Neutral Citation Number: [2014] IEHC 326

THE HIGH COURT

COMMERCIAL

[2014 No. 1314 S.]

BETWEEN

ALLIED IRISH BANK PLC

PLAINTIFF

AND

ANTHONY O'REILLY, INDEXIA HOLDINGS LIMITED AND BROOKSIDE INVESTMENTS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Kelly delivered on the 27th day of June, 2014

Introduction

1. On Monday last, I entered judgment against all the defendants. In the case of the first defendant, it was for €22,657,432.10. Judgment was for €18,506,433.95, in the case of the second defendant. The third defendant was decreed for the sum of €4,150,998.15.

2. Those judgments were entered in circumstances where, in his first replying affidavit, the first defendant accepted, on his own behalf and on behalf of his fellow defendants, that they had no defence to the plaintiff's claim and that it was entitled to judgment against them.

3. Whilst the defendants did not seek to resist the plaintiff's entitlement to judgment, they did seek a stay on execution and registration of that judgment insofar as any unencumbered assets of the defendants might be concerned.

4. This judgment deals with the application for the stay which, unusually, took almost half a day of court time to hear.

Background

5. The first defendant resides at Nassau in the Bahamas. The second defendant is a limited company which has its registered office in Nicosia in Cyprus. The third defendant is an Irish company with its registered office at Castlemartin Stud Farm, Kilcullen, Co. Kildare.

6. In March 2009, the plaintiff agreed to advance €4m to the first defendant to fund his personal investments.

7. On the same date, the plaintiff agreed to advance €3,943,000 to the third defendant for the purpose of funding the repayment of a director's loan given to the first defendant.

8. On 4th May, 2011, the plaintiff agreed to advance €13m to the second defendant for the purposes of refinancing an existing term loan made by the plaintiff to it together with all accrued but unpaid interest from 30th September, 2010.

9. On 29th October, 2008, the first defendant agreed to guarantee any monies which were then or would at any time thereafter be owing to the plaintiff by the second defendant.

10. On 17th November, 2008, the second defendant guaranteed any monies which were then or would at any time thereafter be owing to the plaintiff by the first defendant subject to a maximum sum of €4m.

11. On 7th May, 2009, the first defendant entered into guarantee and indemnity obligations concerning the liabilities of the third defendant to the plaintiff.

12. The defendants defaulted on their repayment obligations under these arrangements thus giving rise to the claim and the entry of judgment.

Security

13. The plaintiff is secured in respect of the indebtedness.

14. In his first replying affidavit, the first defendant averred that he had furnished valuable security to all of his lenders. He went on to point out that the plaintiff is secured in respect of his liabilities and those of the second and third defendants in the form of

> *"(a) 237.48 acres of exceptional stud land at Castlemartin in Co. Kildare;*
>
> *(b) the gate lodge and caretaker lodge at Castlemartin;*
>
> *(c) Shorecliffe House – a Georgian house and the lands at Shorecliffe, Glandore in the County of Cork of 6 acres;*
>
> *(d) 6,116,601 INM shares;*
>
> *(e) 2,791,400 INM shares."*

15. In fact, the security does not extend to the entirety of the Castlemartin Stud lands.

16. Unfortunately for the first defendant, his indebtedness to the plaintiff constitutes only a small percentage of the gross liabilities which he has. The debt to the plaintiff represents less than 11.6% of such liabilities. It follows that the totality of his liabilities are of the order of €195m. He has identified a number of financial institutions to which he owes these monies. They are ACC Bank Plc, Bank of Ireland, Ulster Bank Ireland Limited, Mellon Bank, EFG Bank Trust Bahamas Limited and Lloyds TSB Bank Plc. He also has substantial debts owed to Loan Star which acquired the borrowings which he had with Anglo Irish Bank Corporation Plc.

17. In his first replying affidavit, the first defendant said:-

> *"The security which I have provided to the plaintiff will not be sufficient to satisfy the extent of my present indebtedness"* (See paragraph 7)

18. At para. 15 of the same affidavit, he said:-

> *"Even in the most favourable of selling conditions, the realisation of those secured assets may not discharge the entirety of the judgment debt which would be due and owing to the plaintiff and the plaintiff will have to have recourse to my unencumbered assets."*

19. In his second replying affidavit, this defendant appeared to be more optimistic, he said:-

> *"The plaintiff is secured over a portion only of the property at Castlemartin. The plaintiff is aware that the value of its security will be maximised if the whole estate is sold and it is also aware that its security would not entitle it to force such a sale. I am arranging the sale, as I said I would. The price to be realised for Castlemartin is absolutely crucial; not just to the plaintiff, but to my other creditors and to myself. I am hopeful, particularly in light of the level of interest which has been expressed in the short time in which the property has been marketed that the price realised would be sufficient – when both property sales are completed together with the sale of other assets secured by the plaintiff – to discharge the plaintiff's debt in full."*

20. As is clear from the above quotations from the defendant's affidavits, he began with a definitive statement that the security provided to the plaintiff would not be sufficient to satisfy his indebtedness to it. He then said that even in the most favourable selling conditions, the realisation of the assets *"may not"* discharge the entirety of the debt and that the plaintiff *"will have to have recourse to my unencumbered assets"*. In his last affidavit he expressed hope that realisation of the assets *"will be sufficient to discharge the plaintiff's debt in full"*.

21. In the light of this affidavit evidence and its own knowledge and experience, the plaintiff is apprehensive that it will indeed have to have recourse to the defendant's unencumbered assets in order to obtain full payment of the amount due to it.

22. The defendants seek a stay so as to prevent that happening now. The stay sought is limited to the defendants' unencumbered assets. The plaintiffs are entitled, if they wish, to proceed to enforce as against the secured assets by, for example, appointing receivers. The plaintiff has not done so to date. Indeed, it appears that it does not intend to do so at present.

Jurisdiction

23. No submissions were made concerning the jurisdiction of the court to grant a stay of the type sought nor was any case law cited.

24. Much of the jurisprudence concerning the imposition of a stay on execution and registration of a judgment in summary proceedings deals with cases where the defendant intimates an intention to appeal. Such considerations have no application here. The defendants did not contest the entitlement of the plaintiff to judgment.

25. Over and above the jurisdiction to grant or refuse a stay pending appeal, it is clear that the court has general jurisdiction to grant such a stay even in the absence of an appeal. The matter is dealt with in Delaney and McGrath's *Civil Procedure in the Superior Courts* (3rd Ed.) at para. 26-74 as follows:-

> *"In addition to the situation where a party intends to appeal, there are a wide variety of circumstances where a court may be asked to and may exercise its discretion to grant a stay on a judgment. It is common for a court to place a stay on the judgment for a period of time to give a defendant an opportunity of trying to satisfy the judgment, to negotiate with the judgment debtor (sic) or even on an ad misericordiam basis. The precise effect of this stay will depend on the terms in (sic) which it is granted. Where a stay is granted on the execution of a judgment, this will not prevent the judgment debtor from registering a judgment mortgage but a stay on execution and registration will do so."*

26. The defendants contend that the circumstances of this case render it an appropriate one for the grant of a stay.

Dealings with Creditors

27. The first defendant is 78 years of age. He avers that he has spent his whole life in business and built a reputation for honest dealing and straight talking. He says that while different financial institutions granted him loans and obtained different securities, all of them have at all times known that as between themselves – in respect of his unencumbered assets – he would treat them equally. He contends that this arrangement was made with all of his bankers and was relied upon by them. In turn, he relied on their forbearance so as to permit him to organise the realisation of his assets in an organised and structured fashion. He contends that the plaintiff was privy to this arrangement, a topic to which I will return in due course.

28. He says that if the plaintiff were to execute against his unencumbered assets, such action would step outside the boundaries of the reciprocal commitments made between himself and all his bankers and would have the effect of securing unequal treatment between his creditors. It is to avoid that consequence that he seeks this stay.

29. The stay is sought for a period of six months from now so as to enable him to proceed with the disposal of assets in an orderly fashion. He contends in his first affidavit that, although the plaintiff is entitled to realise the fruits of its judgment, it is not entitled to do so in breach of the terms of the arrangements which have been relied upon by all the lenders *inter se* including the plaintiff. He contends that the plaintiff has obtained the benefit of the forbearance of all of the financial institutions and may not now proceed in a manner inconsistent with that.

30. He says that he has prepared a detailed strategy of realisations which as at the time of swearing his first affidavit (5th June,

2014) was under consideration by all of his lenders. In his second affidavit, he discloses that that process of disposal has produced the following results:-

> (a) The sale of his Dublin house on Fitzwilliam Square has been agreed for a sum of €3.2m. That house is, however, secured to ACC Bank Plc.
>
> (b) He is in a position to sell 3,373,030 shares in Independent News and Media Plc which have also been secured to ACC Bank Plc. He has asked the plaintiff for permission to sell those shares held as security in respect of the indebtedness the subject of these proceedings.
>
> (c) He has agreed the sale of Shorecliffe House in Glandore for €1.75m.
>
> (d) On 9th May, 2014, he gave instructions to effect the sale of his principal residence in Ireland, namely Castlemartin Estate. He says that serious expressions of interest have emerged from international bloodstock concerns in respect of that property. It is in this context that he expressed the hope that the price realised will be sufficient, when all property sales are completed, together with the sale of other assets secured to the plaintiff, to discharge the plaintiff's debt in full. A judgment now, he contends, without a stay is liable to cause great anxiety to the other creditors and that in turn may impact upon the ability to obtain the maximum price for Castlemartin.

31. He also contends that if the sale of all of the assets secured to the plaintiff proves insufficient to discharge the indebtedness, any shortfall is likely to be relatively small and unlikely to exceed 10% of the relevant debt. If a stay of six months on judgment is granted it is his intention to create what he describes as a *"pooling of all of my unsecured assets"*. He will then have a pooling of the surpluses on the sale of the secured assets and will have what he describes as a *"waterfall dividend"* payable to all his creditors based on their respective liability.

The Plaintiff's Position

32. The plaintiff opposes the granting of a stay for any period of time. It contends that it afforded the defendants every opportunity to discharge their indebtedness prior to the commencement of these proceedings. Furthermore, the defendants were on notice that failure on their part to repay the facilities in full would result in the commencement of this litigation.

33. The plaintiff contends that no justifiable reason has been demonstrated by the defendant for denying the plaintiffs the entitlement to exercise their rights as a judgment creditor. Prior to this litigation beginning, the plaintiff reviewed the net worth statement of the first defendant and concluded that equity exists in his asset portfolio. It furthermore is of opinion that he has not provided a satisfactory repayment proposal. That being so, this action and judgment provides the plaintiff with more options to secure repayment of the debt due to it. It should not be deprived of them.

34. In his second affidavit, Mr. Conneely takes specific issue with the contention that the plaintiff is party to any subsisting forbearance agreement whatever may be the position with other financial institutions. I will deal with that later in this judgment.

35. The plaintiff contends that on the first defendant's own evidence the disposal of the secured assets will not be sufficient to discharge the entirety of the plaintiff's debt. It says the proposal to realise assets is unsatisfactory and that it does not wish to be put into a situation where it will have to accept less than the total amount due to it. This is particularly so in circumstances where the defendants were given very considerable periods of time within which to realise assets with a view to discharging their liabilities. Furthermore, the plaintiff says that the first defendant reaffirmed by way of net worth statement as recently as 2013, that he was solvent and had the means available in which to repay the loan facilities to the plaintiff. Such repayment did not materialise and the plaintiff therefore had no option but to bring these proceedings and should not now be denied the fruits of its judgment for any period of time. It will be disadvantaged by such a stay and other creditors may steal a march on it even though it is first in time to obtain a judgment.

Defendants Submissions

36. Counsel for the defendant made it clear that the stay which he seeks is one of six months duration and no more. The stay is to be limited to the defendant's unencumbered assets. The charged assets are already the subject of the asset disposal programme outlined by the defendant in his affidavits. Under that programme, all of the defendant's secured assets are either sold or are being sold.

37. Counsel for the defendants also pointed out that there is no question of the defendants seeking to place assets beyond the reach of creditors. That is accepted by the plaintiff.

38. The defendants are prepared to give an undertaking, as a condition of the stay being granted, that, in the event of any creditor moving against the defendants, they will give immediate notice of such to the plaintiff and consent to short service of an application to vary or vacate the stay. Thus, it is said, there is no disadvantage to be suffered by the plaintiff.

39. Whilst it is acknowledged that the plaintiff has demonstrated great forbearance to date in its dealings with the defendants it is argued that there will be great disadvantage suffered by the defendants should the plaintiffs now be permitted to execute on foot of their judgment against the unencumbered assets of the defendants. This is, *inter alia*, because of the effect it would have on the attitude of other creditors.

40. It is also urged upon me that I ought to view this application in the light of the hope expressed that the sale of the secured assets may discharge the plaintiff's debt in full. Even if it does not do so it is said that only a small percentage of the debt will remain unpaid.

41. The final submission made by the defendants was that there is an issue on the evidence before the court as to whether the plaintiff is bound by the arrangements and undertakings which the defendants have entered into with other banks. If that be so then the plaintiff is precluded from taking any step inconsistent with that arrangement. Although counsel for the defendants made it clear that he was not asking for this issue be resolved, its existence should be regarded as an element to be taken into account by the court in deciding on whether to grant a stay or not. It is necessary to examine this issue in a little detail as I indicated I would earlier in this ruling.

The Arrangement

42. In his first replying affidavit, the first defendant said this:-

"16. In the course of my dealings with all of my creditors I have been anxious to ensure equal treatment as between all the lenders. I have followed this path for two reasons. Firstly, it is consistent with the manner in which I have always conducted my business that I try and treat people with whom I am engaged in any undertaking with fairness. Secondly, I was keen to ensure that I would secure forbearance for my lenders by reassuring them that none of them – as between themselves – would obtain any priority in respect of the realisation of my unencumbered assets.

17. In the circumstances I provided solemn undertakings that in respect of the unencumbered assets of all of the defendants:-

> *(a) no unencumbered asset would be sold or pledged without notification to each lender and without their express approval; and*
>
> *(b) subject to (a) above, that the proceeds from the realisation of any unsecured assets of this deponent and my co-defendants, as well as any surplus arising from the sale of secured assets would be divided pro rata and pari passu as between all of the lenders to the defendants in accordance with their respective proportionate share of the defendants' total indebtedness.*

18. I provided these undertakings to the plaintiff as well as my other lenders and the corollary of the Undertakings was that each of the lenders – and the plaintiff – agreed not to proceed against my unencumbered assets on that basis. Moreover, I not only provided these Undertakings to each of my other lenders, but each of my lenders was made expressly aware that I had furnished an Undertaking in similar terms to the other financial institutions which had advanced me credit.

19. In respect of some of my lenders the Undertakings were subsequently incorporated into formal agreements. In this regard I beg to refer to the negative pledge agreement of 21st December, 2012, of Bank of Ireland (which is exhibited) and the Standstill Agreement of 7th October, 2013, with the plaintiff, (which is exhibited). For the balance of my financiers however, the Undertakings were furnished orally and the same were never reduced to a formal agreement in writing and in this regard – even in circumstances where I was advanced many millions in terms of credit – my lenders trusted that I would keep my word: and I have.

20. For the sake of completeness, however, I say that my Undertakings are recorded in writing in the context of my dealing with other banks. In this regard, I wish to bring the following to the attention of this Honourable Court:-

Lloyds TSB Bank Plc:

By letter of 22nd day of September 2011 from this deponent to Simon Prescott I confirmed, inter alia:-

> *'throughout the year I have confirmed and reconfirmed that no bank is receiving or will receive an advantage over another bank and that any surplus arising from the sale of assets will be made available to all on a pari passu basis and that all security becoming available will be shared in the same manner.' (This document is exhibited)*

ACC Bank Plc:

By letter of the 19th day of August 2011 from my solicitors to Hilda Hewson and Bob Ole it was confirmed, inter alia,:-

> *'Our clients have confirmed that any future surplus funds that become available on sale of assets to discharge financial obligation will be made available to all lenders on a pro rata basis.'* (This document is exhibited)

Anglo Irish Bank Corporation:

By letter of 25th day of July 2011 from this deponent to Bernard Somers – which was subsequently forwarded to Anglo which acknowledged receipt on 12th day of August 2011 – I confirmed, inter alia:-

> *'I confirm…that any future surplus funds from sale of unencumbered assets or assets that become available on discharge of financial obligations will be made available to all lenders on a pro rata basis.'* (This document is exhibited)

21. This present application for a stay is directed to ensuring that the plaintiff adheres to the bargain which was made as between all lenders – including the plaintiff – and myself and on which all parties relied.

22. In the aftermath of the presentation of the present application for summary judgment I have contacted – through my representatives – my principal lenders. Each without exception has confirmed their understanding of the Undertakings – consistent with my own – as outlined at paragraph No. 17 above. Moreover each of the lenders have separately confirmed that:-

> *(a) the bank relied upon the Undertaking when conducting its affairs with the defendants;*
>
> *(b) it was the understanding of the bank that the same Undertaking had been given to all of the other lenders to the defendants; and*
>
> *(c) if it were the case that any of the other lenders to the defendants had not been content to abide by the*

Undertaking then the bank would not have been satisfied to continue to forbear in respect of the indebtedness of the defendants.

23. In addition to the foregoing, I have of course relied upon the force and effect of the Undertaking in my own dealings with the plaintiff and my other lenders. Unless I could be confident that my lenders would not become involved in a hasty rush to judgment, I simply would not have been in a position to dispose of assets in an orderly fashion – which I have been doing – in order to pay down my borrowings."

43. The plaintiff takes issue in strong terms with the contention that it is privy to any forbearance agreements which the defendants may have with other lending institutions. It contends that the only forbearance agreements that it had with the defendants were the Standstill Agreements of 27th May, 2013 and 7th October, 2013, both of which were exhibited in the grounding affidavit sworn on behalf of the plaintiff. Only the latter agreement is relevant.

44. Indeed, it is that latter Standstill Agreement which is actually exhibited by the first defendant at para. 19 of his replying affidavit. It is to be noted that in that paragraph he expressly avers that the Undertakings referred to in the previous paragraphs were subsequently incorporated into formal agreements with some of his lenders. This agreement was, on the first defendant's own evidence, the incorporation of the Undertakings referred to in his affidavit into a formal agreement.

45. A number of things are of note in respect of this agreement. First, it provided what was described as a standstill whereby during the standstill period the plaintiff agreed not to appoint a receiver or initiate bankruptcy or any other insolvency proceedings or make any demands or enter into possession as mortgagee of any of the assets of the obligors whether in their capacities as primary obligor or surety upon certain conditions. The purpose of the agreement was to provide a grace period to allow certain *"liquidity events"* to occur and the proceeds of those events to be used to discharge the defendant's indebtedness to the plaintiff. The Standstill Agreement expired on 31st December, 2013. The expiry of the Agreement is not in contest. Neither is it in contest that the defendants failed to discharge their indebtedness to the plaintiff during the course of the agreement. No further Standstill Agreement was entered into with the plaintiff after 31st December, 2013.

46. The plaintiff accepts that the first defendant did indeed provide solemn Undertakings such as are contended for but say that they were incorporated (as the first defendant admits in the first sentence in para. 19 of his first affidavit) into the Standstill Agreement. They are contained in clause 2(1)(e) and 2(1)(f) The Standstill Agreement expressly provides that the plaintiff's agreement to forbear is only applicable during the term of the agreement, which expired over five months ago.

47. Counsel, faced with the difficulty presented by this, seeks to argue that, notwithstanding the clear terms of the Standstill Agreement and the first defendant's testimony, nonetheless there continued to subsist and indeed, there continues to subsist until this day, the Undertakings referred to at para. 17 of the first replying affidavit which continue to bind the plaintiff.

48. Such a submission is in the teeth of the first defendant's own evidence that those Undertakings were incorporated into the formal agreement i.e. the Standstill Agreement. Not merely did that Agreement have a fixed term which has long since expired but it also contained a *"whole agreement"* clause. This stipulates as follows:-

"This agreement contains the whole agreement between the parties relating to the transactions provided for in this agreement and supersedes all previous agreements (if any) between such parties in respect of such matters and each of the parties acknowledges that in agreeing to enter into this agreement it has not relied on any representations or warranties except for those contained in this agreement."

49. This appears to me to definitively support the contention of the plaintiff that it is not privy to any understanding or Undertakings which may exist between the defendants and other lenders. Its sole and exclusive arrangement with the defendants in that regard is contained in the Standstill Agreement which has now expired.

50. In an effort to try and suggest otherwise in his second replying affidavit, the first defendant contends that it was always his understanding that although recorded in the Standstill Agreements, the arrangement/Undertaking had an independent existence and survived the expiry of the Standstill Agreements. I am unable to accept that that point of view has any legal validity having regard to the testimony given in his first affidavit and the terms of the Standstill Agreements. Reliance was also placed on an email sent on 11th July, 2012, from Mr. O'Neill of Allied Irish Bank to the defendant's adviser, Mr. Somers in the following terms:-

"Dear Bernard

Firstly many thanks for taking the time to come into Bank Centre last week. As discussed I would appreciate it if you could clarify the points below.

I know you stated that any unencumbered assets will be shared pro rata but I just need to keep the file up to date.

Many thanks and talk soon.

Diarmuid."

51. Whilst that email may demonstrate a state of knowledge on the part of the plaintiff concerning the Undertakings referred to by the first defendant at paras. 16 through 20 of his first affidavit, it is a far cry from in any way binding it to any agreement with the defendant. In any event, the email ante dates both of the Standstill Agreements and in particular the second of them by more than a year.

52. As I have already pointed out, counsel for the defendants indicated that I am not being called upon to decide on the issue concerning the alleged independent existence of the arrangement/Undertaking notwithstanding the formal Standstill Agreements. Rather, I am invited to take this issue into account in deciding this application. I am bound to say having, regard to the evidence and the documents, the proposition which is sought to be advanced in this regard is virtually unstatable. I propose to attach little if any weight to it in my consideration of whether a stay should be granted or not.

The Plaintiff's Submissions

53. Counsel for the plaintiff described the defendants' application as a *"threadbare one"*. He critiqued the various propositions which

had been put both on affidavit and in submission.

54. Insofar as the defendants attach great significance to the fact that the stay being sought was one limited only to unsecured assets, he contended that that apparent concession amounted to nothing. The only stay that they could seek was necessarily limited to unsecured assets because the plaintiff has an entitlement to move, independent of this litigation, against any of the assets secured in its favour.

55. Whilst he accepted that the realisation of assets was underway, he contended that that was only so because the plaintiff had brought these proceedings. He pointed out the lack of information concerning the disposal of the major asset in this jurisdiction, Castlemartin estate. Whilst he accepted the justifiable basis for failing to put much concerning that on affidavit, he pointed out that the court was left with nothing more than the first defendants own view concerning that. Those views had, in turn, given rise to the expression of hope in the first defendant's second affidavit that the realisation of assets may be sufficient to discharge the plaintiff in full. Such expressions of hope count for little as far as the plaintiffs are concerned.

56. Part of the defendants' case was that the plaintiff would suffer no prejudice if a stay were to be granted. That, however, it was submitted, presupposes that the other creditors will not institute proceedings during the currency of the stay. A stay, it was said, would provide protection for the other creditors. This, in turn, focuses upon the reality of the position here, namely that these defendants are insolvent. They cannot pay their debts as they fall due. Thus, it is argued, this application for a stay is not so much the court being asked to balance the rights of the plaintiff as against the defendants but really the rights of creditors *inter se*. The defendants' application was characterised as one being made largely on behalf of the other creditors. In that context, it is submitted it is not correct to say that the grant of a stay would cause no prejudice to the plaintiff given that it is the only creditor that has obtained judgment against the defendants.

57. Insofar as the defendants contended that they would be disadvantaged by the refusal of a stay, counsel for the plaintiff pointed out that the other creditors would still be bound by the term of the arrangement/Undertaking entered into between them and the defendants. But, he pointed out that counsel for the defendants suggested that, in the event of a stay being refused, such other creditors may not be bound or may not consider themselves bound and so resile from that arrangement. In such event, they would be entitled to take whatever steps they think appropriate to realise assets. The grant of the stay is entirely self serving, it was said, insofar as the other creditors are concerned.

58. The effect of the grant of a stay is to *de facto* force the plaintiff to be part of the arrangement/Undertaking which the defendants have with the other creditors even though the plaintiff made its own separate arrangements in that regard with the defendants in the Standstill Agreements which have long since expired. It is argued that there could be no justification for the court to bring about such a result.

59. Criticism was also made of the undertaking which is being proffered as a condition of the stay being granted. It was pointed out that the undertaking will merely involve the giving of immediate notice to the plaintiff of a move by any creditor against the defendants with consent to short service of an application to vary or vacate the stay. The undertaking does not extend to the defendants agreeing that the stay would be immediately vacated in such event. Thus, there would have to be a further hearing *inter partes* whilst at that time another creditor or creditors could be proceeding apace. Given that a substantial portion of the unencumbered assets are situated in the Bahamas, there is a real probability that the plaintiff, although the first to obtain judgment, might be far down the queue when it would come to realising assets in such circumstances. Thus, it is argued, the undertaking is not of any real benefit.

Conclusions/Decision

60. A creditor who has obtained a judgment has a strong *prima facie* entitlement to immediately execute on foot of it in whatever way the law permits. Whilst there is undoubtedly a jurisdiction in the court to suspend such an entitlement, the court should exercise particular care and caution before so doing. The grant of a stay is, in effect, a refusal to permit a judgment creditor to exercise legal rights obtained on satisfying a court as to the entitlement to judgment. The grant of a stay negates the entitlement of a judgment creditor to exercise the very rights which that creditor acquired by obtaining the judgment.

61. It would not be wise to attempt to set out, even in a general way, hard and fast rules which ought to apply to the exercise of the judicial discretion to grant a stay. The reason for that is simple. There are so many circumstances in respect of which the court may be asked to consider granting a stay that it is impossible to contemplate them all. They cover a vast range of circumstances and even, on occasions, issues of humanitarian concern. Whilst judicial sympathy and humanitarian concern do have a part to play, it is the duty of the court to uphold the law and to maintain a fair balance between litigants so as to achieve a fair result.

62. The court should approach an application for a stay with caution. It should exercise the discretion judiciously since the grant of a stay is a serious curtailment of legal rights.

63. In the present case, much emphasis was placed by the defendants on the fact that the stay which is sought relates only to unencumbered assets. I attach little significance to that. The plain fact is that the defendants, in the context of this litigation, could only seek such a stay. The encumbered assets are not the subject of this case. There is nothing to prevent the plaintiff from proceeding to secure those assets in accordance with the terms of the charging instrument, whatever such rights might be. It is illusory to suggest that by seeking this limited stay the defendants are making any concession.

64. Neither am I much impressed by the form of undertaking which is proffered and which it is said should provide comfort to the plaintiff. The undertaking is merely to give immediate notice to the plaintiff of any creditor who will move against the defendants, coupled with a consent to short service of an application to this Court to vary or vacate the stay. This will then involve the court having to conduct an *inter partes* hearing and to thrash out the question of whether or not the stay should be vacated. The undertaking would have a greater value if the defendants were prepared to consent to an immediate lifting of the stay in such event. However, that was not the form of undertaking that was offered. Even if that form of undertaking were offered, it does not necessarily protect the plaintiff in any event. Experience teaches that, particularly in large cases such as this, if creditors decide to move against a debtor and his assets they make careful preparations before they move. They will have a plan in place and usually the last element of it is to give notice to the debtor. Other creditors may make all such preparations, while the plaintiff, the first creditor to obtain judgment, would be powerless to act until such time as a hearing would take place in court to consider lifting the stay.

65. On the evidence before me, the probability is that the encumbered assets will not be sufficient to discharge the indebtedness to the plaintiff. That is clear from the first defendant's own testimony. Although he has moved from a definitive statement to that effect to a conditional expression of hope that the realisation of the secured assets would be sufficient to discharge the plaintiff's debt in full, I think the definitive statement carries more weight. Whilst the hope may come to be realised, the probability is that it will not.

66. I am also conscious of the fact that if a stay is granted it *de facto* puts the plaintiff into a position as if the Standstill Agreement was still extant but with none of the benefits provided for the plaintiff therein. The court should not, in effect, reanimate it on a unilateral basis particularly when the terms of that bargain were not honoured by the defendants.

67. I also believe that there is force in the argument that the defendants are now insolvent as they are unable to pay their debts as they fall due. Thus, the court is to some extent holding the ring between competing creditors. The plaintiff made its bargain in the Standstill Agreements. The fact that other creditors have made arrangements with the defendants which differ from that is not a good reason for denying the plaintiff its legal entitlements to seek to obtain the fruits of its judgment at this juncture.

68. I am of opinion that the grant of a stay will be prejudicial to the plaintiff. It will sterilise it from taking any effective steps against the unencumbered assets which will, as a matter of probability, have to be resorted to in order to satisfy the plaintiff's judgment. The refusal of the stay ought not absolve the other creditors from their arrangement/ Undertaking with the defendants. Should they decide to resile from those arrangements, as the defendants' counsel suggested they might, I see no reason why the plaintiff should not glean the advantage of being the first creditor to have obtained judgment against the defendants.

69. The actual prejudice contended for by the defendants, should a stay be refused, is put in very conditional terms. The first defendant said a judgment without a stay *"is liable to cause great anxiety to my other creditors which may in turn impact upon the ability to obtain the maximum price for Castlemartin"*. Such a possibility (and it is no more) is outweighed by the actual prejudice to the plaintiff by the grant of a stay.

70. It also has to be borne in mind that the as the Standstill Agreements demonstrate, ample opportunity was provided to the defendants to meet their obligations to the plaintiff. Despite that forbearance they failed to do so. They now seek a further forbearance from this Court. In my view, for the reasons which I have indicated, I would not be justified in granting such. To do so, would be to preclude the plaintiff from exercising its undoubted legal rights in unwarranted circumstances. The strong *prima facie* entitlement of the plaintiff to proceed to execution has not been displaced.

71. The application for a stay on execution and registration of the judgments is refused.