consider the relevant legal principles by reference to the background to this case. I will then consider the defendants' submissions regarding delay.

<u>A fair issue to be tried</u>

18. The first requirement, commonly referred to as the threshold test, is for the plaintiff to demonstrate that she has raised a bona fide question or fair issue to be tried. I believe that the thrust of the interlocutory relief sought by the plaintiff is prohibitive in nature and therefore this is the appropriate threshold test rather than the higher standard of establishing a case likely to succeed at trial. While there were many issues canvassed in the exchange of affidavits and written submissions, the plaintiff's arguments were confined to the following issues at the hearing of this matter. I set them out below in summary form in circumstances where counsel for the defendants quite fairly acknowledged at the hearing that the plaintiff had raised fair issues, without prejudice of course to his contention that the plaintiff would not succeed at trial.

(1) **That the Receivers have no power of sale**: The plaintiff disputes that the Receivers have any power of sale. The plaintiff says that the PTSB Mortgage Conditions (2002) do not provide the Receivers with a power of sale, but rather confine their powers to the collection of rents and profits in respect of the Property. The plaintiff relies on the draft contract for sale which was produced in respect of the proposed sale of the Property by auction on 26 May 2022, and which is exhibited at "IC5" to the plaintiff's affidavit sworn 24 May 2022. In that contract the "*Vendor*" is described as "*Ken Fennell and James Anderson Receivers over Certain Assets of Irene O'Kelly Connolly (in Receivership) of Deloitte of 29 Earlsfort Terrace, Dublin 2*". The plaintiff relies on clause 8.1 of the draft contract which confirms that the "*…Property is being sold subject to the terms of the Receivers' appointment as Receivers*". The plaintiff also relies on clause 8.2 which confirms that "*This Contract shall be executed by the Vendor acting by the Receivers as the duly appointed Receivers under the Deed of Appointment…*". Reliance was also placed on clause 11 of the contract which provided two alternative means of executing a deed of assurance of the Property on closing. The first proposal was that the purchaser would accept an assurance executed, at the option of the Receivers, by the "*Vendor acting by the Receivers pursuant to the power of sale under the Mortgage/Charge*".

The defendants argue that this ground is now moot in circumstances where the draft contract in respect of which objection has been raised was prepared for sale by a specific auction which has now been withdrawn. They say the correct question is whether the court should restrain *any* sale of the Property rather than restraining it on the basis of a draft contract no longer being relied upon. They say that the Receivers' role is to prepare the Property for sale and that any contract

for the sale of the Property will ultimately have to be executed by the fourth named defendant. The defendants argue that any objections to a future sale of the Property are therefore hypothetical.

(2) **That the Receivers have not been appointed for a valid purpose**: The plaintiff argues that the Receivers, even if validly appointed, are rent receivers only but they have been appointed to sell the Property rather than to collect rents. Reliance was placed on the decision in *Taite v Molloy* [2022] IEHC 308 were Allen J noted at para 86 that

> "*[t]he issue in this case is whether the receivers were entitled to take possession for a purpose quite different and at variance to that for which they had supposedly been appointed*."

He went on to hold at para 87 that

> "*[i]n this case, the receivers do not want possession for the purpose for which they have been appointed. I do not believe that it is correct to say that the receivers are entitled at a minimum to obtain possession in order to rent the properties. In my view, they are entitled to possession for no other purpose, and if not for that purpose, they are not entitled to possession at all*".

The defendants dispute they have not been appointed for a valid purpose. They say that the fourth named defendant in this case had already acquired a statutory right to appoint a receiver and take possession/sell the property in accordance with the Conveyancing Act 1881 (relevant to the Mortgage). They also say that the Receivers collected rent until the tenant left the Property in March 2022.

(3) **That the Receivers have not been validly appointed**: The plaintiff argues that under the Deed of Appointment there was no power to appoint a "receiver and manager". The Deed of Appointment appoints a "receiver", but the acceptance by the Receivers was in their capacity as "receiver and manager".

The defendants do not accept that this would invalidate the appointment of the Receivers**.**

(4) **That incorrect interest rates have been applied to the alleged arrears; and**

(5) **That payments made have not been properly allocated by the fourth named defendant to the arrears**: The plaintiff says in respect of these two arguments that there is a fair issue to be tried as to whether any monies are lawfully due and owing under the Mortgage and whether there has in fact been a default. Complaint is made that this case is really about interest on the Loan as the plaintiff has already repaid the principal amount outstanding. The plaintiff argues that she was never advised of any change in interest rate (as she says is required by the Mortgage), yet higher rates appear to have been charged. This raises a doubt she says in respect of the amount now sought from her by way of arrears. Furthermore, the plaintiff says that repayments she made were not properly allocated to the Loan but were incorrectly allocated to other loan accounts with the fourth named defendant in respect of which the Property is not held as security. She says that this was entirely the fault of the fourth named defendant. It is alleged that between January 2020 and November 2021, €10,800.40 was incorrectly allocated to other accounts by the fourth named defendant.

The defendants refer to the letter of demand dated 27 May 2021 served on the plaintiff referring to an outstanding balance of €32,912.64. They say that the

plaintiff has not and cannot assert that there was no act of default by her in making repayments under the Loan. They say there was clearly a default on her part. Even if the demand was incorrect in amount, the defendants argue that this does not mean the plaintiff is not in default.

(6) **Arguments regarding the Global Deed of Transfer to the fourth named defendant**: The plaintiff argues that there is no reference to the Loan being transferred. While the Global Deed refers to the Mortgage it does not, for example, refer to facility letters. The plaintiff disputes in general terms that the Loan was lawfully transferred pursuant to the Global Deed of Transfer dated 1 February 2019.

The defendants do not accept that the Global Deed of Transfer did not validly assign the plaintiff's Loan to the fourth named defendant. They rely on the registration of the fourth named defendant as the owner of the charge on the Property, as recorded on the folio.

19. It is not necessary for me to determine these issues in detail, although some arguments appear stronger than others and certain arguments would be unlikely to raise a fair issue on their own. The combined effect however is sufficient to meet what is generally acknowledged to be a relatively low threshold of establishing a fair issue to be tried and this was conceded by the defendants at the hearing. This case will therefore turn on a consideration by this court of the balance of convenience/balance of justice (to include the adequacy of damages). I will now consider these aspects.

Submissions of the parties as to the adequacy of damages

20. The plaintiff focuses on her property rights as the primary basis for her argument that damages would not be an adequate remedy for her if the injunction was refused but she

succeeded at trial. Counsel for the plaintiff relies on the decision of Keane J in *Keating and Co. Ltd v Jervis Shopping Centre Ltd* [1997] 1 IR 512 at 518 where he said: "*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*".

21. The plaintiff also referred to the observations of Haughton J in *Langan v Promontoria (Aran) Ltd* [2017] IEHC 309 at para 19 where he said: "*Notwithstanding the fact that the Property is an investment property the general principle that the Court should be slow to a decline an injunction to restrain trespass still applies*."

22. The plaintiff says the defendants' only interest is monetary and that damages would clearly be an adequate remedy for them. Counsel for the plaintiff submits that the plaintiff's title to the Property as registered owner is undisputed and that the taking of possession and/or potential sale of the Property pending a full determination of the issues between the parties would represent a most serious breach of the plaintiff's proprietary rights, which would not be compensated by an award of damages or a purely monetary award. The plaintiff avers at para 13 of her supplemental affidavit sworn 2 June 2022 that

> "*the fact that the Property operated as a rental property does not mean damages are an adequate remedy and/or justify an unwarranted breach of [my] proprietary rights, particularly where [I am] in retirement and where I have clearly paid off the underlying principle for the loan and mortgage.*"

23. The defendants say that the Property is an investment property and that this is a relevant factor in assessing the weight to be given to the respective property rights of all parties (the defendants having a right of security over the Property). They say the onus is on

the plaintiff to satisfy the court that damages are not an adequate remedy for her. They say the term of the Loan was 10 years which ought to have expired in 2014 had the plaintiff made all repayments on time. She did not do so and instead there have been ad hoc payments made by her since that date. She continues to seek to perpetuate a banking relationship after the term of the Loan has expired. The defendants submit that in circumstances where the use to which the plaintiff has put the Property is purely commercial in nature, and that commercial activity is for the purpose of obtaining a monetary benefit (rental income), there is no doubt that an award of damages would be an adequate remedy for her.

24. The defendants also argue that the plaintiff's undertaking as to damages is not supported by any evidence that she is capable of meeting an award of damages were the defendants to succeed at the full hearing of the matter. The second affidavit of James Anderson sworn 16 June 2022 avers at para 47 that *"[T]he plaintiff has several "buy to let" properties…and significant sums are due and owing to the Fourth Defendant on other loan accounts held by the plaintiff…*". He also avers at the same paragraph that *"[T]he plaintiff is insolvent and therefore any undertaking in damages is of no value"*.

<u>Submissions of the parties as to the balance of convenience</u>

25. Both parties submit that the balance of convenience favours their position.

26. The plaintiff submits that the balance of convenience favours granting the injunctive relief sought. She argues that the inadequacy of damages for her is an important component in that assessment by the court. The plaintiff contends that there is a greater risk of injustice if the court fails to grant the relief sought. She says if the relief sought is not granted this would allow the defendants to market and/or sell the Property prior to a full determination of the proceedings. The plaintiff submits that she has a

particularly strong case as regards the purported powers – or lack thereof – of the Receivers and that the court should preserve the *status quo* regarding their inability to sell the Property. Reliance is placed on the judgment of Clark CJ in *Charleton v Scriven* [2019] IESC 28 where, at para 6.14, he noted that it is:

> *"…important to have regard to the fact that it is appropriate for a court, in fashioning an appropriate order at an interlocutory stage, to attempt to put in place a regime pending trial which runs the least risk of injustice, having regard to the uncertainty as to what the ultimate result of the trial may be…This may involve the Court looking at the practical situation on the ground and attempting to determine the course of action which minimises the risk of injustice*."

27. The plaintiff points to the evidence before the court which is that the value of the Property was estimated for auction purposes at circa €100,000 whereas the alleged indebtedness of the plaintiff for the Loan is, at most, €33,515.91. The plaintiff also points to the fact that she has undertaken to discharge the sum of €400 per month to the defendants pending trial and that she has complied with this undertaking since the interim order was granted. The plaintiff submits that the *status quo* should pertain until trial which is that the defendants are restrained from selling the Property pending a full determination of matters.

28. The defendants submit that the balance of convenience favours the refusal of the relief sought in the notice of motion due to the ability of an award of damages to adequately compensate the plaintiff for a purely commercial interest were the plaintiff to succeed at plenary hearing. The defendants submit that the sale of the Property, which is an investment property only, can be readily compensated by an award of damages.

The factors relevant to this Court's assessment of the adequacy of damages/balance of convenience

29. In every case in which a party meets the threshold for injunctive relief the court has to engage in a balancing exercise to determine how best to arrange matters pending trial. In the present case there are factors which weigh in favour of granting the relief but also factors which weigh against it.

30. The factors in favour of granting the interlocutory relief sought include the following: –

(1) If the receivers are permitted to sell the Property, it will be lost to the plaintiff even if she succeeds at trial. The Property is not a family home but rather an investment property (the loss of which can generally be compensated by an award of damages). The Property is, however, immediately adjacent to other investment properties owned by the plaintiff and may have some particular value to the plaintiff for that reason.

(2) The plaintiff avers in para 7 of her supplemental affidavit sworn 2 June 2022 that

> "*substantial payments have been made to the loan account over the years since the inception of the loan, indeed totalling the overall sum of €94,033.33 by my calculations, which is significantly in excess of the principal loan monies of 77,400*".

This is not a case where a borrower ceased making payments at an early stage in respect of their loan. The plaintiff has paid a substantial amount towards the Loan albeit that the defendants say she is in arrears on repayments. Those arrears are however relatively modest compared with the amounts repaid.

(3) The balance outstanding on the Loan is substantially less than the value of the Property. This means that the plaintiff continues to have an unencumbered

interest in the Property. While there was no evidence before the court regarding the proposed means of sale by auction and whether same would be likely to realise the full market value of the Property, there is equity remaining in the Property which increases the plaintiff's level of interest in the Property and so when and how best it might be sold.

(4) The fact that the value of the Property more than covers any arrears outstanding on the Loan also provides a level of comfort to the defendants in respect of the undertaking as to damages given by the plaintiff. The plaintiff has an unencumbered equity in the Property.

(5) The *status quo* is that the Receivers are unable to sell the Property.

31. The factors which weigh against granting the interlocutory relief sought include the following:

(1) There has been a considerable delay by the plaintiff in this case. This is an issue that the defendants argued strongly at the hearing and I propose to consider it in some detail.

(2) While there have been ad hoc payments made by the plaintiff, the defendants say the Loan has been in default for almost a decade, as it was not repaid at the end of the original ten-year term. The defendants say they should in those circumstances be free to deal with the secured Property.

(3) The *status quo* appears to be that the Receivers are in possession and unable to sell the Property pending trial. Mr Anderson in his replying affidavit sworn 31 May 2022 confirms at para 17 that "*the property was occupied on my appointment and rental income was secured from that date until the tenant vacated the property in March 2022*". At para 18 he avers that "*the receivers are*

in possession of the property…". The Order in place however prohibits the Receivers taking possession. In circumstances where the arrears are modest relative to the rental income that could be generated in the current market, it appears unsatisfactory (indeed for both parties) that the Receivers would continue to be prevented from renting out the Property should they wish to do so. That would at least require some amendment to the interim Order currently in place.

32. The single biggest factor weighing against granting the interlocutory relief therefore is delay. I propose to consider the arguments advanced by the parties on this matter before determining whether or not to grant the relief sought by the plaintiff.

Delay by the plaintiff

33. The defendants submit that there are two elements of delay in this case. Firstly, the plaintiff did not act for a period of approximately six months in relation to the appointment of the Receivers. The plaintiff states at paragraph 4 of her supplemental affidavit that she became aware of the appointment of the Receivers "*in or around 4 November 2021 shortly after their alleged appointment*". Secondly, the defendants say the plaintiff has delayed in acting to prevent the sale of the Property, waiting until the evening before the auction to seek injunctive relief and to serve the defendants with relevant papers.

34. The defendants suggest that the plaintiff deliberately delayed seeking injunctive relief until the last possible moment and that this was designed to give the defendants the least possible time to defend those proceedings. In his replying affidavit sworn 31 May 2022, the second named defendant avers at para 4 that *"[T]he Property was put on the market over one month*" before the plaintiff's application to court. The plaintiff in her supplemental affidavit states at para 4 that "*I became aware of the proposed auction on*

26 May 2022 the week after it was listed for auction, which I believe was in or around Friday 6 May". There is therefore some dispute between the parties (not resolved on affidavit) as to when the Property was first listed for auction.

35. What is not in dispute however is that the plaintiff's solicitors sent a cease and desist letter to the defendants on 23 May 2022 requesting an undertaking by 5pm on 24 May that they cease and desist from marketing the Property for sale. No response appears to have been received to that letter by the time the plaintiff made her *ex parte* application to Mr Justice O'Moore on 25 May 2022. The court refused an *ex parte* injunction and instead directed short service of a motion returnable on the following morning, 26 May 2022, being the date of the auction. The following account (which is not contradicted by the plaintiff on affidavit) is set out in the second affidavit of James Anderson sworn 16 June 2022 at paras 6-8:

> "6. *I am advised that when Counsel appeared before O'Moore J on the following morning at 10 am he was informed that an ex parte application had been brought by the Plaintiff on 25 June, which was refused by O'Moore J on the grounds of delay. I say that this was not mentioned to my solicitors in the cover letter enclosing the proceedings.*
>
> 7. *The matter was heard by Dignam J at approximately 11 am on Thursday, 26 May 2022 with a decision of the Court required by 12 pm due to the scheduled start of the auction and I beg to refer to the order of Dignam J when produced.*
>
> 8. *I am advised that the Court was cognisant of the fact that my first affidavit*

> *could not deal with many of the legal issues raised by the Plaintiff given the limited time available to us and the Court also indicated that the decision to order the interim relief was "marginal*"."

36. The defendants say that in this case the plaintiff is challenging the validity of the appointment of the Receivers, which occurred in November 2021 (and of which she was then aware). However, she did not seek to challenge this appointment until 26 May 2022. Even in relation to the sale of the Property, the plaintiff delayed in seeking that injunctive relief, resulting in the court having to consider an injunction application directly before the scheduled auction.

37. Counsel for the defendants argued that the plaintiff has been aware of her default for many years. He referred to her engagement with PTSB in 2017 and said there had been "*extreme forbearance*" shown by PTSB and the fourth named defendant. The letter of demand in this case issued seven years after the expiry of the term of the Loan.

38. Counsel for the defendant relied on an *ex tempore* decision by Stack J in *Patrick McCann v Start Mortgages DAC* (High Court, 3 November 2022). That case concerned facts similar in many respects to the present case save that the property in question was in fact sold at auction before the court order was made. The case then proceeded on the question as to whether the sale could be progressed. The defendants in that case relied heavily on the delay by the plaintiff in bringing the application for injunctive relief. Stack J held that the plaintiff had failed to make out a fair question to be tried but also that the application should be refused on the grounds of delay. At para 8 of her judgment Stack J noted

> "*[T]here is absolutely no question but that the plaintiff applied not just at the 11th hour, but at a minute- to- midnight to restrain an auction which, at the sitting of*

the court, was about to start, and by the time the court could determine the matter, had almost concluded".

39. Stack J in *McCann* was critical of the fact that the plaintiff in that case did not clearly identify the date on which he became aware that the auction was taking place and that there had been a failure to serve papers in a timely manner on the defendant's solicitors (these matters do not arise in the present case). She noted the argument advanced to her that the injunction was held until the last minute "*to ambush the auction and create maximum difficulty for [the defendants] in selling the property*". She held that "*if this were so, that would be an abuse of process, and would lean against the grant of an injunction*" (at para 21).

40. At para 22 of her judgment Stack J stated that "*I think it is sufficient to find that the plaintiff is guilty of delay in seeking the injunction and it should be refused on that basis*". It does not appear that any specific or additional prejudice was required to be established.

41. Counsel for the defendants also relied on the decision in the *Irish Times Ltd v Times Newspapers Ltd* [2015] IEHC 490 where the High Court refused interlocutory relief in circumstances where it found that the plaintiffs had not moved with the reasonable expedition required of a moving party for interlocutory relief. At para 6.6 of his judgment Hedigan J stated as follows:

> "*The test for the Court when considering whether delay defeats the application for interlocutory relief is well-established and relatively straightforward. In Nolan Transport (Oaklands) Ltd. v. Halligan [1999] 1 I.R. 128, Keane J. stated as follows:*

> *'In all cases of this nature where interlocutory relief is sought the courts expect the parties to move with reasonable expedition where they are seeking interlocutory relief because it is of the essence of such relief that if it turns out that it has been wrongly granted one party has suffered an injustice. It is therefore a remedy which should not be lightly invoked and if invoked, it should be invoked rapidly and where a party simply awaits events as they unfold he cannot expect to find court amenable to the granting of this relief as it would where a party moves expeditiously to protect its rights.'*

More recently in Ryanair v. Irish Airline Pilots Association (Unreported, 19th June 2012, High Court, Murphy J.), Murphy J. held that delay on the part of the plaintiff debarred it from claiming an interlocutory injunction to restrain alleged trademark infringement and passing off. He observed:

> *'The court is satisfied that the three months delay between the act of uploading the image and the initiating letter is not a prompt response. In the exercise of its discretion the court refuses the application.'*"

42. Reliance was also placed by the defendants on the decision of the Supreme Court in *Hoey v Waterways Ireland* [2021] IESC 34, where at para 20 of his judgment, Charleton J noted that

> "*…since delay defeats equity, the remedy of injunction is usually, in fact almost invariably, granted at a pre-trial level on the basis of an application with an air of urgency; one where the plaintiff asserts that rights are being interfered with by a defendant and that the erosion of the plaintiff's position must be halted, or*

exceptionally reversed, in order to preserve so much of the status quo as is possible pending the resolution of the issues at full trial."

43. The plaintiff denies that there was delay on her part such as should disentitle her to obtain interlocutory relief. Counsel for the plaintiff referred to Spry, *Equitable Remedies* (9th edn., Thomson Reuters, 2013) at page 507 where the author states

> "*…A defendant who wishes to establish laches must show both that the plaintiff has delayed unreasonably and also that by reason of that delay it would be unjust to grant him the particular injunction in question…*".

The author further states at page 510 that

> "*…In the case of applications for interlocutory injunctions, the mere lapse of time or dilatoriness of the plaintiff should not be seen as in itself a bar. Delay is often found, when combined with additional circumstances, to give rise to an estoppel or to a special equitable consideration such as laches or acquiescence or some other such matter, but otherwise it does not prevent the grant of relief that is otherwise appropriate unless a statute of limitations is applicable directly or in obedience or by analogy, or unless the substantive rights in aid of which the court is asked to act have themselves come to an end. In particular, although it has sometimes been said that mere delay is a sufficient bar when the plaintiff seeks a special discretionary equitable remedy, as opposed apparently to other equitable relief, since all equitable remedies depend to some extent on particular discretionary considerations this distinction cannot be maintained*".

The plaintiff says that the defendants have suffered no prejudice by her delay.

44. There is no doubt that delay defeats equity. There are many cases where the courts have refused to grant interlocutory relief on the basis of delay by the party seeking that relief,

particularly where this delay is unexplained and where it creates an injustice for the other party. Counsel in this case were not agreed on the extent to which it is necessary to establish a specific prejudice or injustice before delay can be relied on to refuse interlocutory relief. I do not believe that a specific prejudice must always be established before a court can refuse interlocutory relief in cases of delay. Obviously if there is a particular prejudice caused by the delay then that will lean heavily against granting the relief sought. But even if there is no specific prejudice, delay by one side almost invariably gives rise to some prejudice to the other party – even if that is confined to the reduced level of preparation time they are afforded to deal with the application. The lack of specific prejudice should not be a bar to the refusal of equitable relief on the grounds of delay, in appropriate cases.

45. A party delaying and then making a last-minute application to court is unfortunately a scenario which occurs all too frequently. It places enormous strain on the courts having to deal with such applications at short notice, disadvantages other litigants by taking up pre-allocated court time and also results in an unsatisfactory hearing where one party is significantly disadvantaged by having insufficient time to prepare. While the courts will always hear urgent applications, the urgency of those applications should not arise because of a delay by the parties themselves. Any party therefore leaving it to the last minute to seek interlocutory relief runs the very real risk that their delay in doing so will result in the denial of the relief they seek.

46. It is also important to highlight another aspect of delay that regularly arises and which is a feature of this case. That is where the party who has obtained interlocutory relief pending trial takes no further steps to advance matters towards trial – being content to sit on the interlocutory relief obtained. When the court determines an arrangement which best preserves the position pending trial, it assumes that the party who has the

benefit of the interlocutory order will in fact advance matters towards trial. In the present case, although the plaintiff obtained interlocutory relief on 26 May 2022, she then took no further steps to advance the proceedings and the defendants were required to bring a motion seeking delivery of her statement of claim. That statement of claim was not delivered until the eve of the hearing of this matter almost one year later. While there was some indication to the court that the parties were in discussions and that this explained the delay by the plaintiff, it is clear nevertheless that the plaintiff did not comply with the time limits prescribed in relation to delivery of pleadings.

47. I believe that the present case can be distinguished on the facts from *McCann*. In particular, the plaintiff in this case has established fair issues to be tried, particularly regarding the power of the Receivers to sell the Property. I therefore need to balance the delay against that fact and other aspects of the balance of convenience outlined above.

48. Given that the plaintiff has established a fair issue to be tried, and balancing the various factors outlined above as part of the assessment of where the least risk of injustice lies, I have come to the view, albeit that the decision is finely balanced, that the least risk of injustice will be achieved by preventing the sale of the Property pending trial. I will therefore grant the plaintiff the interlocutory relief she seeks subject to the following conditions: –

(1) The existing Order should be varied so that it no longer prohibits the Receivers from taking possession of the Property. This reflects the *status quo* on the ground. It will also enable the Receivers to derive rental income from the Property pending trial. Given the level of the plaintiff's alleged arrears and the likely rental achievable, this option should be available to the Receivers pending trial.

(2) The plaintiff should continue to honour her undertaking to discharge the sum of €400 per month to the fourth named defendant pending trial.

(3) The parties must now agree a timetable to take this matter to trial expeditiously. In the event that there is further delay by the plaintiff in advancing the proceedings the defendants will have liberty to apply to discharge or further vary the interlocutory order.

49. I will list this matter for mention at 10.45 on Wednesday 21 June 2023 for the purposes of hearing the parties on the final form of order and costs (for both motions), a timetable to trial and any further issues arising from this judgment.