**THE HIGH COURT**

**COMMERCIAL**

**[2018 No. 389 S]**

**BETWEEN:**

**SEACONVIEW DAC**

**PLAINTIFF**

**-AND-**

**CHEVAS SECURITIES LIMITED AND JAMES (ORS SEAMUS) FAGAN**

**DEFENDANTS**

**THE HIGH COURT**

**COMMERCIAL**

**[2018 No. 1982 P]**

**BETWEEN:**

**SEACONVIEW DAC AND ANNE O'DWYER**

**PLAINTIFFS**

**-AND-**

**CHEVAS SECURITIES LIMITED AND JAMES (ORS SEAMUS) FAGAN**

**DEFENDANTS**

**THE HIGH COURT**

**COMMERCIAL**

**[2018 No. 3775 P]**

**BETWEEN:**

**JAMES (ORS SEAMUS) FAGAN**

**PLAINTIFF**

**-AND-**

**SEACONVIEW DAC AND ANNE O'DWYER**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Twomey delivered on the 11th July, 2018**

**SUMMARY**

1. This judgment considers two issues, first the application by Seaconview DAC ("Seaconview") for summary judgment in the sum of €9,795,180.16 together with continuing interest against the first named defendant, Chevas Securities Limited ("Chevas"), a company controlled by Mr. Seamus Fagan ("Mr. Fagan") in relation to borrowings originally made by Ulster Bank Ireland Limited ("Ulster Bank") to Chevas, and subsequently acquired by Seaconview.

2. The second matter for consideration is a motion by Seaconview and the receiver it appointed, Anne O'Dwyer of Duff & Phelps, (the "Receiver"), for an interlocutory injunction preventing Chevas, Mr. Fagan and his son, Conor Fagan, from interfering with the receivership of certain properties which secured the foregoing borrowings. The key issue in relation to the second matter is that another company controlled by Mr. Fagan, New Vision Investments Property Management Limited ("New Vision"), acquired rights to the common areas of the two apartment blocks secured in favour of Seaconview. On this basis, it is claimed, on behalf of the defendants to the injunction proceedings, that the Receiver is not entitled to use the common areas to access the apartment blocks to which she has been appointed receiver. Seaconview and the Receiver argue that a right of way of necessity arises in favour of the Receiver on the basis that if the defendants' claim is successful at the full hearing of the injunction application, it would effectively quarantine the two apartment blocks from the Receiver.

3. For the reasons set out in this judgment, this Court grants the summary judgment and grants the interlocutory injunction prohibiting any interference with the Receiver using the common areas to access the two apartment blocks.

**FACTUAL BACKGROUND**

4. Chevas borrowed circa €10 million from Ulster Bank which borrowings were restructured pursuant to a facility letter issued by Ulster Bank on the 26th September, 2013, ("the Facility Letter"). The Facility Letter provided eight separate facilities, which were intended for various commercial purposes including the purchase of investment properties. The borrowings were secured over a large number of properties, security being provided by Chevas between 2002 and 2007, and in particular security was provided to Ulster Bank in respect of two blocks of apartments (with 28 apartments in total) in Kimmage, Dublin, which are known as the Royston Village apartments. Mr. Fagan is a director as well as a shareholder in Chevas.

5. The facilities and the related securities were transferred by Ulster Bank to Seaconview by Deed of Transfer dated 23rd October, 2015.

6. By letter of demand of the 30th November, 2017, Seaconview demanded repayment by Chevas of the outstanding sums in relation to seven of the eight facilities and as of 29th November, 2017, the total sum due under those borrowings was €9,276,823.09. By

letter of demand of the 7th December, 2017, Seaconview demanded repayment by Chevas of the outstanding sum in relation the eighth facility, and as of 5th December, 2017, the total amount due under this facility was €518,357. Thus, the total amount outstanding claimed by Seaconview as outstanding from Chevas is €9,795,180.16 plus continuing interest.

7. The Receiver was appointed as receiver over the secured assets on the 21st December, 2017.

**SUMMARY JUDGMENT**
8. The first issue to address is whether Seaconview is entitled to a summary judgment against Chevas. It is not disputed that the money was borrowed by Chevas and that Chevas owes Seaconview the outstanding sums due under the Facility Letter. Rather the first ground of opposition to the grant of summary judgment is Chevas' allegation that Chevas reached agreement with Ulster Bank that the demand loan ceased to be on-demand lending and so it was not open to Seaconview to demand payment under the Facility Letter in November and December of 2017.

**Alleged agreement to convert on-demand loan**
9. This defence is that in or around May 2016 Seaconview agreed with Chevas to accept payment of the monthly sum of €30,000 from the rent of the properties, including the Royston Village apartments, which secured the borrowings. The extent of this claim is the following statement in Mr. Fagan's affidavit on behalf of Chevas:

> "Through engagement Seaconview agreed to monthly payments in the monthly sum of €30,000. This was a significant increase in the payments under the terms of the relevant Facility Letter. Therefore there is no breach of the obligations of the Defendants, no default occurred and accordingly there was never a right to seek judgement in the amount sought[…]
>
> The repayment of €30,000 per month was agreed with Seaconview and constituted an amended agreement between the parties. This amended agreement did not include a term that the facilities were repayable on demand. And for the purposes of these proceedings, as there was no breach of the amended agreement, there has been no default and there is no entitlement on the part of Seaconview to bring this action."

10. As is noted below in detail, the Facility Letter expressly states that the facility *'is repayable on demand'* by Ulster Bank/Seaconview. Accordingly, although it is not explicitly stated by Mr. Fagan in this affidavit, it must be implicit in this defence put forward on behalf of Chevas, that the effect of this agreement by Chevas to accept this sum of money was to convert the on-demand lending of the Facility Letter to term lending, such that Seaconview was thereby preventing from calling in the loan and so is not now entitled to the judgment which it seeks.

11. Although the claim therefore is implicitly made that the on-demand loan ceased to be such, it is relevant to note that nowhere in Mr. Fagan's affidavit does he allege that there was a written or oral agreement on the part of Seaconview that the demand nature of the loans would be altered. Nor is there any reference to the provisions of the alleged agreement between Seaconview and Chevas regarding in particular the length of the 'term' of the loan which was to replace the on-demand loan. The suggestion, that a simple acquiesce or agreement by a bank which is owed money by a lender, to accept a greater sum than the monthly repayments then due from a borrower who owes the lender money under the terms of the Facility Letter, amounts to a fundamental change in the nature of the loan, converting it from an on-demand loan, is not, in this Court's view, a credible defence.

12. The evidence, which Chevas provides in support of its claim, that the alleged agreement to accept €30,000 in monthly repayments amounted to a change in the nature of the loan from on-demand to not on-demand (or a term loan), is the wording of the paragraph entitled *'Repayment'* in the Facility Letter with Ulster Bank, which states:

> "The Facility is repayable on demand by the Bank. Without prejudice to the demand nature of the Facility, repayments covering interest only will continue to be made on a monthly basis until 31/3/2014, at which point it is expected that a satisfactory revised payment repayment structure will have been agreed with the Borrower."

However, if anything this clause proves the contrary proposition, namely that the loan was, and remained, a loan which was repayable on demand. This is because the opening sentence is quite explicit about the nature of the loan as being an *'on-demand'* loan. This fact is emphasised by the start of the second sentence which makes it clear that all references thereafter are to regarded as *'without prejudice'* to the demand nature of the loan. If words are to have the meaning intended for them, this must mean, in this Court's view, that the loan will remain on-demand and no other interpretation is reasonable in this Court's view.

13. To emphasise this point further, the clause then uses language which eliminates the possibility of there being a binding legal obligation on the part of Ulster Bank to terminate the on-demand nature of the loan, since the highly conditional phrase *'it is expected'* is used in connection with the possibility of a revised repayment structure being agreed.

14. It is also to be noted that if there was to be a possible agreement on re-structuring the loan with Ulster Bank, this clause provides for it to be agreed by 31st March, 2014. It is clear that no such agreement was reached by that date, since the alleged agreement or acquiesce by Seaconview to accept €30,000 in monthly repayments was reached in or around May, 2016 some two years later.

15. For all these reasons, this clause cannot, in this Court's view, provide support for the claim by Chevas that it had entered a binding agreement with Seaconview in or around May, 2016 that the loan ceased to be repayable on demand.

16. For its part, Seaconview disputes that any agreement was reached between Seaconview and Chevas to make monthly payments of €30,000, since it says that the agreement was for Chevas to pay €45,000. Mr. Brendan Farrell, on behalf of Seaconview, avers in his affidavit that:

> "An agreement was reached in May, 2016 for Defendants to make monthly payments of €45,000".

17. In addition, Seaconview claims that the fact that no agreement existed for the conversion of the on-demand loan was implicitly acknowledged by Mr. Fagan's signing of Chevas' Accounts as a director of Chevas. These Accounts were for the period ending 31st December, 2014, but were signed (in September 2016) only a few months after Chevas alleges it entered an agreement with Seaconview (in May 2016). Yet these Accounts expressly state:

> "The company lenders have notified the directors that the credit facilities are out of term and *they should be regarded as payable on demand*, however, the lenders have not instigated any enforcement procedures and are currently in

negotiations with other financiers to structure a refinancing package on an agreed basis.

Since period end overseas investment funds have purchased the company's loans from the original lender's and *formally withdrawn the long-term credit facility and the company is now in default of its formal terms*. The company will continue to require the forbearance of their lenders in the short *term not to enforce immediate repayment of its loans.* The directors continue to negotiate with other financial institutions to finance the company's debts and are confident that the company can reach a successful outcome." [emphasis added]

18. It is noteworthy that in these Accounts there is no reference to Seaconview having agreed with Chevas to amend the demand nature of the loan. Yet, before this Court, Chevas is alleging that an agreement was reached with Seaconview a number of months prior to these Accounts being signed, which ran completely contrary to these statements in the Accounts.

19. It is also relevant to refer to an email dated 17th August, 2017, which was sent on behalf of Seaconview to Mr. Fagan in which it is expressly stated that Seaconview:

> "will have little choice but to bring the units to the market on 1 October 2017 (in line with our commitment to [Bank of Ireland] not to enforce prior to 30 September 2017) either consensually with [Mr. Fagan] or otherwise."

20. This email in August of 2017 threatening Mr. Fagan of Chevas with enforcement of its security for Chevas' borrowings, like the Accounts, makes no reference to the alleged agreement by Seaconview in May of 2016 to change the on-demand nature of the loan, but on the contrary this email explicitly refers to the right of Seaconview to enforce its security. Yet, Mr. Fagan did not reply to this email to dispute Seaconview's right to enforce against Chevas, nor did he reply by referring to the alleged agreement from May 2016, an argument which he now pursues for the first time before this Court.

21. As is clear from the test set down by McGuinness J. in *Aer Rianta v. Ryanair* [2001] 4 IR 607 at 615, the key issue for this Court in deciding whether to grant a summary judgment is whether the defendant has a *'credible defence'*. Bald assertions that an agreement was reached to convert a loan from an on-demand loan, which assertions fly in the face of the documentary evidence is not sufficient to constitute a credible defence to a summary judgment application, and since this is what is occurring in this case, this Court rejects this ground put forward by Chevas to resist the summary judgment.

**Counterclaim**

22. Chevas also grounds its opposition to the summary judgment on the existence of a counterclaim by Chevas against Seaconview for the loss of title deeds. This claim is in the form of an assertion by Mr. Fagan that Ulster Bank or Seaconview lost the title deeds, which is countered by the affidavit of Mr. Brendan Farrell on behalf of Seaconview who states:

> "[Mr. Fagan] states at paragraph 27 that there is "*no doubt*" that the deeds were lost by Seaconview or Ulster Bank. In fact, there is no evidence to establish that Ulster Bank or Seaconview ever received the deeds in question. I am advised by Seaconview and believe that the deeds never came into its possession."

In the face of this conflicting evidence, the issue of whether the deeds have been lost by Seaconview cannot therefore be determined in this interlocutory hearing.

23. Crucially however Chevas alleges that it is entitled to damages for this alleged loss by Seaconview/Ulster Bank of the title deeds, because of the fact that Chevas was thereby unable to refinance its borrowings with Seaconview/Ulster Bank with another lender. This is the counterclaim, which Chevas claims is sufficient to prevent Seaconview being entitled to summary judgment. However absolutely no evidence is provided on affidavit to support this assertion. In particular, there is no reference to another lender withdrawing its offer of funding on learning of the absence of title deeds. Indeed there is no evidence on affidavit of even any amount of borrowing being sought or agreed from another lender, nor is there a reference to a named bank or financial institution even being approached or even a meeting with a bank official. This is simply a bare assertion.

24. This Court cannot therefore attach any particular significance to this claim by Chevas that it has suffered loss and has a counter claim arising from the allegation that Seaconview or Ulster Bank lost its title deeds.

25. Even if there was any evidence to support the assertion of the existence of a counterclaim, it seems clear that based on the decision of Clarke J. (as he then was) in *Moohan v. S&R Motors* [2008] 3 IR 650, the counter claim amounts to a claim which is independent from the claim by Seaconview for the money owed to it under the Facility Letter. This is because the alleged loss of Chevas' title deeds does not have any impact upon Chevas' ability to pay the loan, for which summary judgment is being sought, particularly where there is no evidence of any re-financing ever having been sought by Chevas. As an independent claim, it is clear from the *Moohan* case that judgment should be entered for the amount owed to Seaconview and the question of whether the judgment should be stayed, because of the alleged counterclaim, would then be dealt with under the principles set out in *Prendergast v. Biddle*, (unreported, Supreme Court, 31st July, 1957).

26. Applying these principles the apparent strength of the counterclaim and the financial position of the parties, and in particular the fact that there is no evidence to indicate that Seaconview would not be able to meet a claim for damages brought by Chevas for the alleged loss of the title deeds, should Chevas wish to make such a claim, would lead this Court to conclude that the summary judgment should not be stayed.

**Conclusion re: summary judgment**

27. For all of these reasons, this Court concludes that Chevas does not have a credible defence to the application for summary judgment and accordingly judgment against Chevas will be granted.

**INJUNCTION SOUGHT BY RECEIVER**

28. This Court has found that Seaconview is entitled to summary judgment so Chevas' reservations regarding the validity of the appointment of the Receiver (based on the existence of an alleged agreement with Seaconview to change the loan from an on-demand loan) are no longer relevant.

29. However, there remains the issue of a dispute over the common areas relating to the two blocks of the Royston Village apartments in Kimmage. Therefore the next issue to be considered is whether the Receiver is entitled to an injunction arising from this dispute about the common areas and in particular the fact that the Receiver is being prevented from accessing those apartments.

30. The background to the common areas dispute is that it transpires that when the Kimmage apartment blocks were being

developed, there were four blocks of apartments and Anglo Irish Bank plc ("Anglo") was involved in the financing of the acquisition of the property for the development. For this reason, Anglo acquired security over all the apartment blocks as well as security over the common areas. However, when Ulster Bank acquired security over its two apartment blocks it did not get security over the common areas and so it is not disputed that Seaconview does not have security over the common areas.

31. On the 15th September, 2017, New Vision, a company controlled by Mr. Fagan, acquired from Ennis Property Finance Limited (the successor to Anglo) its rights over the common areas. At this stage, Chevas would have been very well aware that enforcement proceedings, by Seaconview against Chevas in respect of the loan and security over the Royston Village apartments, were imminent (see email dated 17th August, 2017, to Mr. Fagan, referred to above). The response therefore was the acquisition of the common areas of the Royston Village apartments by New Vision, a company controlled by Mr. Fagan, which then licensed its rights over the common areas in favour of Chevas, which is also controlled by Mr. Fagan.

32. As a result, the defendants to the injunction proceedings now allege that the Receiver has no right to use the common areas to the Royston Village apartments and they therefore claim that the Receiver cannot access the two Royston Village apartment blocks. If correct, this means that the Receiver appointed by Seaconview, although it is owed €9 million approx. which is secured by the two Royston Village apartment blocks, would be prevented from accessing those two apartment blocks. While it will be a matter for the full hearing of this action to determine this matter, if this claim were to be successful it would seem to this Court to be a very neat way for a borrower to borrow considerable funds from a bank and then stymie the value of the security for those funds by ensuring that the bank, which owns the properties as security, cannot use them without the consent of the borrower, who owns the common areas.

33. It is also relevant to note that sworn evidence was provided by Mr. Brendan Farrell on behalf of Seaconview that the defendants had written to the tenants in the Royston Village apartment blocks telling them that the Receiver was not validly appointed and instructed them not to pay the rent to the Receiver. This has not been denied by the defendants to the injunction proceedings. It is also the case that the defendants have not denied threatening to evict tenants who fail to continue paying rent to their existing landlord, rather than the Receiver. Similarly, the defendants have not denied that they have prevented the Receiver's agents from gaining access to the Royston Village apartments.

34. In making its decision whether to grant an interlocutory injunction against this factual background, this Court relies on the Court of Appeal judgment in *Palaceanne Management Ltd v. AIB plc* [2017] IECA 141. In that case, AIB held security over two apartments in an apartment block and had obtained an order for possession from the Circuit Court. However the management company of the apartment block claimed that AIB had no right of access over the common areas, thereby ensuring that the apartments were landlocked. At para. 64, Ryan P. concludes:

> "I am also of the view that a right of way of necessity or by implication of law would arise in the circumstances […].
>
> The trial judge said that the arrangements in this case were typical and it can scarcely be suggested that it is unusual for a developer to borrow on foot of a mortgage of retained apartments. It would therefore be extremely surprising in my view if it happened that [AIB] suffered the extreme disadvantage that is proposed in this case. It is nothing less than the quarantining of property to which [AIB] is entitled.
>
> […]
>
> In the events that have happened in this case, I think it is irresistible that a right arises by necessity or by implications of law or under the rule in Wheeldon v Burrows (1879) 12 Ch. D. 31."

Accordingly, the Court of Appeal found that there was a right of way of necessity over the disputed common areas.

35. In reliance on this judgment, this Court concludes first that it is arguable that Seaconview has a right of way of necessity over the common areas and secondly that pending the full hearing of the action, Seaconview should not suffer the extreme disadvantage referred to by Ryan P. in *Palaceanne*, which would amount to the quarantining of property to which Seaconview is *prima facie* entitled, pending the hearing of the case.

36. It is for this reason that this Court concludes that the balance of convenience supports an injunction prohibiting the defendants to the injunction proceedings from interfering in any way with the access of the Receiver to the two blocks of apartments as well as unlawful approaches to tenants regarding the non-payment of rents to the Receiver.

37. It seems clear to this Court that if at the full hearing of this action the Receiver was to be prevented from using the common areas, then damages are an adequate remedy for Chevas and counsel for Seaconview stated that it was in a position to meet any future damages claims.

38. On the other hand, Chevas has a very significant undischarged debt due to Chevas and damages might not be an adequate remedy if the interlocutory injunction was refused and Seaconview was successful at the trial of the action.

39. This Court will hear from counsel regarding the precise form of the orders.