THE HIGH COURT

COMMERCIAL

[2017 No. 966P]

BETWEEN:

DAVID LANGAN

PLAINTIFF

-AND –

PROMONTORIA (ARAN) LTD AND TOM O'BRIEN

DEFENDANTS

Judgement of Mr Justice Robert Haughton delivered this 18th day of May 2017

1. The plaintiff seeks interlocutory injunctions in proceedings commenced by plenary summons on 2 February, 2017, in which he seeks injunctions, declarations and other reliefs related to Flat 902, Belvedere Heights, 199 Lisson Grove, City of Westminster, NW8 8 HZ, United Kingdom ("the Property").

2. The Property was the subject of a Charge dated 8 February, 2002, made between the plaintiff of the one part and Ulster Bank Ireland Ltd of the other part. The first named defendant asserts that it is the successor in title to Ulster Bank Ireland Ltd in respect of the Charge, the underlying borrowing and guarantees which supported it. The second named defendant asserts that by Deed of Appointment dated 28 October, 2016, he was appointed by the first named defendant as receiver over the Property. The plaintiff contests this succession and the validity of the appointment of the first named defendant.

3. The defendants oppose the application for interlocutory relief on the basis that;

> (1) no fair or bona fide question has been raised by the plaintiff;
>
> (2) damages would be an adequate remedy in the event that the plaintiff were to succeed;
>
> (3) the Court should not accept the plaintiff's "undertaking as to damages" having regard to the extent of his undischarged debts.

4. The application is grounded on the affidavit of the plaintiff sworn on 21 February, 2017. A replying affidavit was sworn by Mr Andrew Harris, Senior Asset Manager of Capita Asset Services (Ireland) Ltd, which company undertakes loan administration and asset management services in respect of the loans of the plaintiff that are owned by the first named defendant as successor in title to Ulster Bank Ireland Ltd. The plaintiff makes a preliminary point that as Mr Harris is not an officer of the Bank, his affidavit evidence relative to the loans and accounts in question is inadmissible having regard to the Bankers Books Evidence Acts. That argument is unsustainable in the light of Order 40 of the Rules of the Superior Courts, rule 4, which states: –

> "4. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted…"

As this is an interlocutory application the evidence in Mr Harris' affidavit is admissible.

Fair Bona Fide Question

5. Under the test established in *Campus Oil Ltd v. Minister for Industry and Energy (No. 2)* [1983] IR 88, the first issue is whether the plaintiff has raised a fair bona fide question to be tried. In his grounding affidavit sworn on 21, February 2017, the plaintiff sets out the three underlying borrowings from Ulster Bank Ireland Ltd which have been the subject matter of demands for payment by the first named defendant:

> (1) A Bank facility dated 8 January, 2007, in the amount of €125,020 made available to the plaintiff as of 5 September, 2016, "to assist with personal investment in Private Clients Tax Shelter Hotel Investment". The first named defendant alleges that the plaintiff's liability on foot of this facility amounts to €124,041.17.
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> (2) A Bank facility dated 9 April, 2008, making available to the plaintiff first, an overdraft of €5,000 and, secondly a demand loan facility of €412,000 a bridging loan facility of €500,000. The first named defendant alleges that the plaintiff's liability on foot of these facilities amounts to €1,118,767.95.
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> (3) Loan facilities made available to Classic Furniture Ltd ("the Company") pursuant to facility letter dated 9 April, 2008, in respect of which some seven guarantees were executed by the plaintiff in the years 2002-2008 inclusive. The first named defendant alleges that the plaintiff's liability on foot of these guarantees as of 5 September 2016 is €3,178,998.88 including principal and interest.

6. In his affidavit, the plaintiff avers that he purchased the Property in about 1999 and that he executed a legal Charge dated 8 February, 2002, in favour of Ulster Bank Ireland Ltd over his interest in the Property in respect of present or future liabilities to the Bank. He exhibits a copy of the Charge. Under clause 11, English law is the governing law.

7. Mr Harris in his affidavit asserts that the first named defendant acquired the interest of Ulster Bank Ireland Ltd in the borrowings, guarantees and charges in question by Mortgage Sale Deed dated 16 December, 2014, a Deed of Novation dated 12 February, 2015, and Global Deed of Transfer dated 12 February, 2015. Mr Harris further exhibits Deeds of Power of Attorney which he asserts authorised certain persons to assign the relevant transfer documentation on behalf of the relevant parties. He also exhibits a copy Form TR4 from the UK Land Registry purporting to show the first named defendant as the proprietor of the charge dated 8 February, 2002, over the Property. However there is no affidavit of English law indicating the precise status and significance of this exhibit and

the copies of the conveyancing documentation relied upon by the plaintiff to show its title are significantly redacted.

8. The plaintiff seeks to prevent the first named defendant's claim that he is _____ to it, or that the first named defendant can rely on the charge. He claims that despite requests and correspondence his solicitors have not been furnished with the documentation that would prove the first named defendant's succession to the loans and security; that the exhibited documentation is deficient; that the charge is not amenable to transfer or assignment by Ulster Bank without the plaintiff's consent; and that the receiver has not been properly appointed. He also asserts that any claim that the first named defendant might have is now statute barred, and that in the absence of any affidavit as to English law the Court should not have any regard to the Form TR4 as proof that the first named defendant is the owner of the Charge. The plaintiff also alleges negligence/breach of duty in and about the circumstances in which the 2007 facility was drawn down for the purposes of an investment.

9. The plaintiff also asserts that Ulster Bank Ltd agreed to release its interest in the Property. At paragraph 18 of his affidavit the plaintiff avers: –

> "18. In this regard, I say that in or around May 2008 your Deponent engaged in communication with Mr Neil Kinsella, my and the Company's then Bank Relationship Manager, and the signatory on behalf of the Bank on the letter of loan offer of 9 April 2008. I say in the course of these communications, on or about early May 2008 Mr Kinsella on behalf of the Bank agreed to release the Bank charge over the Property, subject to your Deponent providing an up to date leasehold valuation for the Company's property at Blanchardstown Retail Park showing a value of at least €800,000. I say that on my instruction Ms Imelda Lennon, the Company's financial controller, sought an amended facility letter on your Deponent's behalf from Mr Kinsella by email dated 12 May 2008, to reflect the release of the Property as security. I say that Mr Kinsella replied by email dated 15 May 2008 confirming that the Bank had agreed to release the property as security subject to satisfactory present day valuation on the leasehold interest in the Blanchardstown retail unit being provided but he stated that he had yet to receive the valuation. Thereafter, your Deponent procured a valuation of the Blanchardstown property from CBRE, which valuation valued the property at €1,200,000, and same was provided to Mr Kinsella/The Bank…."

The plaintiff then exhibits the relevant communications and valuation. These exhibits support the plaintiff's contention that there was an agreement to release the Property from the charge.

10. In response Mr Harris avers that the bank did not acknowledge that the valuation provided was "a satisfactory present day valuation on the leasehold interest" held by the company in the Blanchardstown Retail Park, and that the plaintiff did not pursue the alleged release until some years later, after the Bank engaged with him to reduce his outstanding debt in 2012.

11. Notwithstanding this response I am satisfied that the plaintiff, at least in respect of the matters deposed to in paragraph 18 of his affidavit, has established a fair and bona fide question to be tried. The court refrains from making any further observations in relation to this question and the other defences raised in relation to the validity of the appointment of the receiver. The issues raised will be a matter for the trial of the action.

Damages as an Adequate Remedy and the Plaintiff's Undertaking as to Damages

12. The next question that arises under the tests enunciated in Campus Oil is whether, if an injunction is refused, damages would fully compensate the plaintiff if he were to succeed in his action.

13. In written and oral submissions counsel for the plaintiff relied on a line of authorities which establish that damages are generally not considered to be an adequate remedy when property rights are at issue. Thus in *Pasture Properties v. Evans* [1999] IEHC 214, Laffoy J. stated: –

> "I think it is axiomatic in trespass cases that damages are not an adequate remedy."

Counsel also cited *Dellway Investments Ltd v NAMA* [2011] 4 IR 1, where at paragraph 563 Finnegan J. stated: –

> "The courts regard interest in land differently to interests in personalty and, in general, damages are not considered to be an adequate remedy.…"

In *Metro International SA & Ors v Independent News & Media plc* [2005] IEHC 309, Clarke J. in paragraph 4.4 suggested the reason for this: –

> "Thus in many cases where a plaintiff alleges an infringement of his property rights the court will intervene by injunction where those property rights have been established rather than compensate the plaintiff for the loss of those property rights."

However in paragraph 4.5 Clarke J. makes it clear that while this is an important principle it is not absolute: –

> "4. 5 While it may well be that a temporary short term interference with a disputed property right (resulting from a failure to grant an interlocutory injunction) may not give rise to quite such a clear-cut situation, it is, nonetheless, in my view important for the court to take into account in addressing the question of whether damages may be an adequate remedy (for the period identified by McCracken J. in Irish Autotrader) whether the nature of the matter which is alleged to be interfered with is the kind of matter which the courts have traditionally held should be protected by injunction rather than simply compensated for in damages."

14. Counsel also referred the court to *Allied Irish Banks plc v Diamond* [2012] 3 IR 549, where Clarke J. gave a further rationale for this principle at paragraph 96: –

> "96.… The courts have always been anxious to guard property rights in the context of interlocutory injunctions:… The reason for that is clear. Even though there may be a sense in which it may be possible to measure the value of property lost, declining to enforce property rights on the basis that the party who has lost its property can be compensated in damages would amount to a form of implicit compulsory[il]y acquisition. If someone could take over my house and avoid an injunction on the basis that my house can readily be valued and he is in a position to pay compensation to that value (even together with any consequential losses), then it would follow that that person would be entitled, in substance, to compulsory acquire my house. The mere fact that it may, therefore, be possible to put a value on property rights lost

> does not, of itself, mean that damages are necessarily an adequate remedy for the party concerned is entitled to its property rights instead of their value."

15. In their submissions the defendants argue that in circumstances where the defendants claim title to the Property the Court should look to the balance of convenience and weigh the plaintiff's asserted need for an interlocutory injunction against the corresponding rights asserted by the defendants to the charge over the Property and the right to repayment of sums due. They rely on *Contech Building Products Limited v Walsh & Ors* [2006] IEHC 45 which was an application for an injunction to restrain passing off at a time when the product had already been placed on the market. The defendant argued that since that was the status quo at the time of the application, the preservation of that position required that the injunction application should be refused. Finlay Geoghegan J. rejected that submission noting that whether an applicant becomes aware of the alleged passing off before or after the offending product is placed on the market is often a matter of happenstance.

16. The defendants also relied on the decision of Keane J. in *Tennant v McGinley* [2016] IEHC 325, where he stated at paragraph 66:

> "I pause here to note that the physical possession or occupation of a development property (as opposed to, say, a family home) in receivership is also often a matter of happenstance. Finlay Geoghegan J. identified the essential question in such cases as to whether the applicant had moved promptly in the face of the unlawful conduct alleged."

Also in his judgement in *Szabo v Kavanagh* [2013] IEHC 491, Keane J. preferred the proposition that the Courts would look at the facts of each case and came to the conclusion, in a case which related to the possession of real property, that he was not satisfied the damages would not be an adequate remedy for the alleged trespass and breach of constitutional rights of which the plaintiff complained.

17. Baker J. reviewed many of these authorities in *Harrington and Anor v Gulland Property Finance Ltd and Anor* [2016] IEHC 447. In that case the plaintiffs asserted that the first named defendant for legal reasons was not entitled to the benefit of a charge under which it had purported to appoint the second named defendant as receiver. At paragraph 38 she stated: –

> "38. It seems to me that damages are not an adequate remedy for these plaintiffs but on the other hand do provide an adequate remedy in respect of the claim of the receiver, and the subject property has the benefit of a relatively substantial rent roll which, if the defendants are correct, may ultimately come to be payable to Gulland and/or the Receiver. Furthermore, as Gulland has not at the date of the hearing before me lodged the transfer for registration, Gulland is not in a position to make title to the premises should it propose to sell, until registration is complete. As Laffoy J. said in her judgement in the Supreme Court in *Kavanagh & Anor v McLaughlin & Anor*, absent registration, and by virtue of s.62(2) of the Act of 1964, the owner of the charge does not have any interest in the land until that owner is registered in the Land Registry…"

18. The defendants

19. urged on the Court that the Property is a residential investment property, and in that sense is to be differentiated from property that might be used or occupied by the plaintiff.

20. Notwithstanding the fact that the Property is an investment property the general principle that the Court should be slow to a decline an injunction to restrain trespass still applies. The Court must have regard to the undisputed fact that the plaintiff is the owner of the Property. However this is not decisive. The existence of the charge executed by the plaintiff in 2002 in favour of Ulster Bank Ireland Ltd is admitted. Moreover the plaintiff also admits the various loans made to him in 2007/2008, and made to the company in respect of which he went guarantor. The indebtedness on foot of these facilities exceeds €4 million. While the court does not take into account the Form TR4 as proving that the first named defendant is now beneficially entitled to the benefit of that Charge, in the absence of an affidavit as to English law, the Court is entitled to take into account for the purposes of this interlocutory application the transfer and conveyancing documentation referred to by Mr Harris, copies of which are exhibited. In considering the balance of convenience the Court also takes into account two further matters. First, the plaintiff makes no suggestion that the defendants would be unable to discharge any award of damages made against them in favour of the plaintiff. Secondly this matter has been admitted to the Commercial Court and the parties can therefore anticipate an early hearing.

21. I have come to the view that refusing to grant an injunction would run a significant risk of not preserving the plaintiff's property rights as damages would not necessarily provide an adequate remedy. On the other hand the circumstances outlined above create significant doubt over the adequacy of the undertaking as to damages that the plaintiff is willing to give. I have come to the conclusion that the balance of convenience is evenly balanced.

22. In these circumstances the court's primary concern should be to take such measures as are appropriate to preserve the status quo ante. As McMenamin J. stated in *Whelan Frozen Foods Limited v. Dunnes Stores* [2006] IEHC 171, after a review of authority –

> "First, as a principle….in the balance of convenience it is clear that as a general rule a court should where possible strive to maintain the status quo."

23. The *status quo* in the present case is that the Property is an investment property owned and let by the plaintiff who is in receipt of rent – or net rent. It may be presumed that he is liable to tax on the net rental. However there is also prima facie evidence that the plaintiff has significant indebtedness to the first named defendant.

24. Order 50 rule 6(1) and (2) of the Rules of the Superior Courts (1986) provide:

"6.(1) The court may grant a mandamus or an injunction or appoint a receiver, by an interlocutory order in all cases in which it appears to the court to be just and convenient so to do.

(2) Any such order may be made either unconditionally or upon such terms and conditions as the court thinks just."

25. In *Bainne Alainn Ltd and another v. Glanbia plc* [2014] IEHC 482 Barrett J. commented on this rule at p.15 –

> "…the question as to whether or not to grant an interlocutory injunction is one in respect of which the court ultimately retains a degree of flexibility and discretion that is unconstrained by strict criteria, though subject of course to the rules of precedent. The necessary flexibility and discretion is reflective, at least in part, of the fact that the life of the law is not logic, it is experience, and experience teaches that even ostensibly similar facts can sometimes require entirely

dissimilar treatment when viewed through the prism of context."

26. In the case before him while noting that the courts typically required an undertaking as to damages from a plaintiff before granting an interim or interlocutory injunction, Barrett J. found that it was not mandatory that the court impose such a condition. It seems to me that this flexibility in respect of the conditions that may be imposed in the granting of an injunction is constrained only by the requirement that the court does what it thinks is just. There is no reason in principle why the court should not impose other or additional undertakings to those typically required by the court.

27. Taking this into account, I have come to the conclusion that an interlocutory injunction should be granted but only if the plaintiff gives on oath the following undertakings in addition to the undertaking as to damages already given in paragraph 30 of his affidavit, namely: –

(a) an undertaking to furnish through his solicitors on record Tom Casey Solicitors within 10 days particulars of all lettings of the Property, and to update such particulars in the event of any change; and

(b) an undertaking to retain on deposit trust account in the name of his Solicitor, pending further order of the Court, all rental income from the Property less normal and reasonable costs of the collection of such rent and tax due thereon; and

(c) to furnish an account thereof to the defendant's solicitors at three monthly intervals, the first such account to be provided on or before 1 July, 2017; and

(d) an undertaking not to sell or otherwise dispose of the Property otherwise than by way of a short-term lease for the purpose of maintaining the rental stream pending the final determination of these proceedings, without leave of the Court; and

(e) an undertaking not to discharge or change his said solicitors without furnishing immediate notice to the defendant's solicitors; pending the final determination of these proceedings.

28. The purpose of these further undertakings is on the one hand to respect the plaintiff's ownership of the Property but on the other hand to acknowledge the claims supported by the evidence adduced by Mr Harris of the acquisition by the first named defendant of the lender's rights under the various loan facilities and the security for repayment in the form of the guarantees, and the cogent questions raised by the defendants over the capacity of the plaintiff to comply with his undertaking as to damages. The usual undertaking as to damages together with these further undertakings are intended to preserve the status quo pending the final determination of these proceedings. In the event that the plaintiff succeeds in his claims, the net value of the income stream from the Property retained in the hands of his solicitors, together with any interest that may have accrued, will remain his entitlement. In the event that his claim is unsuccessful that fund will be held on trust by his solicitors pending further orders of the Court.

29. I am conscious of the possibility that the plaintiff may not be in a position to give all of these undertaking. If that is the case, so be it. If the plaintiff is not able or willing to give these further undertakings on oath then, on the basis that the Court is not prepared to accept the plaintiff's undertaking as to damages *simpliciter*, the balance of convenience shifts in favour of the refusal of interlocutory relief.

30. I will grant a short adjournment to enable the plaintiff to consider this judgement and, if able and willing to give the undertakings, to furnish under oath the further undertakings detailed above. If those undertakings are given, and unless the parties wish to argue otherwise, it is the Court's intention to grant interlocutory injunctions in the terms of paragraphs 1, 2, 6 and 7, and to grant liberty to apply to all parties.