APPROVED **[2024] IEHC 190**

THE HIGH COURT

Record No.: 2023/2831P

BETWEEN:

DUDDY HOSPITALITY IRELAND HOLDINGS LIMITED, BRENDAN DUDDY and LAWRENCE DUDDY

Plaintiffs

-and-

PROPITEER IRELAND HOLDINGS LIMITED, DADAC LIMITED, PROPITEER LIMITED, COLIN SANDY, DAVID MARSHALL, KEN FENNELL and ANDREW O'LEARY

Defendants

JUDGMENT of Mr Justice Rory Mulcahy delivered on 9 April 2024

Introduction

1. The first plaintiff forms part of the Duddy Group, of which the second and third plaintiffs are principals. The first, second and third defendants are part of the Propiteer Group, of which the fourth and fifth defendants are principals. The Duddy and Propiteer groups have a number of joint or intertwined interests in various projects. On 13 September 2020, a settlement agreement ("**the Settlement Agreement**") was concluded for the purpose of seeking to decouple the two groups' interests permanently. On 8 December 2000, a further agreement, a call option agreement ("**the Call Option Agreement**") was reached between the two groups.

2. The Duddy Group and Propiteer Group had, together, owned and controlled the Ibis Red Cow Hotel in Clondalkin, Co. Dublin ("**the Ibis Hotel**"). These proceedings concern alleged breaches of the Settlement Agreement and Call Options Agreement (together "**the Agreements**") in relation to the ownership of the Ibis Hotel. In brief terms, the plaintiffs allege that the first five defendants are in breach of their obligations to use reasonable endeavours to ensure that, in accordance with the Settlement Agreement and Call Option Agreement, ownership of the Ibis Hotel, or of the companies through which it is owned, was transferred to the plaintiffs. Instead of fulfilling those obligations, the plaintiffs argue that the defendants have pursued a strategy whereby the *defendants* gain control of the hotel. The defendants deny any wrongdoing and argue that the plaintiffs had only a conditional entitlement to ownership of the hotel and that their difficulties arise from the fact that they have not been able to satisfy the required conditions.

3. This judgment concerns two separate injunction applications by the plaintiffs. The first application in time sought injunctions restraining the second, fourth and fifth defendants from making any alterations to the board of directors of the companies controlling the Ibis Hotel and directing the re-appointment of the second and third plaintiffs as directors ("the Board composition injunction"). The second injunction sought to restrain the sixth and seventh defendants, receivers appointed by the second defendant over those companies, from selling or disposing of the Ibis Hotel ("the Sale injunction").

4. The injunction applications were heard over three days, on 29 February, 1 March and 5 March. The first to third defendants, the fourth and fifth defendants, and the sixth and seventh defendants were all separately represented. On 22 March 2023, I indicated to the parties that I was refusing both injunctions. I provided a short statement of my reasons for so deciding and indicated that a written judgment setting out those reasons in more detail would follow. This is that judgment.

Background

5. The parties exchanged a total of ten affidavits in relation to the Board composition injunction, one of which was delivered during the hearing, another after the hearing concluded, and six in relation to the Sale injunction. The following is a summary of the most

pertinent facts as appear from those affidavits, together with some of the arguments the parties make by reference to those facts.

6. On 20 July 2018, three companies, Propiteer Hotels Exeter Limited (PHEL), Waring Street Limited (WSL) and Propiteer Ibis Red Cow Limited (PIRCL) as borrowers, entered a financing agreement with Fairfield REF ECS DAC (Fairfield) ("**the Fairfield facility**"). Pursuant to the Fairfield facility, Fairfield made available separate sterling and euro facilities to the borrowers. The purpose of the euro facility was to part-fund the acquisition of the Ibis Hotel. The sterling facility was for the purpose of acquiring a development property in Waring Street, Belfast and also refinancing the debt on a hotel in Exeter, United Kingdom. The sterling facility was made up of two loans totalling £16,050,000; the euro facility was in the sum of €10,575,000. The purchase price of the Ibis Hotel was in excess of €14 million. It appears that the Propiteer Group provided the balance of funds required for that purchase.

7. Although the euro and sterling facilities were separate, each of the companies guaranteed the entirety of the debt and, importantly, the facilities were cross-collateralised, *i.e.* the collateral provided for the loans, including the Ibis Hotel, provided security for the entirety of the debt.

8. The facility was subject to a requirement that the borrowers maintain a 75% loan to value ratio in the secured assets. The facility was due to expire in July 2021. In the event of a change of control of any of the borrowers without Fairfield's consent, the debt would become immediately repayable.

9. At the time of the Settlement Agreement, the Ibis Hotel was owned and controlled by Propiteer Ireland Hotels Limited (PIHL). PIHL was owned by the first plaintiff (40%) and the first defendant (60%). PIHL was the owner of 100% of the shares in Propiteer Ibis Red Cow Limited (PIRCL), which in turn owned 100% of the shares in Propiteer Ibis Red Cow Operations Limited (PIRCOL). The Board of PIRCL comprised the second and third plaintiffs (the Duddy brothers), the fourth and fifth defendants, and a fifth director, Tom Dalton. The Board of PIRCOL comprised the same five directors, together with three sisters of the second and third plaintiffs, Patricia, Shauna, and Paula Duddy (the Duddy sisters).

The Duddys, together, had a controlling interest on the Board of PIRCOL and were responsible for the operations of the Ibis Hotel.

10. In or about 2019, the two groups decided to go their separate ways and, accordingly, the Settlement Agreement was executed in January 2020. The parties to that agreement included the second and third plaintiffs, and the first, third, fourth and fifth defendants.

11. The Settlement Agreement addressed a variety of matters, including issues which are not relevant to these proceedings. For present purposes, of central importance are the provisions in relation to ownership of PIHL. Pursuant to Clause 4.6.1 of the Settlement Agreement, the first Defendant was to transfer its shareholding in PIHL to the first plaintiff. That transfer, however, was contingent on the "Fairfield consent being procured". Clause 4.6.1 required all parties to the agreement to use their reasonable endeavours to procure that consent.

12. The Fairfield consent was described in Clause 4.6.2 as being Fairfield's consent to the Fairfield debt in the amount of €10,376,000.75 being transferred into the sole name of the first plaintiff or being refinanced on terms acceptable to Fairfield. Clause 4.6.2 required the Propiteer Group to provide all reasonable assistance to the first plaintiff in the transfer or refinancing *"provided that the Propiteer Group will have no further liabilities in respect of such debt (which is currently cross-collateralised in the Propiteer Group*." The debt the subject of this clause was the sum then due and owing on the euro facility element of the Fairfield facility.

13. It is important to recall that the Ibis Hotel operated as collateral for the sterling facility provided by Fairfield even though only the euro facility had been required for the purchase of the hotel. The defendants' position is that Clause 4.6.2 required the plaintiffs to obtain consent from Fairfield to refinance the euro portion of its debt, but without imposing on the defendants any obligation to provide additional security for the sterling facility, in respect of which the Propiteer Group would remain liable to Fairfield.

14. Clause 4.6.3 of the Settlement Agreement provides, in part, as follows:

> *"It is acknowledged by the Parties that for a period of time following the execution of this agreement until DHIHL (or its nominee) has procured a refinance or other*

proposal as described in clause 4.6.2 above, each of the Propiteer's Managers' Group [defined to include the fourth and fifth defendants] *and the BLT Group* [defined to include the second and third plaintiff] *will not be in control of certain assets connected to the Fairfield facility, of which the Fairfield debt in PIHL forms a part."*

15. Clause 4.6.5 of the Settlement Agreement provides that until the earlier of either the Fairfield consent being obtained, or a refinance of the Fairfield facility being agreed by the first plaintiff or PIHL, there shall be no change in the constitution of the board of directors of PIHL.

16. In December 2018, the Call Option Agreement was executed. The third plaintiff, in his first affidavit grounding the Board composition injunction, avers that the Call Option Agreement was made in furtherance of the agreement in the Settlement Agreement that the parties would agree the most tax-efficient approach to the various settlements. In an affidavit filed on behalf of the first to third defendants, it is suggested that it was agreed between the parties that it would make more sense to enter into asset-specific agreements and that the Call Option Agreement was concluded to deal with the Ibis Hotel. This dispute may prove to be of some significance, as the defendants argue that the Call Option Agreement contains an entire agreement clause such that the provisions of the Settlement Agreement are no longer applicable. I address this below.

17. The parties to the Call Option Agreement included PIHL, the first plaintiff, the Duddy brothers, and Mr Dalton, and the first, fourth and fifth defendants, WSL, PHEL, PIRCL and PIRCOL. Pursuant to Clause 2 of that agreement, the first defendant granted the first plaintiff an option to purchase the shares in PIHL at any time during the Call Option period. The Call Option period was defined as the period starting on the date of the Fairfield consent or Fairfield refinancing and ending 10 days thereafter. Since the Fairfield consent has never been obtained, an issue arises as to whether the Call Option period has even commenced.

18. The Call Option Agreement provided that from the date of the agreement until the Fairfield consent or Fairfield refinancing was secured, none of the parties would take any action to change the constitution of the board of PIHL, PIRCL or PIRCOL ("**the Ibis companies**").

Efforts to Refinance

19. Subsequent to the conclusion of these agreements, the Covid-19 pandemic struck Ireland and the United Kingdom. This had a material impact on the secured assets. In particular, the business of the PHEL asset, a hotel in Exeter, was negatively impacted by the entry into administration of Flybe, a regional airline based in Exeter. The Waring Street property was not developed. The value of those properties reduced, adversely affecting the loan-to-value ratio of the debt.

20. Despite various attempts, the plaintiffs did not obtain Fairfield's consent to the transfer of ownership of PIHL, or successfully refinance the Fairfield debt. The plaintiffs complain that the defendants were in breach of their obligations under the Settlement Agreement to use reasonable endeavours or provide reasonable assistance to procure the consent or refinancing. They argue that the defendants failed to address the reduced loan-to-value ratio of their encumbered assets, and that this caused or contributed to Fairfield's refusal to provide consent or agree refinancing. The defendants argue that they were under no such obligation.

21. The plaintiffs' grounding affidavits describe a request for Fairfield consent in September 2020, which was not forthcoming, and unsuccessful discussions with Fairfield during the course of 2021 regarding refinancing. What appears to have been envisaged is that the Duddy Group would take on the liability for the euro facility, and provide additional collateral for that loan, with the Propiteer Group assuming liability for the sterling facility. It seems that Fairfield was unwilling to refinance any of the debt unless the defendants provided additional collateral for the sterling facility in circumstances where it was being proposed that the Ibis Hotel would no longer operate as collateral for that facility.

22. The plaintiffs characterise the defendants' conduct in failing to facilitate a refinance as a breach of their "reasonable endeavours" obligation. In addition, they point to specific failures to co-operate in securing a tax report which Fairfield had requested.

23. The plaintiffs secured an indicative offer of refinancing from a third party, Bolt Capital, in October 2021, but that proposal faced the same objections from Fairfield and was not advanced.

24. Following the expiry of the Fairfield facility in July 2021, Fairfield granted a series of short extensions. However, on 25 February 2022, Fairfield's representative emailed Propiteer to advise that Fairfield could not continue to extend the facility beyond 11 March 2022 and that he had been instructed to commence a review of enforcement options. The email referenced a loan sale agreement to a company called Titan and expressed frustration with the lack of progress. It seems that the plaintiffs were not made aware of this communication.

25. On 25 March 2022, the first, third, fourth and fifth defendants wrote to the second and third plaintiffs to advise them that the second defendant, DADAC Limited ("**DADAC**"), a wholly owned subsidiary of the third defendant, had agreed to acquire the Fairfield facility and that the transaction would "*complete shortly".* In fact, it was later confirmed that the sale completed that same date, and that funding for the acquisition was provided by Titan, the company referenced in Fairfield's email of 25 February 2022. The defendants contend that this was not a new facility or refinance but rather a sale of the existing facility; all the terms of the Fairfield facility remained operative, and no additional encumbrances were placed on the assets of, in particular, PIHL.

26. The sale of the Fairfield facility to DADAC was only confirmed to the plaintiffs in July 2022, when correspondence was exchanged in relation to the transaction. Although the plaintiffs now claim that the acquisition was in breach of the defendants' obligations under the Agreements, including under 4.6.2 and 4.6.3 of the Settlement Agreement, they did not immediately treat the acquisition by DADAC of the Fairfield facility as a breach; rather they sought to find a third party to individually refinance the facility relating to the Ibis Hotel. In this regard, they obtained an indicative term sheet offer from a proposed lender, Birch Corporate Credit DAC ("**Birch**"). Although DADAC had acquired the facility, it was the defendants' position that the consent of Titan was required for any refinance or to the release of any security. The defendants indicated that they would be willing to seek Titan's consent subject to the provision of detailed information about the performance of the Ibis Hotel. The plaintiffs' case is that this was not relevant information in circumstances where what was being sought from Titan was its consent to the release of security over the hotel, and that the request for information discloses the defendants' real purpose, which was to acquire control over the Ibis Hotel themselves. The defendants counter that it is entirely reasonable for a

lender, when being asked to release security, to want to know the value of the security proposed to be released.

27. In September 2022, PIRCL paid a fee of €35,000 to guarantee the continued provision of the offer from Birch. In the third plaintiff's grounding affidavit, he avers that the defendants refused to proceed with the refinance offer and that despite repeated requests, the fourth and fifth defendants would not meet with the plaintiffs or facilitate a meeting with Titan. In early November 2022, Birch advised the plaintiffs that it was formally withdrawing its offer. No further efforts to refinance have been put in evidence.

Appointment of Receivers

28. On 8 March 2023, the security trustee of the Fairfield facility, BCM Global (UK) Limited (BCM Global) wrote to the directors of the Ibis companies, acting on the instructions of DADAC. The letter noted that the facility had expired on 22 March 2022 and that all facilities thereunder were payable on demand. The letter also set out various instances of alleged default. It demanded payment of the loan from all the borrowers under the facility. The euro amount then due and owing in respect of the euro facility was stated to be €10,352,521,56. The letter stated that in the event of failure to pay, receivers would be appointed.

29. On 10 March 2023, DADAC appointed the sixth and seventh defendants as receivers over the assets of the Ibis companies. On the same date, receivers were appointed over the shares in WSL and PHEL, the other companies whose assets secured the Fairfield facility. Although the plaintiffs reserved their position regarding the entitlement of DADAC to appoint receivers, in circumstances where they were not in possession of all the documentation relating to that appointment, no complaint is advanced in these injunction applications regarding the validity of their appointment.

30. The receivers indicated, in a letter dated 15 March 2023, that they did not anticipate selling the hotel "*in the short term*." By subsequent letter dated 11 July 2023, the receivers refused to provide a confirmation that they would not sell the hotel pending the determination of these proceedings which had, by that point, been instituted. They did,

however, confirm that they would not sell the hotel without giving 30 days' prior written notice.

31. On 8 November 2023, following an exchange of correspondence between solicitors for the receivers and solicitors for the plaintiffs, the receivers gave 30 days' notice of their intention to sell the hotel. That notice prompted the Sale injunction application. The plaintiffs sought short service of that application on 6 December 2023 and were given a return date of 7 December 2023. On that date, the receivers indicated that they would not sell the hotel pending the determination of the injunction application.

32. Both sides have submitted offers to the receivers for the purchase of the hotel, and each seeks to place significance on the fact that the other has made such a bid, as explained below.

Removal of Directors

33. At the time that the original security was entered into with Fairfield, each of the directors of the Ibis companies signed undated letters of resignation and agreed that the security trustee could date those letters in the event that the security over the shares became enforceable. On 12 June 2023, BCM Global, on the instructions of DADAC, dated the letters of resignation signed by the second and third plaintiffs and Mr Dalton, thus removing them as directors of PIRCL and PIRCOL.

34. In a letter from DADAC's solicitors to the plaintiffs' solicitors of the same date, the solicitors explained that DADAC's decision to remove the plaintiffs as directors had been prompted by the second plaintiff calling a board meeting of the companies to approve draft accounts for the companies for the year ended 2020, which by that time were significantly overdue. The letter set out that there had been correspondence between the second plaintiff and the fourth defendant, Mr Sandy, on the issue and that Mr Sandy had expressed the view that the accounts could not be finalised until further information was provided to the companies' auditors and that that information had not been provided. The letter stated that DADAC was of the view that *"there was no reasonable prospect of the Companies' financial accounts being brought up to date while your clients, and directors associated with them* [the Duddy sisters] *remain as directors of the Companies."* The plaintiffs dispute that they were the cause of any delay in finalising accounts and point to a prior indication by Mr Sandy that he was willing to sign the draft accounts as evidence that their removal

was part of the defendants' overall strategy to facilitate the defendants' scheme to take control of the Ibis Hotel.

35. The letter of 12 June 2023 set out the purported basis of the entitlement to implement the board changes. It advised that the Duddy sisters would be written to in due course and that a resolution had been passed by the Security Trustee to appoint two new directors to PIRCOL. The letter did not reference the defendant's obligations pursuant to the Agreements.

36. By notice dated 15 June 2023, the security trustee instructed the directors of PIRCOL to call an EGM for the purpose of removing the Duddy sisters as directors of that company. At a board meeting held on 26 June 2023, the board resolved to hold an EGM on 19 July 2023 for the purpose of voting on an ordinary resolution to remove the Duddy sisters as directors. The plaintiffs sought short service of the Board composition injunction application on 4 July 2023 and were given a return date of 6 July 2023. On that date, DADAC furnished undertakings not to proceed with the removal of the Duddy sisters, which undertakings continued up to the hearing of the injunction application.

Allegations of Misappropriation of Funds

37. A significant portion of the affidavits was devoted to addressing allegation by each side that the other had been guilty of misappropriating funds from the Ibis companies.

38. The Plaintiffs allege that the fourth and fifth defendants have paid out a total of €978,000 to third parties from the operating account of PIRCL, without board approval, between 2018 and 2020, and also impugn two payments made in 2020, one of €32,482.85, the other of €10.368.20. In affidavits sworn by Mr Sandy, these latter payments are explained as relating to the repayment of loans made by the Propiteer Group to PIRCL for the purpose of paying interest on the loan to Fairfield, and to cover insurance. As regards the larger sums said to have been misappropriated, these are addressed in brief in his first affidavit and in more detail in his second. He explains that the payments were made, with the full knowledge of the plaintiffs, to a wholly owned subsidiary of the Propiteer Group and relate to the development of another site in Clondalkin. The money used, he says, was,

at least in part, an excess arising from the purchase of the Ibis Hotel, which was due to the Propiteer Group.

39. The defendants' allegations against the plaintiffs are two-fold. First, they allege that the plaintiffs have diverted significant sums from the Ibis companies for services which were never provided or approved. Second, they contend that the plaintiffs diverted a valuable contract benefitting the Ibis companies to a company wholly owned and controlled by the Duddy Group.

40. In respect of the first of those categories, although the plaintiffs have provided explanations on affidavit, the defendants have challenged the adequacy of those explanations. Insofar as the plaintiffs claim that the payments were for works done or services provided to the hotel, the defendants have exhibited a letter from the director of Interstate Hotel Management Ireland Limited ("**Interstate**"), the company responsible for the day-to-day management of the hotel, in which he disputes that the works were done, or services provided. The plaintiffs argue that the payments are fully vouched and were approved at a board meeting, though the defendants dispute that these meetings were properly convened. In any event, even where the board approved the payments, the fourth and fifth defendants did not do so. The plaintiffs have also offered to submit the disputed payments to an independent expert accountant for determination and suggest that the defendants' refusal to agree to this is because the defendants' complaints about misappropriation are not being made *bona fide*.

41. For present purposes, of most relevance are two payments made to a company called Strand Road Service, one in the sum of €148,046.31 on 27 February 2023, the other in the sum of €205,212.47 on 9 March 2023. The defendants place emphasis on these payments, in particular, on the alleged inadequacy of the explanation for them and on the timing of the payments. In this regard, it is accepted by the plaintiffs that Strand Road Services is a company wholly owned by the Duddy Group. In his second affidavit in the Sale injunction, the third plaintiff explains that payments were for the benefit of the Duddy Group but that, because the Duddy Group's accounts were frozen, the money was paid to another Group company. It must be said that this doesn't explain what the payments were for, or why Duddy Group accounts were frozen. The defendants place particular emphasis on the timing

of the second payment, which was made the day after the demand for payment, which indicated that receivers would be appointed, and the day before that appointment.

42. The second concern identified by the defendants relates to the benefit of a government contract for the use of the hotel for direct provision, a valuable contract which the plaintiffs take credit for procuring for the Ibis companies. In November 2022, the benefit of that contract was transferred from PIRCOL to a company wholly owned by the Duddy Group, Monastery Road Limited ("**Monastery Road**"). The defendants were not advised of this transfer, which only came to light after the appointment of the receivers. Moreover, they argue that it is a breach of the terms of the security as it took the benefit of the contract outside the scope of the security. Again, the defendants place emphasis on the timing which, they point out, coincides with the withdrawal of the Birch refinancing offer.

43. The explanation provided by the third plaintiff in his first affidavit was that the establishment of Monastery Road was *"simply a new operational and development company established within the group structure"*. The plaintiffs also rely on deeds of trust executed by each of the shareholders of Monastery Road confirming that they held their shares in trust for the benefit of PIRCOL and would exercise voting rights as the beneficial owner directs.

Applicable Principles

44. The parties are, unsurprisingly, agreed that in general terms, the principles applicable to applications for interlocutory injunctions are as set out in *Merck, Sharp & Dohme Corporation v Clonmel Healthcare Limited* [2019] IESC 65, [2020] 2 IR 1 where the Supreme Court identified a series of steps which might be of assistance in deciding whether an injunction should be granted. In those circumstances, the matters for the court to consider in determining whether to grant the injunctions sought are whether the plaintiffs have identified a serious issue to be tried, and, if so, where does the balance of convenience lie. In determining where the balance of convenience lies, the question of whether or not damages are an adequate remedy will be the most significant factor.

45. The plaintiffs say that they have met the threshold of establishing a serious to be tried and that, with respect to the Board composition injunction, they have established a strong case likely to succeed. They also argue that damages are not an adequate remedy for the plaintiffs because of their "specific interest" in the Ibis Hotel, and because the ability of the defendants to meet an award in damages is in doubt. In those circumstances, they argue that the balance of convenience favours the grant of the injunctions sought.

46. The defendants each oppose the injunctions sought. The receivers largely confined their submissions to the receivership injunction. They did have some helpful observations on the Board composition injunction, which I address below.

47. The defendants deny that there is a fair issue to be tried, although each on slightly different grounds. They are *ad idem* that damages are an adequate remedy and that, therefore, the balance of convenience is against the grant of both injunctions.

48. In addition to those considerations, the defendants raise additional factors which, they say, make it inappropriate to grant injunctive relief. All the defendants argue that the plaintiffs have delayed in seeking relief. In addition, the first to fifth defendants argue that the plaintiffs have not come to court with clean hands and, therefore, are not entitled to equitable relief. In this regard, they do not argue that the plaintiffs have failed to disclose material facts, rather they rely on the plaintiffs' alleged misconduct in diverting funds from the Ibis companies to their own use and, in particular, in diverting the benefit of the government contract for the use of the hotel for direct provision from the Ibis companies to the Monastery Road company.

Serious Issue to be Tried

49. The plaintiffs' focus in their submissions was on the defendants' alleged breach of the Agreements. The plaintiffs complain that the defendants' conduct prior to the acquisition by DADAC of the Fairfield facility breached the defendants' reasonable endeavours obligations. Furthermore, they argue that the purchase by DADAC of the loan facility was itself a breach of the Agreements and, in particular, Clause 4.6.3 of the Settlement Agreement, pursuant to which the fourth and fifth defendants agreed not to take a controlling interest in assets connected with the Fairfield debt.

50. As noted above, the plaintiffs' contention is that the defendants are, in effect, engaged in a scheme to subvert the intention of the Agreements and gain control of the Ibis Hotel. Their failure, as the plaintiffs see it, to co-operate with the efforts to refinance and their acquisition of the Fairfield debt without prior notice to the plaintiffs, are said to evidence this intention. In addition, the defendants' detailed request for information on the performance of the hotel and plans for development on the site for the purpose of seeking Titan's consent to refinancing is said to evidence the defendants' interest in securing the hotel asset.

51. The removal of the second and third plaintiffs as directors of the relevant companies, and the proposed removal of the Duddy sisters, is said not only to be a breach of the Agreements but also to be further evidence of the defendants' true intent, to take control of the hotel. It is argued that the real purpose behind the removal of the Duddy directors was to facilitate a non-cash bid for the hotel which has been submitted by the Propiteer Group.

52. The defendants identify a number of substantive defences to the claims being advanced. They argue that far from obstructing the plaintiffs' efforts to refinance, they sought to assist, both with Fairfield and subsequently with Titan, trying to ensure that any offer made had the best chance of being accepted. By way of example, they reject the plaintiffs' suggestion that their request for information on the hotel and future development proposals reflects *their* interest in the asset and argue that it was for the purpose of putting forward a proposal with the best prospect of being accepted. They point to emails which support this interpretation. The fifth defendant swore an affidavit during the course of the injunction application in which he addressed an argument which had been advanced by counsel for the plaintiffs on the first day of hearing that the defendants had never sought Titan's consent to refinance. His affidavit exhibits correspondence with Titan to establish that he had, in fact, made such a request. Counsel for the plaintiffs argued that this correspondence establishes no more than that the issue was "tabled for discussion" and that no formal request was ever made.

53. In addition, the defendants argue that the Settlement Agreement has been superseded by the Call Option Agreement, owing to the entire agreement clause in the latter agreement and that, therefore, only the obligations in the Call Option Agreement subsist. They argue

that the entitlements of the plaintiffs therein are conditional and that the plaintiffs have failed to satisfy the conditions – by failing to secure agreement to refinance – and, therefore, those obligations have fallen away.

54. Though a substantial portion of the affidavits exchanged were addressed to this substantive dispute, in truth, the defendants did not argue that there was no serious issue to be tried *in the proceedings* as to whether there had been a breach of the Agreements. Rather, they pursued a more nuanced argument, that there was no serious issue to be tried in respect of the issues which the plaintiffs sought to injunct, the board composition and the sale of the hotel. Each of the defendants pursued this argument in a slightly different way.

55. The first to third defendants argued that the only issues to be tried in the proceedings identified by the plaintiffs relate to performance of the Agreements. However, those defendants point out, DADAC, which made the change to the board composition and is, therefore, the focus of that injunction application, was not a party to those Agreements. Moreover, there is no complaint that the change to the board composition was done other than in accordance with proper procedures. Thus, they say, there is no issue to be tried on the matter the subject of the injunction application, and therefore no basis for the grant of an injunction against DADAC.

56. Similarly, they argue that it was DADAC who appointed the receivers, and there is no complaint about the manner of their appointment. For the same reasons, the first to third defendants argue that the sale injunction should be refused.

57. The fourth and fifth defendants, of course, *were* a party to the agreements, but they say that it was DADAC not them that made the changes to the board composition and appointed the receivers and therefore there is no issue to be tried *as against them*.

58. In relation to the receivership injunction, the receivers say that there is no claim made against them or about the validity of their appointments and therefore, again, no issue to be tried on the issue of the entitlement of the receiver to sell the hotel.

59. I don't accept that that is the appropriate way to address the question of whether there is a fair or serious issue to be tried. The underlying proposition is that, for the purposes of this injunction application, the court must treat DADAC as an entirely separate legal

personality from that of the third, fourth and fifth defendants such that DADAC was free to act, unconstrained by those other defendants' obligations pursuant to the agreements. In this regard, counsel for the fourth and fifth defendants points out that there was no application to lift the veil of incorporation. I am satisfied that no such application was necessary. The entire basis of the plaintiffs' claim is that the first, third, fourth and fifth defendants owed obligations under the Agreements, which they have breached, *inter alia*, by incorporating DADAC for the purpose of acquiring the Fairfield debt. It is expressly pleaded that DADAC is the servant or agent of the third, fourth and fifth defendants. The question, therefore, is whether those parties' obligations under the Agreements can be breached by the actions of DADAC? Or more precisely, whether the plaintiffs have made out a serious issue to be tried that their obligations can be breached by the actions of DADAC? I have no doubt that they have made out an issue to be tried.

60. Insofar as the first, third, fourth and fifth defendants have obligations under the Agreements, those obligations could not, at least arguably, be avoided by the simple expedient of incorporating a new company in which, it seems, they have a controlling interest, and having that company takes steps which they would not be permitted to take under the Agreements. I have not, of course, concluded that that is what has occurred, but it is quite clearly the case which the plaintiffs make. This is apparent from their pleadings and affidavits and does not require a specific plea that the plaintiffs wish to pierce the corporate veil.

61. There is an arguable case that there has been a breach of the Settlement Agreement in relation to reasonable endeavours, and of the obligation not to take a controlling interest in the assets related to the Fairfield debt. I don't understand this to be seriously disputed, although it is denied that there has been any breach. Moreover, there is an arguable case that the acquisition of the Fairfield debt and the insertion by the first, third, fourth and fifth defendant of a company in which they have a controlling interest was, of itself, a breach of the Agreements. The merits of those arguments do not fall to be determined in this interlocutory application, and I note that the defendants have set out in detail in their affidavits their response to the plaintiffs' allegations that DADAC's acquisition of the Fairfield debt represents a conflict of interest. These issues can be addressed, as necessary, at the hearing of the action. For present purposes, I am satisfied that the plaintiffs' case meets the low threshold of a serious issue to be tried.

62. There is also an arguable case that the changes to the board composition constitute a breach of the Agreements. On its face, those changes were expressly prohibited in both the Settlement Agreement and the Call Option Agreement, and the plaintiffs assert that they, therefore, meet the threshold for a mandatory injunction – a strong case likely to succeed – on this issue. I hesitate to characterise this as a strong case not only because the ongoing enforceability of those agreements may be an issue but also because the liability of DADAC under those agreements will certainly be an issue as it will no doubt assert its separate corporate personality from the other defendants at the hearing of the action.

63. The defendants each argue that, in order to obtain an injunction, a plaintiff must establish that there is a serious issue to be tried in relation to the specific issue the subject matter of the injunction. I do not accept that this is the correct approach to take to the question of determining whether there is a serious issue to be tried. Counsel for the first to third defendants fairly acknowledged that she could point to no authority supporting such a methodology. If the plaintiff has an arguable case that DADAC should never have been permitted to acquire the Fairfield debt, because the acquisition constituted a breach of the Agreements by the other defendants, then it follows that the plaintiffs are entitled to argue that the steps DADAC have taken as owners of that debt – the appointment of receivers, the change in board composition – should never have occurred. It is, in principle, entitled to seek an injunction restraining those actions, or acts by the receivers, without having to point to some procedural error in the particular actions impugned.

64. The plaintiffs have thus met the first the first limb of the test for an injunction.

Balance of Convenience

i. Adequacy of Damages

65. Establishing a serious issue to be tried is merely the first hurdle which an applicant for an injunction must overcome. It is also necessary to establish that the balance of convenience favours the grant of the injunction sought or, put otherwise, that the grant of an injunction

will give rise to the least risk of injustice. The adequacy of damages is a key consideration in determining where the balance lies.

66. In *Merck, Sharp & Dohme*, O'Donnell CJ cautioned that in *"commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy."* That robust scepticism was clearly in evidence in cases referenced by the defendants in submissions, including *O'Gara v Ulster Bank DAC* [2019] IEHC 213 and *Ryan v Dengrove* [2021] IECA 38. In *O'Gara*, Barniville J (as he then was) referred to the decision of the High Court (Stewart J) in *Whelan v Promontoria (Finn) Ltd* [2017] IEHC 739 (at para 40):

> *"In assessing the law in relation to the adequacy of damages, the Court is cognisant of two opposing legal rules of thumb: damages are not an adequate remedy for a trespass and damages are an adequate remedy for commercial investments. Identical considerations arose in this Court's decision in* McGarry v. O'Brien *(Rec No: 2017/4686P)* [[2017] IEHC 740] *which is being delivered contemporaneously to this decision. With respect to the adequacy of damages, the Court's reasoning is broadly similar in both cases. In attempting to reconcile the above rules, the emerging analytic theme is to use a fact-based approach. The property rights at stake in this case relate to real property. Each parcel of land is unique and, where a defendant has improperly disposed of that land, it is impossible to fully compensate for the loss suffered because no other piece of land is identical to the one that was lost. However, where the land is involved in some commercial or monetary venture and the predominant feature of the plaintiff's investment in the land is for some financial purpose, it is quite correct for a court to conclude that such loss can be compensated with an award in damages, as the predominant feature of the plaintiff's investment in the land does not touch upon any of the aspects of that land which make it unique."*

67. The plaintiffs submit that the claim that they can be adequately compensated in damages is "*demonstrably ill-founded on the facts and flatly contradicted by the authorities*". They refer to a number of authorities supporting the proposition that the courts will grant specific performance of agreements providing for the transfer of shares. It is true that the authorities support that, perhaps, unremarkable proposition, but that merely

establishes that an injunction is available in principle; it doesn't say anything about the adequacy of damages. The plaintiffs seek to distinguish *O'Gara* on the basis that the commercial asset in that case was, in effect, merely being used to provide a rent roll, and *Ryan v Dengrove* on the basis that in that case, it was agreed that the asset in dispute should be sold, the dispute was about the terms of sale (and who should be the seller). They say these cases are far removed from the special interest they have in this particular asset.

68. With respect, the evidence adduced by the plaintiffs falls far short of establishing that the plaintiffs have the type of special interest in a particular property, which might justify a conclusion that damages are not an adequate remedy in these applications.

69. The dispute between the parties is self-evidently a commercial dispute. The parties' investment in the Ibis Hotel was for no other purpose, at least none disclosed in the affidavits, than to receive a commercial return. The plaintiffs' "specific interest" in the property, as described in paragraph 116 of the third plaintiff's affidavit grounding the receiver injunction, does not disclose any kind of special attachment to the property which takes it outside the normal sphere, even without the application of any robust scepticism. The property was acquired in a joint venture in 2018, and it was the Propiteer Group, not the Duddy Group, which made the necessary financial contribution to fund the sale. The hotel is managed by a company, Interstate, with no apparent connection to the plaintiffs. Other than evidence that the plaintiffs were involved in the negotiation of the government contract for use of the hotel for direct provision, there is no evidence that any of the Duddy family worked in the hotel or for the Ibis companies, other than in their role as directors. It appears that they have advanced development proposals for the hotel lands and have engaged with the planning authorities, but no planning application has yet been made.

70. Moreover, the plaintiffs' claim to a special interest must be seen in the light of their legal interest in the hotel property, which is a minority shareholding in the company which owns the hotel, a shareholding which is heavily encumbered, and a conditional entitlement to acquire the majority shareholding, a condition which they have not, after four years, managed to satisfy. Had DADAC not acquired the Fairfield debt, it would appear that Fairfield would long since have sought to enforce its security. It is difficult to imagine that the plaintiffs could have had any basis to restrain such enforcement. On one view, DADAC's involvement has simply delayed that enforcement. The plaintiffs argue that this

is not an "ordinary" receivership injunction, but in truth, the distinguishing feature is, as the first to third defendants argue, that in this case, the plaintiffs do not even have an equity of redemption.

71. Of course, as made clear in *Ryan v Dengrove*, an equity of redemption is not necessarily decisive in establishing a sufficient proprietary interest to tip the balance in favour of the grant of an injunction, and I accept that this case can be distinguished from that one by the fact that in *Ryan v Dengrove* the plaintiff was agreed that the property should be sold. But the factual scenario here remains much closer to that in *O'Gara* and *Ryan v Dengrove* – not least because, as in those cases, the plaintiffs are free to acquire the hotel from the receivers - than, for instance, *Betty Martin Financial Service Ltd v EBS DAC* [2019] IECA 327, where the plaintiff's long personal history operating the business, the subject matter of the injunction application, meant that damages could not be considered an adequate remedy.

72. I am not persuaded that the quantification of damages would give rise to any particular complexity in this case; in fact, given that there is an existing sales process which should, in effect, value the asset the subject of the dispute, it is difficult to see how it could be more straightforward. The question of the quantification of damages is perhaps less clear-cut in the context of the Board composition injunction. On balance, however, I think that any damage which is established at trial to have occurred from the wrongful removal of board members would be either the same, or a subset of, any damage which might be alleged to occur in the event that the Ibis Hotel is sold by the receivers, whether to the plaintiffs, the defendants, or a third party.

73. In circumstances where I have concluded that damages are, in principle, an adequate remedy, it is necessary to consider whether the defendants are in a position to meet any claim in damages. In this regard, the plaintiffs' affidavits referenced the fact that the fifth defendant had discharged his legal representation in proceedings in which he was involved in the United Kingdom. They surmised that the most likely explanation for this was that he was in financial difficulties and, therefore, not a mark for any damages claim. The fifth defendant rejected this in an affidavit sworn in respect of the Sale injunction on 21 December 2023 in which he stated that his UK lawyers had been paid up to date and that the reasons they had been discharged were entirely unrelated to funding. He did not update this position in the affidavit sworn during the course of the hearing.

74. Subsequent to the hearing, the plaintiffs sought leave, which I granted, to deliver a further affidavit. The affidavit set out that judgment had been awarded against the fifth defendant in the UK proceedings and also that the fifth defendant had instructed an insolvency practitioner in the UK to assist with the preparation of an individual voluntary arrangement. The plaintiffs argue that this further reinforces their concern that the defendants may not be able to satisfy an award of damages and criticise the fifth defendant for failure to disclose his true financial position. Although I agree that the fifth defendant does not appear to have been entirely forthcoming in his affidavits, I am not satisfied that this justifies a conclusion that the defendants together would be unable to meet an award in damages even if, as appears from the company structure, the fifth defendant is the major shareholder within the Propiteer Group. The plaintiffs have offered no evidence regarding the overall financial position of the Propiteer Group itself and, importantly, the defendants have a 60% interest in what all are agreed is a very valuable asset, the Ibis companies. Litigants in proceedings are not entitled to security for any potential award they may receive and are not, in general, entitled to an injunction to preserve assets simply to safeguard their position pending determination of the proceedings. If an applicant for an injunction wishes to contend that damages are not an adequate remedy because a defendant will not be in a position to meet any notional award, in my view, that applicant must put forward persuasive evidence that this is so. In this case, the plaintiffs' evidence does not come close to meeting the necessary threshold.

ii. Balance of Convenience

75. As the Supreme Court has made clear in *Merck, Sharp & Dohme*, a conclusion that damages are an adequate remedy does not preclude the grant of an injunction, rather the assessment of the adequacy of damages is a component of the overall assessment of the balance of convenience. However, in circumstances where the court confirmed that the adequacy of damages is "the most important" component of that overall assessment, it seems that it would require some significant risk of injustice to tip the balance in favour of the grant of an injunction where damages are an adequate remedy. I am not satisfied that there is any such significant factor here. It is striking that one possible outcome of the proposed receiver sale is that the defendants, who had contracted to sell their interest in the hotel to the plaintiffs, might end up, in effect, acquiring the plaintiffs' interests, but that is not

sufficient to shift the balance. The receivers are obliged to secure the best price they can for the assets in receivership. The fact that it is possible that the defendants may offer the best price for the hotel and thus gain control of it does not suggest that there is a risk of injustice in refusing the injunction. The plaintiffs' suggestion that the changes that the defendants have made to the boards of the Ibis companies might somehow facilitate a sale to the defendants seems entirely speculative and ignores the statutory obligations of the receivers. The plaintiffs remain free to purchase the hotel from the receivers and have submitted a substantial offer. Insofar as they might claim that the price of the hotel has, through the steps taken by the defendants, which they protest, been inflated, then, if they acquire the hotel, they can pursue a claim for any suggested overpayment. And if they don't acquire the hotel, they benefit from that inflated value. There is no compelling risk of injustice which would warrant the grant of an injunction, notwithstanding that damages are an adequate remedy.

76. By contrast, in circumstances where the facility from Titan, which enabled DADAC to acquire the Fairfield debt, is to expire imminently, there is at least the potential for significant prejudice to the defendants if the receivers are restrained in performing their duties. In particular, this may lead to enforcement against other assets owned by the Propiteer Group. I agree with the plaintiffs that the defendants could have, but didn't, put before the court evidence that Titan had a current intention of pursuing enforcement action, and that I should infer therefrom that there is no such evidence, but once the facility expires, the potential for enforcement is real. If the defendants ultimately prevail in these proceedings, there is therefore a risk of injustice would have been done if an injunction had been granted.

77. Importantly, the balance of convenience does not favour the relief in circumstances where, in effect, the companies are now controlled by the receivers whose appointment is not, for the purpose of these applications, in issue. As counsel for the receivers pointed out, the issue of board control, in particular, is thus much less urgent than it might otherwise be. The plaintiffs, as shareholders in the Ibis companies, should have access to all necessary information, and insofar as the boards continue to be required to perform certain statutory duties, it is difficult to imagine that this would be facilitated by having members of the opposing clans on the boards. The evidence was that the boards were not functioning well prior to the second and third plaintiffs' removal, though, of course, this was not necessarily due to any fault on their part.

78. In passing, I would note that it is not clear to me on what basis I could have granted an injunction restraining the defendants from removing the Duddy sisters from the boards in circumstances where they are not parties to the proceedings.

79. In circumstances where I have concluded that the balance of convenience favours refusing both injunctions, it is not strictly necessary for me to address the discretionary factors, delay and lack of clean hands, relied on by the defendants. However, given the attention which was paid to them during the hearing of the application, I propose to address them briefly.

Discretionary Factors

i. Delay

80. The defendants argue that the plaintiffs delayed in seeking both injunctions such as to disentitle them to relief. On their view, the plaintiffs' cause of action arose not later than when DADAC acquired the Fairfield debt in March 2022 and yet the plaintiffs delayed in issuing proceedings until June 2023 and only sought the Board composition injunction in July of that year. Similarly, the defendants all argue that the receivers were appointed in March 2023, but the Sale injunction was not sought until December 2023.

81. I don't believe that criticism of the plaintiffs for delay is fair in the circumstances. Leaving aside that it appears that the defendants neglected to confirm to the plaintiffs until July 2022 that DADAC had acquired the Fairfield debt, that acquisition did not, of itself, render it inevitable that the defendants would, even on the plaintiffs' case, fail to comply with their obligations under the Agreements. It was reasonable for the plaintiffs to seek to engage with the defendants in order to pursue refinancing prior to issuing proceedings. It may be that once the receivers were appointed, it might have been apparent to the plaintiffs that proceedings were inevitable, but I don't think any delay between March 2023 and June 2023 in issuing those proceedings was such as to disentitle the plaintiffs to relief, especially in the absence of any evidence of prejudice to the defendants caused by that delay.

82. It could not have been anticipated that the defendants would take the steps they did in relation to the composition of the boards of the Ibis companies, and the plaintiffs cannot be criticised for having failed to seek that injunction any earlier than they did.

83. Nor was it necessary for the plaintiffs to seek an injunction to restrain the receivers from selling the hotel any sooner than they did. In response to threats of litigation, the receivers had undertaken to give the 30-days' notice of any intention to sell. There was, therefore, no risk of the hotel being sold prior to the service and expiry of such a notice. Had the plaintiffs sought an injunction prior to receiving such a notice, they would inevitably have been met with allegations of prematurity. Nor is there any substance to the complaint regarding the plaintiffs' failure to make the application as soon as the notice was served, but rather to wait until the 30 days had nearly expired. The receivers elected to give the plaintiffs 30-days' notice of proposed sale. The purpose of such notice can only have been to afford the plaintiffs a reasonable opportunity to consider the options open to them once notified that the receivers intended to put the hotel on the market. The defendants can hardly be heard to complain when the plaintiffs use those 30 days for that very purpose. Nor is there any evidence of any alleged delay in seeking the Sale injunction having prejudiced the defendants.

84. In the circumstances, had I otherwise been persuaded that it was appropriate to consider granting one or both of the injunctions sought, I would not have refused either on the grounds of delay.

ii. Lack of Clean Hands

85. As noted above, allegations of misappropriation of funds were made on both sides, which have been met with denials and explanations. There are questions which remain unanswered. To me, the most glaring of those relate to the establishment and purpose of the Monastery Road company. The plaintiffs' explanation for why those chose to form a new company for the purpose of holding the government contract relating to direct provision for the benefit of the Ibis companies is sorely lacking. It is telling that the receivers have secured the return of the contract to the Ibis companies. Notwithstanding the force of the defendants' argument that the court should draw an inference from the absence of a satisfactory explanation, in light of the dispute on affidavit, I would not have been prepared to draw an

inference in the context of an interlocutory application such as to conclude that there had been an absence of clean hands sufficient to justify refusing the plaintiffs relief to which they were otherwise entitled. Similarly, although the explanation for all of the payments to the plaintiffs queried by the defendant is not as complete as it might be, the disputed evidence would not have justified the refusal of an injunction on the basis of a lack of clean hands.

Conclusion

86. For the reasons stated above, I refuse both the injunctions sought. Although the plaintiffs have identified serious issues to be tried in the proceedings, damages would be an adequate remedy if they prevail in the proceedings. Where damages are an adequate remedy, the plaintiffs would have had to identify significant factors giving rise to a risk of injustice to nonetheless be entitled to an injunction. They have not identified any such factors.

87. It is in the interests of all parties that these proceedings be resolved as speedily as possible. I will therefore list the matter on 16 April 2024 for the purpose of fixing directions to facilitate an early hearing and for the making of any ancillary orders.