THE HIGH COURT

COMMERCIAL COURT

Record No. 2017/5073P

Between

WINGVIEW LIMITED T/A THE ELPHIN PUBLIC HOUSE

Plaintiff

and

ENNIS PROPERTY FINANCE DESIGNATED ACTIVITY COMPANY

Defendant

Judgment of Mr Justice Robert Haughton delivered this 10th day of November 2017

1. In this application the plaintiff seeks an interlocutory injunction prohibiting the defendant from appointing a receiver over premises known as the Elphin Public House ("the premises"), which includes a site ("the Site") at the rear of the premises.

2. The background facts are, at least for the purposes of this application, largely uncontested. Anglo Irish Bank Corporation plc, pursuant to a Facility Letter dated 12 May, 2009, made certain facilities available to the plaintiff, secured by a mortgage of the premises, a general floating charge and personal guarantees. The defendant acquired all the facilities and related security and guarantees in 2015.

3. The plaintiff was in default of its obligations under the facilities. A Deed of Settlement dated 25 November, 2016, ("the Settlement") was entered into between the plaintiff and defendant. The plaintiff acknowledged that it was indebted to the defendant as of 24 November, 2016, in the sum of €2,527,354.06. The plaintiff agreed to make the following "Settlement Payment": –

- €100,000 on or before 25 November, 2016
- €400,000 on or before 31 December, 2016
- €1 million on or before 31 March, 2017.

"31 March 2017 or such later date as the Lender in its sole discretion may notify to the Debtor" was defined as the "Long Stop Date". The Settlement then provided: –

> "2.3.3 Following receipt by the Lender of the Settlement Payment:
>
> (i) the lender shall execute and deliver the Deed of Release together with releases of all personal guarantees (including without limitation the personal suretyships of Leo and Marie Fitzgerald) given in connection with the Debtor's Obligations; and
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> (ii) recourse to the Debtor in respect of [the balance of indebtedness] shall be deemed to be limited to the Site only. In this regard, the Lender agrees that… its sole recourse to the Debtor in respect of [the balance of indebtedness] shall be limited to the Site and to the proceeds of sale or other realisation thereof… So that the Lender shall not be entitled to issue proceedings against the Debtor or any surety for judgment for any sum under the Debtor's Obligations or [the balance of indebtedness] save to the extent necessary to enable the realisation of by any receiver and/or the Lender of the Site".

Other provisions of the Settlement will be referred to later in this judgement.

4. The plaintiff made the first two payments. In order to fund the third payment of €1 million the plaintiff sought funding, and on 14 March, 2017, obtained a loan offer from AIB of €800,000 to which it was intended to add €200,000 of shareholder monies. AIB also offered an overdraft facility of €30,000 "to fund working capital requirements". One of the "Conditions Precedent" to drawdown was the following: –

> "3.1.16 **Settlement Agreement**: evidence, to the satisfaction of the Bank from Ennis Property Finance DAC and that the settlement of EUR 1,500,000 plus the transfer of the [Site]… Is in full and final settlement of all amounts due by the Borrower to Ennis Property Finance DAC".

5. It is apparent from emails that are exhibited that in February/March 2017 the plaintiff's solicitors Kane Tuohy (Mr Hand) were endeavouring to satisfy the defendant's agent Mr McIntyre of "Pepper Group" in relation to various matters connected with a planning application in respect of the Site. On 16 March, 2017, Mr Hand informed Mr McIntyre that the AIB facility letter had been signed. Thereafter it is clear that efforts were being made by the plaintiff's solicitors to satisfy the drawdown requirements. It appears from an email from Mr Hand to Mr McIntyre on 27 March, 2017, that AIB had new and somewhat complex requirements in relation to the treatment of the Site that went beyond a simple transfer to the defendant. In the email Mr Hand ends by asking "… Perhaps you could consider very urgently and let us know ASAP that this is in order." On 31 March, 2017, at 17:22 the plaintiff's solicitors sent by email a letter to Mr McIntyre noting that the €1 million was due to be paid on that day and bringing to his attention the drawdown requirements of clause 3.1.16. The author, Mr Hugh Kane, then stated: –

> "Unfortunately, despite the absence of an obvious legal reason, AIB is insisting on the transfer of the site to Ennis or some other legal entity (i.e. a non—Ennis entity).
>
> Pursuant to the terms of the Settlement [Under clause 10.2 the plaintiff agreed to invite the defendant to appoint a receiver "to facilitate the development, management, sale and realisation of the Site."] , our client has consented to the [appointment] of the Receiver, which appointment our client thought would have been effected by now, but even if it had, it is not clear that AIB would deem the clause satisfied.

> Within the time permitted, our client will not be able to secure an alternative facility from AIB. Therefore, while we do not believe that there is a legal issue for insisting on the interpretation which AIB is putting on the clause, as AIB is unwilling to accept our client's position, we would like to arrange a meeting with you to find a practical solution to the issue.
>
> You will appreciate that our client has worked well with Pepper over the last several months to seek to ensure planning permission is likely. As you may be aware, planning permission is due imminently, and perhaps would have issued before now but the reply to the request for further information was slightly delayed to take into account all the parties' inputs.
>
> With a planning decision imminent, it may introduce additional matters to discuss.
>
> In any event, our client is keen that we meet as quickly to discuss how best to address these issues in order to secure the release of €1 million from AIB to satisfy our client's liability to the secured charge holder.

You might revert with the suggested time and date, at your earliest convenience."

6. By email of 3 April, 2017, headed "without prejudice" Mr McIntyre wrote to the plaintiff's solicitors noting non-compliance with clause 3.2 of the Settlement "being a failure to make the payment of €1,000,000 by 31 March 2017 as required by that clause." The email continued: –

> "As a result of the Non-Compliance, a Settlement Default has occurred, *the provisions of clause 3.3 of the Settlement Agreement apply* and you are obliged (as provided in the final paragraph of clause 3.2 of the Settlement Agreement) to continue to make monthly payments under the Finance Documents.
>
> Notwithstanding that no action has been taken by us in respect of the Non-Compliance or any resulting Settlement Default, neither that matter nor the passing of time, nor any other inaction, nor any action, statement or discussion by or on our part is to be construed as constituting a waiver of, or as prejudicing, any of our rights under the Settlement Agreement and the Finance Documents (including, without limitation, the right to demand repayment in full of the Debtor's Obligations and the appointment of a receiver and enforcement of any security created by the debenture), all of which rights, and all remedies in respect of which, are hereby expressly reserved." [Emphasis added].

This is repeated in an open letter dated 10 April 2017 sent by email by Mr McIntyre "for and on behalf of Ennis Property Finance Limited".

7. On 11 April, 2017, AIB issued a revised loan offer which no longer required a transfer of the site to the defendant. Clause 3.1.16 then read: –

> "3.1.16 **Settlement Confirmation**: Evidence to the satisfaction of the Bank from Ennis Property Finance DAC ("Ennis") confirming that on receipt of payment of €1,500,000… (i) Ennis will execute a full date of release in respect of all assets mortgaged and charged by the Borrower to Ennis (save for a fixed charge over the [Site]) and (ii) Ennis has no recourse to the Borrower and/or the directors of the Borrower save that limited to the Site".

8. By email dated 12 April 2017 Mr Hand brought this to the attention of Mr McIntyre, indicating that Pepper would only be required (1) to confirm that their fixed charge security (only) remained in relation to the Site with the general floating charge of the defendant being released in its entirety, and (2) "letter/satisfactory confirmation from Pepper on closing that on completion, they are limited to site only and nonrecourse to client and other assets." By a further email on 13 April 2017 Mr Hand confirmed that the new facility letter had been issued and signed and stated:

> "I shall revert as soon as possible next week with the timeframe for completion.
>
> You have mentioned that the loan holder expects a 10% penalty must be paid on completion pursuant to the settlement agreement. We would suggest that it is best that we complete though payment of the €1 million to be paid under the settlement agreement and that the penalty you refer to be addressed after completion of the €1 million payment by our client."

9. From this it is apparent that the defendant was now requiring, in addition to the €1 million, payment in accordance with clause 3.3 of the Settlement which provides: –

> "3.3 If the Settlement Payment is not made in full by the Long Stop Date (the "Outstanding Payment") an amount equivalent to 10% of the Outstanding Payment (the "Increased Payment") shall be added to the Outstanding Payment and such aggregate amount shall become the amount owing and due to the Lender (the "Due Amount"). Due Amount shall be increased by the Increased Payment (which shall be calculated by reference to the Due Amount) for each month or part thereof following the Long Stop Date in which the Settlement Payment, as increased by the provisions of this clause, remains unpaid. The Lender may in its sole discretion waive the application of this clause 3.3."

The effect of this clause, if valid, was that in addition to the €1 million, an additional payment of €100,000 would be due for the first month (April) and thereafter compound interest on the due amount would continue to accrue at 10% per month.

10. In further communications on 25 April, 2017, 2 May, 2017 and 10 May, 2017, the plaintiff requested confirmation from the defendant/Pepper to enable drawdown. In communications of 28 April, 2017, 5 May, 2017, and 6 June, 2017, the defendant continued to rely on clause 3.3 and require the payment of interest. Thus in his email of 5 May, 2017, Mr McIntyre confirmed that the defendant was "not willing to waive the penalties which have since increased since 30 April and now stand at €1.21m i.e. 10% on €1.1m". This led to impasse, and under threat by the defendant of the appointment of a receiver over the premises, the plaintiff issued these proceedings by plenary summons dated 2 June, 2017.

11. By Order of Gilligan J. granted *ex parte* 18 July, 2017, the plaintiff obtained an interim injunction restraining the appointment of a receiver. Following that, the parties entered into an Interim Agreement on 24 July, 2017, under which the defendant consented to the interim injunction remaining in place pending the hearing of this application with various terms designed to maintain the *status quo*, giving the defendant visibility over the continuing management and operation of the plaintiff's business in the premises, providing for consent and to admission of this case to the Commercial Court, and providing timelines for the exchange of affidavits, legal submissions and pleadings.

12. The plaintiffs plead in their Statement of Claim delivered on 30 June, 2017, that clause 3.3 of the Settlement is a penalty clause and therefore void and unenforceable. At paragraph 25 of its Defence, delivered on 29 September, 2017, the defendant waives the application of clause 3.3 without prejudice to the defendant's rights under any other clause in the Settlement and without prejudice to a denial of invalidity.

The principles to be applied
13. There is no real dispute as to the general test that the court should apply in considering whether to grant an interlocutory injunction. As established by the Supreme Court in *Campus Oil v the Minister for Industry and Energy (No.2)* [1983] I.R. 88, the plaintiff is required to demonstrate: –

> 1) that there is a serious issue to be tried;
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> 2) that damages would be an inadequate remedy for the conduct or activity which is to be prohibited; and
>
> 3) that the balance of convenience favours the granting of an injunction.

This has been refined and in *Okunade v Minister for Justice* [2012] 3 I.R. 88, 180 Clarke J., as he then was, stated:

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

14. I accept that the test normally utilises "fair question to be tried" rather than a "serious one" because it is not necessary for the plaintiff to establish that his case is very strong – see Macken J. in *Lonergan v Salter Townsend* [1999] IEHC 2015. I also accept the statement of law as outlined by Laffoy J. in *Crossplan Investments Ltd v McCann and Others* [2013] IEHC 205, when she stated that "[it] is generally recognised that the threshold for compliance with the 'a fair bona fide question' test is a low threshold". This must be so, because if, on the basis of the evidence adduced on affidavit in support of the claim for an interlocutory injunction the court finds no fair or bona fide question for trial, it follows that if that is the only evidence that will be adduced at trial the case is bound to fail. To that extent there is a correlation between the test for establishing a fair question to be tried, and the test for dismissal of an action on its merits under the inherent jurisdiction of the court.15. This is relevant because the plaintiff's case for asserting a fair issue to be tried rests primarily on consideration/construction of the Settlement. In *Salthill Properties Ltd v Royal Bank of Scotland plc* [2009] IEHC 207 an application was brought to dismiss proceedings under the inherent jurisdiction of the court. Clarke J. stated: –

> "3.9 So far as the general question of whether proceedings are, on their merits, bound to fail it seems to me that it is necessary to address the question which arose for debate between the parties as to the approach which the court should take to the evidence as presented on an application to dismiss such as that with which I am involved. It has often been noted that an application to dismiss as being bound to fail may be of particular relevance to cases involving the existence or construction of documents. For example, in claims based on written agreements it may be possible for a party to persuade the court that no reasonable construction of the document concerned could give rise to a claim on the part of the plaintiff, even if all of the facts alleged by the plaintiff were established. Likewise, a defendant in a specific performance action may be able to persuade the court that the only document put forward as being a note or memorandum to satisfy the Statute of Frauds, could not possibly meet the established criteria for such a document. More difficult issues are likely to arise in an application to dismiss when there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence. At this end of the spectrum, it is difficult to envisage circumstances where an application to dismiss as bound to fail could succeed. In between are a range of cases which may be supported to a greater or lesser extent by documentation.
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> 3.10 However, it is important to emphasise the different role which documents may play in proceedings. In cases, such as examples which I have given earlier, involving contracts and the like, the document itself may govern the legal relations between the parties so that the court can consider the terms of the document on its face and may be able to come to a clear view as to the legal consequences flowing from the parties having governed their relations by the document concerned."

The making and execution of the Settlement are not in dispute and its terms will therefore be considered by the court. Insofar as any other facts are in dispute the plaintiff's case must be taken at its height, and the court therefore accepts those facts and the pleas arising therefrom as asserted by the plaintiff for the purposes of this application.

Fair issue to be tried
16. The plaintiff makes two contentions, that are rolled up in one plea. It is pleaded at paragraph 9 of the Statement of Claim –

> "9. It was an implied term, and/or it was the effect of the proper interpretation, of the Deed of Settlement, that Ennis by itself, through its agents, would provide all necessary confirmations and perform all necessary actions as might reasonably be requested by the Plaintiff as will permit the drawdown of funds from the Plaintiff's bankers."

The plaintiff's central contention is that it was ready, willing and able to make the €1 million final payment subject only to the defendant providing certain written confirmation to AIB, and that the defendant was obliged, (a) on the true construction of the Settlement against the matrix of fact in which it was concluded, and/or (b) on the basis of the pleaded implied term, to provide such confirmation. The plaintiff alleges that the defendant was in breach of the Settlement in failing to provide the confirmations, and in failing to accept the payment of €1 million, and it is asserted that the defendant was not entitled to allege breach by the plaintiff or to make demand for payment under the original Finance Documents.

(a) **Construction of the Settlement**

17. In addressing this question the ordinary principles applicable to the construction of contracts apply to construing the Settlement. The court's overriding task is to determine what the intention of the parties was having regard to the language used in the Settlement. These principles were reviewed in detail by the Supreme Court in *Analog Devices BV v Zurich Insurance Company* [2005] 1 IR 274, where Geoghegan J. quoted with approval the principles set out by Lord Hoffmann in *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896, at pp. 912 – 913:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be next mentioned, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax; see *Mannai Ltd. v Eagle Star Ass. Co. Ltd*. [1997] A.C. 749.
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> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania S.A. v Salen A.B.* [1985] A.C. 191, 201:
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> > 'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense'."

I further accept, as Fennelly J. stated, at p.353 in his judgment in *Analog Devices*, that this exercise of construction must be conducted objectively, and that subjective intentions, and negotiations leading to the conclusion of the Settlement have no part to play. Thus the consideration of the "matrix of fact" provides context or "background knowledge" for the benefit of the reasonable person addressing the construction of the contract, but cannot override the intentions of the parties as expressed in that contract, and does not mean that prior negotiations can override such expressed intentions.

18. On the construction argument the plaintiff contended that the defendants entitlement to make a demand for all amounts payable under the Finance Documents could arise only on default of payment of the €1 million, and that that default could not arise where the defendant declined to confirm that payment of the €1 million would give rise to a good discharge under the terms of the Settlement. In the words of Counsel, the entitlement to make demand could not 'stand proud' of the obligation of the defendant to acknowledge the fundamental purpose and effect of the €1 million payment. It was further contended on the facts that the provisions of the Settlement continued to apply after 31 March, 2017, because no proper demand was made before a point in time when the defendant was in default of its obligation to provide the written confirmation.

19. In response counsel for the defendant pointed out that the "matrix of fact" leading to the conclusion of the Settlement is that the Plaintiff was in default of the original loan facilities and did not dispute that it owed the defendant €2,527,354.06 - and that the plaintiff had not adduced any other evidence of background fact relevant to understanding or construing the Settlement.

20. Counsel then highlighted certain terms of the Settlement to support the contention that the plaintiff was default as of 31 March, 2017. "Debtor's Obligations" are defined to mean all the outstanding obligations at the date of the agreement, in the sum of €2,527,354.06. The "Long Stop Date" is defined as 31 March, 2017. "Settlement Default" is defined to include the occurrence of *inter alia* –

> "(a) any payment under this Deed not being made on its due date, subject to the Debtor having five (5) Business Days following the relevant due date to make the relevant payment;
>
> (c) the Settlement Payment is not made by the Long Stop Date".

In clause 2.1 the defendant acknowledged its indebtedness in the full amount, and in clause 2.2 confirmed that these amounts were due and owing under the Finance Documents, and undertook not to dispute the amount stated. Clause 2.3.1 set out the obligation to pay €1.5 million, and as we have seen, clause 2.3.3 sets out the defendant's obligation to execute and deliver the Deed of Release and to limit recourse to the €1.5 million plus the Site. Clauses 2.5 so far as relevant then provides that:

> "…if a Settlement Default occurs:

(a) the obligations on the part of the Lender in this Deed shall immediately cease and no longer be binding on the Lender…;

(b) all amounts payable under the Finance Documents shall become immediately payable by the Debtor;

(c) the Lender will have full recourse to all its rights under the Finance Documents…;

(d) the Lender shall be at liberty to take all legal action available under the Finance Documents and at law…"

Counsel therefore argued that there was no basis for a court to construe the Settlement as showing an arguable case, and that the full amount under the Finance Documents became immediately due after 31 March, 2017 as the plaintiff was not ready, able and willing to complete the Settlement on that date.

21. Having carefully considered the Settlement and the arguments raised I have reached the conclusion that while the defendant's argument has some force it is also arguable, to the point of raising a fair question to be tried, that proper demand was required to terminate the plaintiff's benefits under the Settlement. This construction is supported by clause 3.3 which seeks to impose interest on any part of the €1.5 million payable under the Settlement and outstanding "by the Long Stop Date". That clause clearly contemplates the obligations contained in clause 2.3 of the Settlement continuing beyond 31 March, 2017. It follows that on non-payment of the balance of €1 million on or before 31 March, 2017, the defendant could opt to treat the Settlement as continuing such that the plaintiff could pay the balance of €1 million plus interest, or alternatively could opt for return to full payment by the plaintiff of all sums due under the original Finance Documents. On this construction a demand from the defendant making clear which option was being pursued, was required. Such a construction is also supported by clause 10.1 in which the plaintiff acknowledged that–

"10.1.1 it is in default of its obligations to the Lender under the Finance Documents and that the Lender is entitled to make demand for the immediate payment or discharge of all sums due to it pursuant to the terms of the Finance Documents; and

10.1.2 if such demand is not discharged, the Lender is entitled to appoint a receiver over the assets and undertaking of the Debtor in accordance with powers contained in the Debenture."

Although in the event that happened the plaintiff consented to the appointment of a receiver over the Site, this does not alter the fact that clause 10.1 contemplates a demand in advance of such appointment. Clause 16 "Duration of Deed" also contemplates that the Settlement "shall continue indefinitely and remain in full force and effect from the date of this Deed unless and to the extent that it is superseded by the provisions of a further written agreement…".

22. Accordingly, on this construction it is arguable the Settlement continued in being up to and beyond 12 April, 2017, when the plaintiff's solicitors notified the defendant's agents that it was in a position to complete and pay the €1 million if the written confirmation for AIB was forthcoming. Moreover, the defendant's arguments do not address the point made on behalf of the plaintiff that furnishing the confirmations required by AIB is asking for no more than confirmation of the fundamental effect of the Settlement if fully implemented, and therefore the Settlement should be construed as encompassing such an obligation. In my view it is arguable that to decline to furnish such confirmation would be a wrongful derogation from the fundamental contractual commitment of the defendant in clause 2.3.3 of the Settlement.

23. Further in that the defendant sought penalty interest under clause 3.3 in correspondence or emails post-dating 31 March, 2017, e.g. on 10 April, 2017, it is arguable that the terms of the Settlement, insofar as they benefited the plaintiff, continued in being up to and beyond 12 April, 2017, (or that the defendant is estopped from claiming or pleading Settlement Default) and that the defendant had a continuing obligation to accept the €1 million proffered at that time and to furnish the confirmations sought pursuant to the revised AIB facility letter. An estoppel is pleaded in paragraph 24 of the Statement of Claim.

(b) **Implied Term**

24. The principles that should be applied in considering whether any such term as pleaded should be implied in the Settlement were not really in dispute, and were recently revisited in the judgment of Finlay Geoghegan J. in *Flynn v Breccia* [2017] IECA 74, in which the recent UK Supreme Court judgments in *Marks & Spencer plc v BNP Paribas Securities Services* [2016] AC 742 were considered. The court should proceed with caution and there is a presumption against importing terms into a contract in writing; the more detailed the contract the stronger is the presumption against implying a term. It is usually inferred based on the presumed common intention of the parties, but may derive from the nature of the contract itself. It must be reasonable and equitable. It must be necessary to give business efficacy to the agreement, so that no term will be implied if the contract is effective without it; alternatively, it should be so obvious that "it goes without saying". It should be capable of clear expression. It should not contradict any express term of the contract. Counsel for the plaintiff did place some emphasis on the following passage from Lord Neuberger in *Marks & Spencer*, that was quoted with approval by Finlay Geoghegan J., where he stated at p.754:

" First, in *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408, 459 , Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional, reasonable people in the position of the parties at the time at which they were contracting…"

25. Counsel also relied on a passage later in the same paragraph where Lord Neuberger made the following observation on "business efficacy", at p.755:

"Sixthly, necessity for business efficacy involves a value judgement. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

26. In ascertaining the presumed intention of the parties the plaintiff placed some reliance on the "matrix of facts" leading to the execution of the Settlement, but also relied on the Settlement and certain terms to suggest that the common intention and understanding of the parties was that the plaintiff would be borrowing/refinancing in order to make the payments contemplated by the Settlement. Counsel relied on the size of the admitted debt (€2.527 million), and the staged payments under the Settlement, culminating in the payment of €1 million, as indicating that the defendant must have known that the plaintiff did not have funding

from its own resources and would have to refinance in order to complete the Settlement. In particular counsel pointed to –

(a) Clause 2.6 which provides:

> "At the request of the Lender, the Debtor shall procure that any other person shall execute and do all such necessary documents, acts, power of attorney and things as may be required subsequent to the execution of this Deed by that party for the purposes of giving effect to the terms of this Deed, including without limitation procuring any payment required to be made to the Lender."

Counsel argued that as the obligation to make payments was that of the plaintiff, that this could only be read as a reference to further documents or acts by a lending bank or other funding third party.

(b) Clause 3.3, the interest clause which has been quoted earlier. Counsel argued that if the defendant at the time the Settlement was entered into believed that the plaintiff was intending to fund it through its own resources it would not have had a provision allowing for interest after a Long Stop Date, but rather would have had a guillotine clause.

27. Counsel argued that this common intention and understanding was mirrored in correspondence in March 2017 in that Mr McIntyre received an email on 16 March, 2017, informing him that the plaintiff had signed a facility letter with AIB, and he expressed no surprise in his reply email which noted that "release can be executed and held pending receipt of cleared funds – obviously won't be releasing this beforehand". Whether such *ex post facto* evidence would be admissible at trial, and the weight that might be given to it, would be matters for a trial judge, but on this application it does afford some evidence to support the plaintiff's assertion as to common intention.

28. On this basis counsel argued that as a matter of business efficacy or because it was "so obvious it goes without saying", it was reasonable and equitable that there be an implied term that the defendant would provide "all necessary confirmations and perform all necessary actions might reasonably be requested by the plaintiff as will permit the drawdown of funds from the plaintiff's bankers". Counsel argued that for the defendant to decline to provide the confirmations required by AIB in its second facility offer would be to derogate from the fundamental terms of the Settlement, and that therefore it is necessary to imply such a term.

29. Although counsel for the defendant in written and oral submissions argued against the suggestion that the common intention of the parties envisaged refinancing through bank borrowing, or that the implication of such a term was necessary for the operation of the Settlement, I have come to the conclusion on the basis of the arguments outlined above that the plaintiff has raised a fair issue to be tried in respect of an implied term. In written submissions the defendant also points to clause 12 of the Settlement which imposes obligations on the plaintiff to provide further documents/assurances "as the Lender may reasonably request to give effect to the terms of this Deed…". It was argued that as the Settlement does not impose any equivalent obligations upon the defendant *expressio unius est exclusio alterius* applies, and the proposed term cannot be implied. That argument presupposes that the suggested implied term is similar to or identical to clause 12, but that is not necessarily so, and on its face clause 12 goes further than the pleaded implied term. It seems to me that this is classically an argument that falls to be more fully considered by a court of trial.

30. The main thrust of the defendant's oral argument was that the pleaded implied term lacks precision, asking rhetorically what does it mean, and what does the defendant have to execute or write? The wording is couched by reference to such "necessary" confirmations or actions "as might reasonably be requested by the plaintiff", and arguably falls to be read in the context of confirmations or actions actually requested. In the present context it is plain that the meaning and effect of the term that the plaintiff seeks to imply is that the defendant had an obligation before completion to confirm that if the final payment of €1 million was made it would release the premises, with the exception of the Site, from all security held including the personal guarantees and the floating charge, and that its sole recourse in respect of the balance would be to the Site. This may be argued either way. Again in my view it is a matter for the trial court to decide whether the term which the plaintiff seeks to imply is too broad or lacking in precision, or indeed whether it can or should be reframed in a more limited or precise manner.

31. Another point relied on by the defendant in the submissions is clause 14 which states:–

> "14. Entire Agreement
>
> This Deed and the documents required as Conditions constitute the entire agreement between the parties to this Deed and supersedes and extinguishes all previous drafts, agreements, arrangements and understandings between them, whether written or oral, relating to the subject matter of this Deed SAVE THAT until such time as the Conditions are satisfied (in the absolute discretion of the Lender) the Debtor shall continue to meet those conditions contained in the Finance Documents as are required by the Lender."

It was argued that this prevents the implication of the suggested term.

32. In response counsel for the plaintiff rely on Exxonmobil Sales and Supply Corp v Texaco [2004] 1 ALL ER 435 where a similar issue arose in a summary judgment application. Nigel Teare QC stated at p.441:

> "[27] The entire agreement clause was also relied upon by Exxonmobil in seeking to defeat the argument that a term should be implied based upon business efficacy. I have not, on that account, rejected Texaco's argument that a term should be implied on the grounds of business efficacy. It seems to me arguable that where it is necessary to imply a term in order to make the express terms work such an implied term may not be excluded by the entire agreement clause because it could be said that such a term is to be found in the document or documents forming part of the contract. The same cannot be said of an implied term based upon usage or custom."

For the purposes of this interlocutory hearing, in my view this is sufficient to raise a serious question as to whether the entire agreement clause can defeat the implication of the proposed implied term.

33. Accordingly, even if the "low threshold" were not satisfied in respect of the construction issue raised by the plaintiff, I would be satisfied that the plaintiff has raised a fair question as to whether there should be implied into the Settlement a term such as that pleaded in Paragraph 9 of the Statement of Claim.

Breach of Settlement

34. The defendant also argued that the plaintiff cannot show a fair issue to be tried because the affidavits and correspondence do

not disclose any breach of the Settlement even if it were to be construed, or to have a term applied, as asserted by the plaintiff. It is indeed clear that the plaintiff had not secured refinancing by 31 March, 2017, and that there is no evidence or even an allegation that the defendant was in breach of the Settlement on or before that date.

35. However, I am not satisfied that on the case that the plaintiff makes it is necessary for it to prove a breach as at 31 March, 2017. Rather the plaintiff makes the case that the Settlement continued in being, in the sense that the plaintiff could avail of its benefits, until a proper notification of default and demand for payment based on the original Financial Documents was made. The plaintiff's case is that it received the second AIB loan offer on 11 April, 2017, which no longer required transfer of the Site to the defendant or any third party, and thereafter all that was required of the defendant was a letter of confirmation of release of security and guarantees. The plaintiff asserts that it was then ready, able and willing to complete. Insofar as the AIB loan was only for €800,000, Mr Leo Fitzgerald in his affidavit sworn on 15 September, 2017, states that the "sum of €200,000 was available by way of shareholders funding, and the sum was available for immediate drawdown in cleared funds in March 2017" (Paragraph 18). It is also clear that insofar as the facility letter of 11 April, 2017, included a requirement by AIB of an "equity contribution" of €700,000, this is made up of €500,000 already paid by the plaintiff to the defendant under the terms of the Settlement, and the further €200,000 being made available by way of shareholder funding. The plaintiff's evidence is that its readiness and willingness to complete on this basis was communicated to Mr McIntyre by the email of 12 April, 2017.

36. Of significance to this argument may be the definition of Settlement Default which at (a) describes "any payment under this Deed not being made on its due date, subject to the Debtor having five (5) Business Days following the relevant due date to make the relevant payment."

37. I am satisfied that it is at least arguable that the defendant did not declare default and make a demand for the balance due under the original Finance Documents until it sent a letter to the plaintiff on 6 June, 2017, or alternatively at some date after 12 April, 2017. Even if the emailed letter dated 10 April, 2017, from Mr. McIntyre is treated as notification of default/a demand, the Plaintiffs assert that within 5 business days they were ready, able and willing to complete the Settlement, and the defendant was in breach in failing to complete.

38. I am therefore of the view that the plaintiff has raised fair and bona fide issues to be determined at trial.

Adequacy of damages as a remedy

39. If an interlocutory injunction is not granted the defendant will appoint a receiver over the Elphin Public House "who will sell the property as a going concern and will continue to trade the premises in the meantime" (paragraph 74 of the affidavit of Mr McIntyre sworn on 18 August, 2017). The company will thus lose not only its business but also its interest in the property which it has enjoyed since 1996. Notwithstanding this, the defendant argues that if the plaintiff ultimately succeeds in these proceedings damages would be an adequate remedy, and are capable of quantification, and therefore the injunction should not be granted. Counsel relies on the decision of the Supreme Court in *Curust Financial Services Ltd v Loewe-Lack-Werk* [1994] 1 IR 450 where Finlay CJ. at page 468 stated –

> "Difficulty, as distinct from complete impossibility, in the assessment of such damages should not, in my view, be a ground for characterising the awarding of damages as an inadequate remedy."

I was also referred to another public house/receiver case, *Camden Street Investments Ltd v Vanguard Property Finance Ltd* [2013] IEHC 478 where Cross J. stated: –

> "45. In this case, it is contended by the plaintiff that damages would be difficult if not impossible to calculate. I accept that it may be difficult for damages to be calculated but I do not believe that it would be in any sense impossible. The loss of the business is always a matter of some conjecture but is capable of adjudication after hearing accountancy or other evidence.... I find that the plaintiffs have not proved the case that they would become insolvent if the injunction was refused if they wished to maintain this action against the defendants. The plaintiffs clearly now have a new source of finance available to them in Mr A."

40. In response counsel for the plaintiff relied on observations of Barrett J. in *Bainne Alainn Limited and another v Glanbia Plc* [2014] IEHC 482 where he suggested that there were three categories of application for interlocutory injunction that will typically present before the courts, the first being where damages are clearly the appropriate relief, the second in which they are not capable of quantification, and a third category:

> "The third is where the alleged loss can conceivably be reduced to damages but where the quantification of these damages is not capable of reasonably precise estimate. In this last regard, nothing is impossible to an accountant or an actuary: if asked to quantify a loss he or she will do so but such estimates may and sometimes will be little more than informed guesswork. In other words one will reach a point where it is possible still to quantify the amount of damages but impossible to do so with any meaningful accuracy. It is this type of impossibility that the court understands Finlay CJ. to refer to when he speaks of *"[d]ifficulty, as distinct from complete impossibility, in assessment of... damages"*, i.e. damages that are completely impossible to calculate with such a degree of accuracy as to represent the probable loss that a person will suffer absent injunctive relief."

41. I respectfully agree with Barrett J. This is not necessarily to disagree with Cross J. in *Camden Street Investments Ltd*, because each case must be decided on its own facts, and there were some notable features of that case that distinguish it from the present one. In particular, he observed that he did not believe that the plaintiffs "who are all corporate beings, or their principals who are all businessmen have in any real sense any emotional stake in maintaining the particular business of Flannery's licence premises". Having regard to 30 years involvement of the plaintiff and its principals in the Elphin Public House, that could not be said to apply to the present case. I also note that the second reason for refusing relief in that case was that Cross J. found that there was "significant failure to disclose material facts to the judge at the interim stage to such a degree as we justify the refusal of relief".

42. I am of the view that if an injunction was refused, and the plaintiff were to succeed in its claim, quantification of its losses would require extensive estimation from accountants and other experts, and this would necessarily involve "informed guesswork" and it would be impossible to calculate them with such a degree of accuracy as to represent the probable loss.

The plaintiff's undertaking as to damages

43. The defendant challenges the value of the undertaking as to damages proffered on behalf of the plaintiff. It does so on the basis of evidence in Mr McIntyre's affidavit sworn on 18 August, 2017, where he points to the failure of the plaintiff to make the final payment of €1 million by 31 March, 2017, its failure to show its ability to comply with the AIB requirement of an equity contribution of

€700,000, and its requirement of a €30,000 overdraft facility as evidenced by the AIB loan offers.

44. In my view in the context of the central and disputed issue in these proceedings, it is not open to the defendant to rely on non-payment of the €1 million by 31 March, 2017, in support of this challenge. In his replying affidavit sworn on 15 September, 2017, as we have already seen, Mr Fitzgerald fully explains how the €700,000 equity contribution is composed of €500,000 already paid, and €200,000 of shareholder money. These averments are not contested. Mr Fitzgerald also points to the fact that AIB suspended the plaintiff's overdraft facility of €30,000 on the basis of a letter sent on behalf of the defendant by its solicitors to AIB on 19 July, 2017, asserting that the floating charge held by the defendant had crystallised – a matter that is clearly disputed. Notwithstanding that withdrawal, the plaintiff has continued to trade successfully from the premises. The defendant has also, with the consent of the plaintiff, appointed a receiver to the Site, and will have the benefit of the net proceeds of sale of the property the value of which has been estimated at €850,000. The defendant has also received the first two payments stipulated in the Settlement. Further if the plaintiff fails in its action, the defendant will probably be entitled to a judgement, and thereafter to enforce its security by sale of the premises as a going concern. No evidence has been adduced by the defendant or any other party as to the value of the premises as a going concern.

45. For these reasons I am not satisfied that the defendant has established a basis for challenging the plaintiff's undertaking as to damages.

Balance of Convenience

46. Following the granting of the interim injunction hearing by Gilligan J. on 18 July, 2017, the parties entered into an "Interim Agreement" on 24 July, 2017. This provided for the continuation of the interim injunction until the hearing of this interlocutory application, but also set out a number of further undertakings on the plaintiff's behalf on the basis that the plaintiff continues to operate the business from the premises in the meantime. The undertakings cover disclosure and transparency in relation to management accounts, the non-payment of dividends and directors loans pending further order, the safekeeping and inspection of the books and records of the company, provision for inspection by the defendant of the premises, the listing of stock and movable assets as of 3 August, 2017, control of cash and expenditure, the payment by the plaintiff of €5500 per month to the defendant's agent, notification of transactions exceeding €3500, and an undertaking to procure the immediate return to the defendant's solicitors of the title deeds to both the premises and the Site by a certain date (it appears that in the title deeds have been returned). On the defendant's part the Agreement required the defendant's solicitors to write to AIB in order to unfreeze the plaintiff's bank accounts, and the defendants undertook not to interfere with the business subject to the plaintiff complying with its undertakings.

47. This very sensible agreement was clearly designed to maintain the *status quo* and protect the parties pending the hearing of this interlocutory hearing. The plaintiff has offered undertakings in similar terms to those set out in the Interim Agreement pending the trial of the action.

48. On this basis, and on the basis of the usual undertaking as to damages, I do not see any ground upon which the defendant can assert that it would be prejudiced by the grant of an interlocutory injunction, particularly as these proceedings have been admitted to the commercial court and there should not be an excessive delay before they go to trial.

49. By contrast if an injunction is refused a receiver will be appointed, the plaintiff's management will be replaced, and the sale will take place of property in which the plaintiff has a proprietary interest. It is conceivable that in such circumstances trade/goodwill may be adversely affected and the value of the business diminished. My earlier observations in relation to the impossibility of accurate assessment of damages (without certain expert guesswork) were the plaintiff to succeed in its action are apposite here. I am satisfied that the balance of convenience favours the granting of an interlocutory injunction.

Conclusion

50. I will therefore grant an interlocutory injunction prohibiting the defendant from appointing, or purporting to appoint, any receiver over the premises known as the Elphin Pub, upon the plaintiff giving the usual undertaking as to damages and in addition continuing undertakings in the terms of clauses [1] – [9] inclusive of the Interim Agreement between the parties dated 24 July, 2017, to continue until the determination of the proceedings in the High Court, and on the basis of the defendants continuing its undertaking in that period in the terms of clause [12] of the Interim Agreement. For ease of reference I direct that a copy of the Interim Agreement be appended to my order.