



THE COURT OF APPEAL

Neutral Citation No. [2021] IECA 282

Court of Appeal Record No. 2018/332

High Court Record No. 2017/11390 P

**Whelan J.
Noonan J.
Pilkington J.**

BETWEEN:

**RODERIC O'BEIRNE
AND
CORMAC O'BEIRNE**

RESPONDENTS/PLAINTIFFS

- AND -

BANK OF SCOTLAND PLC

FIRST NAMED DEFENDANT

AND

PENTIRE PROPERTY FINANCE DAC

APPELLANT/SECOND NAMED DEFENDANT

Judgment of Ms. Justice Máire Whelan delivered on the 27th day of October 2021

Introduction

1. This is an appeal from the interlocutory orders of the High Court (Ní Raifeartaigh J.) made on 10 July 2018, perfected on 25 July 2018, restraining the appellant, Pentire Property Finance DAC ("Pentire"), from acting on foot of a letter of demand of 8 December 2017 to enforce security held over certain of the respondents' properties including by the appointment of a receiver. Costs were awarded to the respondents with execution stayed pending the determination of the proceedings. Pentire seeks to set aside the interlocutory orders and that this court make an order refusing the application of the respondents for interlocutory injunctive relief as brought by way of notice of motion which issued on 14 December 2017.

Background

2. The respondents are chartered surveyors and are engaged in business as property investors and managers.
3. By loan facility letter dated 11 September 2003, Bank of Scotland (Ireland) Limited ("BOSI") advanced a loan facility in the amount of €630,000 to the respondents secured by a deed of mortgage and charge dated 6 February 2004 over Unit Nos. 4, 5, 6 and 7 at 333/337 Le Fanu Road, Lower Ballyfermot Road, Dublin 10 ("the secured property"). The title deeds (comprising 35 muniments in all) to the secured property were deposited with BOSI's solicitors at that time.
4. By virtue of an order of the Scottish Court of Session made pursuant to the UK Companies (Cross-Border Mergers) Regulations 2007 and an order of the High Court pursuant to the European Communities (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008), the business of BOSI became vested in the first defendant, Bank of Scotland plc ("BOS"), with effect from 31 December 2010.
5. By loan purchase deed dated 29 November 2014 and deed of conveyance and assignment dated 20 April 2015, the rights, title, interest and benefits of BOS in the loan facility, facility letter (as amended) and mortgage were assigned to Pentire. The respondents were informed by BOS that it had agreed to sell its rights under the loan and security to Pentire by letter dated 19 December 2014. By letter dated 20 March 2015 from BOS, the respondents were informed that the sale was completed and would take effect from 20 April 2015.
6. Originally the loan facility was for a term of three years with interest payable quarterly and the principal repayable at the end of the term. However, the terms of the loan were varied and extended from time to time including by letter dated 19 February 2007 from BOSI to the respondents and by letters dated 18 January 2011 and 25 November 2011 from BOS to the respondents.
7. By letter dated 20 November 2012 from BOS, the term of the loan was extended by nine months up to 31 July 2013. It was a term of this amendment that if the loan was not paid by said date, it would attract a surcharge rate of 6%.
8. By letter dated 16 October 2013, BOS agreed to forebear from seeking repayment until 30 April 2014 to allow the respondents time to raise funds to repay the loan on the condition that the respondents paid to BOS a minimum sum of €3,595 per month up to that date and that the loan be repaid by 30 April 2014.
9. By letter dated 21 August 2014 from BOS's agent, Certus, the respondents were notified that their account had expired and that the forbearance period had ended. The balance on the account was stated to be €342,574.62.
10. It is clear from the papers and exhibits that from 2015, the respondents were desirous of refinancing their loans with another institution and redeeming the mortgage with Pentire. Following the transfer of the loan to Pentire in 2015, the respondents continued to pay

€3,595 per month to Pentire. They sought to agree a settlement with Pentire's agent, Pepper, without success. The respondents were informed that a balance of €321,981.60 was due and owing and that Pentire was insisting on the full amount of the loan being discharged.

Efforts to redeem mortgage

11. In or about 2 June 2015, the respondents instructed their solicitors to complete refinancing with Bank of Ireland, from whom they had a loan offer of €350,000. The secured property was intended to be subject of a fixed legal charge in favour of Bank of Ireland. However, in the course of investigation of title, it transpired that Pentire was unable to produce 17 of the 35 title deeds which had been deposited with BOSI's solicitors at the time of creation of the mortgage in 2004. The respondents' solicitors raised the issue of lost title deeds with Pentire *inter alia* in correspondence dated 18 September 2015, 13 November 2015, 18 November 2015, 15 December 2016 and 25 January 2017. A feature of this case is the stance exhibited by Pentire to its ongoing inability as mortgagee over several years to provide all the muniments of title to the respondents to enable refinancing of the loan to take effect expeditiously and its apparent non-engagement with the ensuing legal and practical consequences in a constructive manner. It does not deny that the said deeds are missing. It does not assert that any blame attaches to the respondents for their loss. It offers no explanation for their non-availability.
12. As a result of the non-availability of title deeds which included two documents comprising the root of title, and the inability of the respondents to ascertain their whereabouts, the respondents were required to obtain title bond insurance to enable refinancing to progress. The insurer ultimately approved the policy on 16 February 2017. The policy commencement date stated on its face was 13 November 2017. The bond provided was to the satisfaction of Bank of Ireland in a context where the underlying assets to secure refinancing were worth about €1 million and the sum being advanced was €350,000.
13. Between 17 February 2017 and 7 June 2017, the respondents' solicitor corresponded with Pentire's solicitors in an effort to resolve two key issues; namely, the loss of the title deeds and the surcharge interest which, the respondents contended, had been levied incorrectly during the years when the deeds were lost or not forthcoming. The resolution of the surcharge and lost deeds issues was considered material insofar as the respondents asserted the issues were relevant to the calculation of the correct redemption figure to which Pentire was entitled. It is noteworthy that that position accorded in large measure with the views of Ní Raifeartaigh J. in her ruling and judgment under appeal.

Events of November to December 2017

14. On 21 November 2017, Bank of Ireland confirmed to the respondents that the refinancing was complete subject to obtaining redemption figures from Pentire and an appropriate deed of release.
15. By email dated 23 November 2017, Pentire's solicitors gave an ultimatum to the respondents, affording them until 5pm on 1 December 2017 to redeem the loan in full and that enforcement action would commence should they fail to do so.

16. On 24 November 2017, the respondents' solicitors confirmed to Pentire's solicitors that the refinancing was complete and requested a draft deed of release and a redemption statement setting out the redemption sum and particulars for same. Pentire's solicitors advised by email later that day that the redemption figure as of that date was €274,608.96, that interest was continuing to accrue in the amount of €61.24 per day and that legal fees arising from the demand for the return of title deeds were €1,850.00 plus VAT.
17. By letters dated 28 and 30 November 2017, the respondents' solicitors sought copies of documentation upon which Pentire intended to rely to establish it had acquired BOSI's rights, title and interests in the loan. In the later letter, the respondents' solicitors disputed Pentire's entitlement to levy surcharge interest.
18. By email dated 1 December 2017, Pentire's solicitors advised that, if the respondents maintained their position on the issue of surcharge interest, Pentire would commence enforcement and *inter alia* appoint a receiver. It will be an issue for the trial judge at the plenary hearing to determine whether in all the circumstances this constituted a valid and bona fide exercise of the right to appoint a receiver under the terms of the mortgage or, as the respondents contend, an improper exercise of that power. I am satisfied, for the reasons stated hereafter, that this constitutes a fair or serious question to be determined at the trial of this action.
19. In response, the respondents' solicitors asserted that Pentire's entitlement to charge penalty or surcharge interest was a genuine issue which the respondents were entitled to raise and, if necessary, litigate. They further noted that damages arising from the loss of the title deeds would have to be reckoned in any computation of the redemption amount due to Pentire. The respondents' solicitors sought an undertaking from Pentire that it would not take any steps to enforce the loan by appointing a receiver or otherwise. No such assurance was forthcoming.
20. By letter dated 8 December 2017, Pentire made a formal demand for repayment in the sum of €271,869.35 and all the interest thereon which was accruing at a rate of €60.85 per day.

Pleadings

21. The respondents issued a plenary summons on 14 December 2017, seeking *inter alia*:
 - 1) an order restraining Pentire from acting on foot of the letter of demand of 8 December 2017 and enforcing any security including by the appointment of a receiver over the interest of the respondents in the secured property;
 - 2) a declaration that the arrears interest debit levied by BOS from the respondents' loan account between 6 August 2013 and 6 April 2015 is in the nature of a penalty, that the amount levied should be set against the capital and taken into account in the assessment of the sum required to redeem the loan;
 - 3) a declaration that the surcharge interest demanded by Pentire and paid by the respondents since in or about 2 June 2015 is in the nature of a penalty, that the

amount levied should be set against the capital and taken into account in the assessment of the sum required to redeem the loan; and,

- 4) further or in the alternative, a declaration that the defendants or either of them are not entitled to demand surcharge interest in circumstances in which they are unable to comply with the terms of the loan, mortgage and/or s. 16(1) of the Conveyancing Act 1881 (44 & 45 Vic. c. 41).

Interim injunction hearing of 14 December 2017

22. The respondents' application for interim relief was heard before the High Court (Costello J.) on 14 December 2017. The respondents sought interim orders restraining Pentire from acting on foot of the letter of demand of 8 December 2017 and enforcing any security held including by the appointment of a receiver over the respondents' interest in the secured property.
23. The application was grounded on the affidavit of the second named respondent sworn on 14 December 2017. At para. 59, the deponent averred that the enforcement of the loan facilities and security would have a significant, adverse and detrimental effect on the respondents' business particularly in respect of other financial and commercial arrangements which they were in the process of negotiating and completing. He deposed that at all times up to the date of swearing, the respondents had made monthly repayments of €3,595.
24. Unusually, it is necessary in this appeal to consider the *ex parte* application made on 14 December 2017 in some detail since a key allegation by Pentire at the hearing of the interlocutory application and in this appeal was that the interim injunction had been improperly obtained and that the respondents were guilty of material non-disclosure in the course of the said application. That assertion was rejected by the trial judge. It is a central ground of appeal. A consideration of the *ex parte* application transcript indicates that counsel for the respondents referred the court to the grounding affidavit of the second named respondent. Counsel then described the history of the loan between the respondents and BOSI and BOS, including the history of payments and how the loan devolved to Pentire in 2015.
25. Counsel detailed the attempts of the respondents to obtain refinancing from Bank of Ireland beginning in 2015. He indicated that in the course of those attempts, it was discovered that seventeen deeds from the mortgaged properties were missing, including two that went to the root of title. As a result, it was necessary, he said, for the respondents to obtain legal contingency insurance in order to refinance which, due to the insurance company requiring statutory declarations from third parties, took until August 2016. Counsel noted that the refinance was not obtained until November 2017.
26. After explaining that Pentire had expressed an intention to enforce the loan and security if same was not redeemed by Friday 1 December, counsel for the respondents stated that there was a dispute over the amount owed on foot of the facility; Pentire maintained that €272,000 was due and the respondents contended that €211,000 was owed. The

respondents contended that the figure claimed by Pentire included unenforceable penalty charges and surcharge interest.

27. In response to a question from the court, counsel clarified that under the loan contract BOS could levy surcharge but it was the respondents' contention that a term providing for an additional 6% by way of default interest was unenforceable. It was contended that Pentire charged interest when it was not in a position to enable the respondents to redeem the loan since it did not have the title deeds and that either Pentire or BOS had caused delays in the redemption of the mortgage.
28. At p. 5 of the transcript, lines 1 to 2, counsel for the respondents confirmed that they were refinancing and the money was "there waiting to go, but [Bank of Ireland] won't release it until they get a deed of redemption". He further confirmed that the amount of loan finance that had been obtained was sufficient to redeem the mortgage. Costello J. expressly stated that she did not need to know how much money Bank of Ireland had agreed to lend (p. 5, lines 8 to 11).
29. In determining the application, Costello J., sensibly, looked at possible alternative approaches to resolve matters and enquired whether it would be possible to draw down €275,000 from Bank of Ireland to redeem the mortgage and thereafter resolve the disputed sum by pursuing Pentire for the difference or whether an escrow or lodgement to a joint account might resolve issues on an interim basis. Counsel posited that the difficulty with such suggestions was that the respondents were property managers and investors who were refinancing other deals and that Pentire had indicated that it would not enter into negotiations regarding the redemption figure. He indicated that a letter of demand had been sent the previous Friday as the first step in the process of enforcement which would include the appointment of a receiver.
30. An interim order was granted restraining Pentire, its servants or agents from acting on foot of the letter of demand and enforcing any security held including by the appointment of a receiver over the interest of the respondents in the secured property until 20 December 2017. The respondents were granted liberty to serve short notice of the interlocutory application and interim order by telephone and email. Costs were reserved.

High Court hearing of 20 December 2017

31. On 20 December 2017, following an *inter partes* hearing, Costello J. made further orders including that the respondents:
 - 1) continue to make repayments of €3,595 per month pending the determination of the interlocutory application; and,
 - 2) permit Pentire's inspection of the secured property.

Pentire by then was in possession of the respondents' grounding affidavit but did not assert that material non-disclosure had taken place at the *ex parte* application. The motion was adjourned until Tuesday 16 January for mention. Thereafter, even when the DAR transcript

of the *ex parte* hearing was to hand, no application was ever brought by Pentire to Costello J. to vacate her orders on the basis of material non-disclosure or otherwise.

Proposal of 13 March 2018

32. The respondents' application for interlocutory relief was listed to be heard on 14 March 2018. In the evening of 13 March 2018, solicitors for Pentire wrote to their counterparts in open correspondence proposing an interim solution ("the proposal"). Pentire contends at Ground 3 in this appeal that the trial "judge erred...in her treatment of the proposal" and asserts that the court initially favoured the proposal as "an appropriate method by which to dispose of the application...only to reverse that finding without good reason". It is necessary to consider the proposal in its context in some amount of detail. The letter stated:-

"Our client's clear position on affidavit is that there is no basis for the interlocutory relief sought by your clients. This position is adopted in circumstances where your client does not dispute the amount due and owing to our client, save for the alleged charging of surcharge interest for which damages are manifestly an adequate remedy. Your clients have also raised an issue in relation to lost title deeds, for which they have obtained the necessary bond, at a cost of approximately €5,000.00. For the avoidance of any doubt, our client denies any liability to your clients in respect of these matters."

On that basis, the following open proposal was made:-

- "1. Your clients will draw down the loan for which they have approval from Bank of Ireland within seven days from the date of this letter;
2. The sum of €266,820.37 being the redemption figure as at today's date, will be paid into [Pentire's solicitors'] client account upon receipt by your clients of funds from Bank of Ireland. The daily accrual rate is €59.65;
3. The sum of €50,000.00 towards the costs of the proceedings, in respect of which our client is currently fully secured, will be paid into your firm's client account upon receipt by your clients of funds from Bank of Ireland and will be held in that account pending the determination of the proceedings;
4. Upon confirmation that each of the payments at paragraphs 3 and 4 [sic] above have been made, our client's security over the Secured Property will be released;
5. We will hold the sum of €86,467.99 (being the amount of the disputed surcharge interest) in escrow in an account separate to our client account pending the determination of the proceedings;
6. The injunction application will be struck out with costs to our client, and the parties will plead out the case in relation to the issues in dispute; and

7. That all parties would agree that the proceedings should be case managed in the Chancery List towards an early trial.”

The letter makes no express reference to the missing muniments of title and it is to be inferred that Pentire’s position was that no aspect of any loss suffered or expenses incurred by the respondents in relation to same was reckonable in the determination of the correct redemption figure for the mortgage. That, however, was a key issue in dispute between the parties.

33. On the same day, the respondents’ solicitors replied to the above correspondence, reiterating the respondents’ arguments for injunctive relief. Without prejudice, they advised that they had forwarded a copy of the proposal to the respondents and were awaiting their instructions.
34. The following day Pentire’s proposal was formally rejected by the respondents.
35. The case was not reached on 14 March 2018 and was relisted for 25 April 2018.
36. By letter dated 18 April 2018, Pentire’s solicitors sought confirmation that the Bank of Ireland refinance was still available to the respondents. If so, it was contended that “there is no good reason for which a compromise cannot be reached which would resolve the interlocutory application”. If not, Pentire contended that the premise of the respondents’ application had fallen away and it should be withdrawn. The respondents were advised that if documentation confirming the continued availability of the Bank of Ireland refinance was not furnished to Pentire by 5.30pm on Friday 20 April 2018, Pentire would apply to vacate the order for interim relief of 14 December 2017 on the grounds that the purported basis for the relief sought, being to facilitate the respondents in refinancing their borrowings, was invalid.

High Court interlocutory hearing

37. The matter came on for hearing on 25 April 2018 before Ní Raifeartaigh J. It was heard over several days; 25 and 26 April, 17 May, 8 and 21 June and 10 July 2018.
38. Before counsel for the respondents had opened the application, counsel for Pentire questioned the necessity for the hearing in light of the proposal. Counsel for the respondents objected to this approach but the court permitted counsel for Pentire to make his submissions.
39. Pentire’s proposal was handed into court but was not formally opened. Counsel for Pentire asserted that it accorded with the suggestion made by Costello J. at the interim hearing. It is appropriate to observe that Costello J. at the interim hearing made no mention of security for costs or as to the proper allocation of costs in relation to the interim application, however, and the proposal went far beyond her observations. Counsel for Pentire characterised the proposal as follows:-

“...in effect, that the Bank of Ireland loan would be drawn down...in an amount of €350,000, so it significantly exceeds the redemption figure in this case. Then it was

suggested that €266,000 would be paid because in fact the redemption figure had gone down slightly since December. There were proposals made in relation to how costs would be dealt with because as the matter stands...it is common case the properties in the proceedings are worth €1 million, or certainly it is not disputed on my side that that is what they're worth, and in circumstances where they would currently be fully secured in relation to any costs of the proceedings, a proposal was made in relation to that. It was indicated the security would be released and that the disputed sum...would be held in escrow by [Pentire's solicitors] pending the determination of proceedings, the injunction would be struck out and the parties would agree that the matter should be case managed towards an early trial." (p. 4, line 27 to p. 5 line 6)

40. The High Court judge indicated that she would proceed to hear the matter, noting Pentire's submission, and should the hearing subsequently be shown to have been unnecessary, there would be costs implications.
41. The hearing continued the following afternoon. At p. 1 of the transcript, lines 17 to 21, it was confirmed that Pentire's case against the application had expanded from the issue of non-disclosure to the adequacy of damages.

Initial ruling of 17 May 2018 – High Court judge's articulation of *via media*

42. The *ex tempore* judgment began by outlining the facts of the proceedings. The trial judge characterised her understanding of the Pentire proposal as an alternative to an injunction restraining the appointment of a receiver pending trial of the action thus:-

"Essentially, this proposal is that they suggest that the plaintiffs should avail of the Bank of Ireland refinance available to them, that Pentire would be released from the arrangements, leave the plaintiff in possession of the properties, leave the matter of the surcharge and the title deed issues and the correct calculation of the redemption figures to the trial of the action and leave an appropriate amount of money in an escrow account pending the court decision in relation to that matter." (p. 4, lines 13 to 22)

The court observed that such a proposal had been suggested by Costello J. and was subsequently taken up by Pentire. The court then continued to outline the chronology of events. There appears to have been no objection to the judge's characterisation of her understanding of the proposal which was devoid of any reference to costs or security for Pentire's costs.

43. The court considered Pentire's arguments and its submission that the court should not grant an injunction when there was a reasonable alternative proposal on the table.
44. The court noted that the respondents' position was that Pentire had lost the title deeds and delayed in disclosing this fact and that they were legally entitled to a reduction in the redemption figure by reason of that loss. It was noted that the respondents contended that the surcharge interest amounts to a penalty because it is a generic figure not calculated

with reference to any loss of the lender and, further, were contending that Pentire was not entitled to charge default interest when it was itself in default, having lost the title deeds, since, the argument went, that loss was causing the delay in redeeming the loan. The court noted the further submission that Pentire's letter of demand issued in December 2017 was invalid, improperly motivated and was triggered by legitimate demands that the respondents be told the correct redemption figure.

45. In relation to the first of the two issues arising, *i.e.* whether there was sufficient disclosure at the hearing on 14 December 2017, the court noted that Pentire relied on four allegations as constituting non-disclosure at the said hearing; namely, that there had been:

- 1) a failure to disclose various details regarding the Bank of Ireland refinancing offers, including the dates of both facility letters, the amount being offered, the interest being offered and other details;
- 2) a failure to disclose the fact that title insurance had been obtained in February 2017;
- 3) selective use of *inter partes* correspondence and a failure to tell the court that the issues of title deeds and surcharge interest were not raised "until very late in November 2017"; and,
- 4) a failure to disclose that the respondents obtained approximately €40,000 rental income from one of the properties which was not being passed on to Pentire despite the fact the respondents were in default.

46. The judge confirmed that, having read the DAR transcript of the December hearing, she rejected Pentire's claim that there had been any material failure to disclose, holding:-

"While further details could have been put before the court, the question is whether there was material non-disclosure. It seems to me that the essential points relevant to an application for an interim injunction were put before the court, that there was an offer of refinancing from Bank of Ireland in place, that the borrowers had raised issues about surcharge and compensation for loss of title deeds, that the lenders were about to appoint receivers and had not responded to the correspondence about surcharge and compensation and that the properties were, according to the plaintiffs, an integral part of their business portfolio." (p. 13, lines 1 to 13)

As considered hereafter, I am satisfied that her assessment and ruling on the material non-disclosure point in light of the evidence was correct and in accordance with the relevant jurisprudence.

47. The court considered that an essential point leaning against the grant of an interim injunction was the availability of refinance. It noted that Costello J. had not only been made aware of this but immediately saw that this could lead to pretrial arrangements whereby an injunction might not be necessary and the receivership/sale could be averted. It was noted that these possibilities had been discussed with the respondents' counsel during the *ex parte* hearing.

48. The court found that the most material matter weighing against the injunction – namely the Bank of Ireland refinancing – had been before the court at the *ex parte* stage.
49. The court considered the general principles governing the grant or refusal of injunctions. The judge was satisfied that there were fair issues to be tried. These were essentially identified as:
- 1) the validity of the demand letter;
 - 2) the right to have a precise redemption figure identified;
 - 3) whether the respondents were entitled to insist that calculation of the true redemption figure required deductions/set off in respect of the surcharge sums paid or a sum referable to the loss of the title deeds;
 - 4) whether the surcharge was a penalty in all the circumstances; and,
 - 5) whether Pentire was ever entitled to impose the surcharge in light of the lost deeds.
50. The court then turned to what it viewed as the critical question: the adequacy of damages. It noted that the respondents' position was that their property rights were in issue; if a receiver was appointed and the properties sold, it would be at a reduced value because of the lost title deeds and there would be reputational damage involved for them.

Via media of trial judge

51. The judge characterised Pentire's position as being that under the proposal "the issue of property no longer arises" and the court did not simply have to choose between the appointment of a receiver, on the one hand, or the grant of an injunction, on the other, but that there was, in her words, a "*via media*" which resolved the situation.
52. The judge considered that, in circumstances where, in her view, there was an alternative on the table, the court in its discretion should not grant the injunction. The court considered that the respondents may have rejected the proposal because matters became inflamed from November/December 2017 onwards and the relationship between the parties deteriorated. The court noted that Pentire contended that the respondents had an attitude of stalling; alleging "an eleventh hour change of position", a "bad faith application to court" on 14 December 2017 involving non-disclosure, an issue with the respondents' solicitor failing to return one of the title deeds and an incident with regard to the delivery of the schedule on 22 December 2017 in accordance with the court's deadline. It was noted that Pentire had made serious allegations against the respondents' solicitor which, in the court's view, were unwarranted and not withdrawn until the trial. Nonetheless, the court viewed the proposal as reasonable.
53. The court had agreed "up to a point" that the respondents had a *bona fide* legal point about the loss of title deeds and the surcharge interest (p. 16, line 29). She noted that when the injunction was obtained, the respondents sought alternative dispute resolution which was declined by Pentire.

54. The court concluded:-

"So it seems to me that in this case unusually, the issue is not a straightforward question of allowing the enforcement process to take its normal progress or whether I should grant an injunction. If the choice were that straightforward choice, I would have no hesitation in granting the injunction. The sole reason that I have decided not to grant the injunction is because of the alternative that is on the table and it seems to me, in those circumstances, it cannot be said that damages would not be an adequate remedy." (p. 17, lines 22 to 29 and p. 18, lines 1 and 2)

55. The judge directed that the existing injunction would continue for four weeks until the "for mention" date, at which point the court anticipated discharging same, enabling the drawdown of Bank of Ireland funds in the interim. She noted that the mortgage would be redeemed and a figure representing an estimate as to compensation for the loss of the title deeds and surcharge interest would be put in escrow to be litigated in due course.

High Court hearing of 8 June 2018

56. The court heard submissions on costs and the appropriate figures to be held in escrow pending the determination of the proceedings. When it transpired that there was a significant dispute over the appropriate amount to be held in escrow, the parties were encouraged to agree "ballpark" (p. 69, line 11) figures. It is clear that she had not fixed the sum to be held in escrow. The judge indicated that she would hear evidence if the parties could not come to an agreement. Judgment on costs was reserved to 21 June 2018. This factor is consistent with the judge not having adopted any provisions of the Pentire proposal directed to costs. The approach of the trial judge is more consistent with what she had characterised as "a *via media*" (transcript of 17 May 2018, p. 16, line 2) which did not simply contemplate adopting all terms of the proposal but rather indicated a willingness to adopt significant aspects of it subject to certain modifications, as outlined by her, pending the trial.

High Court hearing of 21 June 2018

57. The matter came on for judgment on the issue of costs on 21 June 2018. The High Court judge began by explaining that it had become clear to her at the previous hearing that there was a "significant divergence" between what the court had envisaged and what Pentire's proposal was, in particular on the issue of costs. The judge accepted Pentire's submission; that it was not open to the court to, effectively, direct a course of action that Pentire had not proposed or did not agree to.

58. After reviewing the history of the case, the papers, the DAR of the first hearing and her own notes from the previous hearings, the High Court judge considered that the position ought to be clarified. She stated that she had indicated in her ruling that the essential ingredients to the *via media* were three elements:

- 1) the drawdown by the respondents of the redemption amount (being approximately €261,000 to €270,000) from Bank of Ireland;

- 2) the placement of a portion of that sum in an escrow account with the portion being made up of two notional figures; the first representing the amount of disputed surcharge and the second to represent the loss arising from the loss of title deeds (emphasis added); and,
 - 3) the release of the secured property by Pentire to the respondents.
59. The court explained that, at the prior hearing, it had become apparent that Pentire understood the court's proposal to mean that the entire sum of €350,000 should be drawn down by the respondents and that there was a significant extra element to Pentire's proposal; namely, that a substantial sum of money would be payable towards the costs of the proceedings and held in a solicitor's account.
60. The court recorded that when the court's proposal was clarified at the previous hearing, counsel for Pentire had indicated considerable concern and said that Pentire had always been of the view that a certain amount should be put aside to cover the costs of the proceedings. Counsel had referred to clause 18 of the mortgage in particular.
61. The court confirmed that the proposal of 13 March 2018 had been handed up at the hearing of 25 April 2018. It was stated that the letter was clear that there was a stipulation as to costs. The court further noted that when counsel for Pentire detailed the proposal at the hearing of 25 April 2018, he was, effectively, referring to the proposal letter of 13 March 2018 which was the only detailed proposal in writing. It noted that there was a subsequent letter of 18 April 2018 which invited the respondents in a general way to engage but the court believed that it was the proposal of 13 March 2018 which was put before the court on 25 April 2018.
62. In circumstances where the proposal advanced by Pentire was on a particular basis and "there was a significant divergence between" (p. 2, line 3) what the court had in mind and what Pentire was agreeing to, the court held that it did not have the power to direct that the arrangement be pursued because what the court was directing was not on all fours with what Pentire was prepared to do. In those circumstances, the court considered that it only had the option to either grant or refuse the injunction.
63. In all the circumstances, the court indicated that it was satisfied that it should grant the injunction. The court stated that the issue of costs should not be part of the *via media*. Counsel for Pentire requested to put the matter back for a short period in order to clarify his instructions in relation to the *via media*.

High Court hearing of 10 July 2018

64. Counsel for Pentire informed the court that Pentire was not prepared to alter its proposal as the trial judge had suggested and would accept the ruling on the injunction. In those circumstances, the judge indicated that she would grant an interlocutory injunction and an order for party and party costs in favour of the respondents.
65. With regard to the award of costs to the respondents, the court's reasoning included her view that Pentire had behaved unreasonably with regard to a number of matters, including

its general refusal to engage at all prior to the proposal letter of 13 March 2018 which, the court noted, was sent very close to the first hearing date. The judge considered "that a very unreasonable approach had been adopted" by Pentire to the loss of title deeds and that "a very non-compromising letter with quite an aggressive tone" was sent by Pentire's solicitors stating that the loss of title deeds had "nothing to do with them" (p. 8, lines 27 to 30, emphasis added). The court opined that "if somebody receives title deeds they have a duty in law to keep those safely and for someone to complain about it and be told 'Well, it's not our problem' does not seem to me to strike the right tone and that tone continued throughout the matter" (p. 9, lines 2 to 6).

66. The court expressed disapprobation of Pentire's questioning of the *bona fides* of the respondents' legal team in moving the *ex parte* application on 14 December 2017 and its allegations on affidavit against the respondents' solicitor, which the court found were "entirely unwarranted...and were not withdrawn until I raised the issue with [Pentire's] legal team" (p. 9, lines 11 to 13). The court rejected Pentire's characterisation of its own conduct as being on a par with the respondents' conduct in the case. The court expressed particular disapprobation that allegations had been made in a sworn affidavit to the effect that an officer of the court had failed to comply with a court order. The court noted that there was extensive explanation on affidavit by the respondents' solicitor for why the documents were delivered late by reason of the Christmas vacation and so forth. She noted that it was not until the court raised the issue with counsel that Pentire confirmed it was not standing over those allegations.
67. The court concluded that while there were offers on the table from 13 March 2018 the overall approach of Pentire was unreasonable and unduly aggressive. This was a finding of fact supported by evidence.
68. The court's determination on costs is at p. 10, lines 18 to 24:-

"What I awarded was not ultimately what either side was arguing but again in a very general sense it seems to me that the plaintiff won in the sense that it got something more than what was on offer from the defendant and in that broad sense it seems to me that the costs should favour the plaintiff in relation to that."
69. The order of the court, perfected on 25 July 2018, restrained Pentire, its servants or agents from acting on foot of the letter of demand of 8 December 2017 and enforcing any security held including by the appointment of a receiver over the interest of the respondents in the secured property. It was further ordered that Pentire pay to the respondents the costs of the application generally to include the court hearing of 8 June 2018 including reserved costs (with exception of the hearing in respect of 27 February 2018) to be taxed in default of agreement. The execution of the costs order was stayed pending the determination of the proceedings.

Notice of appeal

70. By notice of appeal dated 3 August 2018, Pentire contended that the High Court judge erred in fact and/or in law in:

- 1) finding that the respondents had not been guilty of material non-disclosure when making the application for interim injunctive relief;
- 2) finding that damages were not an adequate remedy for the respondents;
- 3) her treatment of the proposal made by Pentire to the respondents in open correspondence to dispose of the application for interlocutory injunctive relief;
- 4) finding that the claim of the respondents gave rise to a necessity for interlocutory injunctive relief;
- 5) her treatment of the validity of the letter of demand dated 8 December 2017;
- 6) her treatment of the alleged loss of the title deeds to the secured property;
- 7) her treatment of the issue of surcharge interest;
- 8) determining that the balance of convenience lay in favour of granting interlocutory injunctive relief; and,
- 9) awarding the full costs of the application for interlocutory injunctive relief to the respondents.

71. The respondents opposed the appeal in its entirety. Comprehensive written submissions were lodged on behalf of the parties and detailed oral submissions were made on their behalf; all of which are taken into account in reaching the determination herein.

Standard of review on appeal

72. In *Lismore Builders Ltd. (in Receivership) v. Bank of Ireland Finance Ltd. and Others* [2013] IESC 6 MacMenamin J. considered the circumstances in which an appellate court might review an order made by a High Court judge in the exercise of her discretion in the following manner:-

“...Although great deference will normally be granted to the views of a trial judge, this court retains the jurisdiction of exercising its discretion in a different manner in an appropriate case. This is especially so, of course, in the event there are errors detectable in the approach adopted in the High Court. The interests of justice are fundamental. This is clear from the judgment of Geoghegan J. in *Desmond v. M.G.N. Ltd.* [2009] 1 I.R 737...” (para. 4)

73. That approach was adopted by this court in *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27 wherein, at para. 79, Irvine J. (as she then was) observed:-

“...while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the

appellate court, untrammelled by any *a priori* rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed.”

74. At paras. 22 and 23 of *Lawless v. Aer Lingus Group plc* [2016] IECA 235 Irvine J. (as she then was) further outlined the approach to be taken by an appellate court:-

“...This is not a re-hearing of that application and that being so this court should afford significant deference to the decision in the High Court. It is nonetheless clear that if an appellate court can detect a clear error in the manner of the approach of the High Court judge it is of course free to interfere with that decision. Further, even if the appellant cannot identify such an error the appellate court may nonetheless allow an appeal if satisfied that the justice of the case can only be met by such an approach. The Court is able to do this because it has available to it all of the affidavit evidence that was before the High Court at the time the original interlocutory decision was made. The role of the appellate court in this regard is set out in the decision of this court in *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27 and by MacMenamin J. in *[Lismore Builders Ltd. (in Receivership) v. Bank of Ireland Finance Ltd. and Others]* [2013] IESC 6.

However, it seems to me that all too often parties who are somewhat dissatisfied by interlocutory orders made in the High Court seek to use this Court as a venue to re-argue their application *de novo* in the hope of persuading this court to exercise its discretion in a somewhat different fashion from that which was adopted by the High Court judge at the original hearing. That is a practice which I believe is not to be encouraged.”

75. Collins J. in this court in *Betty Martin Financial Services Ltd. v. EBS DAC* [2019] IECA 327 characterised the appellate court’s approach at para. 39:-

“...while as a matter of principle, ‘great weight’ is to be given to the views of the High Court judge, the ultimate decision on this appeal is for this Court. It is also clear that the EBS is not required to establish any error of principle as a pre-requisite to this Court coming to a different conclusion to the Judge.”

76. Collins J. further explored the key bases for appellate intervention at paras. 40 and 41:-

“...Where the High Court does not explain its basis for taking a particular view on a contested issue and/or fails to engage appropriately with the arguments made to the Court by one or other party on that issue, that will necessarily affect the weight to be attached to the Court’s view on appeal. An obvious parallel is provided by the appropriate approach to findings of fact made by the High Court. In general, such findings will bind an appeal court: *Hay v. O’Grady* [1992] 1 I.R. 210. That will not be the case, however, where the judge fails to engage with the evidence of both sides and explain why one side or the other has been preferred: *Doyle v. Banville* [2012] IESC 25; [2018] 1 I.R. 505.

Separately, it is clear that a judge must give sufficient reasons for his or her decision such that the parties can understand the basis for that decision: see, for example, the decision of this Court in *Law Society v. Callanan* [2017] IECA 217; [2018] 2 I.R. 195, at paras. 80-81 (*per* Hogan J)."

Pentire relies on *Betty Martin Financial Services Ltd. v. EBS DAC* and submits that the High Court judge failed to engage adequately with its position on the interlocutory application and offered insufficient reasons for reversing her original decision to refuse the application.

Material non-disclosure – Ground 1

77. In *Bambrick v. Cobley* [2005] IEHC 43, [2006] 1 I.L.R.M. 81 Clarke J. (as he then was) at p. 86 cited with approval the following statement by Sir Nicholas Brown-Wilkinson V.C. in *Tate Access Floors Inc. v. Boswell* [1991] Ch. 512:-

"No rule is better established, and few more important, than the rule (the golden rule) that a plaintiff applying for *ex parte* relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the plaintiff, the court will discharge the *ex parte* order and may, to mark its displeasure, refuse the plaintiff further *inter partes* relief even though the circumstances would otherwise justify the grant of such relief"

Clarke J. also endorsed at p. 87 the following remark by Lord O'Hagan L.C. in *Atkin v. Moran* (1871) I.R. 6 Eq. 79 at 81:-

"The party applying is not to make himself the judge of whether a particular fact is material or not. If it is such as might in any way affect the mind of the court it is his duty to bring it forward."

In considering whether the plaintiff in that case failed to make appropriate disclosure, Clarke J. observed at p. 87:-

"...the courts have noted (for example in *Brink's Mat Ltd. v. Elcombe* [1988] 1 W.L.R. 1350) that in particular in heavy commercial cases the borderline between material facts and non-material facts can be a somewhat uncertain one and that, without discounting the heavy duty of candour and care which falls upon persons making *ex parte* applications, the application of the principle of disclosure should not be carried to extreme lengths.

Taking those authorities it would seem that the test by reference to which materiality should be judged is one of whether objectively speaking the facts could reasonably be regarded as material with materiality to be construed in a reasonable and not excessive manner."

Clarke J. held on the facts that the non-disclosure of correspondence and discussions concerning a possible agreement to lodge monies on joint deposit on an *ex parte* application

for an interim Mareva injunction constituted a significant and material failure to disclose matters which should have been disclosed.

78. The court then considered what the consequences of such non-disclosure ought to be, concluding:-

"... it seems to me that the court has a discretion, in cases where failure to disclose has been established, to refuse to grant the interlocutory injunction and to discharge the already granted interim injunction but is not necessarily obliged to do so.

It is therefore necessary to consider, in general terms, the criteria which the court should apply in the exercise of such discretion. Clearly the court should have regard to all the circumstances of the case. However the following factors appear to me to be the ones most likely to weigh heavily with the court in such circumstances:

1. The materiality of the facts not disclosed.
2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless, significantly culpable in failing to disclose.
3. The overall circumstances of the case which lead to the application in the first place." (p. 89)

79. Pentire relied on *Re Belohn Ltd.* [2013] IEHC 157, [2013] 2 I.L.R.M. 407, where in the context of examinership proceedings, there had been a failure to disclose certain communications from a financial institution. At p. 424 Hogan J. held that, although he was satisfied that the non-disclosure came about as a result of a *bona fide* error and oversight, and that no personal blame should in that regard attach to either the petitioners or their advisers:-

"...the objective relevance and materiality of this communication cannot be gainsaid. ...In these circumstances, given the objective materiality of the non-disclosure of this correspondence from the bank's solicitor, it would be unjust to allow the order which was actually made to stand."

80. Pentire also cited *Kanwell Developments Ltd. v. Salthill Properties Ltd.* [2008] IEHC 3, where during an *ex parte* application for an order *nisi* of garnishee, it was not disclosed that a petition to wind up the defendant company had been commenced two months prior to the application. Clarke J. (as he then was) emphasised at para. 5.4 that:-

"...the obligation of candour lies on any party making an *ex parte* application to the court, irrespective of the nature of the order which might be made in the event that the *ex parte* application was successful. However, it does seem to me that amongst

the factors which the court should properly take into account in deciding what to do about any non-disclosure, is the extent to which the order sought on the *ex parte* application might be regarded, on the one hand, as largely procedural or, on the other hand, as affecting rights and obligations. Where a third party (not before the court) has their rights and obligations altered on an application made *ex parte*, then the court should be even more anxious to ensure that the party who obtains the benefit of the order has made proper disclosure.”

Notwithstanding the finding by Clarke J. of material non-disclosure, in all the circumstances of the case he found that it did not appear appropriate to exercise his discretion in favour of discharging the order *nisi*.

81. Pentire also relied on *Vieira Ltd. v. Ulster Bank Ireland Ltd.* [2014] IEHC 591 as authority for the proposition that the obligation of disclosure extends to the nature and terms of commercial relationships having relevance to a particular dispute. In that case an application had been brought for interim injunctive relief. Keane J. held at paras. 43 to 45:-

“...in applying for, and obtaining, an interim injunction *ex parte*, the plaintiffs failed to disclose to the Court both the existence of the contractual documentation that appears to govern the derivatives transactions that are the subject of their proceedings and the relevant contents of that documentation.

...

I am satisfied that the existence of that documentation and its contents were at least capable of affecting the mind of the court. Indeed, although it is not strictly necessary to do so, I have come to the conclusion that the mind of court would inevitably have been affected by that evidence.”

In my view the above decisions are only relevant where a claim of material non-disclosure has been made out. I am satisfied on the facts that the trial judge correctly determined that such was not made out in the instant case for the reasons stated herein.

82. I am satisfied that the trial judge comprehensively dealt with the allegation of material non-disclosure including at pp. 11 to 14 of the judgment of 17 May 2018 and correctly identified the key authorities and applied the legal principles therein to the facts. As she correctly observed, even where material non-disclosure is made out, as was stated in *Bambrick v. Copley* and earlier authorities, the court retains a discretion to refuse to vacate an *ex parte* order if satisfied that the circumstances of the case so warrant, including the factors identified by Clarke J. in *Copley*. The test for materiality is an objective one. The decisions sought to be relied upon by the appellant including *Belohn* (where the non-disclosure was both relevant and material) *Kanwell* (where an extant winding up petition was not disclosed) and *Vieira* (where the centrally relevant respondent bank’s terms and conditions were not disclosed) are entirely distinguishable and do not assist Pentire.

83. Pentire alleged that the respondents failed to make full disclosure to the High Court at the application for interim relief. The bases for this contention were expanded on appeal beyond those asserted before the High Court including that the respondents “failed to present an accurate picture of their efforts to obtain refinance” and, in particular, failed to:

“(i) exhibit any of the loan facility letters received from Bank of Ireland”

However, the judge at the interim application did not want to know details of the sum being drawn down and I am not satisfied that exhibiting the loan facility letters was warranted or necessary in all the circumstances of this case.

“(ii) disclose the fact that a loan facility letter had been received on 5 April 2017, as well as 6 January 2015”

In my view this was not a central factor that could be expected to alter the judge’s mind.

“(iii) clarify that the amount of the loan finance offered by Bank of Ireland was sufficient to redeem the mortgage”

In my view, it was apparent to Costello J. that the Bank of Ireland loan finance was sufficient to redeem the mortgage.

“(iv) mention that the loan facility letters from Bank of Ireland imposed terms and conditions which were far more onerous than those applicable to the loan facility [of September 2003], including a surcharge interest rate which was higher than that applicable to the loan facility [of September 2003]”

This point is unsound in circumstances where Pentire’s entitlement to surcharge interest was strongly disputed as a matter of law, *inter alia*, in the context of the respondents’ assertion that Pentire bore legal responsibility for the loss of the deeds and as a consequence, it was contended, was not entitled to claim any surcharge during the period of delay in the refinancing process referable to that loss. The terms of the refinancing arrangement with Bank of Ireland were not probative or relevant as to the validity or enforceability of the mortgage which Pentire sought to enforce. I am satisfied that the asserted objective relevance and materiality of these matters at the interim stage was not demonstrated to the court.

84. All of these contentions were, in my view, correctly rejected by the trial judge. Adequate relevant detail was disclosed at the *ex parte* hearing including in the grounding affidavit of the second respondent, wherein at para. 33 the steps involved in the refinancing process from June 2015 were outlined, and Bank of Ireland’s confirmation on 21 November 2017 that it was prepared to allow the drawdown of funds on receipt of a satisfactory deed of redemption and redemption figures from Pentire. The transcript shows that Bank of Ireland’s position was presented by counsel at the hearing of the interim application and counsel confirmed to the court that the amount of refinance was sufficient to redeem the

mortgage. As noted previously, Costello J. expressly stated that she did not need to know how much money Bank of Ireland had agreed to lend.

85. The respondents further submit that the loan facility documents Pentire asserts ought to have been disclosed had strictly little relevance once it was demonstrated that the sum was *prima facie* sufficient to redeem the mortgage sum since the terms of the refinance were matters to be dealt with at the hearing of the action and had no direct bearing on the court's consideration of whether to either grant the interim relief or give short service of a notice of motion. I agree.
86. The respondents acknowledge that the reference to the April 2017 loan offer was innocently omitted and contend that an explanation was provided in the supplemental affidavits. They submit that there was no deliberate misleading of the court and Pentire has not established that the court was misled in any way. The court accepted that explanation and I am satisfied it was entitled to do so.
87. Pentire additionally argued that the respondents failed at the *ex parte* hearing to present an accurate picture of their efforts to resolve the issue of the missing title deeds and, in particular, failed to disclose that:

"(i) they had obtained title insurance on 16 February 2017, incorrectly asserting that it had only been obtained on 13 November 2017"

I am satisfied that this point is not accurate and while the insurance policy may have been dated 16 February 2017, the obligation to provide an indemnity thereunder self-evidently only commenced on 13 November 2017.

"(ii) they had delayed significantly in obtaining title bond insurance, in circumstances where they had received the necessary statutory declarations from third parties by 14 April 2016 at the latest"

I find that the trial judge was correct and that the evidence did not support that allegation of significant or any culpable delay. The primary cause of delay was the loss of the title deeds (for which the respondents are blameless) and the issue as to the extent (if any) of Pentire's liability for same is a serious question to be tried.

"(iii) Bank of Ireland had communicated its satisfaction with the title insurance and was willing to permit drawdown of the loan finance offered by it"

In fact the correspondence suggests there were ongoing adjustments arising with the requirements of the refinancing bank and Pentire had never provided a draft deed of release.

"(iv) despite extensive negotiations [between the parties] from April 2015 onwards, the issues of the mislaid title deeds and surcharge interest were not raised until 28 November 2017"

I find that assertion to be incorrect. The respondents' solicitors raised the issue of loss of the title deeds with Pentire *inter alia* in correspondence dated 18 September 2015, 13 November 2015, 18 November 2015, 15 December 2016 and 25 January 2017. It is noteworthy that the affidavit of the respondents' solicitor exhibits correspondence dated between 18 September 2015 and 25 January 2017 in which the issues of loss of title deeds and surcharge interest were raised with Pentire's then solicitors.

"(v) notwithstanding their long-standing default..., the respondents were continuing to retain an amount of €40,000 per annum in rental income from the secured property"

The relevance of this point is not understood where the payment of this sum was never sought by Pentire. However, para. 13 of the respondents' grounding affidavit deposed that three of the four units of the secured property were leased. The judge was thus aware of the existence of rental income.

Principles governing grant of interlocutory injunctions – Grounds 2, 4, 5, 6, 7 and 8

88. The appropriate approach of a trial judge to the determination of an interlocutory application was the subject of a comprehensive determination by the Supreme Court in *Merck Sharp & Dohme v. Clonmel Healthcare* [2019] IESC 65, [2020] 2 I.R. 1. O'Donnell J. (as he then was) emphasised that the principles adumbrated in *American Cyanamid v. Ethicon Ltd.* [1975] A.C. 396 as adopted by the Supreme Court in *Campus Oil v. Minister for Industry* (No. 2) [1983] I.R. 88 should not be viewed "as though it were the laying down of strict mechanical rules for the control of future cases" (para. 33) and neither should the *dicta* be viewed as analogous to statutory rules. I also have regard to the comprehensive decisions in this court of Collins J. in *Betty Martin Financial Services Ltd. v. EBS DAC* [2019] IECA 327 and Murray J. in *Ryan v. Dengrove DAC* [2021] IECA 38.

89. In the course of his judgment in *Merck Sharp & Dohme*, O'Donnell J. reiterated the inherently flexible nature of the interlocutory injunction as an equitable remedy and as provided by s. 28(8) of the Supreme Court of Judicature (Ireland) Act 1877 and elucidated the principles deriving from the jurisprudence, usefully identifying a series of considerations which a trial judge might beneficially have regard to in evaluating an application for an interlocutory injunction:-

"(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted.

(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the approach in [*American Cyanamid*] and [*Campus Oil*] will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or

balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit.

- (3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice.
 - (4) The most important element in that balance is, in most cases, the question of adequacy of damages.
 - (5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy.
 - (6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it *may* be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial.
 - (7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial.
 - (8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined.” (para. 65, emphasis in original)
90. A key jurisprudential development emanating from the decision of O’Donnell J. in *Merck* is the determination (at para. 36 of the judgment) that the issue of the adequacy of damages is itself a constituent aspect of the balance of convenience otherwise referred to as the balance of justice:-

“...the preferable approach is to consider adequacy of damages as part of the balance of convenience, or the balance of justice, as it is sometimes called. That approach tends to reinforce the essential flexibility of the remedy. It is not simply a question of asking whether damages are an adequate remedy. As observed by Lord Diplock, in other than the simplest cases, it may always be the case that there is some element of unquantifiable damage. It is not an absolute matter: it is relative. There may be cases where both parties can be said to be likely to suffer some irreparable harm, but in one case it may be much more significant than the other. On the other hand, it is conceivable that while it can be said that one party may suffer some irreparable

harm if an injunction is granted or refused, as the case may be, there are nevertheless a number of other factors to apply that may tip the balance in favour of the opposing party. This, in my view, reflects the reality of the approach taken by most judges when weighing up all the factors involved."

91. Collins J. in *Betty Martin* at para. 85 considered that the *Merck* decision:-

"...effects a significant (and, if I may say so, welcome) restatement of the appropriate approach to applications for interlocutory injunctions, mandating a less rigid approach, both generally and with particular reference to the issue of the adequacy of damages and emphasising that the essential concern of the court is to regulate matters pending trial pragmatically and in a manner calculated to minimise injustice."

92. As was observed by Murray J. in this court in *Ryan v. Dengrove DAC* at para. 45, the decision in *Merck* does not purport to change the test applicable to the grant of interlocutory injunctions as expressed in *Campus Oil*:-

"...It does, however, continue the process of refinement and evolution of that test demonstrated, most notably, by the decisions of Clarke J. (as he then was) in *Metro International S.A. v. Independent News and Media Plc* [2005] IEHC 309, [2006] 1 I.L.R.M. 414, *Allied Irish Banks plc and ors. v. Diamond and ors.* [2011] IEHC 505, [2012] 3 I.R. 549 and *Okunade v. Minister for Justice Equality and Law Reform* [2012] IESC 49, [2012] 3 I.R. 152. At the same time the Court has sought to dispel some misconceptions that had arisen in the course of its general application."

93. It is clear therefore that a two pronged test fell to be operated by the trial judge in the context of making determinations at the interlocutory injunction application: firstly, whether a fair issue to be tried had been established on the part of the respondents and, secondly, an evaluation of the balance of convenience including the integral element of the adequacy of damages. In my view, the transcripts show that she considered the relevant factors and applied the relevant test correctly.

Fair question to be tried – Grounds 5, 6 & 7

94. In its notice of appeal, Pentire contends that the trial judge erred in her treatment of the validity of the letter of demand, the alleged loss of title deeds and the issue of surcharge interest. In particular, it appears that Pentire contends that the trial judge erred in finding that these matters constituted serious or fair issues to be tried.

Validity of the letter of demand – Ground 5

95. Pentire contends that the trial judge erred in finding that there was any issue to be tried concerning the validity of the letter of demand, in circumstances where the respondents had been in a position of admitted default since in or about July 2013. The respondents submit that the letter of demand was invalid, improperly motivated and was triggered by legitimate demands that the respondents be told the correct redemption figure.
96. In all the circumstances of this case, I am satisfied that the trial judge was correct to conclude that there was a serious or fair question to be tried as to whether the letter dated

8 December 2017 constituted a valid letter of demand. The context and surrounding circumstances in light of the evidence before the High Court and the judge's findings raise for consideration by the trial judge at the plenary hearing the extent to which service of the said letter by Pentire was primarily prompted by the requests of the respondents that there be engagement regarding the ascertainment of the true and correct sum lawfully due to Pentire for the valid exercise by the respondents of their equitable right to redeem and their entitlement, or otherwise, to have the exigibility of surcharge interest and the loss of the title deeds taken into consideration in the true calculation of the redemption sum due. The respondents had continued to make monthly repayments throughout. Pentire refused to entertain the possibility that the redemption sum could or should be adjusted in respect of its disputed entitlement to impose surcharge interest or arising from the loss of the title deeds.

97. Hilary Biehler in *Equity and the Law of Trusts in Ireland* (7th ed., Round Hall, 2020) in considering the jurisprudence on the issue of ascertainment of whether a serious or fair question to be tried has been established and the *dicta* of O'Donnell J. (as he then was) in *Merck, Sharp & Dohme v. Clonmel Healthcare*, observes at p. 655:-

"The court will inevitably consider a plaintiff's prospects of success to some extent in determining the threshold question of whether he has established a serious or fair question to be tried."

I also agree with her observations at p. 656, in light of the decision of Lord Hoffmann in *National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.* [2009] 1 W.L.R. 1405 at 1409, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other and that amongst the factors which it may take into account is the likelihood that the injunction will turn out to have been wrongly granted or withheld. That approach accords with the observations of O'Donnell J. in *Merck* at para. 63, particularly that where the balance of convenience may be finely balanced, it may be appropriate, on a preliminary basis, to evaluate the relative strength of rival arguments. Accordingly, I have regard to the fact that, even if the surcharge provision is found at trial not to be a penalty or void, its exigibility by a mortgagee who has *prima facie* breached the duty for safekeeping of the muniments of title in a manner which impedes refinancing of the mortgage is in itself a serious question to be tried. Further, there is at least authority suggesting that where title deeds held by a mortgagee by way of security are lost, the redemption figure is adjusted to take account of that fact.

98. Therefore, there is a serious question to be tried as to whether Pentire was entitled to serve the said letter of demand on the said date in all the circumstances of this case. The granting of the interlocutory injunction to maintain the status quo would, if damages would not be an adequate remedy for the respondents, cause the least irremediable prejudice pending the trial of the action.

The lost deeds – Ground 6

99. The stance of Pentire in regard to the loss of the 17 muniments of title to the properties is difficult to comprehend. Its position appears to be that the lost deeds are not its concern.

But the lost deeds were entrusted to Pentire's predecessor in title, BOSI, in 2004 as an integral part of the mortgage security. At redemption, Pentire as successor in title to the mortgagee has *prima facie* a legal obligation to return the deeds to the mortgagor. The evidence indicates that they are unable to do so. It will be for the trial judge to determine ultimately the legal consequences flowing from the loss of 17 of the muniments of title (including 2 documents which go to the root of title) and the inability of Pentire or any successor in title to produce same. They purchased the mortgagee's interest from BOS in 2015 and are, arguably, fixed with notice of any missing deeds as of that date. In Pentire's replying affidavit, no allegation of non-disclosure to the trial judge in this regard was made, rather it was claimed that the respondents' case in relation to missing title deeds was not made *bona fide* and the time taken to obtain finance from Bank of Ireland was not attributable to "any issue caused by alleged missing title deeds". No absence of *bona fides* on the part of the respondents has been made out.

100. The deed of mortgage and charge was executed on 6 February 2004. The original mortgagee was BOSI. Pentire, by all appearances, stepped into the shoes of BOS under and by virtue of the loan purchase deed dated 29 November 2014 and the deed of conveyance and assignment dated 20 April 2015 and thereupon the rights, title, interest and benefits of BOS in the loan facility, the facility letter (as amended from time to time) and the mortgage were assigned to Pentire. Pentire does not dispute its failure to produce the missing muniments of title; rather, it denies any liability in relation to same. It, however, offers no meaningful explanation for the non-availability of the instruments. Such a stance is unsatisfactory at many levels. When deeds held by way of security are lost or are not forthcoming without any just cause or explanation the mortgagor is generally entitled to an enquiry as to what security or indemnity is to be given in satisfaction of the loss. Historically, mortgagors were entitled to a determination as to the sum which ought to be allowed as a sufficient compensation for the damage done to the estate by the loss or destruction of the relevant muniments of title. The calculus of this quantum has historically included a sum by way of compensation in respect of the expense as may arise on future dealings with the estate and so forth. At common law the general principle to be found in decisions such as *Brown v. Sewell* (1853) 11 Hare 49 was that the amount of compensation determined by a court of competent jurisdiction as being due and owing to the mortgagor was to be set off against the principal and interest due on foot of the security. Whether the respondents' claim in this regard is maintainable and whether they enjoy the entitlement to have the redemption figure calculated with regard to the said factors is clearly a serious question to be tried.
101. The validity and legal consequences (if any) of the claim being advanced by Pentire that it apparently did not have at any time the missing muniments of title will fall to be determined at the plenary hearing. The suggestion advanced on behalf of Pentire that the fact that the mortgagors have title bond insurance, at their own expense alleged to be €4,961.25, is not necessarily an answer in law to the issue. The title bond insurance in question may satisfy a lending institution in the context of refinancing the mortgage where the sum being borrowed is apparently less than one third of the open market valuation of the property in question. There was no evidence that it operates to *de facto* perfect the title of the

respondents or the consequences if it does not. All those issues fall to be determined at the trial and will no doubt be the subject of expert witnesses on both sides. There was no evidence that any steps had been taken by Pentire to procure attested copies of the missing instruments.

102. It appears clear since the decision of Finlay Geoghegan J. in *ACC Bank plc v. Fairlee Properties Ltd.* [2009] IEHC 45, [2009] 2 I.L.R.M. 101 that the Irish decision of *Gilligan and Nugent v. National Bank Ltd.* [1901] 2 I.R. 513 may no longer be good law in this jurisdiction. The latter case had been historically viewed as authority for the proposition that a mortgagee owed no duty of safe custody of deeds. However, Finlay Geoghegan J. disapproved of that proposition and held that a mortgagee owes a general duty of care to the mortgagor for the safe custody of title documents held on foot of security. Whereas the mortgagee has the right to retain the deeds until redemption, he or she has an implied obligation to take care of them prior to redemption on foot of *Donoghue v. Stevenson* [1932] A.C. 562 duty of care principles. At para. 34 of her judgment Finlay Geoghegan J. observed regarding *Gilligan and Nugent v. National Bank Ltd.*:-

"34. I have concluded that the above decision does not preclude the court finding that the plaintiff owed a duty of care to the defendants on the facts found above, to take care in the care and custody of the deposited title documents and in particular to file and store the deposited title documents in such a way that the plaintiff could produce them to the defendants' solicitors when requested..."

At para. 35 she continued:-

"35. First, *Gilligan* is distinguishable on the facts. The request made for the title documents in June 2004, was in the context of a proposed redemption. Whilst it is true that some of the statements in the judgment refer to actual redemption, in current banking and conveyancing practice, in particular where redemption is to occur through a refinancing arrangement, it is normal for the documents of title to be produced on accountable receipt, in advance of actual redemption to permit the new lending institution prepare its security so that the granting of new security, draw down of the new facilities and redemption with release of securities can occur on the same day. ...even on the law as stated in the judgments in *Gilligan v. National Bank*, it appears that on the facts herein, ACC was under an obligation to produce to the defendants the title-deeds on redemption. In current practice, this required them to produce the title-deeds on accountable receipt in advance to permit the new security documents which will enable the monies for redemption to be released to be put in place."

She further observed that the decision in *Gilligan* was not about a failure to produce title deeds. She noted the statutory obligation incumbent on a mortgagee to have the muniments of title available for inspection pursuant to s. 16 of the Conveyancing and Law of Property Act 1881 and further observed at para. 37:-

“...the decision in *Gilligan* long predates the seminal decision in *Donoghue v. Stevenson* [1932] A.C. 562 and the development of the ‘neighbour principle’ in the law of torts.”

This supports a conclusion that there is a serious question to be tried in regard to the missing title deeds.

The surcharge – Ground 7

103. Pentire asserts that the trial judge did not have appropriate regard to the fact that surcharge interest was provided for under the original mortgage. However, that is not the end of the matter. That fact does not preclude the respondents from arguing that the clause is a penalty and as such void *ab initio*. Whether the clause constitutes a liquidated damages clause or a penalty is a question of law. At common law a penalty clause which imposes a secondary obligation on a mortgagor that is out of all proportion to any legitimate interest of the mortgagee in the enforcement of the primary obligation is considered a species of agreement that is contrary to public policy.

104. More relevantly, however, is whether that clause was capable of being enforced – in law or in equity – in circumstances where a mortgagee is found liable for the loss of deeds which in turn impedes refinancing, and, if so, the consequences of same. There was no lawful basis made out whereby the principle of estoppel could be applied to the surcharge aspect of the respondents’ claim in circumstances where for a considerable period of time they did not know that the deeds were missing and Pentire never informed them that they were lost. The terms negotiated by the respondents with Bank of Ireland in respect of refinancing offer no relevant guide to the validity or otherwise of the surcharge clause in the 2004 mortgage instrument. The court was perfectly entitled to question the stateability of Pentire’s contention that the “surcharge” amounted to a genuine pre-estimate of loss as it asserted but did not prove. Pentire has not demonstrated that the trial judge erred either in fact or law in her treatment of the surcharge issue in this case.

Adequacy of damages and the balance of convenience – Grounds 2 & 8

105. Central to the respondents’ position was that the appointment of a receiver in the circumstances that prevailed in late 2017 would have caused significant, disproportionate and unwarranted reputational damage to them and their business and was not justified where the loss of the 17 title deeds had delayed expeditious redemption of the loan and where the respondents were blameless for that loss. Sale by a receiver in such circumstances would be at a significant undervalue because of the missing deeds, it was contended. Significantly, Pentire did not contradict this contention. The respondents suggest that in all the circumstances the attempt to exercise the right to appoint a receiver was not a *bona fide* exercise of that right by Pentire.

106. In substance this was a “receiver-injunction” application to restrain the appointment of a receiver over the secured assets of the respondents by Pentire as creditor. The courts tend to take the view, where the dispute is strictly commercial, and the interests of the parties are exclusively financial, that unless a plaintiff can demonstrate specific factors which tip the balance in their favour and warrant the making of interlocutory orders, the parties will

generally be left to their respective remedies in damages as may be determined at the plenary trial. In the instant case, after initially considering that Pentire's proposal offered a basis to meet the exigencies of the case, following subsequent hearings and exchanges with counsel, the trial judge ultimately was satisfied of the necessity for interlocutory orders. Having considered the matter further and having established a misunderstanding regarding a fundamental element of the *via media* she had envisaged as a holding measure pending trial, the trial judge determined that the respondents had established a fair question to be tried and that the balance of convenience having due regard to the salient factors, including the adequacy of damages as a remedy, warranted the grant of interlocutory injunctions pending the trial of the action between the parties.

107. In *Dellway Investments Ltd. v. NAMA* [2011] IESC 14, [2011] 4 I.R. 1 the Supreme Court concluded that a decision by NAMA to acquire the bank assets represented by the credit facilities of the applicants carried with it, at the very least, a real risk that the property rights and interests of the applicants would be directly and adversely affected. The property right in issue was the applicants' equity of redemption. In that regard, Hardiman J. observed at p. 245:-

"The chargor's or mortgagor's equity of redemption is a most valuable asset which prevents a mortgagee from simply selling the house or land for what it can get in the short term, leaving the mortgagor to discharge the rest."

At p. 371 Finnegan J. noted:-

"...The courts regard interests in land differently to interests in personality and, in general, damages are not considered to be an adequate remedy. It was for this reason that courts of equity developed the remedy of specific performance: *Adderley v. Dixon* (1824) 57 E.R. 239. Likewise a mortgagor can always obtain an injunction to restrain a mortgagee from wrongfully exercising his rights: Kerr, *A Treatise on the Law and Practice of Injunctions* (6th ed., 1927, Sweet & Maxwell) at pp. 523 to 532."

108. The status afforded to property rights by the courts can be seen in a number of cases dealing with the adequacy of damages to compensate for interferences with property rights in the context of applications for interlocutory relief. In *Metro International SA v. Independent News & Media plc* [2005] IEHC 309, [2006] 1 I.L.R.M. 414, Clarke J. (as he then was) said at p. 423:-

"There are...cases where the courts have traditionally not been prepared to award damages even though there is a sense in which any relevant loss could be calculated in monetary terms. Thus in many cases where a plaintiff alleges an infringement of his property rights the court will intervene by injunction where those property rights have been established rather than compensate the plaintiff for the loss of those property rights. To take an extreme but illustrative example a person who owns a house and whose house is occupied by others (assuming them to be a mark for the value of the house) would undoubtedly be entitled to an injunction to restrain such wrongful occupation even though there is a sense in which the aggrieved party could

be fully compensated by being awarded as compensation as against a defendant of means the value of the house together with any additional sums that might be necessary to compensate for the disruption caused. Thus the mere fact that a property right (or indeed a diminution in such a right) can be valued in monetary terms does not of itself mean that damages for an infringement of that property right can necessarily be said to be an adequate remedy."

109. In *Allied Irish Banks plc v. Diamond* [2011] IEHC 505, [2012] 3 I.R. 549 Clarke J. (as he then was) reiterated at pp. 589 and 590:-

"The courts have always been anxious to guard property rights in the context of interlocutory injunctions...The reason for that is clear. Even though there may be a sense in which it may be possible to measure the value of property lost, declining to enforce property rights on the basis that the party who has lost its property can be compensated in damages would amount to a form of implicit compulsory acquisition. If someone could take over my house and avoid an injunction on the basis that my house can readily be valued and he is in a position to pay compensation to that value (even together with any consequential losses), then it would follow that that person would be entitled, in substance, to compulsory acquire my house. The mere fact that it may, therefore, be possible to put a value on property rights lost does not, of itself, mean that damages are necessarily an adequate remedy for the party concerned is entitled to its property rights instead of their value."

In the instant case, Pentire was at all times incapable of delivering the title deeds to the respondents – to which they were entitled on redemption – to enable refinancing of the loan to take place. As mortgagee, Pentire had a *prima facie* liability for failure to produce the missing title documents, as held in *ACC Bank plc v. Fairlee Properties Ltd.*.

110. Pentire submits that the secured property is a commercial asset which has a readily determinable economic value. It is contended that if Pentire had commenced enforcement and appointed a receiver, any loss suffered by the respondents would have been readily calculable. This is unconvincing since Pentire has stepped into the shoes of the mortgagee and must accept the obligations and consequences which flow from that. No evidence was offered to demonstrate that Pentire was indemnified in respect of loss or claims in respect of the lost deeds.
111. Beyond a blanket denial of liability, Pentire has not meaningfully engaged with the principle that, where the title to a secured asset is impaired and its realisation value diminished – and in this case the entire process of redemption by way of refinancing was clearly impeded and delayed – as a result of a mortgagee's inability to provide the title deeds as they are required by law to do, the mortgagee is *prima facie* liable in damages.
112. Pentire argues that the respondents' claim that they have been charged too much interest is manifestly a pecuniary claim for which damages are an adequate remedy. It is submitted the same is true for a claim involving the alleged loss of title deeds by a financial institution, particularly in circumstances where the respondents had already obtained title insurance

costing €4,961.25. Pentire submits that both the adequacy of damages and the overall balance of convenience favoured the refusal of the interlocutory application.

113. Were the level of interest the sole issue, this argument might have some weight. But Pentire has stepped into the shoes of the original mortgagee and the maxim "once a mortgage always a mortgage" applies equally to it.
114. Murray J. in his analysis of *Merck* in *Ryan v. Dengrove DAC* makes the following relevant observation in the context of evaluating the adequacy of damages at para. 49:-

"...the mere fact that damages would be both adequate as a remedy and available to be paid did not absolve the Court from placing the adequacy of damages within the balance of justice as a whole and, therefore, in also assessing any other factors relevant to that balance in a particular case."

Relevant to the issues in this case, he further noted at para. 50 that in *Merck* the Supreme Court had:-

"...made it clear that its consideration of the merits of the plaintiff's claim is not exhausted at the point when it determines that there is a '*fair issue*' to be tried. At paragraph 63 of his judgment, O'Donnell J. said the following:

'In cases where the balance of convenience may be finely balanced, it may be appropriate to have regard, even on a preliminary basis, to the strength of the rival arguments as they may appear to the court'."

115. The right of a mortgagee who is *prima facie* liable in law for the loss of title deeds to impose surcharge interest for the duration of their loss in the first place, and whether such a clause in and of itself operates as a penalty or is void, are serious issues to be tried. Since the clear intention of Pentire as mortgagee is to appoint a receiver to sell the property with a title rendered defective by the mortgagee having lost the title deeds, and fix the respondents with the entire costs of that receivership when the property is ultimately sold at a reduced value, in such circumstances damages would not be an adequate remedy for the innocent respondents who, in the meantime and through no fault of theirs, have been denied their equitable right to redeem the loan for the true sum due and owing. By contrast, damages would be an adequate remedy for Pentire and the respondents are a good mark for their payment.
116. The respondents were at all material times ready, willing and able to redeem the mortgage. Pentire does not assert that the respondents are in any way to blame for the lost deeds. It is clear that the respondents are entirely blameless for the loss. Pentire offers no satisfactory explanation for the non-availability of the deeds. This amounts in equity to conduct tantamount to a clog on the equity of redemption. The appointment of a receiver over assets of the respondents who are businessmen would cause significant reputational damage not readily measurable in damages. The facts in this case are fundamentally distinguishable from routine cases where a defaulting mortgagor merely asserts the right to redeem as an answer to the appointment of a receiver under a mortgage instrument.

The proposal – Ground 3

117. Pentire submits that the proposal of 13 March 2018 would have left the respondents in a far superior position to that resulting from the relief sought on the interlocutory application. Further, it is submitted that the High Court judge fell into error in changing her mind about the adequacy of the proposal and determining that the costs element of the proposal was unnecessary or unreasonable. Even a cursory consideration of the facts and the relative strengths of the rival arguments as suggested by O'Donnell J. (as he then was) in *Merck* demonstrate that that position is not maintainable.
118. The deployment of the proposal which was in effect an open letter of offer was a matter for Pentire. The judge was perfectly free to accept or reject its suggestions and initially adopted some of them in an effort to fashion a *via media* pending trial of the action. Contrary to Ground 3(a) of the notice of appeal, the trial judge had no obligation to "have appropriate regard to and/or to afford appropriate weight to the proposal". Indeed, the methodology adopted by Pentire of insisting on making a prior open offer which had been rejected by the respondents central to the interlocutory hearing is questionable.
119. At this juncture it is necessary to consider whether the 17 May 2018 ruling could be said to be, as Pentire contends in this appeal, a clear adoption by the trial judge of their proposal in its entirety as the appropriate method of disposing of the interlocutory application which the trial judge subsequently resiled from "without good reason". In my view, it is not.
120. Nowhere in the judgment does the trial judge explicitly adopt or approve clauses 3 (security for costs) or 6 (Pentire's costs of the interlocutory application) of the proposal. She envisages the escrow sum encompassing a factor (the loss of the deeds) and sum (referable to that loss) not to be found in the original proposal. Though Pentire may have assumed that those clauses were being approved by the court, since there was no evidence to support that assumption to be found within the judgment, it is difficult to understand how it could reasonably have done so. At p. 18, lines 4 to 17 of the judgment, the trial judge specifically addressed costs, stating:-
- "I should say that the costs will be a different matter and I will hear argument in relation to that in due course. It is not in any view at all a simple 'costs follow the event' situation. I appreciate that Pentire put forward a proposal from March onwards and, in one view of matters, the hearing on the injunction was, in retrospect, perhaps unnecessary. But on the other hand, it would seem to me that many aspects of the behaviour of Pentire was unreasonable and, in particular, the refusal of any offers to engage in settlement at an earlier stage around the time of the injunction in December and perhaps in January. So I will hear submissions in relation to that in due course." (emphasis added)
121. The judge's approach is clearly inconsistent with clause 6 of the Pentire proposal which required payment by the respondents of its costs of the "injunction application" with no provision that same be assessed or taxed in default of agreement or that payment be stayed pending determination of the within proceedings. Secondly, nothing in the ruling suggests that the judge either adverted to or approved of a payment by the respondents of €50,000

effectively by way of security for Pentire's costs as clause 3 envisaged. Pentire appears to have assumed that it did. Thirdly, clause 5 was modified significantly by the judge and required the parties to agree a composite sum to be held in escrow to include a figure referable to the loss of the title deeds:-

"For the moment, what I suggest is that the court will continue the injunction for four weeks only. Then there will be a mention date, at which point I intend to discharge the injunction and this will enable the drawdown from Bank of Ireland during that period. I would expect the mortgage to be redeemed at the latest figure which I understand is in or about €275,000 figure or thereabouts. A figure, if the parties can agree, should be put on escrow and this would need to be a figure which represents some kind of estimate as to what might be the compensation in respect of the loss of title deeds and a figure representing the surcharge and that can be litigated in due course." (17 May 2018, p. 18 line 19 to p. 19, line 3, emphasis added)

122. This represented a significant modification of clause 5 of the proposal which had been confined by Pentire to an amount of €86,467.99 representing the disputed surcharge interest but had made no reference to a further sum being held in escrow towards potential damages or compensation for the loss of the respondents' title deeds. Significantly, the judge observed, "If there is no agreement in relation to that figure, it is a matter that perhaps I will need to decide" (p. 19, lines 3 to 5). The ruling spoke of her "hope and expectation that matters will be dealt with in that manner in the meantime" (p. 19, lines 8 to 9). It is clear that in the meantime the two constituent elements of the escrow sum, as identified by the judge, needed to be agreed between the parties. The parties could be under no illusion but that clauses 5 and 6 of Pentire's proposal had not been adopted by the trial judge and nothing explicitly stated by her suggested she was requiring the respondents to pay security for costs in accordance with clause 3. Thus, whilst the ruling might have been clearer and going through Pentire's proposal on a "checklist" basis might have been preferable, nevertheless in my view it ought to have been clear to the parties that it was not a blanket adoption of Pentire's proposal. Pentire in fact never agreed to any sum referable to the loss of the deeds being held by way of escrow.

123. It is noteworthy from the transcript of proceedings on 10 July 2018, the trial judge observed:-

"...as the matter stood I had decided that since the *via media* I had gone for was different from the one on offer you were to take instructions as to whether you wanted to alter the *via media* on offer or simply accept the ruling on the injunction?" (p. 1, line 28 to p. 2, line 3)

Counsel responded:-

"My instructions are to accept the ruling on the injunction. The position is as I indicated previously the change which the court was proposing to the *via media* would involve the surrender of securities.

...

In respect of the costs claimed and any other charges which might arise, so from my client's perspective they are not in a position to make that concession." (p. 2, lines 5 to 13)

The criticisms of the trial judge subtending Ground 3 of the notice of appeal are not reasonable and are further not made out.

124. I am satisfied that on the evidence the dominant impediment to the expeditious redemption of the mortgage was the failure of Pentire to produce the title deeds. This operated in this case as a clog on the equity of redemption of such a nature that damages would not constitute an adequate remedy for the respondents.

Costs – Ground 9

125. The judge observed:-

"Then in the circumstances I will make the final order for the injunction and in relation to the costs I have heard full argument in relation to costs at this stage and I have given consideration to the matter and I had, in any event, decided to award the costs in favour of the plaintiff but that is strengthened by the fact that it is now actually an injunction so in any event the costs will follow the event. ...I will make the costs in favour of the plaintiff, but I will leave them at party and party costs." (10 July 2018, p. 2, lines 15 to 26)

126. Pentire requests this court to replace the costs order with either no order as to costs or an order reserving the costs to the trial of the action. Further or in the alternative, Pentire submits that the High Court judge erred in law by awarding the full costs of the interlocutory application to the respondents as this effectively penalised Pentire for the confusion which had arisen as to the terms of Pentire's proposal. In those circumstances, Pentire submits that the High Court judge ought to have made no order as to costs in respect of the hearings on 8 June 2018, 21 June 2018 and 10 July 2018.
127. Pentire submits that there are a number of grounds upon which the High Court judge ought not to have awarded the costs of the interlocutory application to the respondents. For the most part the arguments are predicated on Pentire succeeding in its appeal but it has not done so for the reasons set forth above. Firstly, it is submitted that the respondents' material non-disclosure at the interim application should have been reflected in costs. This argument falls away since I am satisfied that the trial judge correctly determined that there was no material non-disclosure. Secondly, Pentire submits that it was inappropriate to award the full costs incurred from the date of Pentire's proposal. The proposal as advanced by Pentire was not in all its terms ever expressly accepted by the trial judge at any stage on 17 May 2018. She expressly varied the escrow and reserved over the costs issue. A careful reading of the ruling makes that clear. Furthermore, nowhere does that ruling suggest that the judge was minded to accede to a proposal for security for costs in favour of Pentire. Silence by the trial judge on the issue of security of costs did not entitle Pentire

to assert or assume that the trial judge had approved clause 3 of its proposal in all the circumstances.

128. The *via media* posited by the High Court judge, which both modified the escrow and the costs aspect, were not accepted by Pentire. The respondents have established serious questions to be tried regarding the validity of the letter of demand, the loss of the title deeds and the surcharge interest and that damages would not be an adequate remedy for same, as stated above. Damages would be an adequate remedy for Pentire and the respondents are a good mark for such damages. Pentire reiterates that the claim of the respondents concerning the missing title deeds is fully contested and that is so. That fact alone does not warrant interfering with the costs order made by the trial judge. I am satisfied that no basis has been identified which would warrant interfering with the exercise of her discretion in relation to the order for costs and the reasoning underpinning it. Pentire has been unsuccessful on every ground of appeal.
129. Further O. 99, r. 2(3) (recast) enjoins the court to make an award of costs at the time it determines an interlocutory application "save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application". The trial judge was entitled to find that she was in a position to adjudicate on the issue of liability for costs. Costs followed the event in the ordinary way. There is no basis shown which would warrant interference with her decision to adjudicate upon costs or the terms of the order she made in respect of same.
130. It is also noteworthy that the trial judge expressed dissatisfaction with the stance of Pentire at various stages. For instance, at p. 16, lines 21 to 25 of the transcript of 17 May 2018, the trial judge noted that Pentire had failed to withdraw unwarranted allegations against the respondents' solicitor until the trial. On 10 July 2018, she had occasion to comment that Pentire had "behaved unreasonably" (p. 8, line 22), that it had sent "a very non-compromising letter with an aggressive tone" (p. 8, line 29), and that its overall approach was "unreasonable and unduly aggressive" (p. 10, line 6). Pentire's stance on costs is further undermined when contrasted with the position adopted by it on costs under the terms of the proposal.

Conclusions

131. On a careful review of the entirety of the transcripts of the hearings, there is no basis for contending that there are errors detectable in the approach adopted by the trial judge such as would warrant interference by this court with the orders under appeal in the manner sought by Pentire. The High Court judge clearly explained the basis for taking the particular views which she did on each contested issue and comprehensively engaged with the arguments made to the court by both sides on each issue raised. Nothing has been identified by Pentire which would adversely affect the weight to be attached by this court to the trial judge's view on each relevant issue.
132. The serious allegation of material non-disclosure was pursued vigorously but not made out by Pentire, as the trial judge correctly found. It is significant also that Pentire never applied to Costello J. to vacate her orders on the basis of material non-disclosure notwithstanding

that they had the grounding affidavits since mid-December 2017, appeared before her on 20 December 2017 and had access to the DAR from late January 2018, many months before the interlocutory injunction was heard. I am satisfied that the application of the principle of non-disclosure should not be carried to extreme lengths as Pentire sought to do and the trial judge's determination accords with the evidence and she correctly applied the relevant jurisprudence, outlined above, to the facts as established by her as her determination of the issue demonstrates.

133. This can be characterised as a receiver-injunction type application and, as outlined by Murray J. in *Ryan v. Dengrove DAC*, the courts are generally reluctant to intervene by way of equitable remedy in such cases where a dispute arises in respect of a commercial loan secured in business assets. Nevertheless, in cases such as the present where a mortgage is granted whereunder the title deeds are deposited with the mortgagee and where a mortgagor is ready and willing to expeditiously redeem the loan and the inability to do so stems principally from the mortgagee's failure to stand ready to return the title deeds, conduct on the part of a mortgagee such as was found to have occurred in this case which impeded the timely ascertainment of the sum properly due on redemption and the exercise of the equitable right to redeem, tilts the balance of justice in favour of the respondents and justifies the granting of interlocutory orders restricting Pentire's freedom to act pursuant to the terms of the security instrument pending the trial of the action and the determination of the respective rights and interests of the parties. Equity does not favour those who fetter the equity of redemption.
134. Pentire's contention that the trial judge offered insufficient reasons for reversing her original decision to refuse the application is not correct. In the first instance the "original decision" of 17 May 2018 was nowhere expressed to encompass the verbatim adoption of the seven clauses of Pentire's proposal of 13 March 2018 as Pentire appears to suggest. The trial judge expressly modified the proposed terms of the escrow and the basis for calculation of the sum was intended by her to represent "some kind of estimate as to what might be the compensation in respect of the loss of title deeds and a figure representing the surcharge" (p. 18 line 28 to p. 19 line 2). On its true construction the *via media* represented the trial judge's adaptation of key elements of the proposal and, as outlined above, the issues of costs and the escrow sum stood over for determination by the court in default of agreement between the parties.
135. Nowhere does the judge express any view on the issue of security for costs which was Pentire's proposal at clause 3. She repeatedly made clear that the issue of costs would be dealt with on a later date. On one view it might reasonably be inferred that the anticipated costs hearing would also encompass Pentire's proposal in respect of security for costs. Insofar as Pentire assumed that the judge, without demur and without canvassing the views of the respondents at all on the issue, intended to make an order that the respondents' solicitors would hold €50,000 as security for Pentire's costs of the plenary action, I can find no statement by the trial judge in the transcripts that could have caused Pentire to understand that the judge had directed her mind to the issue or approved the holding of the said or any sum in respect of same. The only reasonable conclusion, therefore, is that

an element of mutual misunderstanding arose between the court and Pentire on the security for costs issue for which both are blameless.

136. The trial judge was under no obligation to accept the proposal which had the status of an open offer not acceptable to the respondents. The framing of a proposal which sought to “tie up” the entire sum of €350,000 being drawn down under the refinancing arrangement in circumstances where Pentire appeared to be offering no sum to be held in escrow arising from the lost deeds speaks to the unreasonableness of the approach.

137. In summary, Pentire has failed to make out any of the grounds of appeal:

- 1) The trial judge was correct to find that the allegation of material non-disclosure was not made out. Any matters which were not disclosed at the *ex parte* hearing were not material to the decision to grant or withhold interim injunctive relief.
- 2) The trial judge was correct in finding that damages were not an adequate remedy for the respondents.
- 3) The trial judge did not err in her treatment of Pentire’s proposal. She was under no obligation to accept the proposal which had the status of an open offer not acceptable to the respondents. The original decision of 17 May 2018 was nowhere expressed as a verbatim adoption of all seven clauses of the proposal. The trial judge expressly modified the terms of the escrow and the basis of calculating the sum to be held, left over the issue of costs for determination by the court in default of agreement between the parties, and did not express any view on the issue of security for costs.
- 4) The trial judge was correct in finding that the claim of the respondents gave rise to a necessity for interlocutory injunctive relief.
- 5) The trial judge did not err in finding that there was an issue to be tried concerning the validity of the letter of demand and the extent to which service of the said letter was prompted by the respondents’ requests that the issues of the lost title deeds and surcharge interest be taken into account in the assessment of the sum required to redeem the loan.
- 6) The trial judge did not err in finding that there was an issue to be tried regarding Pentire’s inability to produce the title deeds and the extent to which Pentire may be liable for same. The fact that the respondents hold title bond insurance and true copies of the deeds is not necessarily an answer in law to the issue.
- 7) The trial judge did not err in finding that there was an issue to be tried regarding the enforceability of the surcharge interest clause in circumstances where it is arguable that the clause is a penalty and where the loss of the title deeds has impeded refinancing.
- 8) The trial judge did not err in determining that the balance of convenience lay in favour of granting the interlocutory injunctive relief. The trial judge had appropriate regard

to the fact that the respondents continued to make monthly repayments as requested and the unreasonable conduct of Pentire, as appeared on the evidence.

- 9) The trial judge did not err in awarding the full costs of the application for interlocutory injunctive relief to the respondents. In circumstances where Pentire has been unsuccessful on all other grounds of appeal, no basis has been identified for interfering with the exercise of the trial judge's discretion in relation to costs.

Costs of this appeal

138. The appellant has been unsuccessful on all grounds of appeal. The appropriate order, in my view, is that the appellant be liable for the costs of the respondents in this appeal when taxed or ascertained in default of agreement. No stay should be granted in respect of the costs referable to this appeal. The stay granted by the High Court otherwise remains undisturbed. If either party seeks to dispute any aspect of the proposed costs order, the Office of the Court of Appeal should be notified within 14 days of the date of this judgment. Within 21 days thereafter, written submissions no longer than 2,000 words should be delivered by the moving party, with the other party being afforded a further 21 days to respond by written submissions no longer than 2,000 words. Thereafter, a date will be fixed for a hearing on the issue of the costs.

Pepper

139. Pepper Finance Corporation (Ireland) DAC having made out a valid case for its joinder pursuant to O. 17, r. 4 as a co-defendant/co-appellant with Pentire in these proceedings pursuant to a notice of motion which issued on 8 October 2020 and the affidavit of Todd Bowen sworn on 13 October 2020 together with the exhibits therein contained, the court so orders its joinder as co-defendant/co-appellant in the within proceedings to the intent that Pentire and Pepper are jointly and severally bound by all orders made in respect of Pentire to date or hereby or as may hereinafter be made in these proceedings; the respondents' costs of the said motion to be borne by Pepper and same to be taxed in default of agreement. If the parties seek to dispute any aspect of the proposed costs order in respect of the said motion, the Office of the Court of Appeal should be notified within 14 days of the date of this judgment and a date will be fixed for a hearing on the issue of the costs and the exchange of written submissions in respect of same.

140. Noonan and Pilkington JJ. agree with the within judgment and the orders proposed.