THE HIGH COURT

[2023] IEHC 446

[2023 1641 P]

BETWEEN

EMERALD SKY 2 DESIGNATED ACTIVITY COMPANY, LOTUS DECALIA DESIGNATED ACTIVITY COMPANY, MYLES KIRBY AND JOHN HEALY

PLAINTIFFS

AND

VICTORIA HOMES LIMITED, VICTORIA HOMES DEVELOPMENTS LIMITED AND PATRICK (OTHERWISE "PADDY") BYRNE

DEFENDANTS

JUDGMENT of Ms. Justice Emily Egan delivered on the 21st day of July, 2023

Introduction

1. In its judgment in *Charleton v. Scriven* [2019] IESC 28, the Supreme Court, per Clarke C.J. emphasised that interlocutory injunctions should not be treated as a means of attempting, in practice, to obtain a summary judgment. The first and second plaintiffs (where the context so requires, "the lenders") carry on business primarily as lenders to developers in the construction industry. The third and fourth plaintiffs (where the context so requires, "the receivers") are receivers appointed by the lenders over three properties owned by the first defendant, known respectively as "the Dundrum property," "the Airfield property" and "the Knocklyon property" (together, "the properties"). The first defendant, a property development company, is the registered owner of the properties. The second defendant owns 100% of the shares of the first defendant. The third defendant is a director and principal controller of the first and second defendants.

2. The plaintiffs are seeking orders for possession of the properties with a view to their sale. They must therefore demonstrate a strong case that is likely to succeed at trial. It is common case that such a strong case has been made out. It is also common case that the grant of the orders sought will facilitate the sale of the Dundrum property in advance of any substantive trial. However, the plaintiffs argue that such is the strength of their case, and the commensurate weakness of the defence advanced, that the court is fully justified in granting these orders. In this respect, the plaintiffs rely upon *Charleton v. Scriven*, in which Clarke C.J stated that the sequential test for the grant of interlocutory relief identified in *Merck Sharp & Dohme Corporation v Clonmel Healthcare Ltd* [2020] 2 IR 1 only arises in circumstances where there is an issue of substance concerning the validity of the appointment and powers of the receivers. For reasons explored below, I am satisfied that no such issue of substance arises in this case, that no significant defence has been put forward and that the plaintiffs' case is sufficiently strong to warrant the grant of mandatory relief. Furthermore, consideration of the other relevant elements of the sequential test - in particular the adequacy of damages and the balance of convenience/balance of justice - would in any event point to the same conclusion; namely that mandatory relief in respect of the Dundrum property is warranted.

<u>The proceedings</u>

3. In these proceedings, instituted on 13th April 2023, the plaintiffs seek the following orders:

a. A declaration that the plaintiffs are entitled to possession of the properties;
b. an injunction for the delivery of possession by the defendants of the properties and of all keys, alarm codes and other security access devices in respect of the properties;

c. an order directing the defendants to deliver all books and records of purported leases, licences and tenancy agreements in respect of the properties, together with an order declaring same null and void;

d. An order restraining the defendants from impeding or obstructing the plaintiffs in their efforts to secure possession of the properties, to collect rents and/or sell the properties and/or from interfering with the office and functions of the receivers and/or from holding themselves out as having any entitlement to sell, rent or otherwise deal in the properties and/or restraining them from trespassing, entering or otherwise attending at the properties;

e. damages for trespass and for intentional interference in the economic interests of the plaintiffs;

f. judgment in favour of the first and second plaintiffs as against the first defendant as of 12th April 2023 in the sum of €8,288,297.00;

g. an order for possession of the properties pursuant to s. 97(2) of the Land and Conveyancing Law Reform Act, 2009 and an order pursuant to s. 100(3) of the 2009 Act authorising the plaintiffs to exercise their power of sale over the properties.

4. The plaintiffs sought interim relief broadly in terms of paragraphs 3 (a) to 3 (g) above on 14th April 2023 and was granted short service for an early return date for the interlocutory application which came before this court on 28th April 2023.

Summary of the defendants' argument

5. Although it is common case that the plaintiffs have made out a strong case likely to succeed at trial, the defendants nonetheless argue that the court ought not grant the relief sought. Although they accept their indebtedness to the lenders, the defendants rely upon a deed

of settlement of 29th November, 2020 ("the deed of settlement") as between the lenders, the first defendant and Derryveigh Development Ltd pursuant to which the parties agreed a workout of the first defendant's repayment obligations in tandem with phased completion of the development and sale of the properties (and certain other properties which are not the subject of these proceedings). Phased completion of the developments did not occur in the manner specified in the deed of settlement and the first defendant failed to comply with the repayment schedule set out therein. As a result of such default, the lenders were entitled to appoint the receivers over the property. However, it is contended that the first defendant's admitted failure to comply with the deed of settlement was brought about by the deliberate actions of the lenders. The defendants also assert that, if permitted to take possession of the properties, the lenders will procure the sale of the properties at a deliberate undervalue to a purchaser connected with the lenders with a view to receiving a "kickback" on subsequent sale at full market value.

6. It is convenient to now set out the various contractual provisions regulating the loan facilities, the mortgages ("together the finance documents"), the appointment of the receivers and crucially the deed of settlement.

<u>Relevant contractual provisions</u>

7. There are six separate facility letters ("the facility letters") dated between 20th June 2018 and 26th February 2019 pursuant to which the lenders advanced substantial funds to the first defendant as borrower (with Derryveigh Developments Ltd acting as guarantors) for the purposes of acquiring and developing the properties. The facility letters were accepted by the first defendant and Derryveigh Developments Ltd by way of six separate loan agreements ("the loan agreements"). It was an express term of the loan agreements that monies advanced thereunder would be repayable on demand and would be secured by first legal charges over the

properties. The first defendant also entered into four separate mortgages ("the mortgages") which included the following conditions:

- a term that the first defendant would pay and discharge all its indebtedness to the lenders – (existing and future) - on demand;
- the creation of charges ("the charges") over the properties as security for the secured obligations meaning all monies, obligations and liabilities (existing and future) of the first defendant to the lenders;
- a term that the security would become immediately enforceable and that the lenders may in their absolute discretion enforce all or part of the security;
- a term permitting the enforcement of the security without any restrictions imposed by law on the power of sale;
- a term empowering the lenders to appoint a receiver;
- a term that the powers of the receiver appointed included all powers under the Land and Conveyancing Law Reform Act, 2009 and *inter alia* powers to take immediate possession, sell, realise or otherwise dispose of the security.

8. The charges were registered with the Land Registry as a burden on the folio of each property. The loans were not repaid within the time specified entitling the lenders to terminate the facility, demand immediate repayment and take enforcement action including exercising their power to appoint a receiver and execute the power of sale. Although it is common case that the first defendant was in breach of its obligations under the loan agreements, the parties ultimately reached an agreement which was formalised in the deed of settlement executed as between the lenders of the one part and first defendant and Derryveigh Developments Ltd (defined in the deed of settlement as "the borrowers") of the other part. All parties were legally advised in the negotiation of the deed of settlement which, as stated at para. 5 above provided for a workout of various developments by the borrowers and for certain repayment obligations

once the relevant assets were sold. The following clauses of the deed of settlement are of relevance:

- At clause 2.1 the borrowers acknowledged and confirmed that they were indebted to the lenders in the amount of €14,739,353.79 (as of 28th October 2020).
- At clause 2.2 the borrowers acknowledged that the amounts due and owing under the above loan agreements were fully valid, binding and enforceable against the borrowers. The borrowers undertook not to dispute that the amount represented their indebtedness to the lenders.
- Clause 2.3 recorded that the borrowers had procured further funding (of not less than €750,000) from a specified investor ("the investor") to facilitate the phased completion of the developments (defined as six separate development projects being carried out by the borrowers including the development of the properties the subject matter of these proceedings). As each sale progressed, the amount realised would be lodged to an escrow account out of which the relevant "lender redemption amount" or "settlement payment" would be discharged until the full amount outstanding ("the total redemption amount ") had been paid down.
- Pursuant to clause 2.9 the lenders confirmed that, subject to compliance in full by the borrowers with the terms of the deed, including the making of the relevant settlement payment/s on the due date for each such payment and ultimately the payment of the total redemption amount, the lenders would not enforce the security held or pursue the borrowers for the amounts due to the lenders under the facility agreements.
- At clause 2.14 the borrowers acknowledged and confirmed that in the event that the total redemption amount or any part thereof was not paid in the amounts and by the dates specified, this would amount to a "settlement default" and that the lenders might

thereby enforce the security without notice to the borrowers retaining any part of the settlement payment received in partial reduction of the borrowers' obligations.

- At clause 2.11 the lenders confirmed, and the borrowers acknowledged that if a settlement default occurred the obligations on the part of the lenders in the deed of settlement would immediately cease and all amounts payable under the facility agreement would immediately become payable by the borrowers. At this point also the lenders would have full recourse to all their rights under the finance documents and nothing in the deed of settlement would constitute a waiver of any of the rights or remedies of the lenders under those documents.
- Pursuant to clause 2.15 it was agreed that the lenders would only release their security over the property or any part thereof upon receipt of the lender redemption amount in full relating to that property.
- Clause 2.7 provided for the accrual and payment to the borrowers of running costs of €31,250 per month on certain dates or on the occurrence of certain events.
- Clause 3 made provision for the phased completion of the developments The parties agreed a building programme, completion costs, minimum sale prices and closing dates for each development. The lenders could, at their sole discretion, consent in writing to sale at an amount less than the minimum sale price. If so, then 50% of the shortfall would be added to the lender redemption amount for the Knocklyon property.
- The mechanics of the agreed phased completion are set out at clauses 3.3.1 *et seq*. in relation to the completion of four phases of development by the borrowers. Phase 1 is in respect of Feltrim and Mount Merrion/Athgarvan and Drumkeen (none of which properties are the subject of the injunction application). After payment of the lender redemption amount and investor redemption amount, the net proceeds of sale of these properties would be lodged to the escrow account and applied to fund the completion

costs of phase 2 of the development, the Dundrum and Dun Laoghaire properties (the first of which is the subject matter of the plaintiffs' current injunction application) and so forth through phases 3 and 4 of the development, the Knocklyon and Airfield properties respectively (both of which also form the subject matter of the plaintiff's injunction application).

- Clause [4.1.3] (incorrectly numbered as clause 3.1.3) governs authorised payments from the escrow account to the borrowers of completion costs, including all payments due to third parties, on receipt of confirmation emails from OFC (the lenders project manager and the borrowers Quantity Surveyor) as to the amount to be paid within 48 hours of receipt of the above confirmations.
- At clause [4.2] (incorrectly numbered as clause 3.2) the borrowers undertook to complete the developments in accordance with the building programme and completion costs, to dispose of the developments on or before each specified closing date and to apply the proceeds of sale of each unit in the manner specified within the time therein set out.
- Pursuant to clause 10.2 of the agreement, it was agreed that if a settlement default occurred the borrowers agreed to complete a letter of invitation inviting the lenders to appoint a receiver to facilitate the development, management, maintenance, sale and realisation of the property.
- At clause 10.3 the borrowers irrevocably and unconditionally consented and agreed to the appointment of the receiver and undertook and warranted not to resist, defend or obstruct the appointment of the receiver or to take any action or step or issue any proceedings to challenge the appointment of the receiver or to impede or obstruct the carrying out by the receiver of any of its functions.

- It was agreed between the parties that after the total redemption amount was paid to the lenders then, after repayment to the investor of an amount specified ("the investor redemption amount"), any surplus funds in the escrow account will be divided equally between the lenders and the borrowers.
- The deed of settlement included a long stop date for payment of the total redemption amount being fifteen months from the date thereof i.e. February of 2022.

The plaintiffs' affidavits

9. The plaintiffs maintain that as of 22nd October 2022 the first defendant was in default of its obligations under both the finance documents and the deed of settlement which necessitated the enforcement of their security. The total amount outstanding on foot of the first to sixth loan agreements after allowances for all amounts previously paid down by the lenders is €8,288,297.00. By way of instruments of appointment dated 28th October 2022 and 23rd November 2022 the receivers were appointed in accordance with the lender's powers pursuant to the mortgages over the Dundrum property, the Knocklyon property and the Airfield property

10. Shortly after this, on 4th November 2022 the second defendant instituted proceedings entitled *Victoria Homes Ltd v. Emerald Sky 2 DAC and Lotus Decalia DAC* High Court Record No. 2022/5547P ("the Victoria Homes proceedings") seeking damages for breach of contract and/or specific performance of the deed of settlement.

11. Having instituted the Victoria Homes proceedings, the second defendant sought to register a series of *lis pendens* against certain properties of the first defendant, including the properties the subject matter of these proceedings. The lenders brought an application to vacate the *lis pendens* on the basis that the action was not being prosecuted *bona fide* within the meaning of s. 123 of the 2009 Act. The matter was entered into the commercial list, and on 13th February 2023, there being no attendance by the plaintiff, McDonald J. ordered that the *lis*

pendens be vacated. The Dundrum property is not included in the said order as the *lis pendens* was not filed against the Dundrum property until after the lenders application to vacate the *lis pendens* was prepared and filed. However, the second defendant has issued a notice of discontinuance on 15th March 2023 in respect of the Victoria Homes proceedings.

12. The immediate background to the plaintiffs' application for interlocutory relief is set out in the grounding affidavit of Ian Lawlor, managing director employed by the lenders as further augmented by the affidavit of the fourth defendant, John Healy, the receiver. After the receiver's appointment, the third plaintiff notified the first and third defendants in writing of the appointment of the receivers over the properties. It is averred that peaceable possession of the Dundrum property, the Airfield property and the Knocklyon property was obtained. I have no information as to how possession was obtained of the Airfield or Knocklyon properties. However, it is now apparent that the receivers obtained possession of the Dundrum property– an incomplete and unoccupied block of apartments – by removing and changing the locks on the site. Thereafter, the receivers' agents erected a hoarding and arranged for the Dundrum property to be patrolled on a monthly basis between November 2022 and April 2023. It is averred that on 4th April 2023 the third defendant and his agents used a cutting mechanism to take the gates off the hoarding and forcibly gain entry to the Dundrum property. A series of altercations took place over the ensuing days between the receiver's agents and unknown persons acting on behalf of the defendants. Each party accuses the other of using unnecessary force and of deploying excessively violent or threatening tactics. Both parties called An Garda Síochána on more than one occasion. On 5th April 2023, the receivers' agents retook possession of the property only to have same reclaimed by the third defendant later that day. After again reclaiming possession, the receiver avers that on 10th April 2023 several unknown and armed males entered the Dundrum property and demanded that the receivers' agents leave the property, which they did under duress. The receivers' security reported that at least 25 people

had entered the Dundrum property wearing dark hooded clothes, face coverings and sap gloves and carrying sledgehammers, crowbars and baseball bats. On 11th April, the third defendant sent a text message to one of the receiver's security operatives stating that he had removed the illegal trespassers from his property and had secured his property with *"my 30 men under the supervision of An Garda Siochana…We have installed 24 hour security and attack dogs guarding our property and any attempt to enter our property will be at your agents or your own risk."*

13. Attempts by the plaintiffs' solicitors to resolve matters by way of correspondence produced no solution. It is averred that the receivers have secured a purchaser for the Dundrum property and that it was intended that the conveyance of the property would be "*front loaded pre-contract"*, with all title queries resolved before execution of the contract and completion of the transaction. It had been intended that the transaction would complete before 20th April 2023. However, the sale cannot complete until vacant possession of the Dundrum property is secured. It is also averred that the Airfield property was due to be sold but that the purchaser withdrew from the transaction pre-contract without explanation on 6th April 2023.

14. The defendants vigorously dispute the account of the plaintiffs. The third defendant, Patrick Byrne avers that the receivers did not obtain peaceable possession-because they had cut the locks on the hoarding around the property and also maintains that it was the receivers' agents who acted in an aggressive manner. The third defendant avers that after he had regained possession of the premises, the security company acting on behalf of the receivers forced the hoarding, drove a vehicle up to the site, cut the locks and replaced them with their own locks. This kind of behaviour, Mr. Byrne avers occurred on a number of occasions. He avers that he was present for the duration of many of these encounters whereas the plaintiffs' deponents were not and cannot therefore attest to what occurred. At present, the Dundrum property is in possession of the third defendant, his servants or agents.

Analysis

15. The principles applicable to interlocutory injunction applications have recently been summarised by the Supreme Court in *Merck Sharp & Dohme Corp v Clonmel Healthcare Ltd* at page 36 (para 65) of the judgment of O'Donnell J. (as he then was) in the following terms:

> *"(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….. 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 the 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 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."

Strong case likely to succeed at trial?

16. It is common case that as the plaintiffs are seeking certain mandatory orders, they must go further than demonstrating a fair question to be tried and must satisfy the test in *Maha Lingham v. Health Service Executive* [2005] IESC 89. In short, the plaintiffs must show a strong case that is likely to succeed at trial.

17. The defendants accept that the plaintiffs have made out such a case. In one sense, this is hardly surprising given that the following are not in dispute:

- The first defendant is indebted to the lenders;
- the lenders hold security over the properties in respect of the first defendant's indebtedness;
- the lenders enjoy power under that security to appoint receivers over the property;

- the first defendant failed to carry out the phased completion of the developments in accordance with the terms of the deed of settlement and/or failed to pay the settlement payments to the lenders as required by that deed.
- the receivers were validly appointed by deeds of appointment and the first to third defendants were notified thereof;
- the receivers so appointed have the power of sale.

18. The defendants maintain that the lenders artificially contrived to bring about default of the deed of settlement and ought not be entitled to rely upon such default so as to appoint the receivers. They also maintain that, if permitted to take possession and execute a sale of the properties, the lenders will sell at a deliberate undervalue with a view to making an improper profit.

19. The central issue[1] is whether the defendants have made out any real case of substance to this effect. Is there a credible basis for suggesting that the lenders engineered the defendants' default such that they ought not be entitled to enforce their security? Is there a credible basis for suggesting that the lenders will engage in what is effectively fraud? In either case, what are the legal consequences of the plaintiffs' alleged conduct?

The defendants' affidavits

20. It is somewhat unclear whether the defendants argue (1) that the lenders themselves acted in breach of the deed of settlement; or (2) that, although acting within the four corners of the deed of settlement, the lenders nonetheless acted in an obstructive manner so as to inevitably bring about the defendants' default. As the defendants put forward no evidence of

[1] I do not overlook the fact that the defendants also rely upon the fact that interlocutory relief would facilitate the sale of the Dundrum property as relevant to the balance of convenience and the balance of justice, which I will analyse separately below.

breach by the lenders of specific terms of the deed of settlement, I assume that the latter, rather than the former, is the argument made.

21. Mr. Byrne has sworn three affidavits in which he avers that the lenders artificially manufactured the first defendant's non-compliance with the settlement agreement. However, Mr. Byrne's affidavits are light on detail as to what precisely is alleged as against the lenders. His first affidavit provides two examples of "*the attitude*" taken by the lenders. First, Mr. Byrne avers that in May of 2021, following the successful development of the Feltrim site, the assigned certifier resigned due to pressure from the lenders and in particular from Mr. David Grin. Mr. Byrne was informed that the lenders would be appointing a certifier to control all of the sites which, he says, led to avoidable delays and additional costs. However, no details whatsoever are provided of these delays and additional costs. Second, Mr. Byrne avers that the lenders refused to discharge liabilities to Irish Water and ESB for service connections, as a consequence of which site service works could not commence. No details are provided as to which property was impacted by this issue, or of what delay or additional costs were incurred as a result. Mr. Byrne avers that, despite the above the first defendant continued to work on the remaining sites with the sale of the site at Drumkeen closing in mid July 2017, the sale of an apartment in Greygates closing in mid-October 2021 and the sale of the Dun Laoghaire site closing in July of 2022. It appears therefore that the lenders actions did not prevent the progressing of these developments. I do not see how the above is credible evidence of a case of substance that the lenders deliberately engineered acts of default on the part of the defendant.

22. Mr. Byrne also avers that following the sale of the last house on the Dun Laoghaire site, he presumed that the funds then in escrow would be utilised for the completion of the Dundrum site. However, he states that at this juncture Mr. Grin asserted that the defendants were in breach of the payment schedule in the deed of settlement and insisted that the remaining properties were to be sold *"for cost,"* (i.e. for no more than the outstanding loan amount)

failing which the lenders would simply appoint receivers over the properties. No argument is made that the defendants were not in fact in breach of the payment schedule in the deed of settlement at this point in time (July of 2022) which postdates the February 2022 long stop date by some measure. Once again, I do not see how this could be said to amount to a credible basis for contending that the lenders engineered acts of default.

23. A further argument advanced concerns the non-payment of the running costs. Mr. Byrne avers that these running costs of €31,250 per month have never been paid and that the amount currently outstanding is €715,000. This has resulted in various judgments being entered as against the first defendant by suppliers and the County Council; it had also caused difficulties with Revenue. In October 2022, Mr. Byrne formally objected to non-payment of the running costs. Dispute arose and Mr. Byrne confirmed that he would not close any further sales unless and until payment of the agreed running costs was confirmed. Shortly following this interaction, the receivers were appointed.

24. The defendants' position in relation to the non-payment of the running costs is legally unsustainable. These costs would accrue (but not become payable) from the later of 1st January 2021 or the payment in full of both the lender redemption amount and the investor redemption amount in respect of the Feltrim and Mount Merrion properties. It is common case that the latter amounts have not been paid. Alternatively, the running costs would only become payable following the completion of the sales of the first six units in the Knocklyon property and the payment to the lenders of the relevant lender redemption amount in relation thereto. This has also not occurred. No obligation to pay the running costs has therefore accrued and Mr. Byrne had no legal entitlement to withdraw involvement in the phased workout of the development in repayment of the loans. I cannot accept that the non-payment of the running costs before they fell due for payment in any way invalidates the lenders' decision to appoint the receivers.

25. Mr. Byrne's second affidavit avers that "*while more pertinent to the substantive hearing of the proceedings,"* the plaintiffs are factually incorrect in their averment that he "*disengaged from the lenders and failed to complete any of the remaining works required under the deed of settlement following the completion of the Feltrim site in April 2021*". Up to a point, this is correct. Thus, it is clear that after the sale of the Feltrim site, further sites in Drumkeen, Mount Merrion and Dun Laoghaire were sold and that the sale proceeds thereof were duly lodged to the escrow account. However, it is evident that although the debt has been significantly reduced since the conclusion of the deed of settlement, the first defendant is nonetheless in default of the payment schedule set out therein. Thus, there is a significant shortfall in the remittance due in respect of the Mount Merrion property (owing to the fact that only one of the four apartments at Mount Merrion have currently been sold) and in respect of the Dundrum, Airfield and Knocklyon properties.

26. Mr. Byrne's third affidavit explains the reason for the delay in effecting sale and completing development in respect of the Dun Laoghaire and Mount Merrion properties. He avers that Mr. Grin consistently delayed progress on the Dun Laoghaire site by refusing to approve works and delaying payment to contractors. Mr. Byrne exhibits certain correspondence passing between the lenders' project manager and the first defendant's quantity surveyor. This correspondence attests to certain delays in approval and payment in July and August of 2021 but does not suggest anything particularly out of the ordinary in the context of a significant and complex project such as this.

27. Mr. Byrne returns in his third affidavit to Mr. Grin's failure to discharge the fees outstanding to the certifier which, although eventually discharged, delayed the completion of the Dun Laoghaire property. The difficulty from Mr. Byrne's perspective, however, is this all appears to have occurred in January of 2022. Yet, a receiver was not appointed until 28th October 2022. It is difficult therefore to draw any direct link between the two.

28. Mr. Byrne also accuses Mr. Grin of obstructing an agreement to sell the Mount Merrion and Dundrum properties to the Housing Agency of Ireland. Mr. Byrne avers that the sale did not proceed due to an issue in relation to the payment of historic creditors. This is said to have occurred as a result of the lender's breach of their obligations under the deed of settlement in relation to payments from the escrow account. However, insufficient detail is provided of this alleged breach or of its contribution towards the collapse of the intended sale of the properties to the Housing Agency of Ireland. In any event, it appears that the price offered by the agency for the Dundrum and Mount Merrion properties was below that specified in the deed of settlement. It was therefore open to the lenders, at their discretion, to decline to proceed with the sale.

29. It is also relevant to note that the case pleaded in the statement of claim in the Victoria Homes proceedings is difficult to reconcile with that now advanced by the defendants. The Victoria Homes proceedings plead that the lenders breached the deed of settlement in failing to pay the running costs and, thereafter elected to dispose of the developments in an unfinished condition such that the minimum sale price would not be achieved. No case is made that the lenders engineered the first defendants' default in order to profit thereby.

<u>Potential fraud</u>

30. There is even less credible evidence in relation to the defendants' assertion that if granted the relief sought, the plaintiffs will proceed to sell the property at a deliberate undervalue. Mr. Byrne avers that Mr. Grin, whilst working for the second plaintiff, has acted in a similar fashion in the past and is likely to do so again. This assertion is based upon hearsay evidence (of the alleged intended purchaser of the Dundrum properties) and conjecture. Fraud is a serious allegation. It must be borne out by credible evidence, which is here absent.

Potential sale at an undervalue

31. Based upon certain conversations and past behaviour, the defendants further allege that the lenders intention is to sell the property before the construction has been completed and for no more than the amount secured thereon. However, there is no obligation upon a receiver to complete a programme of construction prior to the disposal of an asset to reduce the secured debt. In any event, the defendants have placed before the court no evidence concerning the likely value of the Dundrum property as it currently stands when compared to its value if the development were completed (taking account of further development costs.)

Conclusion on the evidence before me

32. The defendants' account and interpretation of events is disputed by the plaintiffs. I cannot anticipate the outcome of any dispute of fact appearing on the affidavits. However, I must nonetheless look at the strength of the defence and form a view of the extent to which it is likely to displace the case which has been made out by the plaintiffs. Do the evidence and arguments put forward by defendants amount to a case of substance and a credible basis for suggesting that the receivers were invalidly appointed (or that, if possession of the Dundrum property is granted, sale at an undervalue or improper profit will ensue)? I am satisfied that the case made out by the defendants does not reach that threshold. Distinguishing as I must between assertion and evidence, I find that the defendants' affidavits, even at their height, are insufficient to make out a case of any substance that the lenders breached the deed of settlement, procured the defendants' breach thereof or are otherwise guilty of unconscionable behaviour such as ought to prevent them from relying on that breach and appointing a receiver. In all the above circumstances, I find that the defendants have not made out a case of any substance in relation to the invalidity of the appointment of the receivers.

Would the grant of the interlocutory injunction put an end to the action?

33. The defendants urge the court to proceed with particular caution in this case as it is said that if interlocutory relief is granted, it will be dispositive of the proceedings. As I explain more fully below, my intention is to grant injunctive relief in respect of the Dundrum property only. The plaintiffs will still be required to progress the remainder of the proceedings in relation to the Knocklyon and Airfield properties. I am not convinced that the fact that one of the three properties in issue may be sold prior to the trial necessarily means that the grant of the interlocutory injunction puts an end to the action.

Would an award of damages adequately compensate the plaintiffs if the injunction is refused?

34. The plaintiffs maintain that an award of damages could not provide it with adequate compensation because the defendants are incapable of discharging any such award of damages.

35. The defendants do not dispute this. The plaintiffs point to a series of judgment mortgages registered as against the properties the subject matter of these proceedings as appearing on the folios of the Dundrum, Airfield and Knocklyon properties. The amount outstanding on foot of these judgment mortgages is unknown. The underlying debt, as currently outstanding, is significant with interest continuing to accrue; one could not assume that the value of the properties will necessarily be sufficient to cover the debt.

36. It is also clear from the affidavit evidence before the court that the third defendant is unable to discharge his debts as they fall due and he has encountered difficulty with the Revenue Commissioners. It is further apparent that the third defendant is an undischarged bankrupt in the United Kingdom.

37. In these circumstances, I think that the plaintiffs have made out a fair case that the defendants would not be in a position to satisfy an award of damages.

Would an award of damages adequately compensate the defendants if the injunction is granted?

38. The defendants' case is that but for the lenders' breach of contract (or unconscionable conduct), the Dundrum property would not be sold in an uncompleted condition. It is worth considering the various ways in which this case could play out.

39. First, if the defendants succeed in demonstrating that the lenders deliberately procured breach of the deed of settlement and further that the receivers' appointment is thereby invalid, then their claim will be to damages representing, *inter alia*, the differential in sale price as between the value of the Dundrum property if completed and sold in accordance with the deed of settlement and its current value.

40. Second, if the defendants ultimately succeed in demonstrating that the lenders sold the Dundrum property at a deliberate undervalue in order to obtain an improper profit, then this could be accommodated by way of an award of damages as above and/or an account of profits.

41. Third, if the defendants do not succeed in demonstrating that the receivers' appointment is invalid on any of the grounds alleged, they may still, if applicable, contend that the receivers sold the Dundrum property at an undervalue. If sale at an undervalue is made out, then the defendants would recover an amount limited to the difference between the sale price of the assets and the value which could have been obtained had the property been sold at the best price reasonably obtainable at the time of the sale.

42. In each such case, the defendants can be compensated by an award of damages. This is so because (1) the properties are commercial properties not family homes or a principal private residence and (2) the very deed of settlement upon which the defendants rely contemplates the sale of the properties, including the Dundrum property. This is precisely because the first defendant entered into the deed of settlement on the express basis that the properties the subject matter of these proceedings would be sold. The deed of settlement was clear and unequivocal

in fixing identified periods within which the relevant actions were expected to be taken and the defendants have been afforded time to exercise their rights under the deed. It is not disputed that the defendants were in default or that pursuant to the express terms of the deed of settlement the lenders' ability to appoint a receiver with full power of sale has revived. If the lenders are granted an injunction the effect is that the event to which the defendants have agreed – the sale of the Dundrum property – will occur. Thus, either the grant or refusal of the injunction sought in these proceedings leads to essentially the same terminus – the sale of the Dundrum property. Granted, it is not a sale conducted according to the mechanics out in the deed of settlement, but no credible evidence has been set out to the effect that this deed continues to govern the parties ongoing legal relationships. If the sale results in loss to the defendants, then such loss is capable of being compensated in monetary damages. In these circumstances, damages would be an adequate remedy for the defendant.

Where then does the balance of convenience or balance of justice lie?

43. This court must of course seek to ensure the least risk of injustice to the parties pending the hearing of the action. It is appropriate to comment briefly upon the unedifying events which have unfolded in relation to the possession of the property. The receivers were appointed in October of 2022 and state that they obtained peaceable possession of the property on 2nd November 2022. In fact, their agents removed and changed the locks on site. Although the property in issue is an incomplete and unoccupied block of apartments rather than a residential property such as was in issue in *Charleton v. Hassett* [2021] IEHC 746, I accept the defendants' argument that such actions do not represent obtaining peaceable possession. On the other hand, I am also of the view that the pitched battle that ensued thereafter reflects very poorly on all parties, such that neither can be heard to criticise the other.

44. The defendants argue that the status quo is currently that they are in occupation of the Dundrum property and that the court ought to lean in favour of preserving that status quo until the trial of the action.

45. To this end, the defendants distinguish the two cases relied upon by the plaintiffs, *Ryan v. Dengrove DAC* [2020] IEHC 533 and *Downey v. Everyday Finance DAC* [2023] IEHC 101 on the basis that they involved a receiver in possession against whom the owner as plaintiff sought equitable relief. By contrast, in the present case, the borrower is in possession and the receiver seeks the assistance of the court to facilitate disposal. Therefore, unlike both *Ryan v. Dengrove* and *Downey v. Everyday Finance DAC,* this court is being requested to disturb rather than maintain the status quo.

46. However, I do not think that cases such as this ought to depend solely on which party is in possession of the property when "the music stops." This would surely encourage precisely the kind of aggressive and frankly reprehensible behaviour in which both parties have engaged in the run up to the application before this court.

47. I am more influenced by the fact that, irrespective of whether the plaintiffs or the defendants are successful, the ultimate result of the proceedings is that the properties must be sold. If the defendants' case is made out at trial, and an insufficient sum is realised for the property, then their loss will have been crystallised and the plaintiffs are a mark for damages. Conversely, if an injunction in respect of the Dundrum property is refused, then there is an unavoidable risk that the plaintiffs will lose the current sale in circumstances where the defendants cannot fund an award of damages. As in *Downey v. Everyday Finance* there is considerable alignment between the objectives of the parties in these proceedings. The greater the sum that is realised for the disposal of the properties, the greater the reduction in debt will be and the better for both parties.

48. In these circumstances, I am of the view that the balance of convenience favours permitting the receivers to take such steps as appear to them proper to realise the best price reasonably obtainable for the Dundrum property. No case is made that the receivers are party to a deliberate scheme to facilitate sale at an undervalue and improper profit. There is no reason therefore to assume that the receivers will not attempt to obtain the best price reasonably obtainable for the Dundrum property at the time of sale. If they do not, then there is no suggestion that as professional persons with professional indemnity insurance they will not be a mark for damages should any arise. Likewise, should the defendants satisfy the court that the lenders unconscionably brought about breach of the deed of settlement or obtained an improper profit in the manner alleged by the defendants then a claim for damages will similarly lie.

Conclusion

49. I am therefore prepared to grant an order for possession of the Dundrum property only. No information has been put before the court as to who is in possession of the Airfield and Knocklyon properties and there is no suggestion that such properties require to be imminently sold. In reality, the plaintiffs' entire application focussed upon the Dundrum property.

50. For the avoidance of any doubt whatsoever, if the lenders or the receivers are not currently in occupation or possession of the Knocklyon or Airfield properties, there must be no repetition of the conduct pertaining in relation to the Dundrum property. If the plaintiffs are desirous of obtaining possession of such properties, and if peaceable possession is not secured by consent, then the appropriate application ought to be made to court in respect thereof. It also goes without saying that in the event that the plaintiffs or the receivers are already currently in occupation of these properties or in possession of same, then the defendants ought not to engage in behaviour similar to that of which I have been appraised in relation to the Dundrum property.

51. I will if requested make directions in relation to a timetable of pleadings and further steps to ensure that the proceedings are progressed and brought to an early hearing. I would also be disposed to grant the defendants an order permitting them to engage a valuer to enter upon the Dundrum property in order to prepare a valuation report of the development in its current condition as against its value if the development were to be completed prior to sale.

52. I will hear the parties in relation to final orders and costs on 25th July 2023 at 11am.