THE HIGH COURT

COMMERCIAL

[2018 No. 9113 P.]

BETWEEN

LARRY O'GARA AND AILEEN O'GARA

PLAINTIFFS

AND

ULSTER BANK IRELAND DAC AND SEACONVIEW DAC

DEFENDANTS

JUDGMENT of Mr. Justice David Barniville delivered on the 10th day of April, 2019.

Introduction

1. This is my judgment on the plaintiffs' application for an interlocutory injunction restraining the first defendant, Ulster Bank Ireland DAC ("UBI"), its servants or agents from selling six commercial properties in the United Kingdom (the "UK properties") pending the determination of the proceedings. The properties are in various locations in the United Kingdom including Stockton-on-Tees, Bicester, Blackpool, Rochdale, Reading and Hartlepool.

2. While the interlocutory injunctive relief is sought against UBI only, the proceedings have also been commenced against the second defendant, Seaconview DAC ("Seaconview"). The plaintiffs had a number of loan facilities with UBI. UBI maintains that the economic interest in those facilities was transferred to Seaconview during the course of 2015 and that, thereafter, UBI held the legal interest in the facilities and Seaconview held the economic interest in them.

3. As security for the facilities, the plaintiffs entered into mortgages over the UK properties. UBI appointed receivers in the United Kingdom over each of the UK properties the subject of the mortgages in July 2018. The receivers have sought to sell the UK properties. The plaintiffs seek to prevent the sale of the UK properties by seeking the interlocutory injunctive relief referred to above against UBI, its servants or agents. UBI and Seaconview have resisted the plaintiffs' application on several grounds.

Summary of Decision

4. As this is an application for an interlocutory injunction, it must be considered in accordance with the test identified by the Supreme Court in *Campus Oil Ltd. v. Minister for Industry and Energy (No. 2)* [1983] IR 88 ("*Campus Oil*"). Applying that test, I have no doubt that the plaintiffs' application should be refused.

5. The plaintiffs have raised several issues in the proceedings concerning the validity and effectiveness of the transfer by UBI of the economic interest in the facilities to Seaconview, the validity of the demands made by UBI and the validity of the appointment of the receivers. Having regard to the low threshold applicable to the establishment of a fair question or serious issue to be tried, I have proceeded on the basis that the plaintiffs have established that there are fair questions or serious issues to be tried.

6. However, the plaintiffs have failed to establish that damages would not be an adequate remedy for them in the event that the interlocutory injunction is refused but the plaintiffs ultimately succeed at trial. For reasons which I set out in greater detail in this judgment, I am satisfied that damages are clearly an adequate remedy for the plaintiffs in the particular circumstances of this case. The properties in question are commercial properties which are heavily mortgaged in favour of UBI and are let out to commercial tenants. I am satisfied that any loss which the plaintiffs will suffer in the event that their interlocutory injunction application fails but they ultimately succeed at trial will be capable of being compensated by an award of damages. I have no hesitation in rejecting the case advanced by the plaintiffs that the plaintiffs have some particular or special attachment to the properties going beyond that of property investors or landlords. I conclude, therefore, that damages would be an adequate remedy for the plaintiffs.

7. If I am incorrect in that conclusion, and if it were necessary to proceed separately to consider the issue of the balance of convenience, I would again have no hesitation in concluding that the balance of convenience clearly favours the refusal of the plaintiffs' application. I am satisfied that in the particular circumstances of this case, the least harm would be done by refusing the plaintiffs' application and permitting the sale of the properties to proceed in the United Kingdom. Therefore, I refuse the plaintiffs' application.

Factual Background

8. While there are many factual and legal issues in dispute between the parties, the relevant facts for the purposes of this interlocutory injunction application are not really in dispute and can be summarised quite briefly.

9. Between 2003 and 2006, the plaintiffs obtained loan facilities from UBI to finance investment in commercial properties in the United Kingdom and to invest in a property syndicate. Four facilities initially provided in 2003 and 2004 (facilities A to D) were consolidated into one loan facility which was the subject of a facility letter dated 14th April, 2005 (the "April 2005 facility"). The total amount of the loans advanced to the plaintiffs by UBI on foot of the April 2005 facility was £6,313,366.00. The purpose of the facilities, the subject of the April 2005 facility was to amalgamate existing loans advanced to purchase some of the UK properties. The facilities were all demand loans. There is a second relevant facility letter. By letter dated 23rd November, 2006, UBI agreed to provide an additional loan facility of €300,000.00 to finance an investment by the plaintiffs in a property syndicate for another property in the United Kingdom at 33 Old Broad Street, London (the "November 2006 facility"). This was also a demand loan facility. As security for the April 2005 facility, it was agreed that UBI would hold or continue to hold a first legal charge over the six UK properties as well as a first legal charge over a zoned site in Roscommon, an assignment over an investment bond and an assignment over an Ulster Bank hedge fund. The security provided for the November 2006 facility encompassed the first legal charges over the UK properties together with an assignment over a fund and certain bonds. The first legal charges over the UK properties were given in the form of six separate legal charges or mortgages (one in respect of each of the UK properties) (the "mortgages"). The mortgages were expressly stated to be governed by English law.

10. Before turning to the circumstances in which UBI maintains that it disposed of the economic interest which it held in the April 2005 and November 2006 facilities (the "facilities"), and the circumstances in which the plaintiffs were informed of such reported

disposal, I should refer briefly to some of the relevant provisions of the April 2005 facility and of the November 2006 facility.

11. The April 2005 facility was expressly stated to be subject to certain "general conditions". Clause 12 of those general conditions provides as follows:-

> *"Ulster Bank Ireland Limited shall have the right to assign or transfer or sub-participate the benefits and/or obligations of the Facility/all or any of the facilities or any part thereof to another entity within the Ulster Bank Group (that is, Ulster Bank Ireland Limited and its subsidiaries) and/or another bank or financial institution at no additional cost to the Borrower. The Bank may disclose such information about the Borrower (the Guarantor) (or any of the Subsidiaries) and/or the Facilities as the Bank may consider appropriate to any sub-participating bank or institution, any person with whom the Bank is associated and/or any actual or potential assignee, transferee, novatee or sub-participant."*

12. The April 2005 facility also contains the clause under the heading "*Securitisation*" as follows:-

> *"The Borrower hereby irrevocably and unconditionally consents to the Bank at any time or times hereafter transferring, assigning, disposing whether absolutely by way of security or otherwise mortgaging or charging or transferring as part of a securitisation scheme or otherwise this first legal mortgage and/or the benefit of the said Mortgage and/or any collateral or ancillary security (including without limitation any insurance policy or policies of life or endowment assurance) and the monies hereby secured (collectively 'Transfers' and any one a 'Transfer') to any third party or body including without prejudice to the generality of the foregoing any subsidiary or associated company of the Bank and to any trustee(s) or administrator(s) under any trust or administrative arrangement or a securitisation scheme entered into by the Bank (an 'Arrangement') on such terms as the Bank may think fit and to any consequential assurance, reassurance, release of or enforcement of security under a Transfer and/or Arrangement without any further consent from or notice to the Borrower or any other person whereupon all powers and discretions of the Bank (including without prejudice to the generality of the foregoing the right to determine or vary the current rate of interest from time to time payable or deemed to be payable by the Borrower on the monies hereby secured) shall be exercisable by the transferee or other beneficiary of a Transfer and/or Arrangement and the Bank may include the said Mortgage and/or the benefit of the said Mortgage and/or any collateral or ancillary security as aforesaid and the monies hereby secured as aforesaid in any Arrangement without further consent from or notice to the Borrower."*

13. Under the heading "*Demand or Notice*", the April 2005 facility provides as follows:-

> *"Any demand or notice shall be made in writing signed by an officer of the Bank and may be served on the Borrower, either by personal delivery or by post to the Borrower, at the address last known to the Bank and shall be effective notwithstanding that it be returned undelivered <and notwithstanding the debt of the Borrower>."*

14. The November 2006 facility does not contain a clause equivalent to the securitisation clause contained in the April 2005 facility. It is expressly stated to be subject to certain "general conditions" which are different to those to which the April 2005 facility was subject and which were stated to set out the "standard terms and conditions" applicable to the November 2006 facility. Clause 11.32 of the general conditions attached to the November 2006 facility is headed "*Assignment by Bank*". It is in significantly different terms to clause 12 of the general conditions attached to the April 2005 facility. Clause 11.32 provides as follows:-

> *"The Bank shall have the right to assign, transfer or sub-participate the benefits and/or obligations of all or any part of any Facility to another entity without the prior consent of the Borrower and the Bank may disclose to a prospective assignee or to any other person who may propose entering into contractual relations with the Bank in relation to this Agreement such information about the Borrower as the Bank shall consider appropriate."*

15. Clause 11.32 does not contain any limitation on the right to assign, transfer or sub-participate the benefits or obligations of the particular facility to another entity within the Ulster Bank Group or to another bank or financial institution (to which UBI had the right to assign, transfer or sub-participate at no additional cost to the borrower under clause 12 of the general conditions attached to the April 2005 facility). Under clause 11.32, UBI has the right to assign, transfer or sub-participate the benefits or obligations to "an*other entity*" without the prior consent of the borrower and without those limitations.

16. As noted earlier, the November 2006 facility does not contain a clause comparable to the securitisation clause contained in the April 2005 facility. Nor does it contain the "Demand or Notice" clause in the April 2005 facility. The notice provision contained at clause 11.36 of the general conditions attached to the November 2006 facility contains no requirement that the demand or notice must be made in writing and signed by an officer of UBI.

17. The significance or otherwise of these differences will be briefly considered later in the context of the suggested fair questions or serious issues to be tried.

18. The defendants maintain that under a mortgage sale deed dated 22nd July, 2015, made between (*inter alia*) UBI and Seaconview (the "mortgage sale deed") and a declaration of trust made between the same parties and dated 29th September, 2015 (the "declaration of trust"), UBI transferred the beneficial interest in the facilities (and the mortgages put in place to secure repayment of the facilities) with the legal interest remaining with UBI. The plaintiffs make various submissions in relation to the validity of the purported transfer and, in the event that it is valid and effective, on the consequences of that transfer in terms of UBI's entitlement thereafter to make a demand for payment and to appoint receivers notwithstanding the transfer. I briefly touch on those issues when considering the first stage of the *Campus Oil* test, namely, whether the plaintiffs have established a fair question or serious issue to be tried.

19. The plaintiffs were notified of the purported transfer by way of letter from UBI dated 27th July, 2015. That letter notified the plaintiffs that UBI had "*contracted to sell the economic benefit in* [their] *loan(s)… and the facility letter(s), guarantee(s), security and all rights relating to these loans (the "Facility Documents")* to Seaconview Limited… (the "Disposal")". The letter sought to explain how the disposal affected the plaintiffs, noting that the facilities "*remain in place until all amounts payable relating to the Facility/ies have been paid in full*" and that the plaintiffs were "*expected to continue to make payments in line with the Facility/ies in the normal way*".

20. By further letter dated 31st July, 2015, UBI wrote to the plaintiffs informing them that it was no longer in a position to provide the plaintiffs with banking facilities and giving the plaintiffs notice of UBI's intention to terminate the facilities with effect from a date which was not less than three months from the date of the letter (i.e. no earlier than 5th October, 2015).

21. In a further undated letter (which the plaintiffs believe was sent in August or September, 2015), UBI referred to its earlier letter of 27th July, 2015, in which it had informed the plaintiffs that it had "*contracted to sell the economic benefit in the loans advanced to* [the plaintiffs] *by it… along with all facility letters, guarantees and security entered into between* [the plaintiffs] *and* [UBI]". The purpose of the letter was stated to be to explain what that meant to the plaintiffs and to provide the plaintiffs with details of the options open to them as a result of that arrangement and the opportunity to make an informed decision as to how the plaintiffs would wish to have their loans managed "going forward". Under the heading "*Important Information*", the letter repeated that UBI had entered into a legally binding agreement to dispose of the economic benefit in the loans advanced to the plaintiffs to Seaconview. The "*economic benefit*" was described as being *"in essence, the right to receive* [the plaintiffs'] *repayments as well as to receive realisations/payments from any assets used as security for* [the plaintiffs'] *loan(s)".* The letter noted that the legal interest in the loans remained with UBI and that it remained the "*named lender*". The letter then sought to explain why a split had arisen as between the economic and legal interest as follows:-

> *"Under the terms of your Facility Documents there is a requirement that your consent be obtained to transfer the legal interest in the loans i.e. for the Bank to step out of the named lender position and be replaced by the Purchaser. Therefore, the economic interest and value in the loans has passed to the Purchaser but the Bank has remained as holder of the legal interest."*

I note in passing here that in referring to the requirement for the plaintiffs' consent to be obtained to the transfer of the legal interest in the loans, the letter appeared to be addressing the situation covered by clause 12 of the general conditions attached to the April 2005 facility (and was not expressly at least adverting to any rights or entitlements which UBI may have had under the so called securitisation clause in the April 2005 facility or under clause 11.32 of the November 2006 facility).

22. The undated letter went on to explain that in practical terms the effect of the arrangement between UBI and Seaconview was that while the plaintiffs continued to have a relationship with UBI, UBI could not make any decisions in relation to their loans and that all decisions regarding the plaintiffs' loans would be made by Seaconview or its appointed representative or servicer. The letter stated that in order that the plaintiffs could deal exclusively with Seaconview it would be open to them to consent to the transfer of the legal interest in their loans so that "*both the economic and legal interests would pass*" to Seaconview "*thereby removing* [UBI] *from the relationship*". The letter set out in summary two options which were available to the plaintiffs. The first (option 1) was the full transfer of both the economic and legal interests in the loans to Seaconview. The second (option 2) was that the bank would continue "*solely as 'named lender'*". UBI requested the plaintiffs to consider the options set out in the letter and noted that irrespective of the plaintiffs' decision, the economic interest in the plaintiffs' loans "*will pass*" to Seaconview.

23. The plaintiffs had previously instructed a firm of solicitors to correspond with UBI on their behalf. They instructed a new firm of solicitors, L.K. Shields, ("LKS") to represent their interests in October 2015. LKS corresponded on behalf of the plaintiffs with UBI. It is unnecessary for the purpose of this summary to rehearse the details of that correspondence.

24. In a letter dated 10th December, 2015, UBI informed the plaintiffs that Capita Asset Service (Ireland) Limited which changed its name to Link ASI Limited trading as Asset Services ("Asset Services") was servicing the plaintiffs' loans on behalf of Seaconview and required certain documentation from the plaintiffs. On 9th May, 2016, Asset Services informed the plaintiffs that it had been appointed by UBI to provide loan administration and relationship management services to UBI in respect of the plaintiffs' facilities. Therefore, Asset Services were providing services to UBI and to Seaconview in relation to the plaintiffs' facilities.

25. The plaintiffs, through LKS, raised various issues in relation to the purported transfer and in relation to how their loans and repayments were to be dealt with. In the course of that correspondence, in an email to LKS dated 23rd May, 2016, Ted Mahon of UBI stated (*inter alia*):-

> *"The Bank has retained the legal interest in your clients' debt due to omission of a clause in the facility documentation preventing the Bank selling the legal interest in the debt without your clients' consent."*

Mr. Mahon then referred to the fact that UBI had written to the plaintiffs seeking authorisation to transfer the legal interest from UBI to the "*new loan owner*" and stated that "*unless and until the consent letter was received the connection debt* [was] *considered as sub-participated*". Mr. Mahon's email then went on to describe the consequences for the plaintiffs of the disposal of the economic interest in the facilities and also the circumstances in which Asset Services were engaged by Seaconview and, subsequently, by UBI. The email stated that UBI remained the "*legal owner*" of the plaintiffs' debt. Mr. Mahon concluded his email by urging the plaintiffs to lodge monies to the loan accounts nominated by Asset Services in repayment of the facilities. Various letters of demand were issued to the plaintiffs seeking repayment of sums allegedly due under the April 2005 and November 2006 facilities. UBI sent letters of demand dated 14th July, 2014, to both plaintiffs on foot of the two facilities seeking repayment of the sum of €6,469,208.41. Immediate repayment was sought. UBI reserved its right to issue proceedings and to appoint a receiver over any secured property and assets. That demand was signed by two officials of UBI. Further letters of demand were sent to both plaintiffs by UBI on 23rd October, 2017. The amount demanded from both plaintiffs was €6,205,362.96. Those letters of demand were signed by Mr. Mahon on behalf of UBI. UBI again reserved its right to seek to enforce the mortgages including by appointing a receiver and to issue proceedings seeking judgment for the full amount due under the facilities. Further letters of demand were sent to the plaintiffs on 26th June, 2018. This time they were sent by Asset Services and signed by Fergus Barry and Adrienne Fitzgibbon, both described as senior managers (in Asset Services), who were stated as "*acting as lawful attorneys for and on behalf of* [UBI]". In the letters of demand dated 26th June, 2018 (the "June 2018 demands"), the amount claimed as being outstanding as of 26th June, 2018 was €5,659,322.21. The reason why the sum claimed in the June 2018 demands was less than the sum demanded in October 2017, was stated to be due to an overcharge in respect of interest as well as various credits made to the loan accounts including payments made by the plaintiffs and rental income credited to those accounts.

26. The power of attorney to which reference was made in the June 2018 demands is a power made on 9th April, 2018, between UBI and Asset Services under which UBI appointed Asset Services as its attorney. The plaintiffs contend that the power of attorney did not validly authorise the senior managers of Asset Services to sign the June 2018 demands on behalf of UBI. I touch on this briefly when considering the first part of the *Campus Oil test.*

27. On 3rd July, 2018, UBI purported to appoint Matthew Nagle and Kevin Mersh, both of Savills UK Limited, as receivers over the property and assets secured by the mortgages (comprising the UK properties). Separate deeds of appointment were made in respect of each of the mortgages. The deeds of appointment were signed by Brendan Fitzgerald and Fergus Barry, senior asset manager and senior manager respectively with Asset Services, as attorneys for and on behalf of UBI under the power of attorney dated 9th April, 2018 (although I note that in one of the deeds of appointment, Brendan Fitzgerald is described as "Fergus Fitzgerald" albeit that the signature appears to be that of Brendan Fitzgerald (see the deed of appointment under the mortgage in respect of the property at 10 Sheep Street, Bicester, Oxfordshire)). The plaintiffs challenge the validity of the appointment of the receivers on various grounds.

Again, I touch on these grounds briefly later in this judgment.

28. Shortly after the June 2018 demands and shortly before the appointment of the receivers, Asset Services wrote to the plaintiffs on behalf of UBI on 28th June, 2018 informing them that UBI had identified an interest overcharge affecting one of its accounts (Account No. 54001252). The extent of the overcharge was not set out in the letter and was apparently to be determined subsequently. The plaintiffs have obtained their own advice from Eddie Fitzpatrick of Bank Check who has advised the plaintiffs that the extent of the overcharging in respect of a number of the plaintiffs' accounts (including the account referred to above) is in the amount of €567,188.80. The defendants do not accept that the plaintiffs were overcharged in that amount and the extent of overcharging is, therefore, an issue in the proceedings.

29. Following notification of the appointment of the receivers on 3rd July, 2018, the plaintiffs' current solicitors, Coughlan White & Partners, wrote to Asset Services on behalf of Seaconview on 11th July, 2018, pointing to the acknowledgement that the plaintiffs had been overcharged and referring to the advice which the plaintiffs had received by that stage as to the extent of the overcharging. The plaintiffs' solicitors also contested the entitlement of UBI to sell the plaintiffs' loans to Seaconview on the basis that Seaconview is not an entity within the Ulster Bank Group and is not another "*bank*" or "*financial institution*" (as required under clause 12 of the general conditions of the April 2005 facility). It was contended that the sale of the plaintiffs' loans to Seaconview was a breach of the plaintiffs' agreement with UBI and that such breach rendered the loans unenforceable. The plaintiffs' solicitors called upon Seaconview to "*stand down*" the receivers and threatened proceedings if that was not done. In the absence of a substantive reply, the plaintiffs' solicitors wrote letters to UBI and Seaconview on 26th September, 2018. They repeated the contentions contained in the previous correspondence and sought acknowledgements from UBI and Seaconview to the effect that the purported disposal by UBI of its economic interest in the plaintiffs' loans under the April 2005 facility to Seaconview was void and of no effect. In the alternative, the plaintiffs sought an acknowledgement that, having sold its economic interest in the plaintiffs' loans under that facility to Seaconview, UBI had no right or entitlement to exercise any of the powers and discretions of the bank under the April 2005 facility. The plaintiffs also sought confirmation that the purported appointment of the receivers was void and of no effect. The plaintiffs' solicitors further called upon UBI to discharge the receivers appointed, in default of which proceedings would be issued against UBI and Seaconview. There was a reply from UBI on 27th September, 2018, which rejected the plaintiffs' contentions and requested the plaintiffs' solicitors to direct any further correspondence to Asset Services.

30. On 4th or 5th October, 2018 the plaintiffs became aware that one of the UK properties, namely the property at 30 Queen Victoria Street, Reading, Berkshire, was being offered for sale by auction on 18th October, 2018. There is a considerable degree of controversy between the parties concerning the circumstances in which and the terms on which the plaintiffs' solicitors notified UBI and Seaconview of the plaintiffs' intention to commence proceedings and to seek interlocutory injunctive relief. The defendants claim to have been misled by communications from the plaintiffs' solicitors starting with their email of 17th October, 2018 and continuing with further email correspondence on 18th October, 2018, between the plaintiffs' solicitors and Edward O'Boyle of Asset Services and with solicitors in Belfast engaged by Asset Services. The defendants maintain that the communications from the plaintiffs' solicitors led them to believe that an injunction had in fact been granted by the High Court on 17th October, 2018 requiring the property to be withdrawn from the auction on 18th October, 2018. In response, the plaintiffs' solicitor maintains that while some of the email communications could have been worded more precisely, there was no intention to provide misleading information to the defendants. The plaintiffs' solicitor has explained on affidavit that the communications were sent in circumstances of some urgency from the plaintiffs' point of view and there was no intention to mislead the defendants or any breach of a duty of good faith on the part of the plaintiffs. While I touch on this issue very briefly at the end of my judgment, my view is that while some of the communications from the plaintiffs' solicitor could have been phrased more carefully and had the potential to lead the defendants to believe that there was in place an injunction preventing the property from being sold at the auction on 18th October, 2018, the emails were sent at a time of some considerable urgency from the plaintiffs' point of view. I accept that the plaintiffs' solicitor did not intend to mislead the defendants. Nor was there any breach of any duty of good faith on the part of the plaintiffs' solicitor. Were it necessary for me to decide the issue, and for reasons discussed below, it is not, I would not have refused to grant the reliefs sought by the plaintiffs on equitable grounds arising from the communications from the plaintiffs' solicitors on 17th and 18th October, 2018.

31. Following their appointment, the receivers have been in receipt of the rental income from the UK properties and have taken certain steps in relation to the sale of at least one of those properties, namely, 30 Queen Victoria Street, Reading. That property was due to be sold at a commercial property auction which was scheduled to take place on 18th October, 2018. That property is let to HSBC. It was that proposed auction which led to the commencement of these proceedings and this application for interlocutory injunctive relief. The plaintiffs seek to restrain the sale of that property and the other five UK commercial properties. The plaintiffs do not seek interlocutory orders restraining the conduct of the receivership other than to restrain the sale of the UK properties. Nor do the plaintiffs seek to prevent the receivers from receiving the rent payable in respect of the properties. The defendants want the receivers to be in a position to continue to be in a position to dispose of the properties where appropriate.

Commencement of Proceedings and Motion Seeking Interlocutory Injunction

32. While the circumstances in which the plaintiffs' application for interlocutory injunctive relief have given rise to some controversy between the parties (as discussed above), for present purposes I confine myself to a neutral summary of the relevant procedural background.

33. The proceedings were commenced by plenary summons which was issued on 18th October, 2018. The plaintiffs seek various reliefs, some of which are sought in the alternative to other reliefs. The plaintiffs seek declarations that the purported disposal by UBI of its economic interest in the plaintiffs' loans under the April 2005 facility to Seaconview was void and of no effect and that the purported assignment, transfer or sub-participation of UBI's benefits under the April 2005 facility to Seaconview was similarly void and of no effect. In the alternative, the plaintiffs seek a declaration that, having disposed of its economic interest in the April 2005 facility to Seaconview, UBI had no right or entitlement to exercise the powers and discretions under that facility. The plaintiffs also seek a declaration that the purported appointment of the receivers was void and of no effect and an order directing UBI to discharge the receivers. Other relief is sought including restitutionary relief and damages on various grounds. While initially the plaintiffs' solicitors indicated that the plaintiffs would be seeking interlocutory relief in certain terms (which replicated the declaratory and other relief sought in the plenary summons), when this was pointed out to the plaintiffs by the High Court (Costello J.) on 18th October, 2018, the plaintiffs prepared a new notice of motion which was ultimately issued with the liberty of the Court on 31st October, 2018. The proceedings were admitted to the Commercial List of the High Court on 19th November, 2018. The High Court (Haughton J.) gave directions in relation to the exchange of affidavits and the delivery of pleadings. Ultimately, some nine affidavits (including two by experts in English law) were sworn for the purpose of the plaintiffs' application for interlocutory injunctive relief. The plaintiffs' application was ultimately heard by me.

34. In accordance with the directions made (as extended by agreement between the parties), a statement of claim was delivered by the plaintiffs on 14th December, 2018. Directions were made in respect of further pleadings including particulars and the delivery of a defence. As at the date of the hearing of this application, the defence was not due to be delivered. It may well have been delivered

in the meantime.

Interlocutory Injunction: The Test to be Applied
35. The plaintiffs seek an interlocutory injunction restraining UBI, its servants or agents from selling the six UK properties referred to earlier pending the determination of the proceedings. The plaintiffs' application is required to be considered in accordance with the test identified by the Supreme Court in *Campus Oil*. The Supreme Court in that case in turn accepted the test contained in the speech of Lord Diplock in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396. The test has been discussed and elaborated upon in various respects by the Irish Courts in the years following *Campus Oil* including by the High Court (McCracken J.) in *B & S Ltd. v. Irish Auto Trader Ltd*. [1995] 2 IR 142 ("B & S").

36. The test was helpfully summarised by Clarke J. in his judgment for the Supreme Court in *Okunade v. Minister for Justice & Ors* [2012] 3 IR 152 ("*Okunade*").

37. In *Okunade*, Clarke J. summarised the test as follows:-

> "• *The party seeking the injunction must show that there is a fair or bona fide or serious question to be tried.*
>
> • *If that be established, the court must then consider two aspects of the adequacy of damages. First, the court must consider whether, if it does not grant an injunction at the interlocutory stage, a plaintiff who succeeds at the trial of the substantive action will be adequately compensated by an award of damages for any loss suffered between the hearing of the interlocutory injunction and the trial of the action. If the plaintiff would be adequately compensated by damages the interlocutory injunction should be refused subject to the proviso that it appears likely that the relevant defendant would be able to discharge any damages likely to arise.*
>
> • *If damages would not be an adequate remedy for the plaintiff, then the court must consider whether, if it does grant an injunction at the interlocutory stage, a plaintiff's undertaking as to damages will adequately compensate the defendant, should the latter be successful at the trial of the action, in respect of any loss suffered by him due to the injunction being enforced pending the trial. If the defendant would be adequately compensated by damages, then the injunction will normally be granted. This last matter is also subject to the proviso that the plaintiff would be in a position to meet the undertaking as to damages in the event that it is called on.*
>
> • *If damages would not adequately compensate either party, then the court must consider where the balance of convenience lies.*
>
> • *If all other matters are equally balanced the court should attempt to preserve the status quo."* (*per* Clarke J. at para. 70, p. 180-181).

38. This summary was quoted with approval by the High Court (Haughton J.) *in Wingview Limited t/a The Elphin Public House v. Ennis Property Finance DAC* [2017] IEHC 674 ("*Wingview*"), a case on which both sides relied before me, and in many other cases including by me in *Teva Pharmaceutical Industries Limited v. Mylan Teoranta t/a Mylan Institutional & Anor* [2018] IEHC 324.

39. It is, therefore, first necessary to consider whether the applicant seeking the interlocutory injunction (normally the plaintiff) has established a fair question or a serious issue to be tried (there being no difference in substance between these two formulations, as is clear from Clarke J.'s summary in *Okunade*). In the event that the plaintiff does establish a serious issue or issues to be tried, the plaintiff must then demonstrate that damages would not adequately compensate it in the event that the interlocutory injunction were refused but the plaintiff were ultimately to succeed at trial. If the plaintiff cannot establish this, to the appropriate standard, then the application for the interlocutory injunction must be refused. If the plaintiff can establish that damages would not be an adequate remedy for it, the court then moves to consider whether damages would adequately compensate the defendant in the event that the interlocutory injunction were granted to the plaintiffs but the defendant were ultimately to succeed at trial. If damages would adequately compensate the defendant, the interlocutory injunction would normally be granted subject to the plaintiff being in a position to demonstrate that it could meet any liability on foot of its undertaking as to damages. It is normally only where damages would not adequately compensate the plaintiff or the defendant that it is necessary for the court to go on to consider the question of the balance of convenience.

40. In *Okunade*, Clarke J. considered the test for the granting of an interlocutory injunction as being intended to "*minimise the risk of injustice*". He stated:-

> "It can be seen that the analysis of McCracken J. *[in B & S] involves an application of the basic principle, under which the court is required to minimise the risk of injustice, to the sort of facts which normally arise in the context of commercial or property litigation. If a plaintiff does not establish a fair case or serious issue to be tried then interfering with the position of the defendant by means of imposing an interlocutory injunction on that defendant would create a serious and disproportionate risk of injustice. Where damages are adequate on either side and likely to be capable of being recovered in practice then there is no great risk of injustice for the plaintiff or defendant, as the case may be, will, if they win the case, be either awarded damages (in the case of a plaintiff) or be able to recover damages on the undertaking (in the case of a defendant). There is, of course, no real risk of injustice if such recovery would adequately compensate the relevant party."*
>
> (per Clarke J. at para. 71, p. 181).

41. I will now proceed to consider those aspects of the *Campus Oil* test which require to be addressed on this application. I will start by considering the first stage in the test, namely, whether a fair question or serious issue to be tried has been raised by the plaintiffs. I will then consider the question of the adequacy of damages from the plaintiffs' perspective. If necessary, I will proceed to consider the following stages of the test including, if necessary, the question of the balance of convenience. Finally, I will set out my conclusion in relation to the defendants' contention that the plaintiffs' application should be refused on equitable grounds.

Fair Question or Serious Issue to be Tried
42. It is well established that a plaintiff who seeks to establish a fair question or serious issue to be tried does not have to discharge a particularly heavy burden. The threshold for establishing a fair question or serious issue to be tried has been described as a "*low threshold*" (see the comments of Laffoy J. in the High Court in *Crossplan Investments Ltd. v. McCann & Ors* [2013] IEHC 205 which were endorsed by Haughton J. in *Wingview*). That does not, however, mean that it is not a threshold which must be met. It may be helpful to view the threshold in terms of requiring a plaintiff who seeks an interlocutory injunction to demonstrate that there is a

question or issue which would withstand an application to dismiss under the inherent jurisdiction of the court (as observed by Haughton J. in *Wingview*) or under O. 19, r. 28 RSC as disclosing no reasonable cause of action or as being frivolous or vexatious. The threshold is of that order and so unless the case is unstateable, it is generally not a difficult threshold to meet.

43. The plaintiffs have delivered a statement of claim in this case. That is not often so in the case of an interlocutory injunction application. Typically, the court will only have available to it the plenary summons issued by the plaintiff. The fact that a statement of claim has been delivered makes the identification of a fair question or a serious issue to be tried a somewhat easier exercise for the court since not only will the court see in a formal pleading the reliefs which are being sought by the plaintiff (as would be the case if the plenary summons only were available) but also the basis on which those reliefs are sought.

44. The plaintiffs have put forward several questions or issues which they maintain meet the threshold of a fair question or serious issue to be tried. As appears from the pleadings, affidavits and submissions, the plaintiffs maintain that the following issues arise:-

> (a) The purported disposal of the plaintiffs' loans by UBI to Seaconview was a breach of the terms of the April 2005 facility and in breach of contract in that Seaconview was not a subsidiary of UBI or an entity within the Ulster Bank Group and was not a bank or financial institution as required under clause 12 of the general conditions of the April 2005 facility.
>
> (b) The June 2018 demands were invalid as not having been "*signed by an officer of the bank*" (as required by the relevant provision of the April 2005 facility).
>
> (c) The appointments of the receivers on 3rd July, 2018, were invalid as they were based on the allegedly invalid June 2018 demands.
>
> (d) In the alternative and without prejudice to the foregoing, if the purported disposal was valid, it effected an assignment under s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 (the "1877 Act") such that the rights of UBI became the rights of Seaconview and UBI no longer had the power or discretion to make a demand or to appoint a receiver.
>
> (e) In the further alternative, if the purported disposal of the plaintiffs' loans was not an assignment under s. 28(6) of the 1877 Act, it nonetheless amounted to an equitable assignment following which UBI had no entitlement to sue in its own name or to issue a demand or appoint a receiver.
>
> (f) The plaintiffs further allege that UBI was in breach of contract in overcharging the plaintiffs in respect of interest on their various accounts and that the amount of that overcharging was €567,188.80. The plaintiffs seek to recover that amount on various different legal bases from UBI and Seaconview.

45. The defendants forcefully contend that the plaintiffs have failed to establish any fair question or serious issue to be tried in relation to any of the facilities made available by UBI to the plaintiffs. The defendants assert that they were entitled by virtue of the securitisation clause in the April 2005 facility to dispose of the economic interest in the plaintiffs' loans to Seaconview. They maintain that there is no conflict between Clause 12 and the securitisation clause. The defendants further dispute the contention that the June 2018 demands were unlawful and contend that as UBI have retained the legal interest under the relevant facilities, it was the entity required to issue the demands. Further, the defendants contend that the demands were validly signed by Asset Services' personnel in accordance with the power of attorney granted by UBI to Asset Services and that UBI was entitled thereafter to appoint the receivers. The defendants assert that the receivers were validly appointed under the mortgages as a matter of English law. I observe that there are conflicting affidavits from English law experts on that issue. The defendants further argue that even if there was some infirmity concerning the June 2018 demands (which they deny), UBI had sent previous demands in 2014 and 2017 which did not suffer from those alleged infirmities. The defendants dispute the contention that the disposal of the economic interest in the plaintiffs' loans by UBI to Seaconview amounted to an assignment under s. 28(6) of the 1877 Act or an equitable assignment and that UBI continued to have the power to issue demands and to appoint receivers following such disposal. Finally, the defendants maintain that whatever about the issues the plaintiffs seek to raise in relation to the April 2005 facility, those issues do not apply to the November 2006 facility which is also secured by the mortgages on foot of which the receivers were appointed. The defendants accept that the amount, the subject of the November 2006 facility and secured by those mortgages is relatively small in the context of the overall debt and further that the plaintiffs' claim to the effect that UBI had no power to issue demands and to appoint receivers after the disposal of the economic interest in the plaintiffs' loans does apply to the November 2006 facility (although the defendants contend that UBI was in any event, entitled to rely on the demands made in 2014 prior to the arrangement with Seaconview).

46. The plaintiffs have raised several issues in the proceedings. I am not required to decide those issues nor would it be appropriate for me to do so. I am satisfied that the plaintiffs have satisfied the low threshold which must be met to demonstrate a fair question or serious issue to be tried. That is particularly so in relation to the issues raised by the plaintiffs in relation to the April 2005 facility. It is also just about so in relation to the issues raised by the plaintiffs concerning the November 2006 facility. The issues which the plaintiffs raise in relation to the entitlement of UBI to issue demands and to appoint receivers after the disposal of the economic interest in the plaintiffs' loans apply not only in relation to the April 2005 facility but also in relation to the November 2006 facility. While the defendants seek to rely on demands made by UBI in 2014 prior to the arrangement between UBI and Seaconview, UBI, nonetheless, considered it necessary to issue further demands in 2017 and again in June 2018. While the defendants contend that, as a matter of English law, the entitlement to appoint a receiver under the mortgages, did not require a demand and a failure to comply with that demand, that is an issue in dispute between the parties.

47. I am, therefore, satisfied that the plaintiffs have satisfied the low threshold of demonstrating that there are fair questions or serious issues to be tried in this case. In any event, in light of the conclusions which I reach at the next stage of the *Campus Oil* test, I would have been prepared to assume without deciding that the plaintiffs had satisfied this threshold.

Adequacy of Damages

48. I now move to consider the second stage of the *Campus Oil* test. This stage involves two aspects. The first is that the plaintiffs seeking the interlocutory injunction must demonstrate that damages would not constitute an adequate remedy for them in the event that I were to refuse the application for the interlocutory injunction sought but the plaintiffs were ultimately to succeed at trial. If the plaintiffs do not establish this, then the application for the interlocutory injunction must be refused. If the plaintiffs do establish that damages would not be an adequate remedy for them, it would then be necessary for the court to consider the second aspect of the adequacy of damages, namely, whether damages would adequately compensate the defendants in the event that I were to grant the interlocutory injunction sought by the plaintiffs but the defendants were ultimately to succeed at trial.

(a) Adequacy of Damages for the Plaintiffs

49. In considering this aspect of the test, it is necessary first to identify the approach which the court is required to take in considering whether the plaintiffs have demonstrated that damages would not be an adequate remedy. The approach to be taken is well settled. In *Curust Financial Service Ltd. v. Loewe-Lack-Werk* [1994] 1 IR 450 ("*Curust*"), the Supreme Court (Finlay C.J.) held first that "*difficulty, as distinct from complete impossibility, in the assessment of… damages*" is not sufficient to establish that damages would not be an adequate remedy (per Finlay C.J. at 469). Second, the court held that an applicant for an interlocutory injunction must demonstrate that damages would not be an adequate remedy "*as a matter of probability*" on the basis of the affidavit evidence (per Finlay C.J. at 471). Therefore, difficulty in measuring damages is not sufficient. The plaintiffs must establish as a matter of probability that the assessment of damages would be impossible by reason of the particular harm which may be suffered by the plaintiffs. It is necessary, therefore, to consider the evidence put forward by the plaintiffs and that put forward by the defendants in order to determine whether the plaintiffs have established to the appropriate standard that damages would not be an adequate remedy for them in the event that the court were to refuse to grant an interlocutory injunction to them but they were ultimately to succeed at the trial.

50. In his first affidavit, (sworn on 17th October, 2018) Mr. O'Gara asserted that damages would not be an adequate remedy on the basis that one of the UK properties, namely, the property at 30 Queen Victoria Street in Reading was due to be offered for sale by auction on 18th October, 2018, and he contended that on that basis damages would not be an adequate remedy (paras. 65 and 66 of his first affidavit). Mr. O'Gara went on to describe the UK properties as representing "*a carefully selected and managed portfolio*" and to assert that in the event that an interlocutory injunction were refused it "*will be impossible for us to assemble any such portfolio again"* (para. 67 of his first affidavit). He explained that the plaintiffs had "*long been active in the hotel and licensed trade*" and that they have a "*personal interest in the properties and their business potential which goes beyond that of mere landlords",* although he accepted that the plaintiffs had chosen to let the UK properties. He then went on to assert (also at para. 67 of his first affidavit) that it is considered "*almost axiomatic that damages are not an adequate remedy in trespass cases*". However, this is not a trespass case. Mr. O'Gara had accepted at para. 55 of his first affidavit that an application to restrain the receivers from trespassing on the UK properties or from interfering with the plaintiffs' right of quiet enjoinment in respect of those properties was properly a matter for the courts of England and Wales. It was further accepted by him (at para. 34 of his second affidavit which was sworn on 7th December, 2018) that no claim in trespass is made against UBI or Seaconview. Furthermore, no claim in trespass is made in the plenary summons or in the statement of claim which was subsequently delivered on 14th December, 2018. That was the extent of the evidence put forward by the plaintiffs in support of their contention that damages would not be an adequate remedy for them, in the first affidavit sworn by Mr. O'Gara to ground the plaintiffs' application for an interlocutory injunction.

51. When met with the defendants' contention on affidavit that damages would be an adequate remedy in circumstances where the UK properties are commercial properties which are rented by the plaintiffs to commercial tenants for which rent is paid, the plaintiffs expanded on their reasons why damages would not be an adequate remedy. In his second affidavit, Mr. O'Gara stated that he and his wife "*carefully selected*" the properties with a view either to letting them to commercial tenants or, depending on their family circumstances, trading from "*certain of the premises*". He explained that he had been working in the pub, hotel and nightclub industry since the age of 18 (he is now aged 63). He also stated that he was still working in the hotel business. He further explained that two of the plaintiffs' sons had completed B.Comm degrees and work full-time in the pub and nightclub industry, operating a nightclub and bar in Roscommon, where Mr. O'Gara also works. He stated that in light of their family experience in the licensed trade, he and his wife were "*alert to seeking commercial properties from which* [they] *could trade as a family if it proved necessary*". He stated that when the leases on two of the UK properties, namely, public houses in Blackpool and in Hartlepool were renegotiated, the tenants (Yates Wine Lodge) were not agreeable to the rent offered and indicated that they wished to terminate the leases. Mr. O'Gara stated that he and his sons decided that they would take back the licensed premises and operate them themselves and made the necessary preparations for this. Ultimately, it did not prove necessary to do so as the tenant agreed the rent and continued in occupation. Mr. O'Gara stated that the plaintiffs' two sons are actively trying to expand their pub interests and have expressed "*significant interest*" in operating one or both of the public houses when the leases are up (they contain break clauses in the year 2022).

52. With regard to another of the UK properties, the property in Rochdale, Mr. O'Gara stated that the premises were converted to a hairdressing and beauty salon and that the plaintiffs' daughter had completed a hairdressing qualification and expressed an interest in running a salon from the premises. He noted that the particular premises were vacant recently as the tenant had vacated them earlier in the year (2018). Mr. O'Gara rejected the contention that the UK properties were or are to be valued because of the rent roll rather than any feature inherent in the properties themselves.

53. In response, the defendants' principal contention was that the UK properties are commercial properties generating a rent roll and that any loss sustained by the plaintiffs in the event that they fail to obtain an interlocutory injunction but succeed at trial is capable of being addressed by way of an award of damages. In his second affidavit, sworn on 7th January, 2019, Karl Smith on behalf of Seaconview noted that only two of the UK properties, namely, the Yates Wine Lodge premises in Blackpool and Hartlepool, are public houses. He pointed out that while it was stated by Mr O'Gara that he and members of his family had considered occupying and running the two public houses at various times and that the plaintiffs' daughter had considered running a hair salon from the property in Rochdale, they had not actually done so. To date, the plaintiffs have only used the properties for the purpose of generating rent. Mr. Smith further pointed out that the plaintiffs were previously prepared to sell both public house premises in order to reduce their liabilities on foot of the facilities and that this did not suggest that the plaintiffs and members of their family had any particular personal ties to the UK properties.

54. Mr. Smith further pointed out that none of the other properties have anything to do with the licensed trade and are used by the plaintiffs solely for their rent roll. He noted that the property at 30 Queen Victoria Street in Reading is being operated as a bank and is rented to HSBC on a 9.5 year lease from March 2017; the property in Stockton-on-Tees is also being operated as a bank and is rented to Santander on a 25-year lease which ended in February 2017, but Santander remain in occupation and have commenced legal proceedings seeking a new lease; and that the property at 10 Sheep Street in Bicester is operated as a bookmakers and is leased to Ladbrokes on a 10-year lease which is due to expire in 2024.

55. Against this evidential background, the plaintiffs contend that if they fail to obtain an interlocutory injunction restraining the sale of the UK properties but ultimately succeed at trial, the properties may have been sold by the time of the trial and while they may obtain an award of damages, they will not be able to reinvest so as to acquire and build up a property portfolio similar to that which they currently have. Although they do not expressly so state on affidavit, it is submitted on their behalf that the plaintiffs will be unable to borrow additional funds to acquire a new property portfolio, in light of their age. The plaintiffs rely on the decision of Haughton J. in *Wingview* and seek to distinguish that case from the decision of the High Court (Cross J.) in *Camden Street Investments Ltd. & Ors. v. Vanguard Property Finance Ltd.* [2013] IEHC 478 ("*Camden*"). While accepting that the plaintiffs do not seek damages for trespass, it is submitted on their behalf that analogous principles apply in circumstances where they contend that the appointment of the receivers should be found to be invalid as a matter of English law (and seek relief to that effect in the

statement of claim).

56. In response, the defendants stress the commercial nature of the properties and the plaintiffs' interests in them. For reasons summarised above, the defendants dispute that the plaintiffs have any particular or special interest in the properties other than a commercial interest and dispute that the properties themselves have any particular special or inherent features. The defendants, therefore, contend that if the plaintiffs succeed at trial, they will obtain an award of damages to compensate them for any financial loss which they may suffer as a result of the non-receipt of rent from the properties in the event of a sale and by reason of any loss incurred by reason of the sale of the property having regard to the status of the properties as security for the plaintiffs' liabilities under the facilities. The defendants rely on Camden and also on observations made by the High Court (Stewart J.) in *Whelan v. Promontoria* (Finn) Limited and Fennell [2017] IEHC 739 ("*Whelan*"). The defendants seek to distinguish *Wingview* on its facts. The defendants further submit that this is not a trespass case (as expressly acknowledged on affidavit and in submissions by the plaintiffs). Further, even if it were a trespass case, the defendants submit that there is no rule of law that damages can never be an adequate remedy where an interlocutory injunction is sought to restrain a trespass.

57. I have carefully considered all of the affidavit evidence and the submissions made by the parties which I have summarised above. As I noted earlier, the burden of proof rests on the plaintiffs to demonstrate on the balance of probabilities that damages would not be an adequate remedy for them in the event that the court were to refuse the interlocutory injunction sought but the plaintiffs were ultimately to succeed at trial. I am not persuaded on the evidence that damages would not be an adequate remedy for the plaintiff on the facts of this case. Nor am I persuaded by the submissions advanced by the plaintiffs to that end. I am not satisfied on the evidence that the properties have any particular inherent or special feature or emotional attachment for the plaintiffs beyond being commercial properties which are let to commercial tenants such as the operators of public houses, banks and bookmakers for a commercial rent. The evidence put forward by the plaintiffs to suggest that they possess some special or particular interest in the properties is unconvincing. That evidence is vague and general and I am wholly unpersuaded by it. As regards the suggestion by Mr O'Gara that he and his two sons considered taking back the two properties which trade as public houses with a view to operating the public houses themselves, I observe that Mr O'Gara has not provided any documentary evidence to support what can best be described as a vague and general assertion to that effect. Had it been the intention of Mr O'Gara or his two sons to take back the premises and to operate them themselves as public houses, I would have expected to see some documentary evidence such as correspondence with the tenants with whom Mr. O'Gara stated the plaintiffs were in dispute and could not agree a new rent. No such documentary evidence was referred to or exhibited by the plaintiffs. I would also have expected to see supportive evidence in that regard from the plaintiffs' sons, if that were indeed their intention. That is also the case in relation to the alleged interest expressed by the plaintiffs' sons in running one or both or the public houses when their leases expire (or can be broken) in 2022. No such evidence was provided to the court. Nor do Mr. O'Gara's assertions in relation to his and his sons' intentions sit comfortably with the undisputed fact that the plaintiffs were prepared to sell both public house premises to reduce their liabilities to UBI. That does not suggest any firm or concrete intention by the plaintiffs or their sons to take over and run the two public houses in question or any particular special attachment to them. Nor am I persuaded by the assertion made by Mr O'Gara that the plaintiffs' daughter, having obtained her hairdressing qualification, has a real or concrete interest in running a hair salon business from the premises in Rochdale. While stating that the unit was "*vacant recently*" as a tenant had vacated the premises earlier in the year (2018), had there been a genuine interest on the part of the plaintiffs or their daughter in taking over and running a hairdressing business from the premises, I would have expected to see some evidence of this, particularly, as Mr. O'Gara states, the property had been converted to a hairdressing and beauty salon and was "*vacant recently*" in the circumstances stated by him at para. 32 of his second affidavit. I would also have expected to see some evidence from the plaintiffs' daughter. However, again none was provided to the court.

58. While the plaintiffs may have carefully selected the UK properties in assembling their property portfolio in the UK, the inescapable conclusion on the evidence is that the properties were acquired purely as a commercial investment. They were let to commercial tenants at a commercial rent. The plaintiffs borrowed heavily from UBI to acquire the properties and to assemble their commercial property portfolio and are heavily indebted to UBI and/or Seaconview (in the event that the plaintiffs fail in their challenge to the disposal by UBI of the economic interest in the plaintiffs' April 2005 facility). The plaintiffs' indebtedness is secured on those properties by the mortgages and no relief is sought in the proceedings challenging the validity of the mortgages over the UK properties or which would have the effect of releasing the mortgages from the properties unlike in *Farrell v Promontoria (Aran) Ltd. & anor* [2018] IEHC 748 and *Langan v Promontoria (Aran) Ltd. & Anor* [2017] IEHC 309.

59. I agree with the submission advanced by the defendants that any loss which the plaintiffs may suffer as a result of the sale of the UK properties in the event that an interlocutory injunction is refused but the plaintiffs ultimately succeed at trial is a financial loss for which the plaintiffs can be compensated by an award of damages. Damages are claimed by the plaintiffs in the statement of claim. I accept the submission advanced by the defendants that if the plaintiffs succeed at trial, damages will be available to compensate them for their loss. I also accept the submission by the defendants that the value of the UK properties to the plaintiffs in this case is at least twofold. In the first place, the properties have a value in the form of the rent payable by the tenants under the leases. If the plaintiffs succeed at trial in establishing that they have been wrongfully deprived of the rents payable in respect of the properties for a particular period, that is a loss which can be calculated and for which the plaintiffs can be compensated by an award of damages. In the second place, I accept that the properties also have a value in terms of security in respect of the plaintiffs' liabilities on foot of the facilities granted by UBI in April 2005 and November 2006. In the event that plaintiffs succeed at trial and establish that any of the properties were improperly sold by the receivers, whether by reason of a defect in the appointment of the receivers or otherwise, such as a failure by the receivers to achieve the best price reasonably available, the plaintiffs will have suffered a loss by reference to the value which the properties should have achieved by way of security in respect of the loans to the plaintiffs if the mortgages had been properly enforced. This is also a financial loss which can be calculated and for which the plaintiffs can be compensated by an award of damages. The plaintiffs may also suffer other financial losses by reason of any wrongful sale of the properties by the receivers and I should not be taken necessarily as accepting that the plaintiffs' only losses in those circumstances are those referred to by the defendants which I have just mentioned. There may be other financial losses. However, they are all in my view capable of being quantified and, therefore, the subject of an award of damages. While it may be difficult to assess the plaintiffs' losses and, therefore, to calculate the damages to which the plaintiffs may be entitled, in my view, it would by no means be impossible. As stated by Finlay C.J. in *Curust*, mere difficulty in assessing damages is not sufficient to establish that damages would an inadequate remedy. It must be established (on the balance of probabilities) that it would be impossible to assess damages. In my view, it would not be beyond the skill and competence of property valuers and forensic accountants or other financial experts to assist the court in the computation or calculation of damages in the event that the plaintiffs were to succeed at trial. I completely agree with the views of Cross J. in *Camden* in that regard. He stated (at para. 45 of his judgment):-

> *"I accept that it may be difficult for the damages to be calculated but I do not believe that it would be in any sense impossible. The loss of a business is always a matter of some conjecture but is capable of adjudication after hearing accountancy or other evidence. Indeed, the courts frequently enter into such valuations."*
>
> (per Cross J. at para. 45, p. 12)

60. In *Camden*, the plaintiff companies owned and operated a public house on Camden Street which they acquired on foot of a loan facility and in return for which the premises were charged in favour of the bank. The loan facility was ultimately sold to the defendant. The plaintiffs sought to restrain the appointment of a receiver by the defendant. Cross J. held that the plaintiffs had satisfied the first stage of the *Campus Oil* test but failed at the second stage. The court found that damages were an adequate remedy for the plaintiffs (see the passage reproduced by me above). In concluding that damages were an adequate remedy for the plaintiffs, the court held that the plaintiffs and their principals did not have "*in any real sense any emotional stake"* in maintaining the particular public house business from the premises. It is true that the court also went on to find that there was significant failure to disclose material facts to the court at the interim stage which would justify the relief being sought even if the plaintiffs had satisfied the *Campus Oil* test. Unlike the present case, the plaintiffs in *Camden* had been occupying and operating the public house business from the premises for a number of years from 2008. The plaintiffs in the present case have not occupied or operated any business from any of the UK properties in the period since their acquisition. To that extent, *Camden* was a stronger case from the point of view of the plaintiffs seeking interlocutory injunctive relief compared with the present case. I am satisfied that the comments of Cross J. in relation to the possibility of assessing damages and the absence of any emotional stake in the premises applies with equal or perhaps even more force to the present case.

61. The plaintiffs rely on the decision of Haughton J. in *Wingview*. In that case, the court granted an interlocutory injunction restraining the defendant from appointing a receiver over a public house premises and site. Haughton J. emphasised that "*each case must be decided on its own facts"* (para. 41). He stated that he was not necessarily disagreeing with the decision of Cross J. in *Camden* and pointed out that there were some features of that case which distinguished it from the case before him. In particular, Haughton J. noted that in the case before him, if the interlocutory injunction was not granted, the defendant would appoint a receiver who would proceed to sell the property and trade from the premises in the meantime. The court noted, therefore, that the plaintiff company would lose not only its business but also its interest in the property which it had enjoyed since 1996. Haughton J., therefore, distinguished the case before him from *Camden*, having noted the conclusions of Cross J. as to the absence of any "*emotional stake*" on the part of the plaintiff companies in *Camden*. Haughton J. continued (at para. 41 of his judgment):-

> *"Having regard to 30 years involvement of the plaintiff and its principals in the Elphin Public House, that could not be said to apply to the present case."*

62. Haughton J. also drew attention to the fact that a second reason for refusing relief in Camden was the failure to disclose material facts at the interim stage, which was not a feature of Wingview. Having distinguished the case from *Camden*, Haughton J. went on to conclude that if an interlocutory injunction was refused and the plaintiff were to succeed at trial, the quantification of its losses would require "*extensive estimation from accountants and other experts*" and that this would "*necessarily involve 'informed guesswork' and it would be impossible to calculate them with such a degree of accuracy as to represent the probable loss"* (per Haughton J. at para. 42).

63. I agree with the statement by Haughton J. that each case must be decided on its own facts. I also agree that in that case the many years of involvement by the plaintiff company and its principals in the public house premises distinguished the case from *Camden*. However, as already stated, there has been no such involvement by the plaintiffs with the UK properties at issue here. The plaintiffs have at no stage occupied the UK properties or run any business from them. They are commercial properties let to commercial tenants for a commercial rent. The facts of the present case are very far from those found by Haughton J. in *Wingview*. The present case must be decided on its own facts. I am not persuaded on the facts of this case that it would be impossible to assess damages so as to compensate the plaintiffs for any loss which they may sustain, in the event that they succeed at trial.

64. In *Whelan*, Stewart J. also adopted what she termed a "*fact based approach*" (at para. 40). She stated:-

> *"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."*

65. While the court went on in that case to refer to a number of particular features of the case (and the conduct of the defendant) which persuaded her that on the facts of that case damages would not be an adequate remedy, the present case is one which falls squarely within the type of case identified by Stewart J. in the final sentence of the above quotation. On the facts as I have found them in the interlocutory stage of the proceedings, the properties at issue in the present case are commercial properties where the predominant purpose of the plaintiffs' investment in the properties was a financial or commercial purpose. I am satisfied that in such a situation any loss can be compensated for by an award in damages. The plaintiffs' investment in the UK properties does not, on the facts, "*touch upon any of the aspects of* [the properties] *which make* [them] *unique*", in the words used by Stewart J. in *Whelan*.

66. Finally, in this context, insofar as it is suggested by the plaintiffs that by way of analogy at least the court should treat this case as if it gave rise to similar issues to a trespass case, I do not agree. The plaintiffs have made clear on affidavit and in their submissions that they do not make a claim in trespass against the defendants. No claim in damages for trespass is made in the plenary summons or in the statement of claim. This is not, therefore, a trespass case. However, even if it were a trespass case, I would not have reached a different conclusion on the adequacy of damages point. I agree with the approach taken by the High Court (Keane J.) in *Szabo v. Kavanagh* [2013] IEHC 491 ("*Szabo*"). In that case at para. 52 of his judgment, Keane J. stated as follows:-

> *"Turning to the question of the adequacy of damages, I find there is no evidence before the court that would allow it to conclude on the balance of the probabilities that the plaintiff could not be compensated by an award of damages for the trespass and breach of her constitutional rights that she alleges. While the Court notes the dictum of Laffoy J. in Pasture Properties v. Evans… that "it is axiomatic in trespass cases that damages are not an adequate remedy", I would not go quite so far, preferring the view that the court should look at the facts of each case. This was the approach adopted by Finlay Geoghegan J. in Contech v. Walsh, unreported, High Court, February 17, 2006, in respect of an application for an interlocutory injunction in a passing off action, notwithstanding the earlier dictum of Costello J. in Mitchelstown Co-Operative Agricultural Society Ltd v. Golden Vale Products Ltd., unreported, High Court, December 12, 1985, that "it is*

axiomatic in most passing-off actions damages are an inadequate remedy for a successful plaintiff" (at p. 7)." (per Keane J. at para. 52, p. 23)

67. Keane J. concluded that, on the particular facts of the case before him, that damages would be an adequate remedy for the alleged trespass and breach of constitutional rights of which the plaintiff complained. He was strengthened in his conclusion by the decision of the High Court (Kelly J.) in *Fitzpatrick v. Commissioner of An Garda Síochána* [1996] E.L.R. 244 in which the court rejected the contention that the plaintiff could not be adequately compensated in damages for the damage to his reputation, character and good name in the event that he did not obtain the interlocutory injunction sought. Kelly J. was satisfied that damage to the plaintiff's constitutional entitlement to his good name and reputation could be compensated for by an award in damages.

68. I agree with the views expressed and the conclusion reached by Keane J. in *Szabo* and by Kelly J in *Fitzpatrick*. While the plaintiffs sought to rely on *Reynolds v. Malocco* [1999] 2 IR 203, the facts of that case were unusual to say the least and the court concluded that having regard to the position of the defendants, if an injunction were not granted to restrain the publication of the article which the plaintiff claimed was defamatory of him, the plaintiff would be consigned to a trial where damages would be an inadequate remedy because of the "*virtual impossibility of ever recovering any sum awarded*" (per Kelly J. at 219). There is no suggestion in the present case of the defendants being unable to meet any award of damages in favour of the plaintiffs and questions of set off in terms of the plaintiffs' liabilities under the facilities would no doubt also come into play.

69. In conclusion, therefore, in my view, the plaintiffs have singularly failed to establish to the required standard that damages would not be an adequate remedy for them in the event that they fail to obtain an interlocutory injunction to restrain the sale of the UK properties but ultimately succeed at trial.

70. As the plaintiffs have failed at the first hurdle of the second stage of the *Campus Oil* test, it is unnecessary for me to proceed to consider any other hurdle at this stage or indeed to consider the final stage of the test. However, in deference to the submissions made to me on the issues, I propose to set out in relatively short form the conclusions I would have reached on the later aspects of the *Campus Oil* test had it been necessary for me to do so.

(b) Adequacy of Damages for the Defendants

71. It would only be necessary for me to consider whether damages would be an adequate remedy for the defendants in the event that the interlocutory injunction were granted and the defendants were ultimately to succeed at trial, if the plaintiffs had persuaded me that damages would be an inadequate remedy for them. They have not done so and, therefore, their application for an interlocutory injunction fails without the need to consider this aspect of the test. However, I propose to deal very briefly with the arguments raised on this point.

72. The defendants maintain that damages would not be an adequate remedy for them for various reasons. First they contend that the undertaking as to damages offered by the plaintiffs is no more than a *pro forma* attempt to comply with the requirement that an undertaking as to damages be given. The defendants submit that there is no detail provided by the plaintiffs in relation to the undertaking or their ability to meet it. The plaintiffs seek to rely, in order to demonstrate their ability to meet any sum for which they may be liable on foot of their undertaking as to damages, on their claim in respect of interest overcharging which is maintained in the proceedings. As noted earlier in this judgment, the plaintiffs allege in the statement of claim (and on affidavit) that UBI acted in breach of contract in overcharging the plaintiffs in respect of interest. The total amount allegedly overcharged is stated by the plaintiffs to be €567,188.80 as of 23rd May, 2018. The defendants contend that this is not something which can be considered in assessing the plaintiffs' ability to meet any sum which may be required to be paid on foot of their undertaking as to damages.

73. The plaintiffs' attempt to rely, in order to bolster or substantiate their undertaking as to damages, on the claim which it is making in the proceedings for damages and restitutionary relief in respect of interest allegedly overcharged by UBI is a novel one. Neither side could point to any authority for the proposition that a plaintiff, in seeking to demonstrate the force or strength of its undertaking as to damages, can rely on what it hopes will be the outcome of its substantive claim against the defendant. It is not surprising that there is no authority on the point. In my view, it runs quite contrary to the entire basis and purpose of an undertaking as to damages. A plaintiff gives an undertaking as to damages to protect the defendant in circumstances where the plaintiff obtains an interlocutory injunction but ultimately fails at the trial. Conceptually, therefore, it is hard to imagine a situation where having failed at the trial, the plaintiff, nonetheless, recovers a sum which it could use to discharge its liability on foot of the undertaking as to damages. It may be the case that the plaintiffs in the present case would argue, on the facts of this case, that having obtained an interlocutory injunction restraining the sale of the properties, they could lose their case at trial that the loans were improperly sold or that the receivers were improperly appointed and had no entitlement to sell the properties but could succeed on that part of their claim which concerned interest overcharging. However, I would regard an undertaking as to damages predicated upon the ultimate success by the plaintiff on one aspect of a case involving many aspects as being wholly speculative and uncertain and inconsistent with the primary objective of an undertaking as to damages. If I were required to conclusively determine this issue (and I am not), I would not be prepared to accept an undertaking as to damages on the basis offered by the plaintiffs. I would have required evidence to demonstrate the value or worth of the undertaking. I may have afforded the plaintiffs the opportunity of putting that evidence before the court.

74. In those circumstances, and in the absence of further evidence, I would be faced with an evidential deficit. That deficit cuts both ways. The plaintiffs would not have provided me with sufficient information to demonstrate that, leaving aside their overcharging claim, they would be in a position to meet any liability which they may be found to have on foot of their undertaking as to damages. Presumably as part of demonstrating their ability to meet any such liability, the plaintiffs would wish to refer to the value of the UK properties and, in particular, the value of their equities (if any) in the properties. Neither side provided me with evidence of this. From the perspective of the defendants, if the defendants were required to demonstrate that damages would not be an adequate remedy for them by reason of the various matters outlined by Mr. Smith at para. 86 of his first affidavit and paras. 28 and 33 of his second affidavit (including the performance of the UK commercial property market and the potential effects of Brexit), the defendants would also be required to provide some evidence as to the current values of the UK properties to the extent of which those values exceed (or otherwise) the amounts secured on the properties. None of that information was provided by either side. Had it been necessary to decide this issue, I may have required more evidence from the defendants also. In those circumstances and in the absence of that evidence, I would have had a difficulty in reaching a conclusion on the issue as to whether damages would not be an adequate remedy for the defendants. I may, therefore, have proceeded to consider the next stage of the test, namely, the balance of convenience.

Balance of Convenience

75. In light of my conclusion that the plaintiffs have failed to establish that damages would not be an adequate remedy for them, it is not necessary for me to proceed to consider the balance of convenience. However, in deference to the arguments made, I will again

set out the conclusions I would have reached had it been necessary for me to decide this issue.

76. In considering the balance of convenience, the approach which the court is required to take is that explained by Clarke J. in *Okunade*, namely, to assess "*where the least harm would be done"* by comparing the consequences for the respective parties in the case of the grant or refusal of the interlocutory injunction. The balance of convenience, therefore, involves the court considering which result would cause the least harm and minimise or avoid the greatest risk of injustice.

77. It is also the case that, while not a fixed rule, in the event that all matters are equally balanced in the consideration of where the balance of convenience lies, the court should attempt to preserve the *status quo* (see: *B&S*, as summarised by Clark J. in *Okunade* at 180 – 181).

78. If I were required to consider the balance of convenience, I would have concluded that the balance favours the refusal of the plaintiffs' application for the interlocutory injunction sought. I would do so for several reasons. First, the receivers have already embarked upon the process of selling the UK properties with the auction of the first property having been scheduled to take place on 18th October, 2018, but cancelled at short notice when these proceedings were threatened. Second, the *status quo* on the facts of this case is a state of affairs where the receivers have been appointed and are acting in their capacity as receivers. They have embarked upon the process of selling the UK properties. The position is not dissimilar to *McDonagh v Ulster Bank Ireland Limited* [2014] IEHC 476. The plaintiffs do not seek any interlocutory orders halting or suspending the receivership. Third, the UK properties are heavily secured in favour of UBI/Seaconview. The plaintiffs do not challenge the validity of the mortgages over the properties. Nor do they dispute that very substantial sums are secured on the properties. While the plaintiffs contend that the default situation in which they now find themselves was contrived by UBI/Seaconview, the plaintiffs do not dispute that they are subject to very substantial liabilities which are secured on the UK properties, even taking account of the plaintiffs' interest overcharging claim. This is not a case where the plaintiffs seek to challenge the validity of the mortgages themselves. In reality, it is really a dispute as to who gets to control the sale of the UK properties. Fourth, the plaintiffs have been in default at various points dating back to 2010 (although it is the case that the plaintiffs have made payments since that date). Fifth, the defendants have stated on affidavit that uncertainty in the British commercial property market, particularly in the context of Brexit (whether imminent or otherwise), has informed the receivers' decision to seek to sell the UK properties at this point in time. While the plaintiffs may not agree with that decision and may take issue with the judgement call exercised by the receivers, the plaintiffs have not provided any evidence to demonstrate that the receivers' judgement is unreasonable or irrational. I am satisfied that I can take into account the uncertainties which may arise in the event of a "no deal" or other disorderly Brexit occurring which may potentially hinder the sale of the properties and depress the realised value of the properties in the event of such a Brexit. Finally, the refusal by the court to grant the interlocutory injunction sought by the plaintiffs will mean that in the period between the date of the refusal and the date of a trial it is possible that some or all of the UK properties will not have been sold. If that is the case, then the refusal of the interlocutory injunction will not have caused any prejudice to the plaintiffs (at least in relation to those properties which have not been sold). If some or all of the UK properties have been sold by the date of the trial, the net proceeds of sale of the properties will have to be applied to reduce the plaintiffs' liabilities which will, thereby, be reduced. In the event that the plaintiffs were to succeed at trial in establishing that the properties ought not to have been sold, then the plaintiffs' losses can be dealt with by an award of damages.

79. For these reasons, if it were necessary for me to decide the plaintiffs' application on the basis of the balance of convenience (which it is not), I would have concluded that the balance of convenience clearly favoured the refusal of the plaintiffs' application.

Equitable Discretion to Refuse Application

80. While not pressed as a reason in itself to refuse the plaintiffs' application for the interlocutory injunction sought, the defendants contended on affidavit and in submissions that, as part of the exercise of its discretion, the court should take into account the communications from the plaintiffs' solicitor on 17th and 18th October, 2018, which the defendants contend were inaccurate and misleading in referring to the existence of an injunction notwithstanding that injunctive relief had not been applied for or granted at the time of those communications.

81. In light of the conclusion which I have reached on the question of the adequacy of damages for the plaintiffs, it is again not necessary for me to consider or rule definitively upon this issue. However, in light of the fact that the issue was ventilated on affidavit and in the submissions of the parties and in order to ensure that the allegation is not left hanging out there against the plaintiffs' solicitor, it is appropriate that I very briefly set out my conclusions on the issue.

82. I accept that in an appropriate case, if the court or the opposing party was deliberately misled and was led to believe that an order in the nature of an injunction had been granted against that other party when that was not the case, the order would be liable to be set aside on equitable grounds.

83. However, I am not satisfied that that is what happened in the present case. I referred earlier to the communications from the plaintiffs' solicitor on 17th and 18th October, 2018, which the defendants maintain led them to believe that an injunction had in fact been granted by the High Court on 17th October, 2018, when that was not in fact the case. The plaintiffs' solicitor accepted that some of her email communications could have been worded more precisely but strenuously maintained that there was no intention to provide misleading information to the defendants. She explained that her emails were sent in circumstances of some considerable urgency from the plaintiffs' point of view. I agree that some of the email communications from the plaintiffs' solicitor could have been phrased more carefully and did have the potential to lead the defendants to believe that an injunction was in place preventing the particular property from being sold at auction on 18th October, 2018. However, I accept the explanation from the plaintiffs' solicitor that she was under considerable time pressure in communicating with the defendants and that she did not intend in any way to mislead the defendants in her email communications. Nor, in my view, was there any breach of a duty of good faith on the part of the plaintiffs' solicitor. If it were necessary for me to decide this issue (and it is not), I would not have refused to grant the reliefs sought by the plaintiffs on equitable grounds by reason of the communications from the plaintiffs' solicitor on 17th and 18th October, 2018.

Conclusion

84. I have concluded that the plaintiffs have established a serious issue or fair question to be tried for the purpose of their applications for interlocutory injunctive relief restraining the sale of the UK properties. However, I have concluded that the plaintiffs have failed to establish that damages would not be an adequate remedy for them in circumstances where the court refuses their application for an interlocutory injunction but the plaintiffs ultimately succeed at trial. I am quite satisfied that any losses which the plaintiffs might suffer in such circumstances would be capable of being assessed and quantified in monetary terms and the plaintiffs would be capable of being compensated in damages in respect of those losses. In those circumstances, it was not necessary for me to proceed to consider the adequacy of damages from the defendants' point of view or to proceed to consider the balance of convenience or the additional argument raised by the defendants that the plaintiffs' application should be refused on equitable grounds by reason of certain communications from the plaintiffs' solicitor on 17th and 18th October, 2018. However, I have briefly set out my views on those other issues. In light of my conclusion that damages would be an adequate remedy for the plaintiffs, however,

I must refuse the plaintiffs' application.

85. In the event that it were necessary for me to consider the subsequent stages of the *Campus Oil* test, I would have concluded that the balance of convenience favoured the refusal of the plaintiffs' application. On the equitable discretion issue, I would not have refused the plaintiffs' application on equitable grounds arising from the plaintiffs' solicitors' communications on 17th and 18th October, 2018.

86. In the circumstances, therefore, I must refuse the plaintiffs' application.