Neutral Citation: [2013] IEHC 437

THE HIGH COURT

RECORD NUMBER: 2011 NO. 5843P

BETWEEN:

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION), QUINN INVESTMENTS SWEDEN AB AND LEIF BAECKLUND

PLAINTIFFS

AND

SEAN QUINN, CIARA QUINN, COLETTE QUINN, SEAN QUINN JUNIOR, BRENDA QUINN, AOIFE QUINN, STEPHEN KELLY, PETER DARRAGH QUINN, NIALL MCPARTLAND, INDIAN TRUST AB, FORFAR OVERSEAS SA, LOCKERBIE INVESTMENTS SA, CLONMORE INVESTMENTS SA, MARFINE INVESTMENTS LIMITED, BLANDUN ENTERPRISES LIMMITED, MECON FZE, CJSC VNESHKONSULT, OOO STROITELYNE TECKNOLOGH, OOO RLC-DEVELOPMENTS AND KAREN WOODS.

DEFENDANTS

Judgment of Mr Justice Michael Peart delivered on the 6th day of August 2013:

1. Interlocutory injunctions are in place in these proceedings ("the Conspiracy proceedings") on foot of one order made on the 20th July 2011 by Clarke J., and two orders made by Kelly J. on 25th July 2011 and 31st July 2011 respectively. Broadly speaking the former prevents the "personal defendants" from dealing with certain assets described as "IPG assets", while the latter are Mareva-type orders, including the appointment of a Receiver over those assets. The order of Clarke J. dated 20th July 2011 notes that the personal defendants gave certain undertakings to the Court in terms of a number of paragraphs in the interim injunction order made previously by Clarke J. by way of *ex parte* application. The reference to "the personal defendants" is a reference to the first to seventh, ninth and twentieth defendants. The eighth defendant, Peter Darragh Quinn is not a party to the present application. The first named plaintiff "IBRC" gave the usual undertaking as to damages to the Court when applying for these orders.

2. On the 13th February 2013 the Irish Bank Resolution Corporation Act, 2013 became law. On that date the Minister for Finance, pursuant to powers provided by the Act, made a Special Liquidation Order in respect of IBRC, and joint Special Liquidators were appointed.

3. The personal defendants seek now to have the injunctions discharged on the basis that the undertakings as to damages are worthless given that IBRC is now by definition insolvent, unable to pay its debts as they fall due, and in liquidation. They submit that the injunctions would not have been granted if the undertakings as to damages had not been given and refer to the fact that Mr Wallace, one of the appointed Special Liquidators, has conceded on affidavit that IBRC is insolvent, and that he has stated publicly that historical claims against the bank will rank only as unsecured debts in the liquidation.

4. The plaintiffs oppose the present application for the discharge of the injunctions on a number of grounds:

5. Firstly, they refer to the fact that the joint Special Liquidators have on affidavit confirmed the undertakings as to damages previously given to the Court.

6. Secondly, they are offering now, if required by this Court, a fortified undertaking as to damages by ring-fencing a sum of €5,000,000 of the liquidation assets, which they say is more than sufficient to satisfy any claim which could possibly arise in the event that it is concluded in due course that the injunctions in question ought not to have been granted. The personal defendants on the other hand say that the potential value of such claims is more like US$700,000,000 (being the value they place on the IPG assets), and that the offered fortified undertaking is hopelessly inadequate.

7. Thirdly, IBRC submits that even if there is some doubt about the sufficiency of the confirmed undertakings as to damages, or the amount of the fortified undertaking being proposed, it does not entitle the personal defendants to an order discharging the injunctions. They submit that even if the undertakings are considered to be inadequate, the Court, before making the orders sought by the personal defendants, would have to be satisfied that, notwithstanding any such deficiency, the balance of convenience lies in favour of discharging the orders. As part of that consideration, it is submitted that the Court would have to take into account that it has already been found by Dunne J. that the personal defendants had put together a deliberate and premeditated scheme in order to dissipate the IPG assets to ensure as best they could that those assets are not available to the plaintiffs in order to satisfy any judgment to which they may be found entitled in the future, and that this was the reason why the orders had to be applied for.

8. The personal defendants say that when they gave certain undertakings to the Court in the form of the orders made by Clarke J. for the interlocutory injunctions, and when they consented to the Mareva injunctions granted by Kelly J., they took account of and relied upon the undertakings as to damages given to the Court by IBRC.

9. They refer to the fact also that on the application before Clarke J, Aoife Quinn on behalf of the personal defendants averred in paragraph 96 of her affidavit that as Anglo Irish Bank was an insolvent bank able to continue only with the support of its shareholder, the Minister for Finance, the personal defendants were apprehensive that at some point that shareholder would withdraw its support, and considered that in such circumstances the undertaking as to damages would be worthless. She stated that "*an undertaking as to damages unsupported by a parent or shareholder undertaking is not acceptable to the defendants*". It is submitted that the very thing which they feared at that time has now come to pass, and that they should not now be adversely affected by that occurrence by the continuation of the injunctions which are now unsupported by any meaningful undertaking as to damages.

10. Ms. Quinn has referred also to the fact that in certain proceedings in Cyprus, the plaintiff bank had resisted an application for an injunction against it on the basis that "Anglo" was a State-owned bank and that it was in a position to pay any damages that might be awarded against it, and that references to Anglo being insolvent were untrue.

11. She refers also to an averment in an affidavit of Richard Woodhouse grounding the ex parte injunction application herein where he

stated that IBRC's solicitors had explained to him that "*IBRC is required to provide an undertaking as to damages in the event of the interim relief sought being granted*" and that he understood the nature and purpose of such an undertaking, and that he was duly authorised to give such an undertaking. The word "required" in that averment is something emphasised by the personal defendants on the present application.

12. The plaintiffs submit that in estimating the potential value of their claims against the plaintiffs on foot of their undertakings as to damages in the amount of US$700,000,000 the personal defendants are confusing two separate and distinct concepts, namely the value of any claim for losses arising from the granting of the injunctions, and the alleged value of their claims being made against the bank in totally separate proceedings, which have been referred to as "the main proceedings", being proceedings wherein the personal defendants seek to have the loans to them by Anglo declared to be invalid, and that the bank's security is therefore unenforceable.

13. In his replying affidavit, Special Liquidator Kieran Wallace denies that the personal defendants have set forth any basis for claiming that any losses they might suffer as a result of the granting of the various injunctions. He refers to the fact that on each occasion that an injunction was granted, the Court was satisfied that there was a serious issue to be tried, and that the balance of convenience lay in favour of granting the injunctions. He refers also to the fact that on each such occasion the personal defendants did not file any replying affidavit to dispute the facts put forward by IBRC in support of the applications, and that the position remains that there is no real dispute as to the facts. Mr Wallace believes that it is appropriate that a fortified undertaking in the amount of €5 million be proffered and that this is more than adequate to cover any possible claim arising from the granting of the injunctions, the more so in circumstances where he believes that the personal defendants have not put forward any credible basis for claiming that any such losses will arise.

14. Mr Wallace believes that in so far as the personal defendants claim that they may suffer losses from the granting of the injunctions, they would be a consequence of the enforcement by IBRC of its security, and not of the injunctions.

15. He refers to the appointment of a share receiver on the 14th April 2011 over, inter alia, the shares in Quinn Finance Holdings, which is the company through which the Quinn family members held their beneficial interest in the IPG assets. He states that from the 14th April 2011 the personal defendants no longer held any legal or beneficial interest in or control over the IPG assets, and that if any detriment to the personal defendants arises, it arises because of the enforcement steps taken by IBRC on foot of that security, and not as a result of the injunctions granted.

16. He refers to the fact also that the need for the injunctions arose because, even though after 14th April 2011 the personal defendants no longer had any legal or beneficial interest in the IPG assets, they nevertheless took steps deliberately designed to ensure that IPG would be stripped of assets so that the IBRC security would be worthless. He describes in detail how that was done. Mr Wallace refers also to the fact that the personal defendants have deposed on affidavit that the steps taken in that regard were taken before the orders of Clarke J. were made, and in the belief on their part that their actions were justified on the basis that the security held over those assets is invalid. Mr Wallace submits that the claim that they might suffer loss by reason of the injunctions must be viewed in that light.

17. Mr Wallace has referred also to the fact that at an earlier stage the personal defendants have stated that as part of the scheme to put assets beyond the receiver they engaged third parties who would retain control of the assets in question, but that they no longer have any control over the third parties who, they say, reneged on the arrangements to hold the assets on their behalf. He refers to the orders made in the contempt proceedings whereby it was ordered that certain steps be taken to undo or unravel the scheme, and to the response made on affidavit and through Counsel at the time that they were powerless to undo or unravel the scheme or to retrieve any of the assets. Mr Wallace suggests that this is in stark contrast to what is now stated by Aoife Quinn on affidavit on the present application, namely that it is the interlocutory injunctions and Mareva injunctions which have caused them loss and damage which would have been recoverable on foot of the undertakings as to damages given to the Court. He does not believe that the personal defendants have demonstrated any way in which they have or will suffer losses as a result of the granting of the injunctions in question.

18. Ms. Quinn states that while the first injunctive order (Clarke J.) prevents the personal defendants from dealing with the IPG assets, it does not stop the the plaintiffs from doing so, and therefore does not maintain the status quo ante since IBRC and now the Special Liquidators can pursue their efforts to dispose of IPG assets.

19. She goes on to say that neither she nor her co-defendants are aware of what sales or other disposals of IPG assets have been effected by the plaintiffs as they have not been kept informed in that regard, and they fear that some of those assets may have already been disposed of.

20. She makes the point also that the IPG assets were not purchased by the Quinn family as a short term investment, but rather as longer term investments for the benefit of the Quinn family and future generations, and that the sale of those assets in the present economic climate will undermine that investment strategy and result in sales at an undervalue, thereby causing significant losses to the Quinn family. It is submitted that if the injunctions had not been granted, those losses would have been prevented, and that now, having the benefit of the injunctions, the plaintiffs are in a position to dispose of all of the IPG assets before the main proceedings are determined, hence the inadequacy of the undertakings as to damages, including the proposed fortified undertaking.

21. As far as the Mareva injunctions are concerned, Ms. Quinn avers that each of the personal defendants has been adversely affected by those orders in different ways, and she has given certain examples such as the inability to service standing orders on bank accounts, and the inability of her brother Sean Quinn Junior to service the mortgage on his family home notwithstanding that the account from which those payments were to be made was in credit. That has resulted in the bank in question issuing proceedings against him, and appointing a Receiver. These difficulties have apparently given rise to the need to make applications to Court from time to time, and have prevented the personal defendants from contemplating new business ventures and employment. Other prejudice and inconvenience resulting from the existence of the Mareva injunctions are described by Ms. Quinn in her grounding affidavit on the present application.

22. Mr Wallace accepts that some inconvenience is caused to the personal defendants by the Mareva injunctions, but points to the fact that they were granted by consent. He refers to variations to those orders which have been made from time to time to facilitate the personal defendants, and to which IBRC consented.

23. In all the circumstances Mr Wallace submits that the fortified undertaking in the form of a ring-fenced sum of €5,000,000 to be lodged if necessary into a designated bank account is more than sufficient to meet any possible claim by the personal defendants arising from the granting of the injunctions which they seek to have set aside. He submits that the need for the injunctions remains, so that IPG assets are not further dissipated and removed from the reach of the liquidators by the personal defendants as happened

in the past, and he submits that the balance of convenience remains in favour of the injunctions remaining in place.

24. Ms. Quinn has responded to Mr Wallace's replying affidavit by affidavit sworn on the 5th March 2013. She says that it is her belief that upon the liquidation of IBRC the undertakings as to damages no longer exist, and she refers to the fact also that by letter dated 14th February 2013, their solicitors withdrew the consents given to the Court when the injunction orders were made in view of the insolvency of IBRC, describing those undertakings as being "*so fundamental to the consents provided to our clients*".

25. I do not intend to set forth all that Ms. Quinn states in response. But it is fair to say that she reiterates the personal defendants' belief that the proposed fortified undertaking as to damages falls far short of what is required, and she stands by her earlier assertion that the amount of those losses is potentially as high as US$700,000,000.

26. She does, however, say that Mr Wallace's contention that she is confusing the losses which may accrue as a result of the injunctions with the losses that may be suffered for other reasons ignores the issues to be determined in what are referred to as "the main proceedings", being those wherein the Quinn family members seek to establish the illegality opf the loans and that the security held over the family's assets is void and unenforceable, and that those assets therefore were never lawfully transferred or charged to Anglo Irish Bank, and that all enforcement of same is unlawful as a result.

27. She avers that the personal defendants are prevented by the interlocutory injunction granted by Clarke J. from taking any steps to protect their interest in the IPG assets pending the hearing of the Bank's present proceedings, and that if those assets are disposed of by the liquidators at undervalue or at all the personal defendants stand to suffer losses they would not have suffered if the injunction turns out to be one that ought not to have been granted when these proceedings have been finally determined.

28. Martin Hayden SC for the personal defendants submits that the argument put forward by the plaintiffs that the losses that the personal defendants claim they will suffer are not losses that will result from the granting of the injunctions but rather losses resulting from the enforcement of security over the IPG assets is an artificial argument only, and one based on the fact that instead of making its conspiracy claims against the personal defendants by way of Defence and Counterclaim in the so-called main proceedings, they instead instituted separate proceedings ("the Conspiracy proceedings") against the personal defendants on the 28th June 2011, and delivered their Defence in the Main proceedings one month later on the 27th July 2011.

29. The point being made is that if that strategy had not been adopted, and instead, the conspiracy claims were made by way of defence to the main proceedings, any injunction sought in order to protect the counterclaim would have been granted in the main proceedings, supported by an undertaking as to damages which would cover any losses resulting from the granting of the injunction in those proceedings.

30. Mr Hayden describes this as a deliberate strategy adopted by IBRC whereby it seeks to separate its defence of the main proceedings from the injunctive relief which it sought in the conspiracy proceedings. He submits that on IBRC's own case the injunctions obtained in the conspiracy proceedings are necessary in order to safeguard the assets it claims to be entitled to if it is successful in defending the main proceedings. He suggests that this is made clear by Mr Wallace in his first replying affidavit at paragraph 15 thereof where he states that in the absence of the injunctions the personal defendants' stated aim of placing assets beyond the reach of IBRC could continue unfettered, thereby setting IBRC's security at nought and in addition "*in the event that IBRC is successful in defending separate proceedings before this Court (Ciara Quinn & others v. IBRC and Anor, bearing record No. 2011/4336P), the enforcement of its security would be rendered nugatory*". Mr Hayden refers to other statements to similar effect in paragraphs 19 and 70 therein.

31. In these circumstances he submits that this Court on the present application should consider the purpose of the injunctions in the overall context not simply of the conspiracy proceedings, but also the main proceedings. Otherwise, it is submitted, any success which the personal defendants may obtain in the main proceedings will be nugatory if by then the special liquidators have disposed of the IPG security assets. It is submitted that protection should work both ways as part of the exercise of balancing the rights of parties when the issues between the parties have yet to be determined, and that this is the purpose served by an undertaking as to damages as the price required of an applicant for an interlocutory injunction.

32. In relation to the adequacy of the proposed fortified undertaking in the sum of €5,000,000, Mr Hayden points to the fact that there is no particular or evidential basis put forward as to why this amount is considered sufficient.

33. Quite apart from the estimate by the personal defendants that their potential losses could amount to the entire value of the IPG assets, he submits that even to date the personal defendants have been deprived by the injunction granted by Clarke J. of the benefit of certain rents receivable from a shopping mall outside Istanbul (Prestige Shopping Mall). They have been deprived of that rent for a period of two years thus far, and that rent alone amounts to some €9,000,000 over that period. This is a property in respect of which there was no allegation that the personal defendants have attempted to put it beyond the grasp of the Receiver. It is submitted that any loss in respect of this rent therefore results from the injunction granted, and would have been recoverable on foot of the undertaking as to damages. It is submitted that this rent claim alone exceeds the proposed fortified undertaking as to damages, and will exceed it by many millions more by the time the issues between the parties are decided. That is just one of several examples put forward as to why the proposed fortified undertaking is considered to be hopelessly inadequate. I shall return to that matter in due course.

34. Mr Hayden submits that the giving of an undertaking as to damages is an essential prerequisite to the granting of an interlocutory, since no conclusions can be reached on the substantive issues between the parties at that stage, and so that the status quo can be maintained. In this regard he has referred to the statement by Neill LJ in *Cheltenham & Gloucester Building Society v. Ricketts* [1993] 4 AER 276 at p. 281 that "*save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant*". He has referred also to the statement by Laffoy J. in *Pasture Properties Ltd v. Evans* [1999] IEHC 214 where she stated:

> *"The plaintiff cannot get an injunction unless it can give an undertaking as to damages. If an injunction is wrongly granted at this stage and it so transpires at the hearing of the action, the plaintiff must undertake to adequately indemnify the defendant against any loss incurred by the defendant by reason of the injunction being wrongly granted".*

35. Mr Hayden submits that if the undertaking as to damages had not been given when the application for injunctive relief was made, those orders would not have been granted, and therefore, as a corollary, where they are now accepted as being worthless, the orders should be discharged.

36. He has submitted that any undertaking as to damages which is offered to the Court must be a real and meaningful undertaking, if

it is not to be hollow and useless to the party injuncted. He has referred to the judgment of O'Sullivan J. in *Martin v. An Bord Pleanala* [2002] IEHC 82, in which he refused a stay to an applicant on the basis that while the applicant had given an undertaking to the court there was no detail from which the Court could assess it as a realistic undertaking when balanced against the prospective losses which could be suffered by the notice party in the proceedings if the applicant was ultimately unsuccessful in the case. He regarded the undertaking as "*nothing more than a pro forma compliance with the usual requirement of the court in this type of application*".

37. He submits also that where an undertaking is given to support an injunction, it must not be restricted as to amount, and has referred to the judgment of O'Flaherty J. in *O'Mahony v. Horgan* [1995] 2 IR. 411. In that case, the High Court had required an undertaking as to damages on an application for a Mareva injunction, but then limited it to a sum of £25,000 in circumstances where the amount of the fund sought to be protected by the injunction (the proceeds of an insurance policy) was £71,000. The Supreme Court allowed the appeal, but on grounds that the applicant had failed to prove an intention on the part of the defendant to dispose of his assets with a view to evading his obligation to the plaintiff. But in the course of his judgment, O'Flaherty J. made the following remarks, albeit obiter:

> *"Nonetheless, it needs to be emphasised that the Mareva injunction is a very powerful remedy which if improperly invoked will bring about an injustice, something that it is designed to prevent. It may put a person or a company out of business. It may contribute to delay in bringing litigation to a head. It may be used as a diversionary tactic and be part of the skirmishes that increasingly occur in much litigation. It may - as in the case here - take on a life of its own while the main litigation is becalmed ... .*
>
> *As regards the undertaking as to damages, I know of no case where a limit has been put on the amount that may be required to be paid, if it is held that the injunction was improperly obtained, nor do I think it right in principle that such a limit should be placed in view of the far-reaching implications involved in any restraint that is imposed on a party by reason of such an injunction prior to judgment."*

38. This is a view with which Blayney J. agreed in his judgment in the same case, and with which Hamilton CJ was "*[inclined] .. to the views in this regard expressed in the judgment about to be delivered by Mr Justice O'Flaherty*".

39. Mr Hayden has referred to a number of cases which have highlighted the important purpose of a meaningful undertaking as to damages, and without which an injunction will rarely be granted, including *Cheltenham & Gloucester Building Society v. Ricketts [supra] and Pasture Properties Ltd v.* Evans [supra]. In addition he has referred to judgments to like effect in *Australia in First Netcom Pty Ltd v. Telstra* [2001] 179 ALR 725, and *Combet v. Commonwealth of Australia* [2005] 221 ALR 621. Authority from Canada has also been referred to - all stressing the importance of the requirement that an undertaking as to damages be given to the Court if an interlocutory application for injunctive relief is to be granted.

40. He refers to the endorsement by Clarke J. in *Estuary Logistics and Distribution Company Ltd v. Lowenergy Solutions Ltd and anor* [2008] 2 IR 806, of the principles stated by Neill LJ in *Cheltenham & Gloucester* relating to undertakings as to damages, having noted that there seemed to be no Irish authority on the enforcement of an undertaking as to damages in circumstances where the underlying injunction is discharged prior to the hearing of the substantive proceedings. Those principles are called in aid by Mr Hayden. It is the first four which appear to me to have relevance for his submission as to the importance of the requirement for an undertaking as to damages in exchange for the granting of an interlocutory injunction:

> *a. Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does.*
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> *b. The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted.*
>
> *c. The undertaking is not given to the party enjoined but to the court.*
>
> *d. In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so.*

41. The importance of the undertaking as to damages to the person injuncted is further underlined, in the submission of the personal defendants, by the judgment of Laffoy J. in *Shell E & P Ireland Limited v. McGrath and others* [2007] IEHC 144. That was a case where the plaintiff company, the recipient of an interlocutory injunction, subsequently sought the leave of the court to discontinue the proceedings, and, inter alia, the question arose at the behest of some of the defendants as to the enforcement against the plaintiff of its undertaking as to damages given when it applied for injunctive relief. Laffoy J. in her judgment, while dealing principally with the application for leave to discontinue, stated at page 24 of her judgment:

> *"It is clear on the authority of Newcomen v. Coulson [1878] 7 Ch. D. 764] that, as a matter of law, the defendant's entitlement to an inquiry as to damages on foot of the undertaking given by the plaintiff on the application for the interlocutory injunction is not affected by the discontinuance of the plaintiff's claim. Such an entitlement as the defendants have to such an inquiry will survive the discontinuance of the plaintiff's claim."*

42. In Mr Hayden's submission an enforceable and meaningful undertaking as to damages is of paramount importance in the balance to be struck between the rights of the plaintiff to protection and the right of the defendant not to be unreasonably prejudiced or damaged by the grant of injunctive relief. He submits further that therefore any attempt by the plaintiffs to reduce their exposure by limiting the extent of the undertaking in the manner sought by these plaintiffs should be refused by the Court, as it will upset that delicate balancing of rights in favour of the plaintiffs and result in the inability of the personal defendants to recover reasonably foreseeable losses arising from the granting of the injunctions as averred to by Ms. Quinn on behalf of the personal defendants.

43. It is submitted that the plaintiffs are seeking to limit now the extent of any claim which can be made later on foot of the undertaking, in circumstances where the extent of the potential losses cannot now be ascertained or estimated with certainty, and must await the conclusion of the trial. In such circumstances, it is submitted, the amount of any such claim should be taken at its highest, and not on the unscientific basis put forward by Mr Wallace and for which there is no evidential basis whatsoever. Mr Hayden has referred to the fact that the Court has always been called upon in applications for interlocutory relief to examine the capacity of the plaintiff to give and discharge a meaningful undertaking as to damages to the court. I have already referred to the judgment of

O'Sullivan J. in that regard. He has referred to the judgment of Finnegan P (as he then was) in *Riordan v. Minister for the Environment*, unreported, High Court, 26th May 2004 where the plaintiff sought certain injunctive relief. The facts of the case are not relevant, but one of the issues which the learned judge considered was the adequacy of an undertaking as to damages by the plaintiff. When refusing an injunction he stated the following:

> *"Finally I take into account the following circumstance. The plaintiff frankly admits that an undertaking as to damages would be worthless in that he has not the means to satisfy the same if called upon to do so. While not determinative of the application it is a factor which I must take into account. I take into account the expense which has been incurred by the defendants and I also take into account the expense which has been incurred by other candidates and indeed their efforts in their election campaigns. They will not be recompensed for these should the plaintiff ultimately fail in these proceedings."*

44. Further support for these submissions is urged by reference to a judgment of Mr Justice Laddie in the Chancery Division of the High Court in England in *Staines v. Walsh*, as reported in Times Law Reports, 1st August 2003, where the judge is reported as having stated:

> *"So long as an asset-freezing order was in force, there was a continuing obligation on a claimant not only to be willing to honour his undertaking in damages, but to disclose to the defendant any material change for the worse in his financial position ... who could then either seek the voluntary removal of or reduction in the order, or apply to the court for the same".*

Laddie J. concluded that since the claimant had hidden his severely changed financial position it would be "*wholly inappropriate to extend the freezing order" and that "had there been an application before the court to discharge the freezing order, the court would have given it serious consideration*".

45. The personal defendants accept that there can be circumstances where a plaintiff who is impecunious or insolvent can be permitted to fortify the undertaking as to damages in a way that meets the requirement of fairness to the defendants. However, in the present case, they say that it cannot be appropriate to limit the extent of that fortification in the manner sought because it is impossible to anticipate in a meaningful way the extent of the losses that might flow from the granting of the maintaining in place of the injunctions. This is particularly so, in their submission, where the clear purpose of the injunctions is to ensure that the status quo ante is maintained. They submit that there is no reality to the undertaking limited to €5,000,000 in circumstances where it is admitted by Mr Wallace that the amount is not arrived at by any scientific calculation. In essence it is simply a sum which he believes or even guesses on no stated basis is sufficient to cover any possible loss.

46. Mr Hayden has stated that in this jurisdiction the question of the fortification of an undertaking as to damages has not arisen for consideration often in the courts. But he has referred to the judgment of Barr J. in *Caudron v. Air Zaire* [1986] ILRM 10 where, albeit in very different circumstances where the plaintiff had no connection with this country, he required the plaintiff to provide a bond to cover any losses that the defendants might suffer in the event that the injunction ought not to have been granted, and he indicated that he would discharge the injunction in the event that a suitable bond was not forthcoming. Mr Hayden has referred to the fact that the defendants in *Caudron* appealed successfully to the Supreme Court. It appears however that the successful appeal was against an order that had been made for service of the proceedings on the defendant outside the jurisdiction under Order 11 RSC. In those circumstances, the question of requiring a bond by way of fortification of an undertaking as to damages was not considered or decided on appeal as the proceedings simply fell away on the jurisdiction issue.

47. Mr Hayden accepts that the issue herein has not come before the courts previously, but has referred to the statement by Kelly J. in *Harding v. Cork County Council* [2006] 1 IR 294 in which the question of the need for a fortified undertaking by the plaintiff arose. In making his application for an injunction pending his application for leave to seek judicial review on notice pursuant to section 50(3) of the Planning and Development Act, 2000, the applicant offered the usual undertaking as to damages. In considering the balance of convenience the learned judge stated that he did not find any evidence to indicate that the undertaking was either useless or worthless. He went on to state that a fortified undertaking was "*most unusual*" and he agreed with a view expressed by Herbert J. in *O'Connell v. Environmental Protection Agency* [2001] 4 IR. 494 that "*the occasions on which a court might properly require what is described as a 'fortified undertaking to pay damages' must be very few*". But Kelly J. went on to state that "*if such a fortified undertaking as to damages is to be required then a proper evidential basis has to be set for it and such does not exist in the present case*". Mr Hayden submits that in the present case a clear evidential basis exists in the instant case since Mr Wallace himself has accepted that IBRC is insolvent and unable to pay should that be required.

48. Reference has been made also to the judgment of Laffoy J. in *Broadnet v. Director of Communications Regulation* [2000] 3 I.R. 281. in addressing the need for the applicant to provide an undertaking as to damages pending the determination of those judicial review proceedings she stated at p. 302:

> *" ... if no undertaking is exacted, the respondents and the notice parties will have no redress against the applicant for the loss that they have incurred as a result of the existence of the applicant's unsustainable proceedings. It would be patently unfair and unjust to allow the proceedings to continue without the applicant carrying the risk of the loss occasioned thereby, if they are unjustified".*

49. Having concluded that it was an appropriate case in which to require that an undertaking as to damages be given, the question arose then as to whether a fortified undertaking should be required in the form of a guarantee from the applicant company's financial backers, given that it was acknowledged during the course of argument in relation to an application for security for costs that the applicant company alone would not be in a position to discharge an order for costs. Laffoy J. stated as follows:

> *"In support of their contention that the undertakings should be fortified, the parties seeking the undertakings have relied on the following passage from Bean on Injunctions (7th ed.) at p. 29:-*
>
> > *'But where there are doubts about the plaintiff's resources, the court has discretion to require either security or the payment of money into court to 'fortify' the undertaking, or (as an alternative) an undertaking from a more financially secure person or body. This might apply if the plaintiff is legally aided; or a minor or patient ...; or resident outside the jurisdiction (Harmon Pictures NV v. Osborne [1967] 1 W.L.R. 723); or an unquoted company. In cases where the plaintiff is a subsidiary of a large company and apparently lacking funds it is common for the parent company to be invited to guarantee the undertaking in damages in writing'*
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> *It is undoubtedly the case that an undertaking from the applicant would be worthless unless secured. Using the*

terminology used by the first respondent, it seems to me that the applicant's 'backers' should guarantee each undertaking required in the instant case. I will hear further submissions as to how this can be best achieved. A number of devices occur to me. Assuming the backer is a holding company, the holding company could be joined as a co-plaintiff in the judicial review proceedings for the purpose of giving the undertakings. Alternatively, the holding company could give a guarantee in writing of the undertaking as to damages."

50. In the present case, it is suggested by Mr Hayden that the Minister for Finance who is the equivalent of the 'backer' of the Special Liquidators, who are the Minister's agents, should be required to give a guarantee in respect of the undertakings as to damages which were given by IBRC prior to its liquidation, or indeed be joined as co-plaintiff for the purpose of replacing the present undertakings with undertakings from him. It is submitted that the interests of the personal defendants would be protected by such undertakings in just the same way as they were under the undertakings previously given, and in a way which is far superior to the very limited offer of a fortified undertaking limited to the sum of €5,000,000.

51. The personal defendants submit that this Court cannot at this stage of the proceedings estimate with any accuracy how much the losses to them may turn out to be whenever that exercise may have to be conducted. Neither, it is submitted, is the Court entitled to presume that no losses will be incurred, or to presume that the figure put forward by the plaintiffs, namely €5,000,000, will be sufficient in circumstances where it is accepted by the plaintiffs that it is not scientifically based, and where the personal defendants have demonstrated even by reference to one rent-roll from the Prestige Shopping Mall in Istanbul that the figure is already far exceeded by that item alone. They point to the fact that the liquidators are intent in realising the IPG assets as and when they can, and as soon as they can, and that the personal defendants are powerless to prevent that happening, with the result that if they are in due course successful in the "main proceedings" and succeed in having the loans declared illegal, and the security set aside and declared unenforceable, they will be unable to recover on foot of the undertaking as to damages, even if fortified in the sum proposed.

52. Brian Murray SC for the plaintiffs has submitted that in fact there seems to be little between the parties as to the legal principles applicable in relation to the requirement to provide an undertaking as to damages when seeking an interim or interlocutory injunction, and as to the fortification of same in certain circumstances, and that the differences which exist are more questions of emphasis and as to their application in this case.

53. Mr Murray accepts that generally speaking an undertaking will be the price that an applicant will pay for being granted an interlocutory injunction, though he submits that it is not an absolute requirement in all cases, since there can be exceptional circumstances where a court will dispense with the need for one, and grant the injunction nonetheless. He notes in the present case that Mr Wallace has confirmed the undertakings which were given when these orders were granted, and that they remain extant.

54. He accepts also that the purpose of the undertaking is to provide a means by which the defendant who is the object of the injunction may be compensated for losses suffered as a result of the injunction if in due course it turns out that it was wrongly granted. He emphasises however that the losses recoverable under the undertakings are losses caused by the injunction only, and that the undertaking is not some form of general indemnity to the defendant in relation to losses which the defendant thinks he will suffer more generally. He emphasises also that a court will not in all cases enforce the undertaking against the plaintiff even where the plaintiff has not been successful in the substantive case, since the Court has a discretion. In that regard it is to be noted that the undertaking as to damages is one which is given by the plaintiff to the Court and not to the defendant. It is not a contract between the parties, but is a commitment given to the Court by the party seeking the injunction. Mr Murray has emphasised also the need for the defendant to show a causal link between any losses anticipated or claimed and the granting of the injunction.

55. It is submitted also that while a defendant will in most cases have a strong case for arguing that an undertaking as to damages should be required of the plaintiff as a condition for the grant of injunctive relief pending the hearing of the substantive case, a defendant has no such strong claim to a fortified undertaking simply because the plaintiff may not be in a position to pay on foot of the undertaking given. This is an issue on which he accepts that he and Mr Hayden may disagree. Mr Murray submits that even where the plaintiff may be shown to be in a weak financial position, it nevertheless remains a question to be taken into account by the Court when weighing the competing rights of the parties and the balance of convenience.

56. Other factors that the Court will in his submission have regard to are the strength of the plaintiff's case and the conduct of the defendant which it is sought to restrain. Mr Murray places considerable emphasis on the conduct of the personal defendants in this case who on their own admission were intent on taking steps to implement a scheme whereby IPG assets would be disposed of in such a way as to remove them from the reach of the share receiver appointed in April 2011, and had taken such steps prior to the granting of the injunctions.

57. Mr Murray has referred to the fact that the personal defendants never moved in April 2011 to seek to restrain the share receiver from dealing with the IPG assets following his appointment, even though they quickly thereafter commenced what have been referred to as 'the main proceedings' in June 2011. He submits that this must be seen as a deliberate decision on their part, given the fact that they had legal advice available to them. He suggests that the reason may be that by seeking to restrain the receiver from dealing with the IPG assets they would in effect have been acting inconsistently with their own actions in seeking to put the assets beyond reach of the receiver, and he suggests also that the reason why no move to seek an injunction was made is that the steps being taken by them to put assets beyond the receiver would have been uncovered.

58. It is submitted therefore that their decision not to seek an injunction to restrain the receiver has resulted in the situation whereby the receiver remains lawfully entitled to deal with the IPG assets. It follows in his submission that any losses which the plaintiff claim they will suffer for the purpose of the undertaking as to damages are losses which they will suffer because the receiver is free to deal with the IPG assets, and not because of the injunctions which are in place. In effect what the defendants seek to do, in the plaintiffs' submission, is to obtain now by this new route a means of protection which they clearly resolved not to try and achieve by way of injunction application in the main proceedings in April 2011 or subsequently. He has referred also to the fact that in Sweden a bankruptcy receiver was appointed in July 2011 over Quinn Investments Sweden AB, and its 31 subsidiaries, which has resulted in the personal defendants losing control over those assets, resulting in them not being unable to deal with them. Therefore in his submission no losses in that respect can be attributed to the injunctions which are in place, and therefore no losses in respect of those assets would be recoverable on foot of the undertakings as to damages.

59. Mr Murray has referred also to the fact that in the contempt proceedings before Dunne J. in July 2012, Sean Quinn made averments that he along with other defendants had taken steps to remove assets from the IPG in order to frustrate the bank's efforts to enforce its security in circumstances where they were disputing the validity of the bank's security. During the course of his affidavit outlining the scheme being undertaken, Mr Quinn stated that he accepted that it was entirely their own actions which had resulted in them losing control of the IPG assets. This was the reason being put forward at that time as to why they were not in a

position to comply with the coercive orders which had been made. These were the steps which they themselves decided to take unilaterally and secretly, instead of seeking injunctive relief themselves following the institution of the main proceedings. It was apparently the discovery of these activities that caused the plaintiffs to institute separate proceedings against the personal defendants, and apply for injunctive relief, rather than to address the issues which had come to light by way of a counterclaim in the main proceedings, given the fact that the events giving rise to the claims in the present conspiracy proceedings involved actions and wrongdoing by the personal defendants which were unrelated to the claims in the main proceedings. Mr Murray rejects any suggestion that the reason for the commencement of separate proceedings was in order to avoid the possibility that the undertakings as to damages would cover claims in the main proceedings.

60. In the circumstances which have become known in relation to the scheme put in place and advanced by the personal defendants it is submitted by Mr Murray that this may very well be one of those exceptional cases in which, given the defendants' egregious conduct as admitted, no undertaking as to damages should be required at all, never mind a fortified undertaking of the kind being offered to the Court. That submission is made with even more force given the fact that it has been concluded by Dunne J. in the contempt proceedings that the injunction orders put in place were deliberately breached by some of the defendants after they were put in place.

61. It is submitted that no losses can possibly arise to the personal defendants in circumstances where the personal defendants themselves have admitted that through their own actions they have lost control of the IPG assets. Mr Murray refers also to the averment by Mr Wallace that the only IPG asset which remains in the control of IBRC is a building known as the Leonardo building in Kiev. He refers also to the fact that Ms. Justice Dunne in the contempt proceedings stated that there was an admitted sum of €455,000,000 owing to IBRC, and that in such circumstances there can be no doubt that IBRC is entitled to secure assets to satisfy that sum. He has submitted that in certain affidavits by Ms. Quinn she has made that admission, but that is not accepted by Mr Hayden for the personal defendants in his submissions in reply.

62. Mr Murray has made the point also that when considering the potential losses to the personal defendants on this application one must not confuse a claim in respect of losses to them personally with a claim to losses accruing to the corporate entities that own the assets, and that any cause of action in respect of a loss to a corporate entity is vested in that entity and not in any individual shareholder thereof.

63. In support of the submission that it does not automatically follow from the fact that a plaintiff may be impecunious that a fortified undertaking be required, Mr Murray has referred to the judgment of Denning M.R. in *Allen v. Jambo Holdings* [1980] 2 All ER 502 in which he commented, inter alia, that he did not see why a poor plaintiff should be denied a Mareva injunction just because he was poor, whereas a rich plaintiff would get one. In similar vein is the judgment of O'Donnell J. in *Minister for Justice v. Devine*, unreported, Supreme Court, 2012 where he stated:

> *"It would clearly be wrong that the deserving plaintiff with a good claim would be denied an injunction simply because they were without assets. In such a case, the court must take into account the unlikelihood of such a party being able to satisfy an undertaking as to damages as one of the factors in considering the grant of an interlocutory injunction but may, and on occasion does, proceed to grant an injunction in such circumstances without such an undertaking ... ...*
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> *The picture which emerges, therefore, is not of a mechanical rule, but rather of the exercise of the discretionary jurisdiction in which the presence or absence of an undertaking as to damages may be significant, and in many cases decisive".*

64. It has been submitted also that even if it was to be concluded that the personal defendants may suffer losses as a result of the injunctions being in place, they have failed to discharge the onus which is upon them to establish evidentially what those losses will be. Mr Murray submits that the personal defendants have simply come to court and said that the potential losses which they may suffer has to be what they say is the value of the IPG assets. It is submitted that is simply a baseless assertion on their part which confuses the losses to the corporate entities as a result of the enforcement of security, with losses arising from the existence of the injunctions. He has referred to the statement of Hardiman J. in *Dunne & Lucas v. Dun Laoghaire Rathdown County Council* [2003] 1 IR 567 where in relation to a figure of anticipated losses of €144 million estimated by the defendant as the likely losses it would suffer if the injunction was granted , he stated:

> *"The mention of the huge sum of €144,000,000 as the contract price of the South Eastern motorway is, no doubt, properly calculated to make any court hesitate on the threshold of interlocutory relief. But neither this figure nor the much smaller, still very significant, weekly figure quoted above have been related in any way to the actual scope of the proposed injunction ... ... In my view, it is not sufficient, either from the point of view of establishing a balance of convenience or attacking the undertaking, simply to mention huge sums of money without relating them to the specific relief sought or to the specific liability for which the plaintiffs, by virtue of their undertaking, may become liable."*

65. Mr Murray relies on the judgment of Millett J. in *In re D.P.R. Futures Limited* [1989] 1 WLR 778 in relation to the onus of proof - that onus being not limited to establishing the need for a fortified undertaking, but also its quantification.

Conclusions:

66. According to the first affidavit of Mr Wallace, IBRC sought these injunction orders in June and July 2011 because following the appointment of a share receiver over, inter alia, the shares in Quinn Finance Holdings (the company through which the personal defendants held their beneficial interests in the IPG) the personal defendants proceeded to take steps to ensure that the IPG was stripped of its assets thereby rendering IBRC's security worthless. He describes how this was achieved, and says that those steps were taken before the interim and interlocutory orders were made by Clarke J. In fact, this seems to be accepted by the personal defendants. Thus, it is contended that no losses in respect of those assets can be attributed to the orders of Clarke J. Nevertheless an undertaking as to damages was given to the court when those orders were applied for, as is the normal practice.

67. Following the appointment of Mr Wallace as Share Receiver on 14th April 2011 under a number of share pledges executed by certain of the personal defendants as a condition of certain loan facility by Anglo Irish Bank in June 2008, certain of the Quinn family members, and who are part of the personal defendants group in the present proceedings, commenced the so-called main proceedings in which they seek declarations that the purported share charges executed by them in favour of Anglo Irish Bank are invalid, unenforceable and of no legal effect; declarations that the appointment of Mr Wallace as Share Receiver under those charges is invalid, unenforceable and of no legal effect; and declarations that certain undated guarantees executed by them in respect of liabilities of certain Cypriot companies are invalid, unenforceable and of no legal effect. They also seek damages.

68. It is pleaded in the Statement of Claim in the main proceedings that the effect of the appointment of Mr Wallace as Share Receiver is to deprive them of their rights qua shareholders of ownership of the Quinn Group and what is referred to in the Statement of Claim as the QF Group, which according to the Statement of Claim owns properties in "*the Commonwealth of Independent States, Ukraine, Turkey and India*", but is not part of the Quinn Group.

69. The basis on which these declarations are sought is that the underlying purpose of the loans in question was to support the Anglo share price in breach of The Market Abuse Regulations, and in breach of Section 60 of the Companies Act, 1963, and is therefore an illegal purpose.

70. Nevertheless, as I have already referred to, the plaintiffs in those proceedings did not upon the issue of those proceedings seek any injunctive relief in order to restrain the Share Receiver from taking steps on foot of his appointment in relation to the assets. Nor even is a claim for injunctive relief contained within the Plenary Summons or Statement of Claim, which suggests that they at no stage intended to seek such relief, notwithstanding that the Receiver was in situ.

71. Mr Murray has submitted that this is unsurprising since they were in the process of taking their own measures to secure their position by taking steps to put the assets beyond the reach of the Receiver, and that any such application ran the risk of exposing their activities in this regard.

72. When these steps were discovered, the present proceedings were instituted and the orders in question were sought and obtained, and undertakings as to damages were given to the court.

73. It is known by now also that after the order was made by Clarke J. further steps were undertaken in breach thereof to continue the effort to put assets beyond the Receiver. That resulted in the contempt of court proceedings before Ms. Justice Dunne in respect of Sean Quinn Senior, Sean Quinn Junior and Pater Darragh Quinn, and which resulted in her judgment given on the 26th June 2012 when she found them to be in contempt of court.

74. It is unavoidable that the present application to have the injunctions discharged should be viewed against this background. It would be wrong in my view to view the application only by reference to the fact that IBRC has been put into liquidation pursuant to the Act of 2013. That is of course the immediate reason which gives rise to the application, but the fact that IBRC is in liquidation, is not determinative of whether the injunctions ought to be discharged, thus enabling the personal defendants to continue to implement their strategy to place assets beyond the reach of the Special Liquidators, who are acting in the interests of the creditors of IBRC.

75. It is necessary to consider the nature of the undertaking as to damages, and its purpose. What is said by Lord Diplock in *F. Hoffmann-La Roche & Co. ASG v. Secretary of State for Trade and Industry* [1975] AC 295, and also by him in *American Cyanamid Co v. Ethicon Limited* [1975] AC 396 is useful in that regard. As explained, the need for the plaintiff to give an undertaking as to damages is to strike a fair balance as far as possible between the plaintiff's right to be protected from damage and loss which could not be adequately compensated by an award of damages against the defendant, and the defendant's right to be compensated for loss and damage he may suffer as a result of the injunction, in the event that the plaintiff is unsuccessful at trial, and if it is shown that the injunction ought not to have been granted. It is part of the Court's consideration as to where lies the balance of convenience.

76. It is also clear that the undertaking is not intended as a complete indemnity to the defendant. It is not a contract between the plaintiff and the defendant. It is an undertaking which the plaintiff gives to the Court. Indeed, a breach of the undertaking may be considered to be a contempt of court. It must be borne in mind that at the stage when an applpication for an interlocutory injunction is being considered there are often unresolved disputed facts between the parties. Each party will have sworn affidavits. In the event of a dispute on important facts, the Court is simply not in a position to resolve those facts at that point in the proceedings. Inevitably, therefore, there will be occasion where, although the Court is satisfied that a plaintiff has a serious issue to be tried, it cannot in justice reach a conclusion as to the probability of success. It is in such circumstances that the Court must weigh the competing prejudices if an injunction is or is not granted. As Diplock LJ stated in Hoffmann-La Roche at page 361:

> *"... the defendant may have suffered loss as a result of having been prevented from doing it while the interim injunction was in force; and any loss is likely to be damnum absque injuria for which he could not recover damages from the plaintiff at common law. So unless some other means is provided in this event for compensating the defendant for his loss there is a risk that injustice may be done.*
>
> *It is to mitigate this risk that the court refuses to grant an interim injunction unless the plaintiff is willing to furnish an undertaking by himself or by some other willing and responsible person ..... ."*

Diplock L.J. went on at page 361:

> *"[The Court] retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced the measure of damages is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction".*

77. It will be noted that the Court enjoys a discretion not to enforce the undertaking as to damages if the defendant's own conduct would make it unjust/inequitable to do so, even though the normal practice will be to do so absent special circumstances. Peter Gibson L.J. in his judgment in *Cheltenham & Gloucester Building Society v. Ricketts* [supra] gives examples of a number of cases in which, despite the defendant's success at trial and the discharge of the injunction, the Court exercised its discretion not to enforce the undertaking as to damages given by the plaintiff. The circumstances include delay by the defendant in seeking to enforce the undertaking, the unmeritorious conduct of the defendant, and the "inequitable conduct" of a defendant.

78. The fact that upon the failure of the plaintiff's case at trial the judge retains a discretion not to enforce the undertaking as to damages so as to do justice between the parties, begs the question whether there can be circumstances where the Court upon an application for an interlocutory injunction may grant the injunction notwithstanding that there is no undertaking of substance or worth forthcoming from the plaintiff. In normal circumstances, the Court cannot insist on an undertaking, but in the absence of one being offered the injunction will normally be refused, because an undertaking is the price which a plaintiff pays for the granting of the injunction.

79. There is no doubt that the Court can refuse to grant an injunction which would otherwise be granted, where it is satisfied that the undertaking as to damages offered by the plaintiff is of no real value. See for example the judgment of Laffoy J. in *Pasture Properties Limited v. Evans* [supra] where she was not satisfied as to the adequacy of the undertaking offered by the plaintiff company. The converse has been held to apply also in some circumstances. Indeed, *Hoffmann La Roche* was just such a case where the Crown was absolved from the requirement to give an undertaking on the basis that it was enforcing the law of the land as opposed to exercising some proprietary right. No such undertaking was forthcoming from the Secretary of State for Trade and Industry. Similarly in *Kirklees Metropolitan Borough Council v. Wickes Building Supplies Ltd* [1993] A.C. 227, the House of Lords held that it was within the discretion of the Court not to require an undertaking as to damages from the plaintiff council in circumstances where it was seeking the injunction to restrain the defendant from trading on Sundays in breach of Section 47 of the Shops Act 1950. The defendant resisted the claims on the basis that the section was in conflict with article 30 of the E.E.C Treaty. But the council refused to give any undertaking as to damages as a condition of interlocutory relief, since it could not afford to. The House of Lords held that there was no absolute rule that the Crown was exempt from giving an undertaking as to damages, and that the discretion in this regard which the Court had, extended to other public authorities when they were exercising the function of law enforcement.

80. Both of these cases are referred to by O'Donnell J. in his judgment in *Minister for Justice, Equality and Law Reform v. Devine* [supra] from which I have set forth a passage relied upon by Mr Murray, where the learned judge stated that it was well established that an injunction could be granted where the undertaking as to damages was of little real value, and instanced the case of an impoverished plaintiff such as the widow of a deceased in *Allen v. Jambo Holdings Ltd* [supra].

81. If that be the position, and it appears to be, one might ask why then should an injunction be discharged simply because an undertaking as to damages has become worthless due to the impoverishment of the plaintiff occurring after the undertaking was given? Putting that in the context of the present case, one could envisage that after the Special Liquidators were appointed following the passing of the Act of 2013 they might discover some efforts by some creditor of IBRC to put assets beyond the reach of the liquidator, requiring injunctive relief to restrain that activity in the interests of the creditors as a whole. A worthwhile undertaking as to damages may not be available, yet the claim by the liquidators may be seen as raising a serious issue to be tried, or even may appear to be a very strong case as put by the plaintiff on a prima facie basis. Leaving aside completely for the moment the possibility of some sort of bond or other fortified undertaking, it would seem to me, based on the authorities to which I have referred, that the Court in such a case would have a discretion to allow the injunction to be granted notwithstanding the obvious frailty in any undertaking as to damages which might be given. The authorities are clear that the Court enjoys such a discretion, so that it can weigh up all the circumstances of the case, and consider where the justice of the situation lies.

82. The Court could in such a case require some sort of fortification to the liquidator's undertaking in order to do justice as best it can to the restrained defendant. In order to consider such fortification, some attempt must be made by the court to estimate what losses might accrue to the defendant as a result of the granting of the injunction. That of necessity at that stage of the case will be an inexact science in many cases. The present case is one such example, where Mr Wallace has candidly admitted that the figure of €5,000,000 is not based scientifically. In reality he is saying that the personal defendants can suffer no loss attributable to the injunctions, but that in any event that sum will be more than sufficient comfort to the Court to whom the undertakings have been given and confirmed, by way of fortification of the undertakings.

83. In the present case the undertakings were given in good faith and at a time when they had substance. The Court accepted them. There was no necessity at that time to consider their worth or the amount of any losses which might be claimed to flow from the injunctions should it be found in due course that that the injunctions ought not to have been granted. I add at this point that the fact that the plaintiff ultimately fails in the proceedings does not inevitably lead to a conclusion that the injunctions should not have been granted, and/or that the losses claimed are recoverable on foot of the undertaking as to damages. At that time, all the circumstances of the case must be considered, perhaps in the light of evidence which may have emerged at the hearing. But it would appear that at that stage one of the matters which the judge deciding whether or not to enforce the undertaking as to damages will have regard to is the conduct of the defendants. I would add also that the decision to enforce the undertaking is a separate and preliminary step to the actual assessment of the damages itself. Only if the Court concludes in the first instance that the undertaking ought to be enforced does it proceed to the second stage of assessing what those losses are.

84. It is the personal defendants upon whom the onus lies to now satisfy the court not only that the balance of convenience lies in their favour in having the injunctions discharged, notwithstanding the confirmation of the undertakings already given and the fortification of same to the extent of a ring-fenced sum of €5,000,000, but also as to the extent of the likely losses to them as a result of the injunctions having been granted, should it be concluded at a later stage that those injunctions ought not to have been granted.

85. On the balance of convenience, and looking at that question in the context of the present application, and at this point in time, this Court is entitled to take a view on events which are known to have taken place since the injunctions were put in place. It has been found by Dunne J. that those injunctions were breached by at least some of the personal defendants in pursuit of their scheme to place assets beyond the reach of IBRC. The implementation of the scheme was not just feared at the time that the injunctions were applied for. They were already known to have taken steps in that regard, and the orders sought to restrain that activity. The breaches of the injunctions were found to constitute a contempt of court. Dunne J. was not satisfied that the defendants in question had made sufficient effort to purge their contempt and remedy the situation they had contrived, and committal orders were made.

86. It is hard to see why, even if no realistic undertaking as to damages had been available at the time the injunctions were sought, the injunctions would not have been granted in any event, in the light of what was known by the share receiver at the time. The Court might well have been justified in considering that the balance of convenience was so clearly in favour of the plaintiffs that the absence of a solid undertaking as to damages could be overlooked in the interests of justice. It could also have taken into account the undoubted fact at that time that the main proceedings were already commenced and that those plaintiffs had not sought to restrain the share receiver from dealing with the assets which are behind the security which they claim in those proceedings is unenforceable.

87. I have no doubt that on the present application the balance of convenience remains in favour of leaving the injunctions in place. That view is enhanced by the existence of the fortified undertaking, but it is not decisive in my view. It is additional comfort. In the circumstances of this case, where the injunctions were sought because the personal defendants had taken steps to remove assets, the balance of convenience is clearly in favour of the injunctions remaining in place in order to ensure that such unlawful activity would not resume. The fact that the personal defendants claim that the loans are illegal does not mean that they can decide for themselves that the assets should not be available to the receiver lawfully appointed. If they have a point on the legality of the loans, that issue must be determined by the courts. There is no injunction in place on the main proceedings, or even applied for.

88. In any event, as I have said, the onus is upon the personal defendants to quantify as best they can the losses which may accrue

to them as a result of the injunctions being in place, and in doing so not to confuse losses that they may suffer generally as a result of the securities being in place, and those attributable to the injunctions.

89. They have contended that the plaintiffs in these proceedings have abused the court process by making their conspiracy claims in these separate proceedings rather than by way of Defence and Counterclaim in the main proceedings. It is suggested that this is a deliberate ploy on their part to avoid any undertaking as to damages covering losses arising in the main proceedings if the injunctions were granted in those proceedings, should the plaintiffs succeed.

90. I do not agree. The Statement of Claim in the main proceedings was delivered on the 8th June 2011. The application for injunctive relief was applied for by the plaintiffs in the present proceedings on the basis of urgency on the 27th June 2011, and it was only the following day in fact that the Plenary Summons appears to have issued. The plaintiffs herein cannot reasonably have been expected to wait until it was in a position to deliver its Defence and Counterclaim before seeking urgent injunctive relief to restrain the sort of activities which were known by them to be in train by the personal defendants, and which have been admitted. In any event the parties to the present proceedings are different to those named in the main proceedings, and the issues are very different. It is more appropriate that they be addressed in separate proceedings.

91. The personal defendants have gone to great lengths in their affidavits to try and establish that the losses which these injunctions will cause them in the event that the plaintiffs lose the case are in the order of €700,000,000, being in effect their estimated value of the IPG assets. There have been extensive affidavits filed on both sides of the argument. I have set out earlier much of the controversy arising. Underlying their arguments is the claim that in their opinion the loans in question were for an illegal purpose and that the securities underpinning the loans are therefore unenforceable, and therefore that if the assets are realised by way of enforcement of the securities before the Court determines that the loans were illegal, the personal defendants will be left with a worthless undertaking as to damages, or at least one limited to €5,000,000. One is brought straight back to the question posed earlier as to why the plaintiffs in the main proceedings did not seek injunctive relief in those proceedings to prevent the share receiver from dealing with the security assets, or at least requiring him to preserve the value of any assets realised, pending the determination of the issue of the legality of the loans. The share receiver was appointed on the 14th April 2011 following a default on the loans in question. It follows therefore that thereafter the personal defendants did not hold any legal or beneficial interest in the IPG assets, and lost control over them. It is difficult, if not impossible, therefore to argue that any losses could arise for them as a result of the injunction granted to restrain them from taking steps to remove those assets from the reach of the receiver in the manner in which it has been shown they did. Their argument must rely upon their claims in the main proceedings.

92. As I have already mentioned, the personal defendants claim that they are at the loss of a rent- roll from the Prestige Shopping Mall in Istanbul, owned by a Turkish company, and from their share of another building referred to as the Leonardo Office Block in Ukraine which is owned by Quinn Properties Ukraine of which the Quinns themselves own 15%. Ms. Quinn has stated that the annual rent-roll from the Prestige property is in the order of €4.5 million, and that already the rent from that development which they are deprived of by reason of the injunctions in place is over €9,000,000. The loss of a share of the rent from the Leonardo is put at 15% of an annual rent-roll of US$9.6 million. These specific alleged losses are submitted to far exceed the value of the fortified undertaking being offered, and alone render it worthless to the personal defendants, leaving aside altogether the total losses claimed to arise. She has averred that as the personal defendants did not take any steps to put these assets beyond the reach of the receiver, their inability to deal in these assets and benefit from the rent is solely the result of the first injunction put in place and that losses must therefore result from the granting of that injunction.

93. Mr Wallace addresses these claims at paragraphs 12 et seq. in his second affidavit. He states that IBRC has mortgages over these properties. He states that the value of the mortgage over the Prestige property far exceeds the value of the asset, and that while the value of the mortgage over the Leonardo property does not exceed the value of the asset, any surplus will be retained by Quinn Life Direct and other investors as to 85%, with the remaining 15% being held by Mr Baecklund, the bankruptcy receiver appointed over Quinn Investments Sweden AB. He states that the personal defendants have no entitlement to the proceeds of any sale and he makes the point also that the validity of the IBRC lending on the Leonardo building has already been acknowledged to the bank in a letter written on behalf of parties, including the Quinn family, namely a letter dated 7th March 2011 from Messrs. Eversheds to McCann Fitzgerald. He states further that in Sean Quinn Senior's own bankruptcy petition in Northern Ireland, the latter listed an undisputed loan of $44,000,000 in respect of the Prestige Shopping Centre. Mr Wallace goes on to state that the loan on the Leonardo building is in default, and that the bank is entitled to enforce its security and recover its loan via a bankruptcy process in Ukraine and that this would have the effect of significantly decreasing any equity that might otherwise be available.

94. Mr Wallace also does not accept that no efforts were made by the personal defendants to put these two assets beyond the reach of the receiver. He sets out his reasons for this belief in paragraphs 14 and 15 of his second affidavit. He refers also to the fact that the first injunction was granted on the 27th June 2011 but that the bankruptcy receiver in Sweden was appointed on the 5th July 2011, meaning that in any event any claim for losses on foot of the undertaking in these respects must be confined to a period of just over a week between 27th June 2011 and 5th July 2011. He states also that in any event the injunction did not prevent the personal defendants from asserting their rights over the assets in the Swedish bankruptcy, and instances that they challenged the appointment of Mr Baecklund in the Swedish Court of Appeal, albeit unsuccessfully.

95. There are other specific assets in respect of which Ms. Quinn averred that no steps had been taken to remove them beyond the reach of the receiver, and she refers to those individually in her second affidavit. Mr Wallace by way of reply does not accept that no steps were taken, and he explains why he believes that to be the case.

96. In so far as Ms. Quinn also referred to a number of assets in respect of which she says that IBRC have no security and yet are covered by the first injunction, Mr Wallace deals with that at paragraph 24 of his second affidavit. He accepts that they are covered by the injunction, but states also that the properties which she has referred to are neither referred to in the pleadings nor in the schedule of assets referred to in the injunctions granted by Kelly J. But nevertheless he states that in any event they are controlled not by IBRC but by the Swedish bankruptcy receiver over the assets of Quinn Investments Sweden AB, and that this control is independent of the injunctions. Mr Wallace also states his belief that in fact the personal defendants did take steps to dissipate these assets prior to the injunctions being granted.

97. Ms. Quinn takes issue with a great deal of what is stated by Mr Wallace in his second affidavit. These matters cannot be determined finally on this application. In so far as they remain relevant issues at the substantive hearing they will have to be determined after a full hearing at that stage. But I am satisfied on the basis of the affidavits filed by Ms. Quinn and Mr Wallace that the likelihood is that the losses claimed by the personal defendants to arise are, if they do in fact materialise, unlikely to result from the granting of the injunctions, and are more likely to result from the enforcement of the loan securities, including under the bankruptcy in Sweden. In my view the personal defendants have not established a causal link between the losses they claim will arise and the granting of the injunctions themselves.

98. It is impossible to reach definitive conclusions in this regard on the present application, no more than it is possible to do so when the Court is considering the adequacy of an undertaking as to damages at either interim or interlocutory stage. But the Court must do its best on the available evidence in an effort to determine where the balance of convenience lies, and how to ensure the least chance of injustice arising.

99. It will be recalled that Mr Hayden referred to the obiter remarks of O'Flaherty J. in *O'Mahony v. Horgan*, and in particular the second paragraph thereof where he stated:

> *"As regards the undertaking as to damages, I know of no case where a limit has been put on the amount that may be required to be paid, if it is held that the injunction was improperly obtained, nor do I think it right in principle that such a limit should be placed in view of the far-reaching implications involved in any restraint that is imposed on a party by reason of such an injunction prior to judgment."*

The other members of the court were inclined to agree with what he stated in this regard.

101. I have considered these remarks in the context of the present application. The first thing to be said is that of course the remarks are obiter. But they must also be seen in the context in which they were made, namely a case where a limitation had been placed on the undertaking as to damages where the full amount payable on the insurance policy in question was clear and ascertained. There seems to have been no apparent reason stated for limiting the extent of the undertaking as to damages to £25,000 in the face of a possible claim on the undertaking in the sum of £71,000. The present case is very different, where the amount of any possible claim is not easily ascertained. In fact it cannot be ascertained at this stage. The undertakings remain in place and they are unlimited in nature. The problem arises as to their real value, and I have dealt with all that. But the question for consideration is whether the fortification offered should be found acceptable by the Court in all the circumstances. It is a different set of circumstances than those in *O'Mahony v. Horgan*.

102. Another matter raised by Mr Hayden is whether the Minister for Finance should be required to provide an undertaking as to damages or to underwrite in some way the undertaking as to damages already in place, and as fortified, as a condition of the injunctions remaining in place. I am not satisfied that such a condition should be imposed in this case. It might be different perhaps if I had been satisfied to the required extent by the personal defendants, upon whom the onus rests, that losses which could accrue to them as a result of these injunctions being in place were likely to exceed by a significant amount the amount of the fortified undertaking offered. I am not so satisfied, for the reasons which have already been given. It is mere assertion and based on a premise that is incorrect for the purposes of these present proceedings, namely an estimate of the current value of the IPG assets.

103. In my view, that balance of convenience/balance of justice lies in favour of refusing the present appplication, and to order that the plaintiffs lodge in court the sum of €5,000,000 being offered to the Court by way of fortification of the undertakings as to damages which are in place pending further order of the Court, and I will so order.