Neutral Citation: [2014] IEHC 316

THE HIGH COURT

[2014 No. 4500 P]

BETWEEN

TOLA CAPITAL MANAGEMENT LLC

PLAINTIFF

AND

JOSEPH LINDERS AND PATRICK LINDERS

DEFENDANTS

(NO.1)

JUDGMENT of Mr. Justice Cregan delivered on the 5th day of June, 2014

Introduction

1. In this case the plaintiff seeks the following interlocutory injunctive reliefs against the defendants:-

> (1) An order restraining the defendants from completing a debt purchase agreement with Ulster Bank in respect of the properties the subject matter of these proceedings otherwise than in trust for the plaintiff.
>
> (2) An order restraining the defendants from placing on the market, selling, transferring, assigning, disposing of, charging or otherwise dealing with the properties the subject matter of these proceedings save in accordance with the terms of Method A: Loan structure of the Binding Option Agreement between the parties dated 6th February, 2014;
>
> (3) An order directing the defendants to provide evidence confirming that the defendants alternative financing for the debt purchase agreement entered into with Ulster Bank consisted entirely of debt with no third party equity participation.

Factual Background to the Application

2. The plaintiff is a limited liability company incorporated under the laws of Delaware United States. It has its principal place of business at 299 Park Avenue, 16th Floor, New York in the United States.

3. The defendants are sued in their personal capacities. However, at para. 8 of the grounding affidavit of Ronan Dodd, solicitor for the plaintiff, it is averred that:-

> *"The defendants or companies controlled by them are the owners of the following properties (hereafter collectively referred to as the "properties") described in the Binding Option Agreement as: [The details of certain properties are then set out]."*

4. The defendants wished to enter into an agreement with Ulster Bank to buy back certain loans which they owed to Ulster Bank and which were secured on properties which either they, or companies controlled by them, owned. In order to buy back these loans they needed to obtain finance from alternative financiers. One possible financier was the plaintiff and, according to the defendants, the role of the plaintiff in the renegotiations of the defendants' refinancing of their loans with Ulster Bank was that the plaintiff would provide evidence of alternative funding to Ulster Bank.

5. The plaintiff alleges that the parties entered into a Binding Option Agreement on 6th February, 2014.

6. Under the terms of the option agreement, the defendants granted the plaintiff an exclusive option to acquire certain properties. The agreement also set out two possible structures to purchase the properties (the subject of the option) as follows:-

> (1) Method A – Loan Structure
>
> (2) Method B – Partnership Structure

7. Paragraph 1 of the option agreement provided that the Linders would negotiate the purchase of the loans from Ulster Bank in return for a full and final release by Ulster Bank of all claims over the companies, the individuals and the properties. Tola agreed to provide the Linders with letters demonstrating proof of funds which the Linders were authorised to present to the bank in connection with negotiating a price for the purchase of the loans.

8. Paragraph 2 of the agreement provided that for a period of thirty to forty five days after the date in which the Bank provided written notice of its acceptance of the purchase price, the parties would negotiate to reach an agreement for the purchase of the properties under the terms of Method B: Partnership Structure" set out in the agreement.

9. It was also agreed that if the Linders terminated negotiations for the purchase of the properties prior to the expiration of the negotiation period and prior to the execution by the parties of a legally binding contract, "then the Linders shall pay the sum of €500,000 to Tola within thirty days of the Linders' notice to terminate the negotiations or at the time of the closing of the transaction with the bank, whichever occurs earlier".

10. Paragraph 3 of the option agreement provided that, in the event that the parties were unable to reach agreement on the terms of the purchase of the properties under Method B: Partnership Structure, "then Tola shall have the right, but not the obligation, to purchase the properties under the terms of Method A: Loan Structure" as set out in the agreement. It also provided that Tola could

exercise its option by a notice of intent to purchase to the Linders within seven days of the expiration of the negotiation period.

11. However, the critical clause in the contract and one which is at the heart of the dispute between the parties is at para. 4 which provides as follows:-

> *"Notwithstanding the foregoing, the Linders may, within seven days of receipt of the notice from Tola exercising the option to purchase, elect not to proceed with a purchase pursuant to the terms of Method A: Loan Structure by notice of intent to decline the Loan Structure purchase to Tola so long as all of the following conditions are met:*
>
> > *(a) The Linders shall have obtained alternative financing comprised entirely of debt with no third party equity participation, sufficient to allow the Linders to effect the purchase of the loans from Ulster Bank, and*
> >
> > *(b) The Linders pay the sum of €500,000 to Tola within thirty days of the Linders notice to decline the purchase." (Emphasis added)*

12. The plaintiff subsequently provided the defendants with letters demonstrating proof of funds.

13. Subsequently, the defendants entered into an agreement with Ulster Bank for the repurchase of their loans on 23rd April, 2014. The terms of this agreement were clearly confidential but were given to the plaintiff by the defendants in good faith

14. The parties then entered into negotiations to see if they could agree a partnership structure under the Binding Option Agreement.

15. However, these negotiations proved inconclusive and on 18th April, 2014, the defendants (through a Mr. Tuite), sent an email confirming that the defendants were withdrawing from the negotiations.

16. On 22nd April, 2014, the plaintiffs then, by notice, exercised its option to purchase the Tola properties in accordance with Method A: Loan Structure set forth in the option agreement.

17. On 28th April, 2014, the defendants gave notice of their intention to decline to proceed with the purchase by the plaintiff of the Tola properties in accordance with Method A; they stated that they had obtained alternative financing comprised entirely of debt with no third party equity participation which would allow them to complete the debt purchase agreement with Ulster Bank and requested the plaintiff's bank details in order to make a payment of €500,000 pursuant to clause 4(b) of the Binding Option Agreement.

18. By letter dated 28th April, 2014, the plaintiff confirmed receipt of the defendants notice declining to proceed with method A and sought documentary confirmation that the requisite alternative financing (i.e. entirely debt with no equity participation) had been obtained as required by the option agreement.

19. Further correspondence took place between the parties and on 14th May, 2014, solicitors on behalf of the defendants wrote to the plaintiff stating that the defendants' sole remaining obligation under the option agreement was to make a payment of €500,000 to the plaintiffs, and asserted that the plaintiff had no entitlement to demand further information. However, the plaintiff contended that the defendants were under a contractual obligation to provide specific information to the plaintiff to confirm that the defendants had, indeed, met the precondition for declining the exercise of the plaintiff's option to purchase, (*i.e.* that they had obtained alternative debt financing from another financier without any equity participation). The plaintiff also stated in its affidavit that the defendants' failure to provide this information was unreasonable and that the only conclusion to be drawn from the refusal to supply such information was that the defendants had not complied with clause 4. More importantly, the plaintiff contends that there is a binding agreement for the purchase of the properties under Method A: Loan Structure.

20. Thus, the defendants are of the view that the Option Agreement has been terminated (and that all they need to do is pay the plaintiff the sum of €500,000); the plaintiff, on the other hand, maintains that it is still entitled to exercise its option to purchase certain properties in accordance with the terms of Method A: Loan Structure.

21. Given the impasse between the parties, the plaintiff issued a plenary summons on 16th May, 2014. The plenary summons seeks, *inter alia*:-

> 1. An order for specific performance of the option agreement entered into on 6th February, 2014;
>
> 2. A declaration that the plaintiff holds the benefit of a contract for the purchase of the Tola properties and a charge over the Linders properties from the defendants in accordance with the terms of Method A: Loan Structure of the Binding Agreement; [the Tola and Linders properties are set out in the plenary summons]
>
> 3. A declaration that the defendants hold the properties in trust for the plaintiff;
>
> 4. An order restraining the defendants from completing a debt purchase agreement with Ulster Bank in respect of the properties otherwise than in trust for the plaintiff; and
>
> 5. Orders similar to orders one, two and three of the notice of motion;
>
> 6. Damages and other reliefs.

22. Mr. Joseph Linders swore a replying affidavit on behalf of the defendants and set out the background to the involvement of the plaintiff in the commercial affairs of the defendants and their associated companies. In the first instance, however, Mr. Linders stated that he took grave exception to certain averments in the plaintiff's affidavit which, he said, disclosed sensitive financial and commercial information which had been given to the plaintiff by the defendants in good faith as part of a due diligence exercise entered into between the plaintiff and the defendants prior to the option agreement being entered into. Mr. Linders stated that the plaintiff was now seeking to use this sensitive commercial information - which was clearly confidential - to exert pressure on the defendants and to extract a commercial advantage from the defendants subsequent to the termination of the option agreement by the defendants.

23. Mr. Linders stated that the option agreement between the parties was entered into on 6th February, 2014 before the defendants entered into their refinancing agreement with Ulster Bank. Mr. Linders stated that the role of the plaintiff in the renegotiation of the

financing arrangements with Ulster Bank was to provide evidence of funding to demonstrate that the defendants were in a position to purchase and/or refinance their liabilities with Ulster Bank. Mr. Linders stated that, in this way, the plaintiff provided a financial service to the defendants for which the defendants were prepared to pay them "handsomely" in the sum of €500,000. Mr. Linders also stated that the option agreement would only become operable and effective on certain events occurring and agreement being reached between the parties.

24. Mr. Linders stated that the defendants had entered into a confidential agreement with Ulster Bank on 23rd April, 2014, the essential terms of which were that it was agreed between Ulster Bank and the defendants that the defendants would seek to effect a refinancing of their overall liabilities with Ulster Bank.

25. Mr. Linders also states at para. 9 of his affidavit:-

> *"The defendants have procured third party debt financing from a reputable firm of international financiers which will facilitate the refinancing and/or purchase of our lending arrangements with UBIL. This is addressed in further detail below. This was envisaged by the purported option agreement and it naturally follows that the plaintiff can have no further role in the refinancing and/or purchase of our indebtedness from UBIL. It seems to be the gravamen of the plaintiffs case that they are retrospectively seeking to insert or imply into the terms of the agreement, particularly clause 4(a) thereof, that third party debt financing from an independent entity must be, in some way, subject to their approval or the terms or conditions of which should be examined by them in advance in some way and in some other way approved by them. This is not what the parties agreed…Bearing in mind the manner in which the plaintiff has abused the confidential information we have already provided them access to, I have no doubt but that the plaintiff would use that information to try and damage our contractual arrangements with our financier and/or UBIL."*

26. Thus, Mr. Linders interpretation of the agreement was that it was an option agreement entered into between the parties, that the plaintiff provided evidence of funds, that the defendants were able to use that evidence of funds in their negotiations with Ulster Bank, that there was a debt financing agreement between the defendants and Ulster Bank and that the defendants for their own good reasons decided to terminate the option agreement with the plaintiffs as they say they were entitled to do within the terms of the option agreement. The defendants say that they have obtained alternative financing from an alternative financier and, therefore, they were in a position to terminate the option agreement with the plaintiffs. Mr. Linders stated that he was of the view that the actions of the plaintiff were an opportunistic attempt to take advantage of the defendants' position and to seek to put in place an arrangement which was manifestly contrary to the agreement between the parties.

27. The various further affidavits filed on behalf of both parties are replete with assertions of what the various clauses in the option agreement mean or purport to mean. The issue of the construction of the option agreement is clearly not a matter for the court to decide at the interlocutory stage. The various interpretations and construction of the agreement are a matter for the final trial of the action.

The Nature of the Relief Sought – Prohibitory or Mandatory?

28. The plaintiff submitted that paras. 1 and 2 of its notice of motion were seeking prohibitory rather than mandatory injunctions.

29. This was vigorously contested by counsel for the defendants who submitted that the reliefs sought at paras. 1 and 2 of the notice of motion were essentially mandatory in nature.

30. The plaintiff also indicated to the court that it did not wish to proceed with an application under para. 3 of its notice of motion.

31. It is necessary, therefore, to consider the reliefs sought at paras. 1 and 2 of the notice of motion.

32. Paragraph 1 of the plaintiff's notice of motion seeks an order restraining the defendants from completing a debt purchase agreement with Ulster Bank in respect of the property the subject matter of these proceedings "otherwise than in trust for the plaintiff".

33. Having heard submissions from both parties in respect of para. 1, it is clear, in my view, that the order sought is, in substance, an order that the defendants should complete the debt purchase agreement with Ulster Bank in such a manner that, at the closing, the defendants should hold the relevant properties in trust for the plaintiff. This does not simply restrain the defendants from doing what they intended to do; it means that they must take active steps at the closing of their debt buy back agreement with Ulster Bank to ensure that these properties are held in trust for the plaintiff. This could mean, for example, that declarations of trust might have to be executed in respect of each property. In any event, it would mean that, at the closing, instead of the title to the properties passing back to the defendants, the defendants would have to take steps to ensure that the title would pass to the defendants on trust for the plaintiff. That is clearly a dramatic alteration in the contractual relationship between the defendants and the plaintiff. Moreover, it could also clearly have a significant and damaging effect on the agreement which the defendants have with their new financier. It is clear that the Linders intend to obtain new finance from a new financier; part of the security for this new financing would be the title to the relevant properties. However, if the Linders were, in fact, holding these properties in trust for the plaintiff, the new financier could well take the view that the security being provided by the Linders was simply not adequate and refuse to finance the buy back of the loans. Therefore, the effect of such an injunction would be to frustrate the contract which the defendants have entered into with Ulster Bank. This Court would be very slow to grant any interlocutory relief which would have such an effect. Thus, what is sought by the plaintiff is clearly in substance, and in essence, a mandatory injunction.

34. Moreover, it is also clear that the defendants have, in fact, entered into a debt purchase agreement with Ulster Bank on 23rd April, 2014, and that this debt purchase agreement is due to complete in or about August, 2014. Thus, the effect of the orders sought by the plaintiff is either (i) to set aside the contract entered into between the defendants and Ulster Bank or (ii) to amend the terms of the contract entered into between the defendants and Ulster Bank to ensure that the defendants hold the properties in trust for the plaintiff. When stated in this form, also, it is clear that the reliefs sought at para. 1 are mandatory in substance.

35. The relief sought at para. 2 is an order restraining the defendants from selling, transferring, assigning, disposing or otherwise dealing with the property except in accordance with the terms of Method A of the option agreement entered into between the parties on 6th February, 2014. Again, it is clear to me - having heard submissions by both parties in respect of this matter - that the substance of what is being sought by the plaintiff is an injunction directing the defendants to contract with the plaintiff on the terms of the Method A: Loan Structure of the option agreement entered into between the parties. Again, although it purports to be a prohibitory injunction, it is, in substance and in essence, a mandatory injunction directing the defendants to enter into a particular contractual agreement with the plaintiff on particular terms.

The Criteria for the Grant of a Mandatory Injunction

36. The criteria for the grant of a mandatory interlocutory injunction have been the subject of much case law. In *Maha Lingham v. Health Service Executive* [2006] ELR 137, the plaintiff applied to the High Court for an interlocutory injunction restraining the defendant from dismissing him from his position as a temporary surgeon at Cork University Hospital. The High Court (Ms. Justice Carroll) refused the application for an injunction and the plaintiff appealed to the Supreme Court.

37. Fennelly J. giving judgment on behalf of the Supreme Court stated as follows at p. 140 of the judgment:-

> *"The second [legal matter] is that the implication of an application of the present sort is that in substance what the plaintiff/appellant is seeking is a mandatory interlocutory injunction and it is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such a case it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action. So it is not sufficient for him simply to show a prima facie case and, in particular the courts have been slow to grant interlocutory injunctions to enforce contracts of employment."*

38. This Supreme Court decision in *Maha Lingham* was applied by Clarke J. in *Bergin v. Galway Clinic Doughiska Ltd* [2008] 2 I.R. 205. In these proceedings the plaintiff initiated High Court proceedings seeking an injunction against the defendant restraining his dismissal. Clarke J., in the High Court, granted an interlocutory injunction restraining the defendant from dismissing the plaintiff and from appointing another Chief Executive, except on terms which would allow the plaintiff to return to his duties should the court ultimately make such an order.

39. At para. 16 of his judgment, Clarke J. noted that the first legal issue which arose between the parties was what was the appropriate standard to be applied in assessing the case which the plaintiff has to make out at the interlocutory stage and stated:-

> *"It is clear from cases such as Fennelly v. Assicurazioni Generali [1985] 3 I.L.T. 73 and Maha Lingham v. Health Service Executive [2005] IESC 89, that a plaintiff may be entitled to injunctive relief which would have, to some extent, the effect of continuing his or her employment but only, it would seem, where the plaintiff concerned can establish a strong case."*

40. Likewise, at paras. 19, 20 and 21 of his decision (in considering *Maha Lingham* and *Naujoks v. National Institute of Bioprocessing* [2006] IEHC 358, a decision of Laffoy J.), Clarke J. states as follows:-

> *"19. Applying Maha Lingam v. Health Service Executive [2005] IEHC 89 in Naujoks v. National Institute of Bioprocessing Research and Training Ltd [2006] IEHC 358, Laffoy J. undoubtedly applied the strong case test in determining that the plaintiff had not discharged the onus in relation to what was described as the first strand of the plaintiff's case.*
>
> *20. Laffoy J. went on to consider a second strand of the plaintiff's claim which relates to fair procedures. It is suggested by counsel on behalf of the plaintiff herein that Laffoy J. in relation to that strand applied the ordinary or lower standard of fair issue to be tried. I am not satisfied that Laffoy J. did in fact apply a lower standard. Indeed it would be difficult to see the logic of so doing. The basis for the higher standard is that the substance of the relief sought is a mandatory order requiring the employer to keep the employee in employment. The order remains a mandatory order even though the plaintiff claims that a purported termination of his employment is unlawful by reason of a finding of wrongdoing having been arrived at in breach of the principles of natural justice. However, couched the substance of the relief is the same. I am not, therefore, satisfied that different standards apply depending on the nature of the claim advanced on behalf of the plaintiff concerned. Where a plaintiff seeks to prevent an employer from exercising a prima facie entitlement to terminate a contract of employment, then that employee is, in substance, seeking a mandatory order requiring that his employment continue and that his employment entitlements are met.*
>
> *21. It follows, in my view, that, in order to determine whether the first step towards granting such an order has been met, it is necessary that the plaintiff concerned establish a strong case.*

41. In *Shelbourne Hotel Holdings Ltd v. Torriam Hotel Operating Company Ltd* [2010] 2 I.R. 52, Kelly J. also reviewed the principles applicable to the granting of a mandatory injunction. At para. 72 of his judgment he states as follows:-

> *"72. The parties are in disagreement as to the principles which ought to be applied by the court in considering an application for interlocutory mandatory relief.*
>
> *73. On the one hand the plaintiff contends that the test is that prescribed by the Supreme Court in Campus Oil v. Minister for Industry (No. 2) [1983] I.R. 88. It is the same test as that prescribed by the House of Lords in American Cyanamid v. Ethicon Ltd. [1975] A.C. 396. The test requires that in order to obtain such an interlocutory injunction the plaintiff has to demonstrate a serious issue for trial, inadequacy of damages and the balance of convenience lying in favour of the grant of the order.*
>
> *74. The defendant contends that a different test must be met on the first of those three issues. It argues that it is not enough to show a serious issue for trial but rather, the issue must be such as to allow the court to feel a high degree of assurance that the injunction is being rightly granted or, to put it another way, a likelihood or strong likelihood of success at the trial."*

42. The learned High Court Judge then reviewed other authorities in Ireland the UK and stated as follows:-

> *"[77] Campus Oil v. Minister for Industry (No.2) [1983] I.R. 88 was itself a decision given on an application for a mandatory interlocutory injunction. It has been followed in such a context on many occasions for example the decision in Cronin v. Minister for Education [2004] IECH 255 [2004] 3 I.R. 205, which I have just mentioned as well as the decision of Carroll J. in A & N Pharmacy Ltd v. United Drug Wholesale Ltd [1996] 2 ILRM 42 and the decision of Peart J. in Sheehy v. Ryan (Unreported, High Court, Peart J., 29th August, 2002).*
>
> *[78] There have however been other dicta suggestive of the necessity to demonstrate a strong or clear case redolent of the language used by Megarry J. in Shepherd Homes Ltd. v. Sandham [1971] Ch. 340 where he spoke of the necessity for the case to be "unusually sharp and clear" before a mandatory injunction would be granted.*

[79] Indeed, the approach of Megarry J. was subsequently approved by the Court of Appeal, per Mustill L.J., in Locabail International v. Agroexport [1986] 1 W.L.R. 657. There that judge noted that, although the judgment of Megarry J. antedated the decision in American Cyanamid v. Ethicon Ltd. [1975] A.C. 396, nonetheless the statement of principle in relation to the case of a mandatory injunction was not affected by what the House of Lords said in that case. Mustill L.J. went on to prescribe the test applicable to applications for interlocutory mandatory injunctions by reference to a passage from Halsbury's Laws of England (4th ed.) which states as follows at para. 948:-

> *"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once … a mandatory injunction will be granted on an interlocutory application."*

[80] That very passage was cited with approval by Costello J. in Irish Shell v. Elm Motors [1984] I.R. 200.

[81] In Boyhan v. Beef Tribunal [1993] 1 I.R. 210, Denham J., then a High Court Judge, described a mandatory injunction as a powerful instrument and said that:-

> *"In seeking this exceptional form of relief, a mandatory injunction, it is up to the plaintiffs to establish a strong and clear case - so that the court can feel a degree of assurance that at a trial of the action a similar injunction would be granted."*

[82] This approach has been adopted by the Supreme Court in Lingam v. Health Service Executive [2005] IESC 89." (and the learned High Court Judge set out the quote of Fennelly J. set out above).

"[83] This approach seems very different to that adopted by the Supreme Court in Campus Oil v. Minister for Industry (No. 2) [1983] I.R. 88 and by Laffoy J. in this court in Cronin v. Minister for Education [2004] IEHC 255, [2004] 3 I.R. 205. It is more in harmony with the approach of the English courts beginning with the observations of Megarry J. and culminating more recently in the Court of Appeal decision in Zockoll Group Ltd. v. Mercury Communications Ltd. [1998] F.S.R. 354 where that court said at p. 366:-

> *'… the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be 'wrong' in the sense described by Hoffmann J.*
>
> *Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo .*
>
> *Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater the degree of assurance that the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.'"*

43. At para. 85 Kelly J. continued:-

"[85] To return to Ireland, there seems to be an inconsistency of approach on the standard that must be met in order to obtain an interlocutory mandatory injunction. On one view it is the demonstration of a fair case or serious issue for trial, on the other, a higher standard of proof must be achieved that has variously been described as a strong case likely to succeed at the hearing of the action or a strong and clear case.

[86] Faced with these conflicting approaches and pending a final determination of the issue by the Supreme Court, I am much attracted by the approach of Hoffmann J. in Films Rover Ltd. v. Cannon Film Sales Ltd. [1987] 1 W.L.R. 670 where he took the view that the fundamental principle on interlocutory applications for both prohibitory and mandatory injunctions is that the court should adopt whatever course would carry the lower risk of injustice if it turns out to have been the "wrong" decision.

[87] Whatever standard applies it is clear that the grant of mandatory interlocutory relief is exceptional. In many if not all cases, the mandatory nature of the relief will also be a factor to be taken into consideration when the balance of convenience falls to be considered. "

44. In *AIB v. Diamond & Ors* [2011] IEHC 505, Clarke J. stated as follows at para. 5.1:-

"5.1 The criteria for the grant of interlocutory injunctions has been well settled in this jurisdiction since the decision of the Supreme Court in Campus Oil. In Shelbourne Hotel Ltd. v Torriam Hotel Operating Co. Ltd. [2010] 2 I.R. 52 Kelly J. noted a number of authorities from the United Kingdom which suggested an approach based on assessing where the least risk of injustice lay. Kelly J. did not find it necessary to reach any definitive conclusions on the point. As it happens, at much the same time, writing extra judicially in the foreword to Kirwan – Injunctions Law and Practice (1st Ed. 2008), I noted the same developments and suggested that a high value might be placed on an assessment of where the greatest risk of injustice might lie in future applications for interlocutory injunctions. As such, it is important to emphasise a number of points.

5.2 First, the Campus Oil jurisprudence is now so well established in the case law of the Supreme Court and, indeed, this Court, that it would, in my view, be impermissible for this Court to depart from it unless and until any judgment of the Supreme Court so authorised. However, on analysis, it seems to me that it is, perhaps, more appropriate to characterise the "greatest risk of injustice" criteria not so much as a different test to that which has become established in the Campus Oil jurisprudence but rather as the underlying principle which informs the more detailed rules which have been worked out in accordance with that jurisprudence.

5.3 It is inevitable that a court having to decide whether to grant or refuse an interlocutory injunction will be faced with some risk of injustice. The whole point of interim or interlocutory injunctions is that they are designed to be granted or refused after a very early and often quite brief hearing with a view to deciding what state of play should subsist until the court has an opportunity to conduct a full hearing. Against that background it is inevitable that there will be cases where an injunction will be granted but where it will turn out, after trial, and with the benefit of full evidence and argument, that the plaintiff who obtained the interlocutory injunction was in the wrong and should, with the benefit of hindsight, never have had the advantage of a restraining order. Likewise, it may transpire that a plaintiff who is refused an interlocutory injunction may succeed at trial and will have suffered whatever injustice flows from not having had the benefit of a court order in the intervening period.

5.4 Obviously, the extent to which there may be a risk of injustice can vary hugely from case to case and, within one case, from party to party. However, it seems to me that it is an acknowledgment by the court of that risk of injustice that informs the detailed rules that have evolved by reference to which the court decides whether to grant or refuse an interlocutory injunction. If a plaintiff cannot establish a fair issue to be tried, then there is obviously a huge risk of injustice in imposing an injunction on a defendant where there is, at least at the time of the interlocutory hearing, no real basis for supposing that the plaintiff will ultimately succeed."

45. Clarke J. also stated at para. 5.8:-

"5.8 On the basis of that analysis, it might be said that giving consideration to the least risk of injustice does not really add much to the overall picture for it might be seen simply to justify the existing set of rules. However, it seems to me that a "least risk of injustice" analysis has perhaps some additional benefits. First, it can be a useful measure for deciding whether a somewhat different approach to normal is needed in particular types of cases. It is now well settled that in cases involving a mandatory injunction the court will normally require a higher level of likelihood that the plaintiff has a good case before granting an interlocutory injunction (see for example Lingam v Health Service Executive (Unrep., Supreme Court, Fennelly J. 4th October, 2005). It may well be that the logic behind that departure from the normal rule can be found in the added risk of injustice that may arise where the court is asked not just to keep things as they were by means of a prohibitory injunction but to require someone to actively take a step which may, with the benefit of hindsight after a trial, turn out not to have been justified. The risk of injustice in the court taking such a step is obviously higher. In order to minimise the overall risk of injustice the court requires a higher level of likelihood about the strength of the plaintiff's case before being prepared to make such an order. Likewise, in cases such as Evans v. IRFB Services (Ireland) Ltd [2005] IEHC 107 and Bergin v. Galway Clinic Doughiske Ltd [2008] 2 I.R. 205 the attempt to fashion an interlocutory order which minimised the overall risk of adverse consequences might be seen to be examples of the same underlying principle.

5.9 Given that, based on the above analysis, the detailed rules which have evolved for considering interlocutory injunction applications can be said to stem from an attempt by the court to work out the course of action which gives rise to the least risk of injustice, then it may well be that that underlying principle can be a useful tool or measure to be applied where the court is confronted with a difficult situation."

46. In *Okunade v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2013] 1 ILRM 1, Clarke J. giving the judgment of a unanimous Supreme Court stated as follows at para. 9.7 of the judgment:-

"9.7 It is fair to say that much of the detailed analysis of the Campus Oil test has occurred in the context of injunction proceedings which at least have a significant commercial contractual or property character. The basic rules for the grant or refusal of such injunctions at the interlocutory stage are well settled. The test perhaps finds its most detailed exposition in the judgment of McCracken J. in B&S Limited v. Irish Auto Trader Limited [1995] 2 I.R. 142 at 145 which has been approved by Laffoy J. in Symonds Cider v. Showerings (Ireland) Limited [1997] 1 ILRM 481 and Quirke J. in Clane Hospital Limited v. Voluntary Health Insurance Board (Unreported, High Court, Quirke J., 22nd May 1998)."

The learned judge then set out the test at para. 9.8 of his judgment. He states at para. 9.13:-

"9.13 It is unnecessary for the purposes of this judgment to analyse in detail each of the types of cases where a refinement of what might be described as the "pure" Campus Oil test has evolved. However, some examples are illustrative of the fact that such refinements and variations can be seen as a response to the need to minimise the risk of injustice in the context of the particular types of issues which are likely to arise in special cases.

9.14 A first example may be found in relation to mandatory interlocutory orders. As Megarry J. observed in Shepherd Homes Ltd. v. Sandham [1971] Ch.340 at 359:-

> *"In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."*

O'Higgins C.J. made similar comments about the difficulty in granting mandatory orders at an interlocutory stage in Campus Oil itself. Perhaps the area where mandatory interlocutory orders have received their most extensive recent consideration in this jurisdiction is in the field of so called employment injunctions (that is applications brought by plaintiffs seeking to restrain either dismissal or certain steps being taken in a disciplinary process) where the courts have applied a test which involves a variation on the "pure" Campus Oil principles. Where, for example, the substance of the order sought in those cases involves something which, in substance, is a mandatory order (as to which see Bergin v. Galway Clinic Doughiske Ltd [2008] 2 I.R. 205 and Giblin v. Irish Life and Permanent plc [2010] IEHC 36), the courts have required the plaintiff to establish not just a fair or arguable case but rather the higher standard noted by this Court in Maha Lingam v. Health Service Executive [2006] 17 ELR 137."

47. In my view, therefore, it is clear from this review of the authorities that, in the case of mandatory injunctions, there is what Clarke J. has described as "a refinement" or "a variation" of the "pure" *Campus Oil* test. This variation has been applied to mandatory injunctions in two recent Supreme Court decisions – *Maha Lingham* and *Okunade*. In my view, it appears from the decision of Fennelly J. in *Maha Lingham* and the decision of Clarke J. in *Okunade* that where the order sought is a mandatory order, then the appropriate test is that the plaintiff must establish, in the words of Fennelly J. in *Maha Lingham*, that he has "a strong case that he is likely to succeed at the hearing of the action".

48. It also appears to be the case that, where a mandatory injunction is being sought, the court should also particularly adopt "whatever course would carry the lower risk of injustice" as stated by Kelly J. in *Shelbourne Hotel* and Clarke J. in *Okunade*.

49. Therefore, I am of the view in this case that the plaintiff must establish a strong case that it is likely to succeed at the hearing of the action before it is entitled to an injunction.

Specific Performance of a Loan Agreement
50. The main relief sought by the plaintiff in a plenary summons is specific performance of the option agreement entered into between the parties. Whilst the exact nature of the option agreement is a matter for trial of the action, it appears to be a loan agreement, albeit of an unusual kind.

51. In general, however, it appears that the courts lean against specific performance of loan agreements. Thus, in *Gorringe v. The Land Improvement Society* [1899] 1 I.R. 142 Porter M.R. stated as follows:-

> *"As a general proposition it is correct to say that a mere agreement to lend money even upon security will not be specifically performed. If money is lent, the lender may call it in again and therefore specific performance will be futile. Money compensation in such a case affords an adequate and indeed the best remedy and goes nearer to complete restitutio in integrum than the enforcement of a loan which the lender might straightaway proceed to require back leaving the borrower in no better position after the interference of the court."*

52. In *Duggan v. Irish Allied Building Society* (Unreported, High Court, Finlay P., 1st March, 1976), Finlay P. stated at p. 15 that a court could not and should not grant a specific performance of a contract to advance money.

53. However, the question of whether there is an absolute rule that the courts will never in any circumstances make an order for specific performance of a loan agreement is unclear. In "*Specific Performance in Ireland*" (Buckley, Conroy & O'Neill), the authors state at para. 7.23:-

> *"Damages will overwhelmingly remain the normal and proper remedy but any absolute rule to the effect that specific performance of the loan agreement will never be granted must be doubted. High English authority has described as an "untenable contention" the proposition that "specific performance of the contract to make a money payment was not available" See Beswick v. Beswick [1968] 1 A.C. 58 per Lord Hodson at 81."*

54. Likewise, at para. 7.24 the authors state:-

> *"Sir Garfield Barwick in a strong dissent in the New Zealand case of Loan Investment Corporation of Australasia v. Bonner [1970] NZLR 724 considered that the complexities of modern commerce might well throw up situations where an order for specific performance could be required."*

55. It is, of course, not necessary that the court should decide this principle at the interlocutory stage. However, the fact that, in general, courts will not grant specific performance of loan agreements is a factor to which a court can have regard in assessing whether a strong case has been made out.

56. Thus, given the nature of the plaintiff's case and the current state of the case law on specific performance, I am satisfied that the plaintiff has not fulfilled the test for a mandatory injunction, i.e. the plaintiff has not established that it has a strong case that it is likely to succeed at the hearing of the action.

The Issue of whether Damages are an Adequate Remedy
57. Counsel for the plaintiff submitted that the actual test of whether damages were an adequate remedy consisted of two limbs:-

> A. Whether damages were an adequate remedy for the plaintiff, and
>
> B. Whether, if so, the defendants were, as he put it, "a mark" for any damages award obtained by the plaintiff.

58. Counsel for the plaintiff relied on *American Cyanamid v. Ethicon Ltd* [1975] A.C. 396 where Lord Diplock stated at p. 408:-

> *"As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendants continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the plaintiff's claim appeared to be at that stage."*

59. Counsel for the plaintiff also relied on *Westman Holdings Ltd v. McCormack* [1992] 1 I.R. 151 where the Supreme Court considered whether the plaintiff could be adequately compensated in damages where personal defendants were unlikely to have the means to meet the award. The Supreme Court held that even though the plaintiff's potential loss was entirely pecuniary, compensation would not be an adequate remedy and Finlay C.J. stated:-

> *"Having regard to the decision of this Court in Campus Oil v. the Minister for Energy (No.2) and in particular to the judgment of O'Higgins C.J. in that case, I am satisfied that once a conclusion is reached that the plaintiff seeking an interlocutory injunction has raised a fair question to be tried at the hearing of the action in which, if he succeeded, he would be entitled to a permanent injunction that the court should not express any view on the strength of the contending submissions leading to the raising of such a fair and bona fide question but should proceed to consider the other matters which then arise in regard to the granting of an interlocutory injunction. They are firstly as to whether the plaintiff could, in the event of being refused an injunction and succeeding in the action be adequately compensated by damages. That question raises two separate issues potentially in every case. The first is the question as to whether damages would be an adequate remedy and the second is as to whether there is a defendant liable to pay such damages who is able to do so and thus the appropriate compensation could actually be realised."*

60. Counsel for the plaintiff conceded that damages would be an adequate remedy for the plaintiff. However, he submitted that, on the evidence before the court, the defendants were not "a mark" for such damages and, therefore, damages were not an adequate remedy.

61. In this regard the plaintiff submitted that the defendants (and their companies) were indebted to Ulster Bank, that all of the properties involved in the option agreement were currently pledged as security (and would be pledged as security with any future third party funder or financial institution); and that any judgment or award which the plaintiff might obtain against the defendants would rank behind secured debt and were unlikely to be satisfied. He also submitted that the profits which the plaintiff would have made on the option agreement would have been substantial and would be far in excess of what the defendants could afford to meet on any award of damages.

62. However, Mr. Linders in his second affidavit stated that the defendants were both solvent and had substantial means. He also stated that his solicitors were in a position to hand into court, in a sealed envelope, a summary of the defendants' net worth. The plaintiff's counsel objected to such a course of action and submitted that the court had no jurisdiction to receive such a sealed envelope. In any event, I indicated to the parties that it was not my intention to consider the contents of a sealed envelope. Mr. Linders also stated that he was unwilling to put this information on affidavit lest it be abused by the plaintiff in a similar manner to the manner in which it had abused other confidential financial information which it had obtained from the defendants.

63. Moreover, Mr. Linders stated in his first affidavit that if the defendants were allowed to complete the debt purchase agreement, then the defendants would be "in extraordinarily robust financial health into the future". The defendants submitted that the plaintiff's application would, if successful, completely destroy the debt repurchase agreement which they are seeking to complete with Ulster Bank. They submit that catastrophic financial results would ensue for the defendants and their companies.

64. In these circumstances – and given the case law - I am of the view that the court is entitled to consider whether the defendants would be in a position to meet any possible award of damages (which the plaintiff might obtain at the trial of the action) at the determination of the plenary action rather than at the time of the application for an interlocutory injunction.

65. In this regard, Mr. Linders stated at para. 65 of his first affidavit that any settlement or purchase of debt by any third party funder with Ulster Bank "will give rise to significant financial advantage which would ensure the financial independence and stability of the defendants and the related companies and significant equity". He also stated that the defendants controlled very large property portfolios and that the proceeds of rent and further operating profits were more than adequate to discharge any damages that might arise in the plaintiff's favour. Mr. Linders also stated that if the defendants were successful in obtaining the debt write down, the reduction and servicing costs on the lower debt level and the increase in commercial values would ensure that the defendants and/or companies controlled by them would be in a position to meet any judgment which the plaintiff obtained. Mr. Linders also stated that the surplus rental income enjoyed by the defendants and their associated companies over the repayment of bank commitments was considerably in excess of €2m a year.

66. Counsel for the defendants also submitted that the plaintiff had not made any attempt to quantify the damages which it thought it might suffer as a result of the defendants' alleged wrongdoing. He also submitted that it would be possible for the plaintiffs to quantify such a loss, but they had deliberately chosen not to do so as a tactic in its application for interlocutory relief. His submission was that, in effect, the plaintiffs sought to argue that their damages were not possible to calculate at this stage, but that they would be significant and that the defendants would not have the financial wherewithal to meet such a significant damages award. This, counsel for the defendants submitted, was not an appropriate tactic in an interlocutory application. The plaintiffs could have calculated any alleged damages award which they thought they might recover and if such a figure had been put before the court, the defendants could have sought to satisfy the court that they were a mark for any such award. However, the defendants submitted, what the plaintiff could not do was to make a generalised claim for a significant but unstated amount for damages and then simultaneously claim that the defendants would not be able to meet such a sum. This submission was rejected by the plaintiff who argued that certain information about the valuations of property had been put before the court which would provide some yardstick by which the court might assess the measure of damages which the plaintiff might suffer as a result of the defendants alleged breach of contract if the plaintiff was successful at trial.

67. In *Curust Financial Services Ltd v. Loewe – Lack – Werk Gmbh* [1994] 1 I.R. 450, the Supreme Court held that difficulty, as distinct from complete impossibility, of assessment was not a ground for characterising the award of damages as an inadequate remedy.

68. In the present case the plaintiff has accepted that damages are an adequate remedy for the plaintiff. Despite this concession, which in my view was properly made, the plaintiff has not been able to put forward a figure as to what its damages might be. However, given that it has accepted that damages are an adequate remedy, it follows as a matter of logic that the plaintiff should be in a position to assess at least a range of what those damages might be. The burden of proof is on the plaintiff so to do if they wish to argue that the defendants are not in a position to meet such an award. However, given that it has not done so in this case, it seems to me that it cannot argue, that the defendants cannot meet an award of damages when that amount is an unknown.

69. In any event, given the evidence on affidavit of the defendants, it appears that the defendants will be in position to meet an award of damages which the plaintiff might obtain.

The Balance of Convenience

70. In assessing the balance of convenience the court has to have regard to all the factors in the application.

71. Firstly, as Kelly J. remarked in *Shelbourne Hotel Holdings Ltd v. Torriam Hotel Operating Company Ltd*:-

> *"In many if not all cases the mandatory nature of the relief will also be a factor to be taken into consideration when the balance of convenience falls to be considered."*

72. In my view, the nature of the relief being sought is certainly a factor which I am entitled to take into account. The relief sought by the plaintiff would, in effect, completely undermine the agreement entered into between the defendants and Ulster Bank. The court should be extremely slow to grant orders which could have such an effect.

73. Secondly, as was stated by McCracken J. in *B&S Ltd v. Irish Auto Trader Ltd* [1995] 2 I.R. 142 at p. 146:-

> *"While Lord Diplock only used the phrase "balance of convenience" when considering the position if damages were not an adequate remedy for either party, I would be more inclined to the view that the entire test rests on a balance of convenience, but that the adequacy of damages is a very important element and may frequently be the decisive element in considering where the balance of convenience lies."*

74. Given that, as here, the plaintiff has accepted that damages are an adequate remedy for it (albeit with the reservation that it

believes the defendants may not be "a mark"), I am of the view that this also is a factor which weighs in the balance of convenience against the granting of an injunction.

75. Thirdly, as was stated in *Ó Murchu v. Eircell Ltd* (Unreported, Supreme Court, 21st February, 2001) Geoghegan J. stated at pp. 9 and 10 of the decision as follows:-

> *"…I am satisfied that the balance of convenience favours refusing the injunction. First of all there is the well known principle that in general the courts will not grant an injunction which would involve ongoing supervision. A court is therefore very slow to grant injunctions in either service contracts or trading contracts because it is very difficult to assess, at any given time thereafter as to whether such injunctions are being obeyed or not. It is also usually impractical and undesirable that two parties be compelled to trade with one another when one, for reasons which are perfectly rational, does not want to carry on such trading."*

76. The defendants in this case have stated clearly on affidavit that all necessary trust and confidence between the parties has broken down and they clearly do not wish to contract with the plaintiff. (See also *Sheridan v. Louis Fitzgerald Group Ltd* (Unreported, Clarke J., 4th April, 2006) where Clarke J. relied upon similar factors to refuse an injunction and also referred to *Ó Murchu v. Eircell* Ltd). In my view, this is also a factor to which I have regard in assessing the balance of convenience.

77. Fourthly, as was stated by Clarke J. in *Okunade*, as follows:-

> *"9.10 The test of the balance of convenience is, of course, itself expressly directed to deciding where the least harm would be done by comparing the consequences for the plaintiff in the event that an interlocutory injunction is refused but the plaintiff succeeds at trial and the consequences for the defendant in the event that an interlocutory injunction is granted but the plaintiff fails at trial."*

I, therefore, turn to compare the consequences for both parties in the event that an injunction is granted or refused.

78. In respect of the balance of convenience, the plaintiff submitted that the defendants would suffer no prejudice other than being delayed in their transaction with a third party funder.

79. However, the defendants in their affidavits clearly stated that if an injunction were obtained by the plaintiff, it would have catastrophic results for the defendants (and the companies they controlled) for the following reasons:-

> 1. The relief being sought had the potential to completely undo the protracted and careful negotiations between the defendants and Ulster Bank in relation to a debt purchase agreement.
>
> 2. As a result of the agreement between the defendants and Ulster Bank there was a timetable under which a number of requirements had to be met, including delivery of security.
>
> 3. If the defendants were unable to meet that timetable and complete the purchase of debt by mid August, Ulster Bank would then become entitled to enforce their security and effect a sale of the properties on the open market, thus, utterly setting at nought the debt purchase agreement which the defendants had entered into with Ulster Bank.
>
> 4. Enforcement by Ulster Bank against the defendants in respect of these properties would also constitute an act of default in relation to separate and substantial borrowings which Linders of Smithfield Ltd, (a company in which the defendants are two of the three shareholders), had from another lender secured on another suite of properties and would trigger potential enforcement in respect of that matter.
>
> 5. The companies which owned the properties referred to in the option agreement are trading companies, including companies operating the heating and motor car trades in which up to 60 people are employed and their jobs and livelihoods would be at risk in the event of an injunction. An injunction would, therefore, raise in their words "the very real prospect of the bank enforcing against the companies".
>
> 6. Mr. Linders stated that "the potential for damage is incalculable and potentially catastrophic not just by reason of the loss to the defendants which would potentially be all of the assets, but to the risk of the livelihood of numerous individuals not party to the option agreement.
>
> 7. Mr. Linders also stated that "I have no doubt that the plaintiff has sought these orders in the full knowledge that if the defendants are stopped financing from its preferred financier, the agreement with UBIL cannot be completed and the defendants face the loss of all their businesses".
>
> 8. He also referred to the "extraordinarily calamitous and adverse circumstances which would arise if the court made such an order".

80. Subsequently, after the application had been heard but before judgment had been delivered, counsel for the plaintiff sought liberty to file an additional affidavit to exhibit a letter sent from the plaintiff to the defendants after the hearing of the injunction application. This application was opposed. However, counsel for the plaintiff submitted that the plaintiff would suffer significant prejudice if it was not permitted to put that letter before the court. It was submitted that it was relevant to the court's assessment of the balance of convenience. Given this submission, I granted leave to the plaintiff to file a supplemental affidavit solely for the purposes of exhibiting a letter dated 26th May, 2014, from the plaintiff's solicitors to the defendants' solicitors and I gave liberty to the defendants to file a replying affidavit exhibiting their reply.

81. The plaintiff in its letter of 26th May, 2014, offered to pay the relevant amount to Ulster Bank – essentially in lieu of the third party financier which the defendants had obtained to finance the buy back of its loan from Ulster Bank. It also suggested that if this offer was accepted, the security held by Ulster Bank over the properties could be assigned by Ulster Bank to the plaintiff pending the trial of the action, and if the plaintiff was unsuccessful then the plaintiff would assign back the said security rights to the defendants or its nominee for the same consideration.

82. By letter dated 26th May, 2014, the plaintiff's proposal was rejected for a number of reasons. Firstly, the defendants stated it had actively terminated all contractual and commercial relations between the parties; secondly, all necessary trust and confidence had broken down between the parties and, therefore, it was not the intention of the defendants to enter into any further contractual

relations between the parties.

83. It is difficult in my view to see how such a proposal would add to the balance of convenience in favour of the plaintiff. Having considered the correspondence, I am of the view that it does not provide any basis which would change the balance of convenience in favour of the plaintiff. If anything, it simply serves to emphasise the difficulties of operating any contractual arrangements between the parties if an injunction were granted.

84. Having considered all the evidence set out on the affidavits and having considered the submissions of both parties, I am in no doubt that the balance of convenience in this matter clearly favours the refusal of the injunction sought.

Conclusion
85. In the circumstances, I will refuse the reliefs sought by the plaintiff in the notice of motion.