Neutral Citation: [2016] IEHC 325

THE HIGH COURT

[2015 No. 3053P]

BETWEEN:

STEPHEN TENNANT

PLAINTIFF

AND

HUGH MCGINLEY AND MCGINLEY CONSTRUCTION LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice David Keane delivered on the 14th day of June 2016

Introduction

1. This is an application for an interlocutory injunction restraining any interference with the conduct of a receivership or with the exercise of a receiver's functions, or both

Background

2. The plaintiff is a partner in a professional services firm. He was appointed as receiver over a number of properties owned by the defendants on the 31st March, 2015.

3. The first named defendant Mr McGinley is a businessman and property developer and is a director and sole shareholder of the second named defendant ("the company").

4. In 2005, the defendants acquired a site at East Road, East Wall, Dublin 3 for the purpose of developing an apartment complex and retail units. Construction of the development, which became known as Alexandra Place, was completed in 2008 and 15 of the apartments were sold.

5. On foot of a facility letter dated the 27th February 2008 Bank of Ireland ("the bank") renewed a number of the company's existing loan facilities and extended a further loan facility to it, which combined facilities amounted to just under €28 million in aggregate. Those facilities were expressed to be repayable on demand or, in the absence of such a demand, were to be repaid from the net sale proceeds of the relevant properties, including those at Alexandra Place, by way of a single repayment on the anniversary of the original draw down date.

6. The loans were secured by mortgages over a number of properties owned by the company, including the apartment complex and an adjacent site at East Wall. Mr McGinley provided guarantees in respect of those facilities in his personal capacity.

7. As is by now well documented, the property market was then entering a downturn, which later became a collapse. A number of proposed sales fell through and the majority of the apartments in the development were left unsold.

8. The loan facilities and attendant security interests associated with the properties were subsequently transferred to National Asset Loan Management Limited ('NALM'), a subsidiary of the National Asset Management Agency ('NAMA') in 2010.

9. It seems clear that the loan facilities were drawn down and that they were not repaid on the anniversary of that event. Instead, it would appear that discussions ensued between the defendants and their relationship manager in the bank following which, in 2009 and 2010 the defendants set about completing works on the vacant apartments so that they might generate a rental income stream until such time as market conditions improved and they could be sold. The defendants were responsible for the expenditure necessary to fit out the apartments for rental and for the day to day management of the apartment complex. The defendants were to remit the net rental income from the apartments to the bank to be applied against the defendant's indebtedness or, at least, against the interest accruing upon it.

10. The defendants later had to expend a further €328,690.96 on the works required to bring the underground car-park of the apartment complex into compliance with the applicable fire safety regulations. The bank subsequently contributed €112,590.61 towards that sum with the approval of NALM/NAMA. No explanation has been provided concerning how the apartment complex came to be constructed in such a manner that almost a third of a million euro had to be expended on the remedial works necessary to bring it into conformity with the applicable fire safety regulations.

11. On the 1st December 2011, following receipt by the bank of a business plan submitted by the defendants, it wrote to them in its capacity as manager of the relevant debts on behalf of NALM/NAMA, stating that the said plan was not acceptable. The letter identified a number of issues which had to be addressed as a matter of urgency if the lender's support for the defendants was to continue. The letter went on to state, in material part, that neither its issue and acceptance, nor any of the discussions leading up to it, constituted a waiver or amendment of the rights of the parties and that all such rights, including the right to enforce any security held by NALM/NAMA, were expressly reserved and capable of being exercised without further notice.

12. On the 29th May, 2012, the bank again wrote to the defendants in the same capacity, stating that its letter was to be read in conjunction with, and was to be deemed part of, the letter of the 1st December, 2011 just described. In particular, the second letter stated that all terms and conditions detailed in the first letter were to remain unchanged and would continue to apply. An appendix to the second letter sets out a "property strategy approved by NAMA" to be pursued by the company, which includes, among other things, the rental by it of the "full scheme" at Alexandra Place, the provision of monthly rental reconciliations in that regard and the marketing of the properties for sale in 2015.

13. By a loan sale agreement dated 20th June, 2014 made between the bank, NALM and a company named Promontoria Eagle Ltd ("PEL"), PEL purchased the company's loans. PEL appointed Capita Asset Services (Ireland) Limited ("Capita") to provide loan

administration services in relation to the defendants' loans, amongst others.

14. Upon its appointment as asset manager, Capita wrote to the defendants on the 5th September, 2014 requesting a meeting and the provision of a cash flow projection. The requested meeting took place on 11th September, 2014, attended by Mr McGinley; his son; staff from Capita; and staff from an entity called Cerberus European Servicing Limited ("Cerberus"), which acts as an advisor to PEL. At that meeting, the defendants were asked to furnish a debt repayment proposal. The company submitted one on the 26th September, 2014. By letter dated the 21st October, 2014, Capita advised the defendants that the company's proposal had been deemed unacceptable to PEL.

15. A number of meetings and further correspondence followed. Settlement negotiations continued into 2015. No agreement was reached. On the 12th March, 2015, PEL issued letters of demand to the company as borrower and to Mr McGinley as guarantor. Those letters identify an aggregate sum then due from the company in excess of €27 million and an aggregate sum then due from Mr McGinley on foot of various guarantees in respect of those borrowings in excess of €3.6 million. It appears to be common case that, in response to those demands, the relevant loans were not repaid and that no payment was made by Mr McGinley on foot of the various guarantees he had provided in respect of those loans.

16. On 31st March 2015, PEL appointed the plaintiff as receiver over certain assets of the defendants comprising the property at Alexandra Place and six other properties including land, a commercial unit, and investment properties in counties Tyrone, Donegal, and Dublin. The plaintiff avers that, in respect of the Alexandra Place property, the receivership encompasses 57 apartments and one occupied commercial unit. Mr McGinley avers that the Alexandra Place development comprises 73 apartments, of which 16 have been sold, together with three commercial units and a crèche facility.

17. In turn, on 31st March, 2015, the receiver appointed Chartered Assets Property Limited ("Chartered Assets") as property management agents for the Alexandra Place property.

The underlying proceedings
18. A plenary summons issued on behalf of the receiver on 21st April, 2015, seeking an order for possession of, amongst others, the Alexandra Place property; injunctions restraining the defendants from interfering with the receivership or the functions of the receiver, from interfering with the receipt of rents by the receiver, from entering or continuing to occupy the premises, and from trespassing upon or interfering with the receiver's possession of the property; and, if necessary, a declaration that the receiver has been validly appointed in respect of the property.

The relief now sought
19. The motion now before the Court issued on the 29th April, 2015. In it, the receiver seeks orders restraining the defendants from: interfering with the receivership or with the exercise of the plaintiff's functions; interfering with the receipt of rents from tenants; entering or remaining in occupation of the properties concerned without the plaintiff's permission; or trespassing on the said properties or otherwise interfering with the plaintiff's possession of them.

The defence to the underlying proceedings
20. Neither the company's very substantial indebtedness; nor the significant guarantees provided by Mr McGinley in that respect; nor the provision by the defendants of the relevant security as part of the underlying loan transactions; nor the entitlement conferred under the relevant security instruments to appoint a receiver; nor the failure by the company to repay its debt upon demand or of Mr McGinley to honour his various guarantees when called upon to do so; nor the formal validity of the instruments appointing the plaintiff as receiver are in issue for the purpose of the present application.

21. Rather, the defendants contend that the plaintiff's appointment as receiver is invalid. They do so on two principal grounds.

22. First, the defendants argue that their acceptance of the terms of the bank's letters of the 1st December 2011, 29th May and 16th November 2012 and their course of dealings with both the bank and NALM/NAMA amount to an accomplished and binding agreement between those parties, which they describe as a 'management work out agreement.' They assert that they have abided fully by the terms of that agreement and are now in a position to see it through to completion. They submit that the enforcement of the lender's security through the appointment of the receiver is incompatible with the terms of that agreement and is, therefore, invalid.

23. Second, the defendants argue that the failure by the bank or NALM/NAMA to permit them to be heard prior to the assignment or sale of their loans to PEL was in breach of their right to natural and constitutional justice and fair procedures and that, in consequence, the said assignment or sale was invalid, as was the subsequent appointment of the plaintiff as receiver by PEL.

24. There is no controversy or doubt that the defendants have remained in occupation of the Alexandra Place properties; have prevented the plaintiff from taking possession of them; have interfered with the receivership and the exercise of the plaintiff's functions in that regard; and have interfered with the receipt of rent from tenants by the plaintiff as receiver. Of course, the defendants say that they are entitled to do all of those things by reference to their contention that there is no lawful or valid receivership in respect of those properties and that, accordingly, the company is the legal person entitled to remain in possession of the property; to exclude the plaintiff from it; and to receive the tenants' rents.

25. On the 1st April 2015, the plaintiff wrote to Mr McGinley to inform him of the plaintiff's appointment as receiver over various assets of the company, including the Alexandra Place property. A copy of the plaintiff's deed of appointment was enclosed with that letter, which included a request for details of all extant lease or rental agreements. The plaintiff avers that he has not received any such information from either the company or Mr McGinley.

26. The defendants do not deny that the company, through its agents, has informed tenants that they should not pay rent to the plaintiff as receiver or to the plaintiff's agent Chartered Assets. The defendants' solicitors wrote to Chartered Assets on the 2nd April 2015 asserting that neither the plaintiff nor Chartered Assets are entitled to receive rents. The defendants' solicitors wrote to the plaintiff's solicitors on the same date in broadly similar terms and threatening an application for injunctive relief in the absence of an immediate undertaking to refrain from taking any action in relation to the receivership assets.

27. On the 8th April 2015, a representative of Chartered Assets, who was seeking to deliver a letter or notice to tenants on behalf of the receiver, and another gentleman accompanying him were refused access to the Alexandra Place complex by Mr McGinley's son Daniel McGinley and a gentleman named Patrick James Flanagan, also known as Seamus Flanagan. In an affidavit sworn for the purposes of the present application, Daniel McGinley acknowledges, as the plaintiff has alleged, that he and Mr Flanagan refused those persons entry on the basis that they were not willing to permit them to deliver letters on the premises without a court order. I

pause here to note that it is difficult to reconcile the stance taken by Mr Daniel McGinley and Mr Flanagan (who the company report exhibited by the plaintiff suggests is a director of the company but who is only prepared to acknowledge on oath that he is a painter and decorator by trade and a 'maintenance employee' of the company) with that adopted by the defendants' solicitors in threatening, though not bringing, an application for injunctive relief to restrain the plaintiff from acting as receiver. While the latter approach acknowledges (correctly, in my view) that the defendants would require an injunction to prevent the plaintiff from carrying out his functions as receiver by reference to the issues that they seek to raise, the former appears to suggest that it is the plaintiff who would require the express sanction of the court to carry out his functions.

28. On the 14th April 2015, the defendants' solicitors wrote to PEL's solicitors, identifying the defendants' 'essential objection' to the receivership as the alleged existence of a 'management work out agreement' with which it was said to be incompatible. The same letter goes on to challenge the validity of the transfer of the company's loans from NALM/NAMA to PEL. Despite the asserted existence of a concluded agreement concerning the 'working out' or compromise of the defendants' indebtedness alleged to have been entered into at some point between the 1st December 2011 and the 16th November 2012, and the asserted invalidity of the transfer of the company's loans from NALM/NAMA to PEL on the 20th June 2014, the letter asserts that the defendants had been attempting in good faith to negotiate with PEL since the 11th September 2014. The letter concludes by stating that, failing PEL's acknowledgement that it is bound by the said 'management work out agreement', proceedings would issue to challenge the transfer of the company's loans to PEL and, presumably in the alternative, to seek a declaration that PEL is bound by that agreement.

29. For his part, the plaintiff has averred that during the months of meetings that occurred between September 2014 and his appointment as receiver on the 31st March 2015, no alleged 'work out' agreement was mentioned at any stage, much less was any documentation provided that would evidence any such agreement. It does appear to be common case that the defendants' solicitors wrote to PEL's solicitors on the 18th March 2015 to assert that, in demanding repayment of the company's loans, PEL was acting, or was proposing to act, in breach of an agreement between the company and both the bank and NAMA evidenced by a letter from the bank to the defendants, dated the 29th May 2012. If that is a reference to the letter already identified (and exhibited on affidavit by Mr McGinley for the purpose of the present application), it would be difficult to disregard the statement on its face that it is to be read in conjunction with, and deemed part of, the bank's letter of the 1st December 2011.

30. And if that were so, it would be more difficult still to disregard the fact that the defendants each signed their acceptance of the terms of the letter of the 1st December 2011, which (in material part) include the following express provisions:

> "NAMA expressly reserves all of its rights and remedies arising now or subsequently:
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> (i) Under any facility agreement or finance document currently in existence between [the company, East Road Developments Ltd and Mr McGinley ("the Connection")] and NAMA and/or any [participating institution ("PI")] and whether any such facility agreement or finance document relates to the Connection or not;
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> (ii) Under any security or other document currently in existence from any part of the Connection or any third party in favour of NAMA and/or a PI whether in respect of the liabilities or obligations of the Connection or any part thereof or any other liabilities or obligations whatsoever in favour of NAMA and/or a PI has security;
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> …
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> Neither the issue and acceptance of this letter nor any discussions leading to the issue of this letter constitute a waiver or amendment of the terms of (or rights of any party under) any [such document] or otherwise under any applicable law and all such rights, including the right to enforce any security held by NAMA, are expressly reserved and may be exercised without further notice. Any time, indulgence, delay or failure to take any action by NAMA and/or [the bank] shall not constitute any waiver of any contravention of [any such document] or any waiver of any such rights.
>
> For the avoidance of doubt any facilities to the Connection currently in default remain in default.
>
> 2. NAMA may terminate, in whole or in part, any support it may provide to the Connection at any time at NAMA's sole discretion including, without limitation, where NAMA is of the opinion that the Connection is not complying with any of the conditions of support as set out in this letter ….
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> 3. Compliance with the conditions and requirements specified above may warrant a further review or re-assessment by NAMA. However, any such review or re-assessment is as the sole discretion of NAMA. This letter should not in any way be taken as an offer or commitment by or on behalf of NAMA to consider an extended working relationship.
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> …
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> 5. This letter does not constitute a legally binding commitment to create any legal obligations on or for NAMA or the connection."

31. As previously noted, the present proceedings commenced by plenary summons issued on the 21st April 2015. On the following day, the 22nd April 2015, a plenary summons issued on behalf of the defendants (as plaintiffs) in proceedings against NALM, NAMA and PEL. A Statement of Claim has since been delivered in those proceedings. In it, the defendants in these proceedings plead that the transfer of the company's loans to PEL was invalid or, in the alternative, that PEL is bound by the alleged "management work out agreement", on the basis already described. The defendants also plead that the loan repayment demand which preceded the appointment of the plaintiff as receiver was invalid because the company was not in default under the relevant loan agreements and because the demand was not accompanied by any account or statement, evidencing the amount then due. On that basis, the defendants seek damages, together with a number of declarations, including declarations to the effect that PEL is not entitled to appoint a receiver and that the appointment of the plaintiff as receiver is invalid.

Present application - test to be applied

32. This is an application governed by the principles recognised by the Supreme Court in *Campus Oil Ltd. v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88. That is to say, the plaintiff must establish that he has raised a fair *bona fide* question; that an award of damages would be inadequate to compensate him for any loss he might suffer if an injunction is not granted; and that the balance of convenience favours the grant, rather than the refusal, of the injunction or injunctions sought.

Fair *bona fide* question

33. I have no doubt that, *prima facie*, on the basis of the matters already identified as not in dispute between the parties, the

plaintiff has raised a fair *bona fide* question to be tried concerning the validity of his appointment as receiver of the properties at issue and his entitlement to exercise his functions as such. Those maters include: the company's very substantial indebtedness; the significant guarantees provided by Mr McGinley in that respect; the provision by the defendants of the relevant security as part of the underlying loan transactions; the entitlement conferred under the relevant security instruments to appoint a receiver; the failure by the company to repay its debt in accordance with the terms of the relevant loan agreements and, later, upon demand; the failure of Mr McGinley to honour his various guarantees when called upon to do so; and the formal validity of the instruments appointing the plaintiff as receiver.

34. It seems to me that to consider instead the question of whether the defendants have raised a fair *bona fide* question on any of the defences to the plaintiff's claim that they have put up on affidavit would be to reverse the test. While the position might be different if the Court were driven to the conclusion that the defendants have established a complete defence to the plaintiff's claims, such that the plaintiff cannot really establish a fair issue to be tried, it is otherwise entirely inappropriate for the court to express any view on the strengths of the parties' respective cases.

35. Bearing those observations in mind, in light of the matters raised in argument it may be appropriate nevertheless to consider the defences that the defendants have put up and upon which they appear to rely not only at the trial of the plaintiff's action but also in opposition to the present application.

i. breach of a 'management work out agreement'

36. The first defence raised is that the defendant's acceptance of the terms of the bank's letters of the 1st December 2011, 29th May and 16th November 2012 and their course of dealings with both the bank and NALM/NAMA amount to an accomplished and binding agreement between those parties, which they describe as a 'management work out agreement' and which they contend has been breached by the appointment of the plaintiff as receiver, rendering that appointment unlawful and, thus, invalid.

37. Confronted with the express terms of the letters quoted earlier, which, to use a neutral expression, appear to offer little support for the interpretation that the defendants seek to place upon them, the defendants argue that their subsequent course of dealings with the bank and NALM/NAMA establish the existence of the agreement for which they contend. In particular, they point to the work and expenditure entailed in bringing the apartment complex into compliance with the fire regulations; fitting out the unsold apartments for rental; managing the apartment complex; remitting the rent payments received to the bank; and selecting and appointing an estate agent to handle the sale of those apartments, as comprising the consideration that they have provided in exchange for the waiver by NALM/NAMA (and by PEL as its successor in title) of their entitlement to enforce their security.

38. In response, the plaintiff makes a number of points. First, he submits that the express terms of the said letters are directly contrary to the agreement for which the defendants contend. Second, he argues that the consideration actually provided by NALM/NAMA for the steps taken by the defendants, as guarantor and borrower in substantial default, was self-evidently the forbearance of NALM/NAMA in refraining from taking immediate steps to realise its security. In avoiding receivership in 2011, the defendants obtained an obvious benefit in that they retained the income from, and an equity of redemption in, the secured properties, allowing them the opportunity to reduce their indebtedness. Third, the plaintiff submits that there is no basis in fact or logic for asserting, much less concluding, that in taking the specific steps required of them under the express terms of the said letters, the defendants were embarking on a course of dealing modifying those terms.

ii. breach of the defendants' entitlement to fair procedures

39. The second defence raised is that the failure by the bank or NALM/NAMA to permit the defendants to be heard prior to the assignment or sale of their loans to PEL was in breach of their right to natural and constitutional justice and fair procedures and that, in consequence, the said assignment or sale was invalid, as was the subsequent appointment of the plaintiff as receiver by PEL.

40. In support of this argument, the defendants rely on the decision of this Court (*per* Finlay Geoghegan J.) in *Treasury Holdings & Ors. v. NAMA & Anor.* [2012] IEHC 297, interpreting the principles governing the right of a borrower to be heard, as those principles were described in various different ways by the Supreme Court in *Dellway Investments & Ors v. NAMA & Ors* [2011] 4 IR 1. In considering the judgment of Fennelly J. in Dellway, Finlay Geoghegan J. concluded her analysis of the relevant principles in the following terms:

> "93. Whilst the other judgments put matters in a slightly different way, it does not appear to me that any of the other judges disagreed with an entitlement to be heard where, at minimum, the decision would have "material practical effects on the exercise and enjoyment of the rights of the applicants". Certain of the judgments refer to "rights and interests" as does the judgment of Fennelly J. rather than rights alone. I am doubtful that anything special turns on this, save that it may imply a broad approach."

41. The defendants say that the sale or transfer of the company's loans by NALM/NAMA to PEL had material practical effects on the exercise and enjoyment of the rights of the company, thus entitling the company to be heard.

42. In response, the plaintiff argues that particular regard must be had to the next paragraph in the judgment of Finlay Geoghegan J. in *Treasury Holdings* which states:

> "Even adopting this formulation, there is the additional question as to the nature of the rights and interests which may satisfy this test. Rather than attempt to address this on a theoretical or abstract basis, it appears to me preferable to consider the opposing submissions of the parties on the facts applicable to Treasury in the autumn of 2011. It is commoncase that a person's right to be heard is dependent on the specific facts applicable to that person. In *Dellway*, Denham J. (as she then was) stated at para. 84:-
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> > 'In light of the constitutional right to be heard, to fair procedures, the question is whether any such right to be heard by the appellants arises implicitly in the Act of 2009 and in the circumstances of the case.'"

43. The plaintiff contends that a fundamental difference between the facts of both *Dellway* and *Treasury Holdings* and the facts of this case, is that the latter involve neither a decision by NAMA to acquire any loan nor a decision by it to enforce its security on any loan but rather a decision to sell the defendants' loans to a third party (in this case PEL), which has acquired the benefit of those loan agreements subject to the same terms and conditions as those which governed the original loan agreements between the defendants and the bank. The plaintiff argues that, as PEL has none of the particular statutory powers and privileges conferred upon NAMA under the National Asset Management Agency Act 2009, the sale or transfer of the said loans to PEL cannot have any material

practical effect on the exercise and enjoyment of the defendants' rights or interests, since the sale merely restores the *status quo ante* and does not adversely affect the existence or exercise of the defendants' rights or interests in any way.

44. In this regard, the plaintiff points in particular to that portion of the judgment of Denham J. in *Dellway* (at para. 138) which emphasises the fact that the remit of NAMA is quite different to that of a bank.

45. In addition, the plaintiff submits that there is a more fundamental difficulty with the defendants' attempt to challenge the decision made by NALM/NAMA to sell or transfer their loans to PEL. The plaintiff contends that any such application is hopelessly out of time having regard to the provisions of s. 193 of the National Asset Management Agency Act 2009, not having been brought within one month after the decision was notified to the defendants. The plaintiff argues that the time limit under s. 193 applies by analogy to any application for declaratory relief in plenary proceedings, which could have been the subject of an application for judicial review, on the authority of the decision of Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301 and, while acknowledging that time may be extended where there are substantial reasons why the proceedings were not brought within time and where it is just in all of the circumstances to do so, having regard to the interests of other affected persons and the public interest, further argues that no such reasons have been advanced and that in this case the interests of third parties, including those of PEL with whom the defendants purported to engage for over six months from September 2014 before raising this argument, would plainly be adversely affected by any such decision to extend time now.

iii. An invalid demand

46. A third and, perhaps, subsidiary line of defence advanced by the defendants is that the appointment of the plaintiff as receiver was not preceded by a valid letter of demand because it was a condition precedent to the issue of any such letter that there should first have been an event of default, whereas no such event has occurred because, the defendants' contend, the relevant loan has become an interest only loan by course of dealing between the parties and the rent payments which the company was remitting to PEL were meeting the interest on the loan at the material time.

47. The plaintiff argues in response that there is no evidence whatsoever to suggest, much less establish, that the loans at issue were interest only beyond a bald averment by Mr McGinley to that effect, which is plainly entirely misconceived. It does seem fair to pause here to observe that, in the course of argument, the proposition advanced on behalf of the defendants appeared to alter slightly to become more obviously a reflection of the defendants' contention that PEL was not entitled to demand repayment of the relevant loans (or to appoint a receiver) unless and until there was some breach of the 'management work out agreement' contended for by the defendants, which would of course depend on a finding that such an agreement exists.

48. The plaintiff makes a number of further points in reply. First, he points out that there is nothing in the relevant facility letter that requires an event of default before demand – the monies owing were due to be repaid within one year of being drawn down or upon demand. Second, he submits that clause 6 of the relevant indenture of mortgage made on the 28th September 2006 between the company and the bank provides that the monies secured become due on demand and the bank's power of sale is expressly stated to be exercisable without the restrictions on its exercise imposed by s. 20 of the Conveyancing Act 1881. Third, he submits that rental payments currently being remitted by the defendants are perhaps sufficient to meet the interest arising on the €12 million loan facility advanced to the company but are certainly not sufficient to meet the interest arising on all four extant loan facilities, currently amounting to €26 million. Finally, in so far as Mr McGinley complains on affidavit that the the repayment demand was not preceded or accompanied by a statement of account, the plaintiff invokes the commentary at para 8.4 of Malek and Odgers (eds.), *Paget's Law of Banking*, 14th ed., (London, 2014) to the effect that a statement of the amount due is not a legal requirement for a valid demand.

iv. conclusion on defences raised

49. Reiterating my earlier observation that it is normally inappropriate for the court to express any view on the strengths of the parties' respective cases, beyond its conclusion on whether the applicant has established a fair bona fide question to be tried, in addressing the foregoing arguments as they were presented to the Court by each side I propose to limit myself to the finding that that the defendants have failed to satisfy me on the evidence so far presented that they have made out a complete defence to the plaintiff's claims, such that the plaintiff cannot meet the requirement to establish a fair issue to be tried on the validity of his appointment as receiver and on his entitlement to exercise his functions as such.

The adequacy of damages

50. The plaintiff has averred to his willingness to provide the usual undertaking as to damages as a condition of the grant of the injunctive relief that he seeks. No issue has been raised concerning his ability to make good on that undertaking should he be required to do so.

51. On the other hand, a serious question has been raised concerning the defendants' ability to compensate the plaintiff by an award of damages for any loss suffered by him between now and the trial should the interlocutory injunctions he seeks be refused. The plaintiff points to the defendants' substantial indebtedness. In addition, there is an unsatisfied judgment against Mr McGinley that was registered by the Collector General in the sum of €87,064.55 (with costs of €309.63) on the 14th December 2010 and an unsatisfied judgment against the company that was registered in the sum of €5,332.65 (with costs of €947.30) on the 30th October 2012.

52. In response, Mr McGinley first asserts that the company does not accept that it owes as much as €26 million, without attempting to clarify what sum it acknowledges it does owe on foot of the substantial borrowings it has obtained but not repaid. Mr McGinley then avers that the company's solvency is not in question because there has been no default in the repayment of the loans but, of course, that is a circular argument since the plaintiff will only succeed at trial (and can only claim damages from the defendants for any loss suffered) if he can establish the converse. Finally, Mr McGinley acknowledges the unsatisfied judgments against the company and himself, but says that arrangements are now in train to discharge those debts.

53. In the circumstances and, in particular, by reference to the meagre evidence presented by the defendants of their current financial status, I cannot be satisfied that the plaintiff will be adequately compensated by an award of damages for any loss he may suffer between the present hearing and the trial of the action should the injunctions now sought be refused.

54. In relation to the position should the injunctions sought be granted and the plaintiff's action subsequently fail, I am conscious that the rights in dispute in these proceedings are property rights and that an entitlement to damages is often considered insufficient protection where property rights may be lost. However, it is a particular feature of this case that the dispute between the parties concerns which of them is to have control of the process of sale of the development properties at issue. I consider that a fundamental distinction between this case and the situation posited by Clarke J. in *A.I.B. plc v. Diamond* [2012] 3 I.R. 549 at 590, whereby a person might be deprived of his home subject only to an undertaking to compensate him to the value of that home (and

any consequential losses) should the relevant order subsequently be found to have been wrongly made, amounting to a form of compulsory acquisition.

The balance of convenience
55. Both sides have raised several issues and have had much to say on the issue of the balance of convenience.

56. A significant controversy has arisen concerning whether the defendants, or any of their servants or agents, have been acting aggressively towards existing tenants in seeking to prevent those tenants from remitting rent due to the plaintiff, as receiver, rather than the company. The plaintiff avers to a telephone call that a member of his staff received on the 20th April 2015 from an unnamed tenant alleging that Mr Flanagan made a telephone call to that tenant 'of an aggressive nature' in which he indicated that, if the tenant's rent was not received by the company by close of business on that date, all services to the apartment would be disconnected and individuals on behalf of the company would call to seek vacant possession of the property.

57. The plaintiff further avers that, on the 30th April 2015, the same member of his staff received a telephone call from the mother of another tenant who said that Mr Flanagan had texted her daughter and had called to the door of her daughter's apartment. The mother stated that her daughter would not open the door to Mr Flanagan but overheard him 'threatening' another tenant by telling that person that if his or her rent was not paid to the company (rather than the receiver) services would be cut off. The tenant's mother stated that, in the circumstances, her daughter felt compelled to pay rent to the company.

58. The plaintiff was furnished with, and has exhibited in redacted form, a letter dated the 5th May 2015 and signed by each of the tenants in that apartment, stating that rent is being paid "under duress, intimidation and threats to cut off services." Remarkably, that letter is countersigned (as a receipt) by Mr Flanagan on behalf of the company.

59. In response to these averments, Mr McGinley, his son Daniel, and Mr Flanagan have each denied on affidavit that they have threatened or intimidated any of the tenants in the apartment complex. Mr McGinley asserts that it is the plaintiff who has caused the tenant's anxiety by corresponding with them to the effect that the rent due is payable to him as receiver. Mr Flanagan denies that he threatened that services would be cut off if rent was not paid to the company, but acknowledges that he has had conversations with a number of tenants in which he has explained that, if tenants do not continue to pay rents to the company, he 'would have no authority to attend to any maintenance issues which may arise.'

60. In relation to the receipt dated the 5th May 2015, Mr Flanagan admits that the letter is genuine and that he signed it, but avers that he did so without reading it. Both Daniel McGinley and Mr Flanagan aver that their relations with tenants, including the tenants concerned, remain cordial. Daniel McGinley avers to a conversation that he had subsequently with the tenant to whom the receipt was provided, while 'carrying out works' to that tenant's apartment, during which he avers the tenant concerned expressed shock at the receiver's behaviour in exhibiting that receipt for the purpose of these proceedings. However, no explanation has been forthcoming as to why the tenants of any apartment would write such a letter if they did not feel intimidated or under duress. Accordingly, and making due allowance for the hearsay nature of the evidence concerned, it must be a matter of some significance in considering the balance of convenience in this case.

61. A number of other matters have been ventilated at some length on affidavit and in argument. For example, it is now common case that one of the apartments in the building was occupied by Daniel McGinley and Mr Flanagan free of rent. The plaintiff says that this, in conjunction with other matters, gives rise to a concern that rent is not properly being accounted for. The defendants say that the apartment was being used, in effect, as an office for maintenance, administration and security purposes to the benefit of the development as a whole. The parties are in dispute concerning which of them can more efficiently and cost-effectively manage the properties. There is a dispute about whether a commercial unit at the complex was let by the company without the necessary consent of the charge holder. There is some controversy concerning whether the VAT treatment of the rental income from the property has been dealt with appropriately. It does not seem to me that any of these matters is especially germane to the central issues that I must resolve.

62. A key factor, in my view, in considering the balance of convenience in this case is the extent to which the defendants' opposition to the injunctive relief sought is based not on the validity of the plaintiff's appointment as receiver *per se* but, rather, on the asserted incompatibility of that appointment with an alleged "management work out agreement" that the defendants claim to have entered into previously with the bank and NALM/NAMA, and on the asserted invalidity of the transfer of the defendants' loans from NALM/NAMA to PEL. Yet neither NALM nor NAMA are parties to the present action, whereas they are each – together with PEL - defendants to the separate action commenced by the defendants (as plaintiffs in that case) on the day after these proceedings issued, but in which other action no injunctive relief has been sought, thereby depriving both NALM/NAMA and PEL of an opportunity to be directly heard in opposition to the defendants' claims in that regard.

63. It seems to me to follow that, in the particular circumstances of the present case, the central features of the *status quo ante* are that the plaintiff was, and is, the subject of an appointment as receiver valid on its face, and that his appointment occurred against the background of certain undisputed facts including: the company's very substantial indebtedness; the significant guarantees provided by Mr McGinley in that respect; the provision by the defendants of the relevant security as part of the underlying loan transactions; the entitlement conferred under the relevant security instruments to appoint a receiver; and the failure by the company to repay its debt upon demand and of Mr McGinley to honour his various guarantees when called upon to do so.

64. *Taite v. Beades* [2013] IEHC 440 was a case in which a receiver obtained a number of injunctions (certain of which were broadly similar to those now sought) against a mortgagor in default in respect of certain residential investment properties. On behalf of the defendants it is argued that the position in that case was different because the receiver there was in possession of the properties at issue. On reading the judgment of McDermott J., it is by no means clear to me that that was so. But, even if it were, it does not seem to me that the fact of physical possession or occupation can, or should be, dispositive in cases of this kind. To hold otherwise would be, however inadvertently, to encourage undesirable action and confrontation of the kind that occurred in *Taite* (described at paragraphs 24 and 25 of the judgment).

65. In considering the balance of convenience in *Taite*, McDermott J. emphasised the importance for both receivers and the tenants that there should be clarity and stability in the definition and exercise of their respective rights (at paragraph 36 of the judgment). That seems to me to be an important factor in considering the balance of convenience in this case also.

66. *Contech Building Products Limited v. Walsh & Ors* [2006] IEHC 45 was a case that involved an application for an injunction to restrain passing off where the product complained of had already been placed on the market. The defendant argued that, since this was the *status quo* at the time of the application, the preservation of that position required that the injunction application be refused. Finlay Geoghegan J. rejected that submission, noting that whether an applicant becomes aware of alleged passing off before

or after the offending product is placed on the market is often a matter of happenstance. 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 whether the applicant had moved promptly in the face of the unlawful conduct alleged. Here, it cannot seriously be doubted that the plaintiff moved promptly once problems arose shortly after his appointment as receiver.

67. In the circumstances described, I am firmly of the view that the balance of convenience favours the grant of the injunctions at issue.

Conclusion
68. For the reasons set out above, I am satisfied that the plaintiff has met the relevant test under the *Campus Oil* guidelines. I will therefore grant the interlocutory injunctions sought in terms of the notice of motion.