THE COURT OF APPEAL

CIVIL

Neutral Citation Number. [2021] IECA 38
Court of Appeal Record No.: 2020/222
High Court Record No.: 2018/1872 P & 2020/4756 P

Faherty J.
Haughton J.
Murray J.

BETWEEN

PAT RYAN

PLAINTIFF/APPELLANT

- AND –

DENGROVE DAC

RESPONDENT

BETWEEN

PAT RYAN AND PHIL MONAGHAN

PLAINTIFFS/APPELLANTS

- AND –

DENGROVE DAC AND KEY TYRRELL

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Murray delivered on the 17th day of February 2021

The issue

1. In the course of the judgment giving rise to this appeal, Twomey J. referred to the relief sought by the appellants - and refused by the Court - as a '*receiver-injunction'*. Applications for such injunctions – in this instance restraining the appointment by a creditor of a receiver and/or the undertaking by the receiver of one or more actions *vis a vis* secured assets – are not uncommon. Where arising in the context of commercial loans secured by commercial assets, they are often refused. In such disputes, damages will generally be an adequate remedy, and the appointing institution and/or receiver will frequently be good for any award made against them. Generally in a purely commercial dispute of this kind where the parties' interests are exclusively financial, the law adopts the position that they are best left to their respective remedies in damages. The cases of this kind in which there is a particular factor tilting the balance in favour of the claimant such as would justify the making of orders restricting the creditor's freedom of action pursuant to agreed security instruments, tend to be the exception.

2. It was basically for these same reasons that Twomey J. refused the '*receiver injunction'* sought by the appellants in the two cases giving rise to this appeal ([2020] IEHC 533). While I agree with both his conclusion, and the essential reasons for it, the cases present some unusual features.

3. Specifically, unlike many applicants for such relief, the appellants do not object in principle to the sale of the secured assets. In fact, the first named appellant ('Mr. Ryan') has, in circumstances to which I will return, agreed to a sale and - on one version of the case he advances – still seeks to enforce that agreement. What both appellants object to is thus not the sale of those assets, but their sale *by a receiver* in the particular context that now presents itself.

4. Central to that context is the fact that the parties to the first of the above entitled actions had, following the commencement of the trial of the action, entered into a settlement agreement. The appellants say that that agreement remains in force. However, they also say that if that agreement is not in force, the consequence is that the trial of that action must resume. This, it is their contention, leans heavily in favour of the grant of the injunctive relief they claim.

5. This is said to be the case because there is a significant dispute between the parties as to the basis on which the amount outstanding on the relevant facilities is determined. On the appellants' account, the sum properly charged by the relevant securities is in the region of €17.3M and they said that they will be in a position to discharge that sum, and thereby obtain possession of the charged assets. On the interpretation of the documents urged by the respondent ('Dengrove') the amounts in issue exceed €430M. In those circumstances, it is said, to enable the respondent to obtain the benefit of the appointment of the receiver is, in effect, to deprive the appellants of their equity of redemption before the dispute between the parties as to the sum charged on the assets has been duly determined at a full hearing.

The background

6. The appellants are members of two partnerships - 'the City Arts Partnership' and 'the City Partnership'. The partnerships are the respective owners of two properties at (i) 5-6 City Quay, 2-3 Gloucester Street and 26-30 Moss Street Dublin 2, and (ii) at 1-4 City Quay and 23-25 Moss Street (together 'the property'). The other members of the partnerships are John, Brian, Niall and Alan McCormack, Paddy Kelly, and Pierse Contracting Limited (now in liquidation). As well as being governed by the partnership agreements, the relations between the partners were the subject of a joint venture agreement entered into between them in December 2003.

7. Mr. Ryan is entitled to a 25% interest in the City Partnership, and a 12.5% interest in the City Arts Partnership, the members of the partnerships holding the relevant assets as tenants in common. The second named appellant ('Mr. Monaghan') avers that he, similarly, is the owner of '*in excess of 20%'* of the equity in the properties in question. The profits and losses of both partnerships belong to and are borne by the partners in proportion to their share of each partnership.

8. The secured assets comprise a significant commercial site, being the last remaining substantial plot of development land along the south city centre quays. Its acquisition was funded by loans advanced by Anglo Irish Bank Corporation and charged by five instruments executed in 2003 upon the interests of the members of the partnerships in the respective assets. Following the establishment of the National Asset Management Agency ('NAMA') the loans and securities were transferred to it in March 2011, these being sold by NAMA to Dengrove on January 30 2017. As of now, Dengrove says,

the partners have been in default of their obligations under the relevant facilities (which provided that recourse to the partners was several) for a period of more than ten years.

9. Dengrove contends that the liabilities secured by the relevant charges and securities extend beyond the sums due and owing in respect of those facilities, and capture all of the indebtedness owed to it by each partner (and not just the sums advanced on foot of the specific facilities in issue). Pierse Contracting Limited ('Pierse') (which has been in liquidation since 2011), and the Kelly and McCormack families have very significant liabilities to Dengrove which were incurred outside the facility letters. Pierse alone, which has a 27% interest in the partnerships, owes Dengrove €44,226,963.52 and one of the other partners has an outstanding liability of €188,714,125. However, the only indebtedness to Dengrove of the appellants in these proceedings is that arising from the facility letters. The difference between the positions urged by the parties is, in financial terms, stark: as I have noted, on Dengrove's account the amount outstanding is €430M, while according to the appellants it is €17.3M.

10. Before the institution of the first set of proceedings in 2018, the sole plaintiff in that case, Mr. Ryan, and Dengrove had exchanged correspondence in which they agitated their position on this, and other issues. It was Mr. Ryan's contention that he owed no money to Dengrove save for his share of the debt due on these facilities, that no part of any interest he held in the property was otherwise charged in favour of Dengrove, and that he had sought – but Dengrove had for some time refused to provide – a redemption figure on the basis of which he could redeem the loan and obtain the return of the secured assets. When that figure was eventually provided it included almost

€5M in default interest which, Mr. Ryan said, Dengrove had no legal basis for charging.

The proceedings

11. It was in these circumstances that Mr. Ryan instituted the first action against Dengrove on 5 March 2018. The Summons issued on that date sought a sequence of declaratory orders reflecting his claim (i) that he was entitled to discharge or redeem the indebtedness of the City Partnership arising from the Facility Letters, (ii) that he had the right to discharge or redeem the indebtedness of both partnerships in his capacity as a tenant in common in the property and (iii) his contention that Dengrove had unlawfully adjusted the sums alleged to be due so as to exceed the amounts owing at the time of the assignment to it.

12. The primary contention advanced in the proceedings, and elaborated upon in the Statement of Claim delivered on May 2 2018, was that the partnership agreements precluded one partner from charging the assets of the partnership, that Dengrove was bound by these restrictions, and that Dengrove could not assert that the property could be used as security for indebtedness other than that arising from the specific facilities extended to those partnerships. The indebtedness accrued pursuant to the two partnership facilities which it is alleged was all Dengrove was entitled to require the borrowers (including the first named appellant) to redeem, was described in the proceedings as '*The Lawful Redemption Amount*'. It was claimed in the proceedings that Dengrove could not charge default or penalty interest on that amount.

13. Mr. Ryan made his purpose clear in his pleadings: paragraph 50 of the Statement of Claim stated as follows:

> '*These proceedings have as their objective the establishment of the Plaintiff's entitlement to discharge his own indebtedness and in addition that of each of the other partners partnership indebtedness and thereby secure the return of all security'*.

14. Dengrove delivered a full defence to this claim. It did not seek to counterclaim against Mr. Ryan. The proceedings having been admitted into the Commercial List, they progressed to a trial date fixed for October 9 2019. Dengrove delivered its witness statements in early August of that year. One of these was from a Mr. Jaeger. There, for the first time, he acknowledged that default interest was no longer being pursued by Dengrove. However, it appears that there was up to and during the trial a dispute between the parties as to what interest could be lawfully applied to the debt. The first named appellant averred in his affidavits sworn for the purposes of this application that Dengrove maintained until after the trial had commenced a claim for what he describes as '*overcharged interest'* (which he distinguished from the '*unlawful default interest'*). Further, at least according to the evidence adduced by Mr. Ryan in this application, in the immediate run up to the trial it was the position of Dengrove that it could apply any surplus to the debts of the co-partners and thereby (as he put it) '*wipe out'* his equity.

15. However, in advance of the trial of the action commencing, Dengrove, by letter dated 24 September 2019, made an open offer to Mr. Ryan recording its agreement to the open market sale of the property without the appointment of a receiver. It said that

such an open market sale could take place by one or more agents instructed jointly by Mr. Ryan, the other partners and Dengrove. The letter said as follows:

> '*Following an open market sale of the property any equity due to your client will be repaid to him. This ensures your client's equity of redemption. Any equity of any of the partners with other liabilities to Dengrove DAC will be applied against their indebtedness to Dengrove DAC.'*

16. Thus, by the time the trial began Dengrove accepted that the share of the sale price attributable to Mr. Ryan's interest would be applied to his share of the debt, with the surplus being returned to him. This met part of his concern. However, it remained Dengrove's position that it was not constrained in applying the share of the sale price attributable to the other partners only to the debts arising directly under the facility letter. It said that it was entitled to apply any surplus arising in respect of their shares to *all* their liabilities. This position was not accepted by Mr. Ryan, and it remains an issue to be determined at the trial – should it resume.

17. The case opened on the date fixed before Twomey J. and ran for three days. In his opening statement, counsel for Mr. Ryan explained the position as between the parties as of then. First, he said, it was agreed that the redemption figure did not include default interest. Second, the redemption figure was not agreed, but he noted that the experts were liaising in respect of the proper figure. Third, he explained that Dengrove accepted that Mr. Ryan was not liable for the debts of his co-partners, and that he was entitled to his share of the profits of the partnership upon sale without deduction of any of the debts of his co-partners. Fourth, he said that what was not accepted was that

Dengrove was obliged on redemption to return the security having obtained repayment of the redemption figure.

18. That said, it appears that as the hearing progressed it was accepted at various points by Mr. Ryan in his evidence that the essential outstanding issues of concern to him were the amount of the redemption figure and the issue of his costs. He also confirmed that he wanted the property, it being his intention to purchase the site so that he could develop it. He stated that he wanted to control the property and to control the sale of the asset. At one point in his cross examination, the following exchange took place:

> '*Q. You didn't want to repay the loan. You had an opportunity to do so in December 2016 and you didn't. What you wanted to do was acquire the debt and to acquire the mortgage to put you in the driving seat as against your partners. Isn't that so?*
>
> *A. I wanted to develop the site and if that was the way to do it, okay, yes.'*

The settlement

19. The parties were in negotiation during the hearing. On the third day of the trial, October 11 2019, the proceedings were compromised, the terms of that compromise being recorded in a written settlement agreement of that date. The terms (which incorporated an '*entire agreement*' clause) were, insofar as relevant to this application, as follows:

(i) There was to be a consensual sale of the property by way of '*open market sale by the partners in the partnership'*. This was to be effected by way of tender with sealed bids to be delivered by a deadline to be nominated by the joint selling agents. The agreement provided that the tender offers would each be opened in the presence of Mr. Ryan or his representatives and any of the other parties of the partnerships or their representatives and together with Dengrove and/or its representative.

(ii) Peter Lynch of Cushman and Wakefield and Tony Waters of HWBC were to be the joint selling agents. Ronan Daly Jermyn, solicitors, were to be jointly instructed to oversee the negotiation and execution of contracts for the sale of the property. Both were to be retained '*on normal commercial terms to be agreed by the Parties'*.

(iii) The redemption loan sum was agreed in an amount of €17,379,125.09, the agreement stipulating that Mr. Ryan was to be paid from the net proceeds of sale a sum the equivalent of 20.7% of those proceeds (reflecting his share across the two partnerships) with the remaining monies to be applied to the discharge of the borrowings. A sum of €356,700 was to be paid towards the costs incurred by Mr. Ryan in bringing the proceedings. Upon receipt of the sales proceeds and making of certain deductions therefrom (including the sums to be paid to Mr. Ryan), Dengrove would release its security on the property.

(iv) The sale was conditional upon the agreement of the other partners. Provision was made for the taking of a vote in each partnership, so that if a requisite

majority of 51% of the votes of the partnership were cast in accordance with the terms of each partnership agreement, this would be binding. This agreement was to be obtained on or before 24 October 2019, with the proceedings being adjourned for mention until October 25 to enable this consent to be secured. The parties could agree a later date '*which agreement is not to be unreasonably withheld'*. In the event that the requisite consent was not obtained by that adjourned date, or that date was not thus extended, it was agreed that the parties would seek a resumed hearing at which the settlement agreement would have the status of a '*without prejudice'* document.

(v) The critical provision of the agreement for present purposes is clause 2.4. It referred to two points in time – the Adjourned ***Date*** (which was 25 October 2019) and the Second Adjourned ***Period*** (which expired six months after the Adjourned ***Date***). It provided as follows:

'*In the event that the Requisite Majority is achieved by the Adjourned Date (or such other date as may be agreed between the parties, which agreement is not to be unreasonably withheld) the parties agree that these proceedings shall be adjourned for a period of six months for mention only (the Second Adjourned Period).*

In the event that the sale process has been completed within the Second Adjourned Period (or such later date as may be agreed between the parties, which agreement is not to be unreasonably withheld) the proceedings will be struck out with no further order. In the event that the sale process has not been

completed within the Second Adjourned Period (or such later date ***as may be agreed in writing*** *such agreement is not to be unreasonably withheld) the parties agree to seek a resumed hearing date and the settlement (and any documents arising therefrom) shall not longer be of any legal effect and shall have the status of a without prejudice document'.*

(Emphasis added).

(vi) Upon completion of the sale of the property, the proceedings would be struck out. The agreement made it clear that it did not affect the rights of the defendant or obligations of the other partners and stipulated that the '*conclusive implementation'* of the terms of settlement would constitute a full and final settlement of the '*dispute'* as defined in the agreement which, basically, referred to the dispute between the parties arising from the loan facilities.

20. The relevant partners' meetings were duly held on October 16, both resolving by the requisite majority to confirm the sale. The second adjourned period was thereby triggered, the proceedings being adjourned to Friday April 24. The agreement was clear as to what the parties expected to happen during that period.

21. Thus, the intention was that the sale process would complete within the Second Adjourned Period. If it did not so complete, either party had the entitlement to ask the other to extend the time and, if the requested party refused its agreement it could only do so on reasonable grounds. On one view, if the sale process had not completed and the period was not thus extended, the settlement would be of no legal effect and either

party was free to seek a resumed date for the trial. However, the agreement did not state that time was of the essence. Moreover, the agreement neither precluded nor made provision for the taking of enforcement steps by Dengrove in relation to the property in the event that the sale process did not conclude within that period and no extension of the time was granted in respect of it. Instead, upon termination of the agreement it envisaged the resumption of the trial.

Steps taken following the settlement

22. Dengrove's deponent, Mr. Bezian, averred in his first affidavit (at para. 33), as follows:

> '*Unfortunately, very little progress has been made by Mr. Ryan in relation to the sale of the Property since October 2019. Under the control of Mr. Ryan and with the protections afforded to the Defendant, the sale was to be conducted on the open market.'*

23. Mr. Ryan's response was this:

> '*I deny at paragraph 33, where Mr. Bezian says that very little progress has been made in relation to the sale of the Property since October 2019'*

24. Earlier in his second affidavit he says:

> '*RDJ were appointed, the consents of all the partners was achieved and significant progress was made despite the global Covid-19 pandemic to bring*

the Property to market. I say that the partners continued to call meetings, sought up dated advices on the sale from RDJ as evidenced by the RDJ letter dated 21 April … and continued to prepare the Property to be put up for sale on the open market despite the obvious impediments the Covid-19 pandemic caused.'

25. In his third affidavit, he says the following:

'At all times I engaged with despatch and with utmost due diligence in order to procure the putting in place of all arrangements for the sale of the Partnership Properties as soon as possible. I beg to refer to … an email from Mr. McCarthy of RDJ to my son dated the 29th June wherein he stated "Hi Padraic, I received the email below from Beauchamps last week. No doubt you are aware of the appointment. It is disappointing in the context of the good progress made on the sale." It is clear in the circumstances that, as Mr. McCarthy says, good progress had been made in the sale and it is entirely incorrect for the Defedant to assert that I have in any way delayed same.'

26. Exhibited with Mr. Ryan's grounding affidavit was a letter sent to him on July 2 2020 from Mr. Lynch of Cushman and Wakefield. There, he refers to the provision of what he describes as '*considerable advice'* to the appellants and their partners in respect of the proposed sale. These were stated to include:

'*estimates of realisable value, sales strategies and general advice on how to maximise the value from any disposal ..*

27. He also stated:

> '*boreholes have been undertaken on the site, an architectural survey and appraisal commissioned and completed with the solicitors in the final stages of completing a title audit with the preparation of a draft contract for consideration by prospective purchasers. The intention was to go to the market at the end of January/early February but in light of Covid-19 the proposed sale was temporarily deferred.*
>
> *In the interim we targeted a number of potential purchasers and have been actively engaged with them on the property. For all intents and purposes the marketing and due diligence aspects are complete and the sale can commence immediately and once we are out of the current lockdown*
>
> *.... The only delay to the sales process commencing was Covid-19.'*

28. Noting these comments, and the evidence of Mr. Ryan that he discharged the costs of these various steps, the other actions taken following the agreement of the partners on October 16 and the adjournment of the case on October 25 that are discernible from the affidavits and exhibits, are as follows.

(i) On January 6 and 9 respectively, the parties signed a letter of engagement retaining Ronan Daly Jermyn to progress the sale. This was as provided for in the Settlement Agreement. The terms and conditions included a stipulation that

in the event the parties disagreed on instructions to that firm they would '*resolve the position amongst themselves and issue joint written instructions'* to the firm.

(ii) The firms of Cushman and Wakefield and HWBC were appointed as joint selling agents. This happened on 9 January. This was also as stipulated in the Settlement Agreement.

(iii) It is clear that Ronan Daly Jermyn provided advices to the first appellant in January 2020. Those advices were never exhibited. The effect of those advices was that, unless the Liquidator of Pierse Contracting could obtain a deed of release of certain charges held over the property by Bank of Ireland, the sale should proceed by means of a mortgagee in possession. Although this advice was given by the independent solicitors nominated in the settlement agreement, the first named appellant appears to have had some difficulty with this advice. He avers that this method of sale '*had not been agreed to by the partners'* and that '*there is no evidence to show that I agreed to [it]'*.

(iv) On February 19, Ronan Daly Jermyn prepared draft particulars and conditions of sale. This presented two alternative options – a sale by the mortgagee in possession, and what was described as '*a non MIP'* sale.

(v) Correspondence was exchanged between the appellants' solicitors and Beauchamps at the end of March, with the former asserting that Ronan Daly Jermyn had been raising queries with Beauchamps in relation to queries

regarding two of the partners and asking that Beauchamps (which appear to have also been representing at least one of those partners) progress the matter.

(vi) Ronan Daly Jermyn furnished further advices on April 21. These were addressed to the first named appellant's son. They stated '*unless Tom O'Brien (as liquidator to Pierse Contracting) can obtain a deed of release of the floating charges from Bank of Ireland, then the sale must proceed by the MIP route.*'

29. In the High Court it was said on behalf of Dengrove that there had been absolutely no marketing of the property. That has not been denied on oath (although Mr. Lynch's correspondence might suggest otherwise). No specific steps undertaken with a view to marketing the property have been identified.

Covid-19 and the Second Adjourned Period

30. As Ireland felt the effects of the global Covid-19 pandemic in March 2020 the government increased restrictions on public gatherings with a view to containing the spread of the virus. On March 16, the President of the High Court issued a direction adjourning certain High Court proceedings. As part of that direction all Commercial Court matters were adjourned generally with liberty to re-enter. Mr. Ryan avers that the Covid-19 pandemic was the main element delaying the sale of the partnership properties.

31. On Wednesday April 22 the appellants' solicitors sent an e-mail to Dengrove's solicitors stating:

'*I note that the mention which was listed this Friday has been adjourned generally with liberty to re-enter pursuant to the Covid-19 directions.'*

32. The e-mail did not seek an extension of the second adjourned period. Dengrove did not respond. In Mr. Ryan's second affidavit he explains his position saying that the second adjourned period could not occur because there were no Courts open. He later expresses the view that '*the adjourned **date** which would mark the end of the Second Adjourned Period in accordance with the Settlement Agreement has not yet occurred'.* This view was reflected in oral submissions to this Court: counsel for the appellants stated that his solicitor's view at the time was that the issue of an extension of time did not arise because '*the matter had to be back before the Court and there was the Covid issue, and if he had any instinct or hint that the Defendant was going to suggest that that was the drop dead date, he would have immediately written and asked for an extension of time'*. Had he sought an extension of time it is to be expected that Mr. Ryan would have had to proffer some account of progress to date and would in all likelihood have had to both explain any opposition he or other partners may have had to the type of sale proposed by the jointly appointed solicitors.

33. The next event occurred on June 25 2020, when Dengrove appointed Mr. Tyrell as receiver over the property. Mr. Ryan avers as follows of what he believed Dengrove was doing between the end of March and the end of June:

'*As far as I was concerned I assumed that they were working towards the agreed sale process. If they took any step or made any communication to suggest that*

the Second Adjourned Date was deemed to have come or gone I would immediately requested [sic] *that they extend the that date because of the impact of Covid-19.'*

34. It is not clear what, precisely, Mr. Ryan believed Dengrove was doing. He refers consistently - in reference to the period from the middle of March until receipt of notification that a receiver has been appointed - to the impact of Covid-19 and to the effective cessation of all commercial activity during that time. However, and at the same time, the jointly agreed solicitors had in February given advices that the sale should proceed via the mortgagee in possession route. Mr. Ryan does not appear to have agreed with this. At no point in the hearing of this matter was it explained what, precisely, his difficulty was - except that he had not agreed to it.

35. Dengrove submits that it was his issue with the advices provided by the jointly appointed solicitors that, in fact, caused the stalling of the sale. It also says that if the property is sold other than by it as mortgagee in possession (or for that matter by a receiver) the effect will be to depress the price. The reason for this, as it was explained in oral submissions to the High Court, was that the effect of a mortgagee in possession sale will be to overreach charges on the property whereas a sale in any other way will require a purchaser to take its chances on those charges. If the purchaser is prepared to do that, they will want a reduction on the price. Mr. Ryan, Dengrove stresses, is a potential purchaser.

36. Mr. Ryan responds in his final affidavit, denying that he frustrated or delayed the sale of the assets in any way, denying that he refused to engage the mortgagee in possession

issue and stating that there '*was never any consensus that the partnership properties would be sold by way of mortgagee in possession'*. Mr. Lynch, it should be observed, recorded in his letter that it was intended to go to market at the end of January or beginning of February but that '*in light of Covid-19 the proposed sale was temporarily deferred'*. As the trial Judge noted in his judgment, Covid-19 did not cause any general lockdown in Ireland until March.

The appointment of the receiver

37. At the same time, Dengrove made no demand for payment prior to the appointment of the receiver, and indeed has never made such a demand. It was part of the appellants' case that had such a demand been made, Mr. Ryan could and would have redeemed and been thereby entitled to the return of the security and title free from any charge that Dengrove might hold.

38. On June 25 Beauchamps, solicitors for Dengrove, wrote to the second named appellant advising of that appointment. The letter highlighted considerations that had prompted the appointment. These included the fact that other partners in both partnerships had, it was alleged, previously invited the appointment, the fact that the loans and securities had been in default for over ten years, the plaintiff's evidence to the High Court, including his stated desire to sell the partnership assets, the fact that there were approved draft contracts for the sale of the partnership assets (which were enclosed with the letter), the necessity that Dengrove would have to convey title to the partnership assets as mortgagee, and the fact that marketing and sale of the partnership assets had '*stalled indefinitely'*. The letter expressed the intention that a sale would be

achieved on the basis of what was described as '*the approved draft Contract for Sale'* and recorded Dengrove's consent to a resumed hearing. The letter did not assert that the settlement agreement was at an end, but it did record the consent of Dengrove to seeking a resumed hearing date for the proceedings with a view to having determined '*any residual issues therein'*.

39. The appellant's solicitors responded to this letter on June 26. In their reply they claimed that the '*Second Adjourned Period'* had not yet expired '*in circumstances where the listing for mention only on the 24th April 2020 was adjourned automatically by the Court due to the Covid-19 pandemic'*. This position – that the Second Adjourned Period did not expire until the Second Adjourned **Date** (a phrase that does not appear in the settlement agreement) was mentioned in Court – was repeated in subsequent correspondence. The letter of June 26 also asserted that the sale of the property was delayed owing to charges registered against certain of the partners interests, referring in that regard to the mail from his solicitor to Beauchamps dated 27 March. The reason for the hold up, it was said, was due to extensive delays on the part of Mr. Kelly and the McCormack's clarifying their instructions. An application for interim relief was threatened.

40. Also on June 26, Beauchamps advised the appellants' solicitors of the identity of the receiver, and the receiver himself corresponded with Mr. Ryan. On June 29, Beauchamps replied to the letter from the appellants' solicitors asserting that the settlement agreement was of no effect as the Second Adjourned Period had expired, and contending that they were not party to the issues as between the borrowers to which reference had been made, observing that Mr. Ryan had ample opportunity between the

end of March and June 25 to address these issues. The appellant's solicitors' response (of July 2) repeated their position as recorded in their earlier correspondence, but also asserted that Mr. Ryan had incurred expenditure in preparing the property for sale, including marketing fees, site investigation work, a feasibility study, CGI's and the amount billed to him by Ronan Daly Jermyn. That letter advised that an application would be made to Court the following day. The appellants' solicitors also began similar correspondence at this time on behalf of Mr. Monaghan who, as I have noted earlier, was a member of the partnerships but not a party to either the first proceedings or the settlement agreement.

The injunction

41. The summons in the second action was issued the following day (July 3). As is clear from the title, this action is brought by both Mr. Ryan and Mr. Monaghan. Essentially, Mr. Monaghan contends that his solicitor entered into an agreement with the solicitor for Dengrove the effect of which was that he would be entitled to participate in any potential sale of the property by virtue of the equity he had in the property on the same basis as Mr. Ryan.

42. Notices of motion were issued in both actions on July 3 seeking orders directing the defendant to discharge Mr. Tyrrell as Receiver in respect of the property and/or directing it to instruct Mr. Tyrell to take no further steps in the receivership and in particular no step in the marketing, sale or alienation of any interest in the property. In the first action, an application was also brought for the joinder of Mr. Tyrrell as a defendant in the case and granting similar interlocutory orders against him. As the

exchange of evidence in the applications proceeded, the affidavits sworn in both cases were similar. No distinction between the applications was drawn in submissions to this Court, and – that being so – I will not generally differentiate between them in the course of the remainder of this judgment.

43. An application for an interim injunction was brought before McDonald J. late in the afternoon of 3 July 2020, and he granted an order restraining the sale of the property by the receiver. The parties engaged in an exchange of affidavits, the application for an interlocutory order coming for hearing on July 23 and proceeding over that and the following day. The reasons for Twomey J.'s refusal of the relief claimed were set forth in a careful and comprehensive reserved judgment delivered on 29 September 2020 .

44. Before this Court, the appellants advanced five grounds on which they contended that Twomey J. erred in the analysis leading to that conclusion. Four of these appear to me to be ancillary to the central issue in the appeal. That issue is whether the trial Judge erred in his conclusion that damages would be an adequate remedy for the appellants and that the balance of justice favoured its grant. I will deal with this issue before returning to the other four questions identified by the appellants in their submissions. First, that question needs to be put in its legal context.

Relevant principles

45. The judgment of O'Donnell J. (with which Clarke CJ, and McKechnie, Dunne and O'Malley JJ. agreed) in *Merck Sharpe and Dhome Corporation v. Clonmel Healthcare Limited* [2019] IESC 65 does not purport to change the test applicable to the grant of interlocutory injunctions as expressed in *Campus Oil v. The Minister for Industry and*

Energy (No.2) [1983] IR 88. It does, however, continue the process of refinement and evolution of that test demonstrated, most notably, by the decisions of Clarke J. (as he then was) in *Metro International SA v. Independent News and Media plc* [2005] IEHC 309, [2006] 1 ILRM 414, *Allied Irish Banks plc and ors. v. Diamond and ors.* [2011] IEHC 505, [2012] 3 IR 549 and *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 49, [2012] 3 IR 152. At the same time the Court has sought to dispel some misconceptions that had arisen in the course of its general application.

46. The Court felt that those misconceptions, where they had manifested themselves, could be traced back to a failure to appreciate the inherent flexibility of the remedy afforded by the provisions of s. 28(8) of the Supreme Court of Judicature Act (Ireland) 1877 and Order 50 r. 6(1) of the Rules of the Superior Courts. Insofar as the decision of the Supreme Court in *Campus Oil* approved and applied the approach adopted by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396, *Merck* interprets both as leaning away from the prescription of criteria to be applied as a set of '*calcified'* rules to be operated in any given case by an exercise of '*tick[ing] the relevant boxes'* (see paras. 27 and 47 of the judgment of O'Donnell J.). The overall effect of the decision was summarised by Collins J. in *Betty Martin Financial Services v. EBS DAC* [2019] IECA 327 (at para. 85), stating that the judgment:

> *'effects a significant (and, if I may say so, welcome) restatement of the appropriate approach to applications for interlocutory injunctions, mandating a less rigid approach, both generally and with particular reference to the issue of the adequacy of damages and emphasising that the essential concern of the*

court is to regulate matters pending trial pragmatically and in a manner calculated to minimise injustice.'

47. In thus re-orientating the proper approach to such an application, four features of the law relevant to this appeal were stressed in the judgment *Merck.*

48. First, insofar as there was a debate as to whether *Campus Oil* envisaged a three limbed test where an interlocutory injunction was sought (fair issue to be tried, adequacy of damages and balance of convenience) or a two pronged analysis (with the adequacy of damages being one aspect of the overall balance of convenience or, as it was termed, balance of justice), O'Donnell J. made clear that the two relevant factors were the fair issue (without which no interlocutory injunction could ever be granted) and the '*balance of justice'*. To approach the matter in this way, he said, reinforced '*the essential flexibility of the remedy'* (at para. 35). Noting that the issue of whether the test was properly characterised as having two or three parts was '*semantic'* he made it clear that as part of the latter assessment, the question of whether damages would be an adequate remedy for the plaintiff must necessarily be addressed and it will, in most cases, be '*the most important element in that balance'* (see para. 64(4)).

49. Second, it followed that in approaching that issue, the mere fact that damages would be both adequate as a remedy and available to be paid did not absolve the Court from placing the adequacy of damages within the balance of justice as a whole and, therefore, in also assessing any other factors relevant to that balance in a particular case. Thus, allied to this and contrary an interpretation sometimes put on comments of Finlay CJ in *Curust Financial Services Ltd. v. Loewe-Lack-Werk* [1994] 1 IR 450,

468 and 469, O'Donnell J. made it clear that where a plaintiff might obtain damages, the fact that calculation of such damages was not a '*complete impossibility'* did not in itself preclude the grant of an injunction: '*[t]he fact that it is not completely impossible to assess damages should not preclude the grant of an injunction to the plaintiff in an appropriate case'* (at para. 47).

50. Third, the Court made it clear that its consideration of the merits of the plaintiff's claim is not exhausted at the point when it determines that there is a '*fair issue'* to be tried. At paragraph 62 of his judgment, O'Donnell J. said the following:

> '*In cases where the balance of convenience may be finely balanced, it may be appropriate to have regard, even on a preliminary basis, to the strength of the rival arguments as they may appear to the court'*.

51. He elaborated upon this later in the same part of his judgment:

> '*It is recognised in the decision in American Cyanamid that if the question of adequacy of damages is evenly balanced, it may not be appropriate to consider the relative strengths and merits of each party's case as it may appear at the interlocutory stage. Courts are correctly reluctant to express views on cases which are to come to trial. However, it would be absurd if this rule of abstention were to result in a court concluding an agonised and necessarily imperfect assessment of a number of variable factors in a field with which it has little familiarity and where the evidence is indirect, written, and untested, all the while averting its attention from the area (perhaps of pure law) in which it can*

justifiably claim expertise. For this reason, I consider that Hogan J., taking the view he did of the balance of convenience, was quite correct to form some tentative view of the merits.'

52. As I read O'Donnell J.'s judgment, the approach he was thus suggesting was limited in scope. In particular, it seems to me to be evident from the context that he envisaged a view on the merits (other than in determining whether there was a fair issue to be tried) being taken only in circumstances in which there was a legal issue on which the Court could confidently express such a position and that, it seems to me, necessarily depends on any facts relevant to the disposition of that issue being supported by credible evidence. This, it should be noted mirrors the position in England since the middle of the 1990s, if not as a matter of practice before then (see Bean '*Injunctions'* (8th Ed., 2004) at para. 3.12). In *Series Five Software v. Clarke and others* [1996] 1 All ER 853 Laddie J. conducted a comprehensive analysis of the law before the decision in *American Cyanamid.* After a careful consideration of the speech of Lord Diplock in that case, he concluded of it – in terms similar to that appearing throughout the judgment in *Merck* - as follows (at p. 865)

'*In my view Lord Diplock did not intend by the last-quoted passage to exclude consideration of the strength of the case in most applications for interlocutory relief. It appears to me that what is intended is that the court should not attempt to resolve difficult issues of fact or law on an application for interlocutory relief. If, on the other hand, the court is able to come to a view as to the strength of the parties' case on the credible evidence, then it can do so …. To suggest otherwise*

would be to exclude from consideration an important factor and such exclusion would fly in the face of the flexibility advocated earlier in American Cyanamid.'

53. Fourth, O'Donnell J. in the course of his judgment touched on an issue which subtends the repeated invocation by the appellants in this case of their property rights. In *Merck* the High Court and, by a majority, this Court refused the plaintiff's application for an interlocutory injunction to restrain the defendants from breaching a Supplementary Protection Certificate held by *Merck* in respect of a medicinal product: the injunction was sought in a context in which the defendant challenged the validity of that certificate. The High Court refused the injunction on the basis that damages were an adequate remedy in the event that Merck succeeded in its claim and that it was not, therefore, necessary to go further and consider any question of the balance of convenience (including whether damages would have been an adequate remedy for the defendant in the event that the relief were granted). In this Court, Peart J. determined that while damages would adequately compensate the plaintiff, they would not have compensated the defendant, Whelan J. reached a similar conclusion stressing that Clonmel - in the event that it was restrained by injunction but succeeded at trial - would lose the benefit of its first mover advantage for which it could not be compensated in damages while Hogan J. dissented, emphasising the property right in issue and his view that damages were not an adequate remedy for the breach of that right in the event that it was determined that the SPC was valid.

54. An important aspect of the analysis undertaken by Hogan J. in reaching his conclusion was the relationship between the jurisdiction of the Court to grant interlocutory relief, and the obligation of the State to defend and vindicate the constitutional rights of the

citizen mandated by Article 40.3.2. That obligation, he explained by reference to his decision in *Herrera v. Garda Commissioner* [2013] IEHC 311, dictated that where the refusal of injunctive relief could prejudicially hinder the exercise of such a right '*the courts cannot be beguiled by legal formalism or corralled into the unthinking and uncritical application of rules governing the grant of interlocutory relief*' without taking account of that factor. In the specific context with which he was concerned in that case, this had the following consequence (at para. 11):

> '*generally speaking, a clear infringement of an established intellectual property right such as a patent or an SPC must be restrained by injunction if the courts are to remain faithful to their constitutional obligation as imposed by Article 40.3.2 to respect and vindicate the property rights of every citizen. It is no answer in a case of this kind to say that the fact that the patent infringer is prepared to pay damages and is also a mark for damages is a ground for not granting an interlocutory injunction in the first place. If that were indeed the law, then the courts would, I think, he failing in the constitutional obligation of which I have just spoken.*'

55. Hogan J. thus prefigured the subsequent decision of the Supreme Court in a number of important respects. He did so in moving away from a doctrinaire application of any principle that an interlocutory injunction should be refused where damages were on conventional analysis adequate and likely to be recoverable, rooting the necessity to adopt this approach *inter alia* in the inherent value of protecting the constitutional property right in issue. In focussing instead on the '*balance of justice'* (and including within that the adequacy of damages) Hogan J. further adopted the position that it was

necessary in calculating that balance to (a) give some weight to the *prima facie* validity of the SPC and (b) to pronounce '*tentatively on the underlying merits of the SPC'*.

56. The Supreme Court agreed with Hogan J. that the injunction ought to have been granted. O'Donnell J. concluded that damages would not be an adequate remedy for either party in the event that an injunction was granted or refused. What tipped the balance in favour of its grant in that case was the fact that *Merck* was the holder of an SPC that was valid and effective until declared otherwise by a court of competent jurisdiction, that that certificate represented the *status quo ante,* and the fact that no steps had been taken by Clonmel to clarify the essential matters upon which the defendant's right to launch the product depended - that is those concerning the question of the validity of the SPC. Because he believed that Clonmel's case that the SPC was invalid did not present '*that degree of strength'* that would outweigh these other factors as relevant to the balance of justice, *Merck* had made out its case for such an order.

57. . O'Donnell J. addressed the reference by Hogan J. to property rights as follows (at para. 54) :

> *Furthermore, it is perhaps not necessary to go to the lengths of placing a constitutional right in the balance to agree with Hogan J. in the Court of Appeal that the majority judgments do not give appropriate weight to the right involved from the S.P.C. holder's point of view. It is, in my view, incorrect both to depreciate the 001 S.P.C. as being no more than a right to an income stream, and at the same time elevate Clonmel's interest in becoming the incumbent generic to the key status of an interest which, if damaged, cannot be*

compensated by the award of monetary damages. The interests of the S.P.C. holder and the interests of the generic challenger are both interests in acquiring a position in the market. The difference between them is that the S.P.C. holder has a right conferred by a process of law which is presumptively valid: something which, if anything ought perhaps to favour Merck.

58. At the conclusion of his judgment, O'Donnell J. suggested the following eight propositions:

'(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted;

(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the American Cyanimid and Campus Oil approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;

(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;

(4) The most important element in that balance is, in most cases, the question of adequacy of damages;

(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;

(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it may be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial.

(7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;

(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined."

59. Twomey J. relied heavily on this summary of the relevant principles in the course of his judgment. They provide a useful starting point for an assessment of the appellant's challenge to that decision.

The decision of the trial Judge

60. There was no dispute in this Court as to whether the plaintiff had established *a* serious issue to be tried for these purposes. Twomey J. found that there was such an issue as to whether it was lawful for Dengrove to appoint a receiver to the property after the passing of the deadline for the sale, in circumstances where no application was made by the plaintiff for an extension to the deadline prior to the 24 April 2020 and at a point when Ireland was affected by the Covid-19 pandemic (at para. 25 of the judgment). Rolled into that issue are various possible theories – that the agreement not being one in which time was of the essence Dengrove had to serve notice before terminating, or that it was an implied term of the agreement that Dengrove was not entitled to take such enforcement action if the agreement was terminated having regard, *inter alia,* to the fact that the agreement envisaged that the trial would resume or indeed that the implications of the appellants' equity of redemption mandated such a construction of the agreement. The fact that the events unfolded during the Covid-19 pandemic and

that the relevant consent could not be unreasonably withheld may be relevant to some or all of these contentions. Having regard to the fact that there is no dispute but that there is *a* fair issue to be tried, I do not propose to dwell in detail on how each of these versions of the case meets this test. Each of them appears to me to be in one shape or form stateable.

61. However, the trial Judge decided that the balance of justice favoured the refusal of the appellants' application. In that regard, Twomey J. stressed four features of the case (at para. 8):

> *' • one is dealing with commercial property ('one of the last remaining office development sites on the south quays, located in a pivotal position where there is an expectation a significant density of development will be sustained'), and not a family home,*
>
> *• money has been owing for over a decade secured on that Site and accordingly the balance of justice favours the bank/assignee selling the Site and discharging the secured borrowings,*
>
> *• no compelling evidence has been provided that a commercial/development site in Dublin 2 would be sold at undervalue if sold by the Receiver (rather than by the Partnerships), and,*
>
> *• even if this were established at the trial, no compelling evidence was adduced to convince the Court that Dengrove would not be able to meet an award of*

damages for the alleged undervalue if the Site was sold by the Receiver prior to that trial.'

62. Twomey J. was clearly correct in this case to place the question of whether damages would be an adequate remedy for the appellants in the event that they were refused an injunction, at the centre of his analysis. As I observed in the introduction to this judgment, the authorities show that in '*receiver-injunction'* cases involving commercial properties (and I stress the latter part of that description) the position is often adopted that in a dispute between an undertaking that has borrowed monies for wholly commercial purposes, and a secured lender who has obtained as a condition of that borrowing security over wholly commercial assets, the dispute is a commercial one, and the remedy for breach by either party of their obligations under those arrangements sounds in damages (see *Camden Street Investments Ltd. & ors v. Vanguard Property Finance Ltd.* [2013] IEHC 478, *Kinsella & ors v. Wallace & ors* [2013] IEHC 112, *O'Gara & anor. v. Ulster Bank Ireland DAC & anor* [2019] IEHC 213, *Murphy v. McKeown* [2020] IECA 75). Experience suggests that many cases of this kind fall within the description suggested in *Merck* (at para. 38) :

'*There are, as Lord Diplock recognised, some cases which are so simple and clear cut that it is apparent that damages will be a wholly adequate remedy. There may also be cases where it may be more convenient (in the broadest sense of the word) and where there may be less risk of injustice if events simply proceed, and the court can adjudicate on the merits when the facts are established and award remedies based on established facts rather than the speculation involved in any injunction application. Curust … can be seen in*

this light and as a corrective against the temptation to dress up standard commercial disputes about money into more high octane disputes about interlocutory injunctions.'

63. Of course, there will be exceptions to this (see for example *Wingview Limited v. Ennis Property Finance DAC* [2017] IEHC 674), and indeed in many such situations there will be significant issues around the ability of the plaintiffs to honour their undertaking as to damages. But in seeking relief of this kind in a context such as this where a plaintiff has made out a fair issue to be tried, the focus in judging the balance of justice should usually start with whether damages are an adequate remedy - albeit conscious that this forms but one part of a more general test. This follows from the fourth and fifth of the *Merck* propositions within which, in my view, this case clearly falls. As Collins J. explained in *Betty Martin* (at para. 34) while – once a fair issue to be tried has been identified - the decision to grant or refuse injunctive relief becomes a matter of overall assessment of where the balance of justice lies, particular (and, in many cases, decisive) weight must be given to the adequacy of damages within that overall assessment.

The adequacy of damages

64. Central to that aspect of the appellants' case for an injunction were the allied contentions that (a) if the asset was sold by a receiver it would sell at an undervalue and (b) that there was a risk to the solvency of the corporate group of which Dengrove is a member, meaning that it might not recover that loss.

65. The evidence supporting the first of these claims was as follows. First, Mr. Ryan himself deposed that the consistent advice to him (which he said reflected his own experience of the property market over the years) was that sale by a receiver would '*undermine the value of the property and would not secure the best price'.* In one of his later affidavits he averred that it was his experience over decades in the property market that '*a Receiver sale destroys value'.* Second, Mr. Monaghan averred that there was to be a '*fire sale'* of the property. Third, Mr. O'Brien, the liquidator of Pierse Contracting Limited averred as follows:

> '*the appropriate method of sale to realise maximum return for the appropriate creditors of Pierse Contracting Limited (In Liquidation) is by way of an open market sale by the owners … I understand that a sale by any method other than which has been agreed will damage the interest of the creditors'.*

66. Fourth, substantial reliance was placed upon a letter from Mr. Lynch of Cushman amd Wakefield. The letter read as follows:

> '*The intention was to go to the market at the end of January/early February 2020 but in light of Covid-19 the proposed sale was temporarily deferred. [….] The only delay to the sales process commencing was Covid-19.*
>
> *Apart from my concerns of the current state of affairs I would maintain serious reservations that the value of the property will be maximised if the property is sold through a receivership or pre-pack arrangement with the inclusion of other assets or in isolation. The asset is unique in terms of being one of the last*

remaining office development sites on the south quays, located in a pivotable position where there is an expectation a significant density of development will be sustained.

In my own experience, a receivership may disadvantage the value and proceeds obtained by the vendors and a straightforward consensual open market disposal of the property would be a preferred and more advantageous route to all concerned which as I indicated above was what we were led to believe was the agreed format.'

67. The contention that the sale of the property by a receiver would damage value was disputed by Dengrove. The receiver, Mr Tyrrell, expressed his surprise at and disputed the assertion in the first appellant's affidavit that a sale by a receiver would significantly undermine the value the property would achieve. He observed that the vast majority of property sales over the past 10 years in the Dublin Docklands or on the Quays had been instructed by receivers and achieved record prices. He said as follows:

'*it is the intention that the sale is conducted through a transparent open marketing campaign and managed by a reputable sales agent. Prior to launching a property for sale, a Receiver will generally seek proposals from a number of sales agents, meet the agents to review their proposals in detail before deciding on a successful agent. The Property is one of the last sites on the Dublin Quays that has not yet been developed. It is a prime site for further development, and I have no doubt that when it is brought to the open market, it*

will generate significant interest across a variety of potential purchasers including those with a specialisation in the development of such sites. I am not aware of any property sale on the Dublin Quays over the last number of years where it was intimated that the ultimate price was impacted because the sale was by a Receiver.'

68. He proceeded to question the views expressed in Mr. Lynch's letter, noting that Cushman and Wakefield had been instructed by several receivers in respect of such transactions on the Dublin Quays over the past number of years and observing the absence of any empirical evidence to support the position expressed by him. He rejected the suggestion by Mr. O'Brien that an open market sale by the owners would return less than an open market sale by the receiver. He stated that he would be guided by the selling agents to be retained for the sale and their advices as to the process to achieve the best available financial return. He confirmed that his firm held adequate professional indemnity insurance.

69. In his second affidavit, Mr. Tyrell rejected the suggestion that the sale of the property would be conducted by him at an undervalue or by way of a fire sale. He confirmed that the property would be sold on the open market, and taking account of the available professional advice. This was repeated in firm terms by Mr. Bezian in his second affidavit '*the Property will be sold on the open market to achieve the best price available'*.

70. Thus, the high point of the evidence relied upon by the appellants is the assertion by a number of witnesses (Mr. Ryan and Mr. O'Brien) that in their experience receiver sales

result in depressed prices, and the assertion by someone who is *not* a witness (Mr. Lynch) that this would be the case in relation to this property. However, an abrupt statement of opinion by an expert (even if he were a witness) is not proof of anything. Before a court can act on opinion evidence, it must both understand the basis of the opinion, and be confident from the face of the expert's evidence that he has taken all relevant matters into account informing it. The legal position was explained by Stewart-Smith LJ in *Loveday v. Renton* [1989] 1 Med. LR 117 in a passage quoted with approval by Charleton J. in *James Elliott Construction Ltd. v. Irish Asphalt Ltd.* [2011] IEHC 269 at para. 12:

> '*The mere expression of opinion or belief by a witness, however eminent … does not suffice. The Court has to evaluate the soundness of his opinion. Most importantly this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence.'*

71. Mr. Lynch does not explain the basis for his opinion – beyond attributing this to his '*experience'*. He just gives it - and does so in a context which clearly required some explanation of the basis for his view. By common consensus, the property is singular and is of prime attraction to those involved in the development of commercial property in the city. The site is prominent and substantial, the receiver has indicated and Dengrove has averred on oath that the sale will be an open one conducted having regard to the appropriate professional advice, including advice as to marketing. A failure by the receiver to properly market the property and to take reasonable precautions to obtain the best price reasonably obtainable for it would expose him to the significant risk of an action for breach of duty. If the Court were to be expected to conclude that

notwithstanding these considerations the price would be depressed if sold by a receiver it would have to be told *why* this was the case.

72. Yet, none of this is addressed in the evidence adduced by the appellants. They simply rely upon unexplained and uncorroborated assertion. Even then, the opinion that is offered is conspicuously vague: all Mr. Lynch can say is that he has '*serious reservations',* that the receivership '*may'* disadvantage the value and that it may be '*more advantageous'* to proceed by way of a '*straightforward consensual open market disposal of the property'*. And perhaps more importantly again, it is not apparent whether Mr. Lynch was aware that Dengrove has committed to an open market sale. Certainly, he did not record that fact in expressing his opinion.

73. Expert opinion that is not referenced to the expert's understanding of the relevant factual context in which their opinion is tendered is properly disregarded for that reason alone, not least of all because the Court does not know if the expert has complied with their obligation to make a full and proper assessment and disclosure of the information they have relating to the issues on which they are expressing an opinion. The position was explained by Charleton J. in *Condron v. ACC Bank plc* [2012] IEHC 395, [2013] 1 ILRM 113 at para. 19:

> '*Experts have a particular privilege before the courts. They are entitled to express an opinion. In doing so, their entitlement is predicated upon also informing the court of the factors which make up their opinion and supplying to the court the elements of knowledge which long study and experience has equipped them so that, armed with that analysis and the elements of arriving there, the court may be enabled to take a different view to their opinion.'*

74. This statement, and the passage from *Loveday v. Renton* to which I have referred were made in the context of plenary actions rather than of interlocutory applications. However, while noting the different questions of proof and the facility for adducing hearsay evidence in an application of this kind, the same basic principles must apply. It is not open to the appellants to produce letters or affidavits from an expert witness stating that there might be an adverse impact on value simply because the property will be sold by a receiver and, without explaining the basis for that view or providing any detail of the factual assumptions on which it is based, to proclaim that they have provided evidence sufficient to ground this aspect of their proofs.

75. Because the appellants have thus not actually established that there will be any loss following from the sale by the receiver, the issue of whether it has been proven that Dengrove would not be good for that loss does not in truth arise. Generally, of course, this is an inherent part of the assessment of whether damages are an adequate remedy (see *Westman Holdings Ltd. v. McCormack* [1992] 1 IR 151, at p. 158). If they succeed in their case that a receiver was wrongfully appointed, their financial loss will be the difference between their return had the receiver not been appointed, and the return that they actually achieved. It is hard to my mind to see how that could arise in the particular circumstances that present themselves here without the receiver breaching his duty. Given that the appellants have never specified *why* a receiver sale of this asset on the open market is going to yield less for the appellants than would a sale conducted outside a receivership, it is impossible to be certain.

76. If the receiver breaches his duty he will be liable accordingly. The receiver has averred as to the adequacy of his firm's professional indemnity insurance. It follows that for the appellants to establish that damages are not an adequate remedy they must show *both* (a) that they may suffer loss for which the receiver is not liable, but for which Dengrove is legally responsible, and (b) that Dengrove will not be in a position to compensate them for that loss.

77. A great deal of energy is directed in the appellant's affidavits to establishing that latter proposition. Given my conclusions (a) that the appellants have not on the evidence they have tendered to the court established that there will actually be any loss, (b) that they have laid no foundation for the suggestion that the receiver would not be good for such loss, and (c) that they have not identified a likely cause of that loss for which Dengrove (but not the receiver) would be legally responsible, it is not my intention to dwell on this evidence. However, I would observe the following.

78. While Dengrove has not engaged in detail with that evidence, its deponent has averred in clear and categorical terms that it is not dependent upon its parent group for its solvency and that the underlying value of the security held by Dengrove comfortably exceeds the amount outstanding on the facility. They tender that evidence in a context in which Mr. Monaghan has averred that he expects payments from the sale of the site in the region of €5M. Because the appellants do not say *why* sale via the receivership will result in an undervalue, they do not provide any estimate of what the undervalue will actually be. Whatever it is, the monetary loss is presumably unlikely to be greater than the sum they so expect and one would have thought somewhat less. Given that the two appellants between them hold only 40% of the interests of the partnership, it

should represent a roughly corresponding fraction of the difference between the value that has been obtained and the value that should have been realised (less the admittedly outstanding debt).

79. Given that the greater the disparity between the true valuation and the valuation ultimately obtained the more likely it is that the receiver has been responsible for a breach of duty, the appellants are more likely to be dependent on Dengrove to cover their losses only for smaller disparities between the actual value and the value achieved. Whether or not that is correct**,** Ms. Smith SC in her oral submissions before the High Court conducted an exercise using the first named appellant's own figures showing that a 20% differential between true value and realised price would entail a loss for him of €2.5M and a 10% differential a loss of €1.3M. Whether this is mathematically perfect or not, I have seen nothing in the evidence or submissions in either Court to suggest the range is wrong. Nor is there anything in the evidence adduced by the appellants that would satisfy me that Dengrove would not be good for damages within that range. None of that, I should say, is changed by the additional evidence which the appellants sought to have admitted at the hearing of this appeal and to which I have had regard in reaching this conclusion.

The balance of justice

80. All of the foregoing serves to underscore that if the appellants are to have any basis for an interlocutory injunction, they have to identify features of the '*balance of justice'* which, notwithstanding their inability to establish a likelihood of loss or recoverability, require the grant of injunctive relief. Excluding that limited category of a case in which interlocutory injunctive relief will be granted on the basis of the strength of the

plaintiff's claim alone, the *balance of justice* is, as made clear in *Merck*, the critical consideration in an application for interlocutory injunctive relief in any case in which the plaintiff has established a fair issue to be tried. The low threshold of the latter test means it is the central inquiry in the overwhelming majority of such cases.

81. The first use of the phrase appears in the judgment of Donaldson MR in *Francome v. Mirror Group Newspapers Ltd.* [1984] 2 All ER 408, at p. 413. The reason for his choice of language is instructive. He explained it as follows:

> '*we are not at this stage concerned to determine the final rights of the parties. Our duty is to make such orders, if any, as are appropriate pending the trial of the action. It is sometimes said that this involves a weighing of the balance of convenience.* ***This is an unfortunate expression. Our business is justice, not convenience.*** *We can and must disregard fanciful claims by either party.* ***Subject to that we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights.*** *Since the parties are usually asserting wholly inconsistent claims, this is difficult, but we have to do our best.* ***In so doing, we are seeking a balance of justice, not of convenience****.'*
>
> (Emphasis added).

82. Clarke J. expressed similar views in his foreword to the first edition of '*Injunctions, Law and Practice,'* (B. Kirwan (2008)). In *Okunade v. Minister for Justice* [2012] IESC 49, [2012] 3 IR 152 at para. 104, he framed the inquiry by reference to '*where*

the greatest risk of injustice would lie'. Clearly, the adequacy of damages is a crucial component of that and in this case (for the reasons I have explained) it carries very significant weight. That this is so becomes clearer when one has regard to the specific factors upon which the appellants rely in urging that the trial Judge erred in refusing such relief.

83. Central to these is a refrain repeated throughout the affidavits delivered on behalf of the appellants and echoed in the written and oral legal submissions made on their behalf, that their property rights are impaired by the appointment of the receiver and that an injunction should be granted because of that impact on those property rights. This argument and the allied contention that the trial Judge consequently failed to have regard to the impact of an injunction on the trial was presented in counsel's oral submissions as '*the most fundamental error'* in his judgment. It bears some consideration.

The relevance of property rights

84. In principle, the case law is clear in positing both the appropriateness of the Court taking account of the inherent value of a property right in determining whether to grant an interlocutory injunction (see *Allied Irish Banks plc. and ors. v. Diamond and ors* at para. 96) and in recognising that the equity of redemption is itself a valuable asset which precludes the mortgagee from simply selling the property for what it can obtain in the short term (*Dellway Investments Ltd. and ors v. National Asset Management Agency and ors* [2011] IESC 4, [2011] 4 IR 1 at para. 174). However, it is easy to lapse into enthusiastic rhetoric around the vindication of property rights, while overlooking the complexity sometimes attending their application. Reliance upon the

right requires clear identification of what, exactly, is involved, potentially a qualitative legal judgment as to whether some such entitlements should in particular situations enjoy stronger protection than others (on a temporary basis or otherwise) and, where this is the case, a legal justification for that outcome. This has the capacity to be less than straightforward in proceedings involving competing property rights, which comprise bundles of different legal entitlements, and which may range from outright ownership of real property, to contractual and in some cases inchoate rights, and which may involve assets that are held for differing purposes. A home, or property otherwise held to a particular and personal end, or for that assets in which a person has an emotional investment (as was the case in *Betty Martin*) may not fall to be treated in the same way as secured assets that are used only for business purposes (see *O'Gara v. Ulster Bank* at para. 59).

85. In commercial cases involving assets acquired and held solely for commercial purposes there will frequently be two sets of competing property rights in play. Sometimes it is possible to adjudicate as between them and to decide that, on a temporary basis, the exercise of one party's property right should be suspended in protection of the rights of the other. *Merck* is a good example of this. There the Supreme Court clearly felt that account should be taken of these interests, but in that case it was in a position to resolve the tension between Merck's SPC and Clonmel's right to enter, and obtain an income stream from, the relevant market by reference to the fact that Merck had a certificate which was *prima facie* valid, while Clonmel had a challenge to validity which was not conspicuously strong. In some particular circumstances, the fact that one party's rights will be terminated permanently if an injunction is not granted while the other's can be simply kept in abeyance until trial, resolves the issue. However, in

other cases it is not possible to decide that one party's rights outweigh its opponents': in that situation the invocation of competing property or property based rights sometimes becomes a zero sum game, adding little to the common law rules. That, indeed, is what happened in *Allied Irish Banks plc and ors. v. Diamond*.

86. Here, the appellants assert rights to their equity of redemption in the property. However, these rights and their attainment are constrained by contractual arrangements with both their partners and by their agreements with their lender. The latter confer corresponding rights on Dengrove to enforce its security and to recover the debts outstanding to it by sale of the property. The critical issue presented by the appellant's case is whether their rights should temporarily prevail over Dengrove's in that context and, if so, why.

87. The way this aspect of their argument was put on behalf of the appellants in their oral submissions was as follows. If the appellants are presented with a situation in which the receiver has sold the site, then it is said that Mr. Ryan will have lost his property rights. Reference was made to '*the range of rights that this gives him*'. These rights, it is said, include the right to sell, the right to go back to the partners under the partnership agreements and invoke the terms of those agreements, the right to develop in combination with the partners or subject to the terms of the partnership agreement with some or none of them. Later, it was said, that if Dengrove sold the site through the receiver, the appellants would be faced with a situation where their rights had been expropriated. If the appellants established that they had the right to redeem on the basis asserted by them, Dengrove will have had no legal right to have sold the asset. The purpose of the trial, as it was put by on behalf of Mr. Ryan in his written

submissions to the High Court '*is to vindicate his property rights, something which is clearly defeated by the appointment of a receiver'*.

88. However, in this particular case all of this strikes me as highly theoretical. The facts suggest a far simpler scenario. I think they reduce themselves to seven straightforward propositions:

(i) Dengrove has an entitlement on the face of the security documents to appoint the receiver so as to give effect to its desire to sell the asset and to recover the debts owing to it. It is a matter for the appellants to establish precisely why Dengrove should be constrained in the exercise of that entitlement.

(ii) Mr. Ryan is free to purchase the asset on such a sale.

(iii) Mr. Ryan has not only agreed to a sale, but actually presents as part of his case on this application the argument that the settlement agreement remains in force and (it follows) that therefore the property should be sold.

(iv) The appellants have failed to establish that an open market sale by a receiver will yield a lower price than the method of sale to which Mr. Ryan has agreed and which he seeks to enforce.

(v) The facility for the appellants to agitate their equity of redemption is, from their perspective, a negative contingency. It only arises in the event that they are wrong in saying that the settlement agreement has not terminated, and Dengrove is right in saying that it has. Therefore, unless Mr. Ryan abandons his claim that the settlement agreement remains in force it only arises if it is assumed or

determined that the appellants, although having the opportunity to sell the property or to extend the agreement, failed to exercise those rights in the manner envisaged by the settlement agreement.

(vi) If, however and through whatever means Mr. Ryan ends up running the case that Dengrove cannot apply the proceeds of sale to the non-partnership debts of other partners and if Mr. Ryan prevails in that argument, the effect is *not* that he automatically and simply gets the asset outright on paying the redemption sum. He still has to deal with his partners. He has not elaborated upon what this will involve, although as I have noted his aim is to be '*in the driving seat'* with them. While he alludes to the possibility that the other partners might all work with him to develop the site, there is no evidence whatsoever that the majority of them would do so. In the course of submissions there was opaque reference made to the appellants dealing with their partners or having recourse to their rights under the partnership agreements. This was never explained. Similarly, there was very general reference to the fact that the assets were held as tenants in common and to the possible exercise of rights of partition. How, exactly, this would either work or affect matters was never explained either. At no point did the appellants identify or quantify any likely financial loss if they were to pursue the route of purchasing the property rather than invoking their equity of redemption and '*dealing with'* their other partners.

(vii) In fact, the key feature of the property right of the appellants in play in this application is not their right to exercise an equity of redemption or to develop the property or to prevent its disposition, but their asserted entitlement to preclude a sale according to a method with which they disagree. For the

purposes of an interlocutory application of this kind and in these very particular circumstances if they are to demand that that right be placed in the equation, any sensible assessment of the balance of justice requires that they provide some coherent explanation of their objection above and beyond the fact that they do not agree to this method of sale. However, they have failed to advance any credible reason why they will not agree to sale by the receiver or for that matter by Dengrove as mortgagee in possession. Insofar as I can ascertain, Dengrove's claim that the reason the appellants want to preclude sale by a receiver or mortgagee in possession is that they (or at least Mr. Ryan) wish to purchase the property and therefore to depress the price, has never been refuted. It is not irrelevant in determining the weight to be given to that objection that, whether or not it amounted to a lack of candour, Mr. Ryan did not go out of his way to point out that he was being advised by the jointly appointed solicitors that the latter was the appropriate method of sale and that he did not agree to that course of action.

89. In these circumstances even if Mr. Ryan has a credible basis for asserting an equity of redemption of the kind for which he contends, I can see no reason why the inherent value of Mr. Ryan's property rights should, having regard to these considerations, temporarily prevail over those of Dengrove. The precise dimensions of his rights are far from clear cut, their realisation is contingent on a number of variables, the meaningful exercise of his equity of redemption is constrained by a sequence of contractual obligations and he only comes to make this case if it is accepted or decided that he had a contractual right to have the property sold in a manner that was acceptable

to him, but failed to avail of it. The critical fact is that he has agreed to a sale, and by claiming that the settlement agreement is in force has shown that he still wants one.

90. This case is thus now about ways, means and money – whether and if so how Mr. Ryan gets the property, whether and if so how Dengrove disposes of it, who pays who and who gets what. It is not about the inherent value of the property rights of either party and I do not believe that in the particular circumstances of this case the invocation of those rights affects the analysis.

Overview

91. As I have noted, when the detail of the various aspects of the relevant legal test is interrogated and applied, it remains necessary to stand back, to look and to seek to determine more generally where the justice of the situation lies.

92. Taking Mr. Ryan's case at its height he would say that he was in the middle of a trial, he was agitating an issue around the proper redemption figure for his loans, he entered into a settlement agreement, he settled on the basis that he could have an input into the sale of an asset in which he has an interest, he found the time fixed in the agreement passing as a result of his interpretation of when the Second Adjourned Period concluded, and rather than return to trial to determine the issue he was agitating (as the settlement agreement, if properly terminated, envisaged) he would say that he now finds (a) his property being sold by a receiver against his wishes, and (b) that any resumed trial will recommence with an important end point (the partnership resuming full ownership of its asset on payment of its version of the redemption sum) pulled

from under him. If the injunction is granted, he says, Dengrove's loss is ascertainable, and recoverable from him. If it is not, he contends, his property right stands to be extinguished by a mode of sale to which he has never agreed.

93. However, and at the same time, these proceedings are about commercial assets brought and defended by experienced, well advised and resourced parties. Mr. Ryan decided to settle his case and did so on the basis that there would be a sale of the asset. He was given ample time to exercise the rights afforded to him by that agreement, which was clear and unequivocal in fixing identified periods within which the relevant actions were expected to be taken, and he was given the right to require the extension of the agreement if *inter alia* circumstances conspired to prevent the sale closing within that period. Even after that period had expired he had a further period of eight weeks to progress matters before anything happened. The sale did not complete, an extension was not sought, he does not appear to have done anything for two months after April 25 and nothing in the express terms of the agreements that had been executed precluded Dengrove from doing exactly what it did. Of course, none of this is to deny the arguability of the appellants' cases as identified by the trial Judge. That case, however, needs to be viewed in its context.

94. If Mr. Ryan is denied an injunction the effect is that the event he has agreed to – the sale of the asset – will occur. Certainly, it is not a sale conducted according to the modality to which he agreed and which he wanted, but he has failed to establish that or explain why this makes any tangible difference. He is free to bid for the property, and he is free to purchase and develop it. He has not established that the occurrence of that event under the aegis of a receiver will adversely effect his economic interests and, if it does, he has not established that he will be unable to recover monetary

damages to reflect that damage to those interests. If he is granted an injunction the consequence is not merely to impede Dengrove in the exercise of its legal rights, but to delay further the realisation of the property and the discharge of the liabilities that have been outstanding for some considerable period of time. In circumstances where both outcomes lead to the same essential terminus – an ability on Mr. Ryan's part to pay for and to acquire the asset – and in circumstances in which it is for Mr. Ryan to establish his entitlement to the relief he claims, I cannot see that he has shown that the balance of justice should tip in favour of the relief claimed.

95. I do not believe that this is a case in which it is necessary to assess the merits of the parties claims in order to determine where the balance of justice lies. Suffice to say that I do not see the appellants' case on any of the issues they seek to agitate as being so strong as to tilt in their favour a balance which I firmly believe having regard to the factors I have outlined, to be pointed the other way. At the end of the day their argument depends on interpolating into the settlement terms that could have been, but were not, expressly agreed between the parties. The law, of course, enables this to be done in certain circumstances and, as I have observed, their argument is a stateable one. They face, however, a burden in making it.

Some further issues

96. I pointed out at the beginning of this judgment that the appellants made five points in their written submissions. I have addressed what appears to me to be the principal argument. One related to costs, and I will return to that shortly. The other three were as follows.

97. First, complaint is made that the trial Judge found facts that were in dispute between the parties and that in so doing he exceeded his remit in determining an application for an interlocutory injunction. This objection is without foundation and the specific instances identified by the appellants do not withstand scrutiny. At paragraph 20 of his judgment the trial Judge made it clear that his outline of the facts in the preceding paragraphs was presented as a description of the '*nature of the dispute'* and that he was conscious that that dispute would in due course be addressed at a full hearing. Thus, the statement by the trial Judge that the Second Adjourned Period was the six month period ending on 24 April 2020 is a record of what the document actually says, not a finding of fact. His reference to Mr. Ryan not following advice issued by RDJ by letter dated 21 April 2020 corresponds with the evidence: I can find nowhere in the affidavits a statement by Mr. Ryan that he either agreed with or communicated any agreement with, that advice. In fact, at para. 78 of his supplemental affidavit he says (perhaps curiously) that '*there is no evidence to show I agreed to'* such a sale. Similarly, I have seen no statement by Mr. Ryan that he was not aware of the Ronan Daly Jermyn advice prior to 17 July 2020. I do not read the judgment of the Court as expressing any concluded view as to the proper redemption figure or as making any finding that the mode of sale was prescribed or required by the settlement agreement. I have explained earlier in this judgment why I believe that the judge was quite within his rights in not acting on the evidence of Mr. Lynch.

98. Second, it is said that Twomey J. erred in finding that there had been a lack of candour or material non-disclosure on the part of Mr. Ryan. This is a reference to a finding by the Judge that the advices given by Ronan Daly Jermyn in February that unless the liquidator could obtain a deed of release in respect of certain charges the sale must

proceed by way of a mortgagee in possession, ought to have been disclosed by the appellants in seeking the interlocutory relief. The Judge took this into account in determining where the balance of justice lay. Here (while not expressing a view one way or the other as to whether lack of candour properly features in the balance of justice as opposed to simply being an outright basis for refusing equitable relief) I am inclined to agree with the appellants.

99. Mr. Ryan should not have averred (as he did in his first affidavit) that '*the only matter now outstanding is the legal pack from RDJ'* when, actually, there was a significant and fundamental issue between the partners and the solicitors as to whether the former would follow the latter's advice as to whether the sale should have proceeded via a mortgagee in possession. However, I do not think in all of the circumstances the failure to disclose the Ronan Daly Jermyn advices was sufficiently egregious to justify withholding equitable relief. The principle should not, as explained by Clarke J. (as he then was) in *Bambrick v. Cobley* [2005] IEHC 43 (at para. 41) be taken to '*extreme lengths'*. It was most imprudent not to refer to the advice, but my inclination would be to give the appellants the benefit of the doubt in respect of urgent injunctive relief prepared in the context of a myriad of complex facts and documents, and under some considerable pressure of time.

100. It was also, I should say, most imprudent for Dengrove not to have raised this issue in its affidavits and to have referred to this lack of candour only in legal submissions at the eleventh hour. However, I would give it the benefit of the doubt too. The most benign explanation for its actions in holding this point until the very end and thereby limiting the ability of the appellants to address it on affidavit, is that this non-

disclosure was not realised by Dengrove itself to represent a lack of candour until a very late stage in process. If this were so, it would reinforce the two points I have just made – that everyone was working under very considerable pressure in preparing for the application, and that the lack of candour was not actually that obvious.

101. Third, it was said that the trial Judge did not afford fair procedures to the appellants by failing to have regard to arguments advanced on their behalf. I can see no basis for this complaint. I have reviewed with some care the written submissions and transcript of the oral argument made by the appellants to Twomey J. I can find no material issue presented in those written or oral submissions that was immediately relevant to the relief sought that was not addressed directly or indirectly by the trial Judge.

102. Finally it is to be observed that the appellants also seek to contend that the actions of Dengrove in appointing a receiver without serving a demand invalidated that action. This issue was comprehensively addressed in the context of a similarly worded charge by Ni Raifeartaigh J. *in Ffrench O'Carroll v. Permanent TSB* [2018] IEHC 794. I find her analysis there persuasive and agree with the conclusion reached in her judgment that no such demand is required. No reason has been identified by the appellants as to why she was wrong in arriving at that view, and that being so I do not believe that this objection presents a fair issue to be tried.

Conclusion

103. My reasons for concluding that Twomey J. was correct in determining not to grant the interlocutory injunction sought by the appellants can be summarised as follows:

(i) While the appellants have established a fair issue to be tried as to whether Dengrove was entitled to appoint a receiver when it did having regard to the provisions of the Settlement Agreement, they have not established that the sale by such a receiver will result in any financial loss to them. The opinion evidence upon which they relied in this regard did not, by reason of the failure to explain the basis for the conclusions expressed by the relevant expert or to identify the factual basis on which it was prepared, establish anything of relevance to this application. The Court can act only on evidence, not assertion (including assertion based on '*experience'*), and at no point in this application was it ever explained to the Court *why* the sale on the open market of the property by a receiver would result in a sale at an undervalue.

(ii) The balance of justice does not favour granting an injunction to restrain a sale of the property in circumstances where (a) the appellants themselves are agreeable to (and are in fact in one version of their case seeking to enforce) a sale, and (b) the method of sale which they seek to prevent has not been proven by them to be detrimental in any way to their financial interests when compared with the method of sale to which they have agreed.

(iii) The invocation by the appellants of their property rights is on the facts of this case, misconceived. This is a commercial case in which the property rights of both parties are engaged. The appellants have pointed to no credible theory by reference to which the negative contingency of their property rights in enforcing their equity of redemption should

temporarily prevail over Dengrove's rights in realising its security and obtaining recovery of the monies owing to it. This case is about ways, means and money – whether and if so how Mr. Ryan gets the property, whether and if so how Dengrove disposes of it, who pays who and who gets what. It is not about the inherent value of the property rights of either party.

(iv) In those circumstances the critical question is a financial one. In circumstances where (a) the appellants have not on the evidence they have tendered to the court established that there will actually be any loss if the receiver proceeds as he proposes, (b) they have laid no foundation for the suggestion that the receiver would not be good for such loss as might arise, (c) they have not identified a likely cause of that loss for which Dengrove (but not the receiver) would be legally responsible, (d) on their own case the financial loss that would arise were the property disposed of at an undervalue is limited and (e) they have not established that Dengrove would be unable to discharge damages awarded within the limited range likely to present itself, it is impossible to see why Dengrove should be precluded from exercising its rights under the relevant security documentation.

(v) This is the case irrespective of whether Dengrove's financial loss if an injunction is granted can be quantified and recovered. The onus is on the appellants to establish that the circumstances are such as to merit injunctive relief in the first place, and this they have failed to do.

Costs

104. The final point on the appeal arose from the decision of Twomey J. to order costs against the appellants. I would not interfere with the exercise of his discretion in this regard. Order 99 r. 2(3) of the Rules of the Superior Courts is framed in mandatory terms, with a negative exception:

> *'The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.'*

105. It was a matter for the trial Judge to decide whether he could '*justly adjudicate on costs'* and he decided that he could. Once that was so, costs followed the outcome. While the appellants submit that this was a case in which the interlocutory application turned on '*aspects of the merits of the case which are based on the facts'* (*ACC v. Hanrahan* [2014] IESC 40), I do not think that reasoning applies here. This was a self-contained application for interlocutory relief, the determination of which does not resolve any issue in play at the trial.

106. In this case, the appellants have been unsuccessful in their application. It might be argued that Dengrove has not been '*entirely successful'* having regard to the findings I have made in regard to the lack of candour issue. However, as I explained in *Higgins v. Irish Aviation Authority* [2020] IECA 277 at para. 10, a party who is partly successful in proceedings may nonetheless obtain all of its costs if, having regard to the matters iterated in s. 169 of the Legal Services Regulation Act 2015, it is

appropriate to do so. I believe it is appropriate to do so here. While I fully understand that the issue of candour was important to the appellants and indeed occupied some focus of the hearing and written submissions, I am nonetheless firmly of the view that the trial Judge did not err in refusing the application for interlocutory relief, and that in the light of that conclusion it is proper in the circumstances here to order costs in full against the appellants.

107. This is only a provisional view as to the costs, and the appellants are free to dispute it. If they do, the Court of Appeal office should be notified within seven days of the date of this judgment and a date will be fixed for a hearing on the question of costs.

108. Faherty and Haughton JJ. are in agreement with this judgment and the orders I propose.