Neutral Citation [2013] IEHC 205

THE HIGH COURT

[2013 No. 4137P]

BETWEEN

CROSSPLAN INVESTMENTS LIMITED AND PAT HALPIN

PLAINTIFFS

AND

PAUL McCANN, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 7th day of May, 2013.

Factual basis of the application

1. Over the decade from 1999 to 2009 the first plaintiff (the Company) borrowed from Irish Nationwide Building Society (the Society) to acquire and develop a property at Merrion Road, Ballsbridge, Dublin. The interest of the Society subsequently became vested pursuant to a transfer order under the Credit Institutions (Stabilisation) Act 2010 in Irish Bank Resolution Corporation Limited (the Bank), which is now in Special Liquidation pursuant to the Irish Bank Resolution Corporation Act 2013. Hereafter the Society and the Bank, as its successor, will, as regards contractual relations with the Company and the second plaintiff (Mr. Halpin), be referred to as "the Lender".

2. The most recent security given by the Company to the Lender was a mortgage with floating charge dated 12th July, 2009 (the 2009 Mortgage) made between the Company of the one part and the Lender of the other part, whereby premises known as No. 54, No. 56, No. 52 and No. 50 (being the lands registered on Folio 56633F of the Register of Freeholders, County Dublin), Merrion Road, Ballsbridge, Dublin, 4, were mortgaged in favour of the Lender to secure, in accordance with the provisions thereof, all such monies as were then or should from time to time thereafter become due and owing to the Lender. Clause 8E thereof provided as follows:

> ". . . all monies hereby secured shall become immediately payable or shall be deemed to become immediately payable as the case may be and the security shall become enforceable if the [Lender] shall by Notice in writing make a demand on the Company for payment of the monies hereby secured, or, whether or not the [Lender] shall by notice in writing make such a demand, on the happening of all or any of the events set out in the following sub-paragraphs of this sub-clause E . . .."

The events set out thereafter are not relevant for present purposes, as the Lender relies on a demand notice served on the Company. Clause 9A of the 2009 Mortgage dealt with the appointment of a receiver and provided as follows:

> "The [Lender] may at any time after the monies hereby secured have become payable and the security hereby constituted has become enforceable appoint . . . any person . . . to be a Receiver . . . of the Charged Properties . . .."

3. By letter dated 15th February, 2012 from the Lender to the Company the following demand was made in the following terms:

> "We hereby demand payment forthwith of all amounts of principal, interest, costs and expenses outstanding under the Offer Letters, being an aggregate amount of €25,170,660.24 as of the date of this letter. Payment can be effected by electronic transfer to account number . . . held with AIB or by bank draft delivered to [the Lender] at 2 Grand Parade, Dublin 6."

After reserving the right to make further and other demands upon the Company it was stated as follows in the letter:

> "In the event that payment is not received by close of business on 17 February, 2012, we are entitled to and reserve the right to enforce any security given to us to secure the facilities made available under the Offer Letters, to take all such actions as are permitted under the said security (including, without limitation, the appointment of a receiver) and to take steps, as we are lawfully entitled to, to recover all monies due by you to us."

The penultimate paragraph in the letter was as follows:

> "Nothing in this letter constitutes or should be deemed to constitute, a waiver of any rights or remedies of [the Lender] under the Offer Letters or any security documents entered into or otherwise available as security for the facilities made available under the Offer Letters or otherwise."

4. The Company did not prior to 4pm on 17th February, 2012, or, at any time thereafter, discharge its indebtedness to the Lender either by electronic transfer or by bank draft left at the Lender's designated premises.

5. By a deed which was executed by the Lender on 17th February, 2012 at 4pm, having referred to various security documents set out in the first schedule thereto, which included the 2009 Mortgage, the Lender appointed the first defendant (the Receiver) "to be Receiver (as such term was described in)" each of the security documents, of all of the assets referred to, comprised in and charged in its favour by the security documents and to enter upon and take possession in the manner specified in the security documents of the premises described in the second schedule thereto, being Nos. 50, 52, 54 and 56 Merrion Road, Ballsbridge, Dublin, 4, as described in the 2009 Mortgage. The Receiver's acceptance of the appointment was endorsed on the deed of appointment.

6. All of the security documents referred to in the first schedule to the deed of appointment contained provisions similar to the provisions outlined at para. 2 above except one. That was a mortgage debenture dated 27th October, 1999 (the 1999 Mortgage Debenture) made between the Company of the one part and the Lender of the other part. The corresponding provisions of the earlier security document started with Clause 2.1, which was the core provision of the covenant to pay, wherein the Company covenanted

with the Lender that it would "on demand pay and discharge the Secured Liabilities when the same are due", the expression "Secured Liabilities" having been earlier defined as all monies, obligations and liabilities owing or incurred by the Company to the Lender. The power of appointment of a receiver was linked to the security having become enforceable. Clause 8.1.4 provided that the security thereby constituted "shall become enforceable" on the happening of an "Enforcement Event". The events the occurrence of which would constitute an "Enforcement Event" were set out in Clause 8.2 and included failure to pay the "Secured Liabilities" when they ought to be paid. The submission of counsel for the Lender that, as regards the relevant provisions in relation to repayment by the Company of the debt and the Lender's entitlement to enforce the security, while the wording in the 2009 Mortgage differs from the wording in the 1999 Mortgage Debenture, in substance the provisions in the two security documents are the same, in my view, is correct. Therefore, for present purposes, insofar as it is necessary to do so, I propose considering the issue as to the validity of the appointment of the Receiver raised on behalf of the Company by reference to the provisions of the 2009 Mortgage.

The proceedings and the application

7. These proceedings were initiated by a plenary summons which issued on 24th April, 2013. The application before the Court is an application for an interlocutory injunction and it seeks relief against the Receiver only. The relief sought is an order restraining the Receiver from selling, transferring, charging or otherwise conveying any interest or interests in the property of the plaintiffs until the determination of the proceedings. In fact, the property in issue is the property at 50, 52, 54 and 56 Merrion Road, which had been partly developed as a hotel, and is known as Merrion Hall. It was trading as such when the Receiver was appointed.

8. To put the application into context, the primary relief sought in the endorsement of claim in the plenary summons is a declaration that the purported appointment by the Lender of the Receiver as receiver to and over the assets of the Company is invalid, void and of no effect. There are various other reliefs sought including declarations that certain provisions of the Act of 2013 are repugnant to the provisions of the Constitution, hence the joinder of Ireland and the Attorney General as defendants. However, those aspects of the proceedings are not material to the present application.

9. The principal basis on which it is alleged by the Company and Mr. Halpin, who is a fifty per cent shareholder in the Company, that the Receiver was not validly appointed is that the deed of appointment was executed at or about 4pm on 17th February, 2012 and prior to the close of business as set out in the demand, so that the monies had not yet become payable and, accordingly, the power to appoint a receiver did not exist. It is also alleged that there was "substantial overcharging" on the Company's account because, it is alleged, the Lender wrongfully charged interest by reference to the incorrect EURIBOR rate. That allegation is peripheral, in the sense that it does not go to the core issue, which is whether the Receiver was validly appointed and whether he has authority to sell Merrion Hall.

Other proceedings involving the plaintiffs and the Lender

10. In 2012 the Lender instituted summary proceedings (Record No. 2012/No. 135 COM) against Mr. Halpin as guarantor of the liability of the Company to the Lender for €25,560,423.26. By order of the Court (Kelly J.) made on 4th October, 2012, the Lender obtained judgment against Mr. Halpin in the sum of €20m, being the amount in respect of which judgment was sought by the Lender, and the costs of the application for summary judgment. The balance of the claim, which was in excess of €5.5m and which I understand to represent the interest claimed by the Lender, has been adjourned to plenary hearing and the plenary proceedings are ongoing in the Commercial Court. The order of 4th October, 2012 is under appeal to the Supreme Court.

11. In July 2012 the Receiver initiated an application pursuant to s. 316(1) of the Companies Act 1963 (the Act of 1963), which was first returnable before the Court on 8th October, 2012. The proceedings (Record No. 2012/411 COS) were brought by the Receiver in his capacity, not only as Receiver of the Company, but also as receiver of Elektron Holdings Limited (Elektron), which is "associated" (not using that expression in any technical sense) with the Company. The respondents to the application were Mr. Halpin and, his partner, Ann Keane (Ms. Keane). On the evidence before this Court, it appears that the Receiver was also appointed receiver by the Lender over the assets of Elektron, which included the property known as Aberdeen Lodge, 53 – 55, Park Avenue, Sandymount, Dublin 4. In the s. 316 application, the Receiver has sought directions, in his capacity as receiver of Elektron, as to the entitlement of Mr. Halpin and Ms. Keane to withhold possession of Aberdeen Lodge and the basis on which that issue arises appears to be that it is contended that the Receiver is not entitled to possession because Aberdeen Lodge is a "family home". The outcome of that issue has no bearing on the application before the Court. Other reliefs are sought by the Receiver, in his capacity as receiver of both Elektron and the Company, in those proceedings, which, as regards the Company, seek an order that a statement of affairs, details of outstanding creditors, access to books and records and suchlike be provided by the respondents.

12. In Mr. Halpin's grounding affidavit sworn on 24th April, 2013 on this application, he averred that his understanding of the position of the Receiver and the Lender to be "that no challenge exists in those proceedings [the s. 316 application] to the validity of the receiver to [the Company] though there is clearly one in relation to Elektron". Mr. Halpin further averred that ancillary proceedings in the High Court between Elektron, as plaintiff, and the Receiver, the Lender, Ireland and the Attorney General, as defendants (Record No. 2012/12134P) were discontinued shortly after being initiated (in fact on 19th December, 2012) "once it became clear that [Mr. Halpin] was entitled to challenge the appointment of the receiver to Elektron in the context of the *section* 316 application".

13. Recently, the respondents in the s. 316 proceedings, registered those proceedings as a *lis pendens* against the property registered on Folio DN 56633F, being No. 50, Merrion Road, which is now part of Merrion Hall. By order of the Court (Cooke J.) made on 23rd April, 2013, the *lis pendens* was vacated. It has been asserted on behalf of the Receiver in the replying affidavit of Fiona O'Connell, a solicitor in Beauchamps, the solicitors on record for the Receiver, sworn on 26th April, 2013, that these proceedings were a direct response to that order.

14. While other proceedings have been referred to in Ms. O'Connell's affidavit, my understanding is that, apart from the s. 316 proceedings in respect of which confusion has reigned throughout the affidavits, the only other proceedings in existence which affect the liability of the Company, and of Mr. Halpin as guarantor of the Company's liability, to the Lender or challenge the validity of the appointment of the Receiver over the assets of the Company are the following:

(a) the pending appeal to the Supreme Court against the order of the High Court (Kelly J.) in the summary proceedings;

(b) the plenary proceedings in relation to the balance of the Lender's claim in the summary proceedings which are proceeding in the Commercial Court; and

(c) these proceedings.

The contents of the grounding affidavit of Mr. Halpin referred to at para. 12 above originally gave the impression that these proceedings are the only proceedings in which the validity of the appointment of the Receiver over the assets of the Company is challenged.

15. However, Ms. O'Connell has averred in her affidavit that on 5th December, 2012, counsel for Mr. Halpin and Ms. Keane advanced an argument before the Court in the s. 316 proceedings, which had not been canvassed in any of the affidavits filed prior to that, "to the effect that the receivership was invalid because the Receiver was appointed shortly after 4pm whereas the Letter of Demand of 15th February gave until close of business on 17th February to make the payment sought". Ms. O'Connell then quoted the following paragraph from an affidavit sworn by Ian Wigglesworth, a senior manager with the Lender, in support of the s. 316 application on 19th December, 2012:

> "Finally, I understand that Counsel for the Respondents advanced an argument before this Honourable Court on 5th December, 2012 to the effect that the Receivership was invalid because the Receiver was appointed at 4.10pm when the Letter of Demand gave until close of business on 17th February, 2012 to make the payment sought. I say and believe that the reason for the appointment after 4pm was that banking hours for payment finished at 4pm after which it was clear that there was no possibility of the demands on 15 February 2012 being complied with. As will also be clear, even to now there has been no proposal by either Elektron or [the Company] or, indeed Mr. Halpin as guarantor, to discharge any portion of the liabilities in issue."

16. Later in her affidavit, Ms. O'Connell averred, in the context of an assertion that there had been delay by the Company in challenging the appointment of the Receiver over the assets of the Company, that –

> ". . . the argument canvassed in Mr. Halpin's 24th April, 2013 Affidavit concerning the timing of the Receiver's appointment has already been raised in separate proceedings in the manner outlined above and will fall to be determined, at trial, in the hearing listed to begin on 11th June."

17. The confusion referred to earlier arises from the inconsistency between the averment in Mr. Halpin's grounding affidavit referred to at para. 12 above and that averment in Ms. O'Connell's affidavit. In his final affidavit sworn on 30th April, 2013, Mr. Halpin, having referred to the initiation of the s. 316 application in July 2012, has averred as follows:

> "These proceedings are currently extant before the High Court and include our claim that the Receiver is invalidly appointed by reason of having been appointed at a time when the monies had not become due."

Mr. Halpin went on to aver that, in the circumstances –

> "...it is simply not accurate to assert that I have not challenged the validity of the appointment of the Receiver."

The fact that it is acknowledged by the plaintiffs in these proceedings that the issue which is at the core of these proceedings, the validity of the appointment of the Receiver, is also an issue in the s. 316 application which, as I understand the position, is listed in the Commercial Court for hearing on 11th June, 2013, raises the question why the plaintiffs initiated these proceedings seeking a determination of the very same issue and brought an application for an interlocutory injunction in these proceedings. On the other hand, the fact that the Receiver acknowledges that the issue as to the validity of his appointment over the assets of the Company will fall to be determined in the s. 316 application on 11th June, 2013 raises the question why the Receiver did not immediately move to have the application which is before this Court transferred to the proceedings in the Commercial Court.

Conduct of receivership

18. In his affidavit sworn on 26th April, 2013, the Receiver has outlined the following steps which were taken in relation to Merrion Hall:

> (a) Immediately after his appointment he held a meeting with Mr. Halpin at Merrion Hall. It is clear from the affidavit that the affairs of Elektron, in addition to the affairs of the Company, were the subject of that meeting, but this Court is concerned only with the affairs of the Company. It was made clear to Mr. Halpin that neither he nor any other directors were in control of the Company or any of its assets. The Receiver expressed the opinion and that of his staff that Mr. Halpin acknowledged and accepted that that was the situation in relation to the Company. Following the meeting, the Receiver wrote to Mr. Halpin and, *inter alia*, advised him that he had instructed his solicitors, Beauchamps, to write to Mr. Halpin.
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> (b) In fact, Beauchamps' letter which is exhibited in a later affidavit sworn on 29th April, 2013 of Damien Murran, a solicitor in Beachamps, was written on 21st February, 2012 and it dealt entirely with the issue of the Receiver, in his capacity as receiver of Elektron, getting possession of Aberdeen Lodge. There is also exhibited in Mr. Murran's affidavit Mr. Halpin's response dated 23rd February, 2012, in which, apart from addressing the position in relation to Aberdeen Lodge, Mr. Halpin stated that it would be a pity to close Merrion Hall and to make the staff redundant due to the Receiver's inability to get insurance. Mr. Halpin stated that Merrion Hall was trading and had an income stream, that there was insurance then in place and he was happy to work out an arrangement to keep the premises open.
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> (c) The Receiver in his affidavit averred that following his appointment Merrion Hall was inspected by his staff and by his insurance brokers and a decision was made "not to trade this asset due to its condition and associated risk". Over the course of the weeks following his appointment his staff took control of the property, engaged valuers and surveyors, and prepared the property for the market.
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> (d) The Receiver's position is that Mr. Halpin relinquished possession of Merrion Hall to him on 17th February, 2012. That is disputed in Mr. Halpin's final affidavit, to the extent that Mr. Halpin has averred that he operated the hotel for a short time after 17th February, 2012 and that it only ceased to trade and closed after the St. Patrick's Day holiday in 2012.
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> (e) The Receiver has averred that Mr. Halpin was fully aware of the Receiver's intention to sell the property. The contemporaneous documentary evidence bears that out. By letter dated 9th May, 2012, the Receiver informed Mr. Halpin that, as of 8th May, 2012, Merrion Hall was officially being marketed for sale. Mr. Halpin was asked to furnish documentation detailing any of his personal possessions which were still stored in the property. The Receiver sent a reminder letter to Mr. Halpin on 5th July, 2012, noting that he had not received any documents in respect of any personal items that might be stored in Merrion Hall and pointed out that, once any sale was finalised, he would not be in a position to assist Mr. Halpin on the matter.
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> (f) The Receiver has comprehensively outlined the "very public advertising campaign" undertaken to achieve the optimum price for Merrion Hall and has exhibited copies of advertisements and coverage in the property section of the Irish Times in late May 2012. The Receiver has also outlined the "very extensive marketing process" which ensued. His conclusion, on

> the basis of the advice he has received from Savills, who were retained in connection with the sale, is that "the best market price for the property has been achieved".

19. While it is clear that the Receiver has agreed to sell Merrion Hall, it is not clear when the contract was entered into. The contract was apparently exhibited in an affidavit sworn by Ms. O'Connell on 19th April, 2013 to ground the application to vacate the *lis pendens*. In any event, in her affidavit in these proceedings, having referred to paragraph 20 of Mr. Halpin's grounding affidavit in which he averred that he had become aware that the Receiver "is attempting to sell" Merrion Hall and that he is "concerned that such a sale would pre-date the hearing of the s. 316 application". Ms. O'Connell interpreted Mr. Halpin's motivation for registering *the lis pendens* as to prevent a sale of Merrion Hall. She has further averred that, thus far, that objective has certainly been achieved, because the purchaser has been unwilling to complete the purchase. She has averred that her clear understanding is that the sale will not be completed for so long as a challenge remains to the appointment of the Receiver. She has also averred that the best price the Receiver has secured for Merrion Hall was "a mere fraction of the indebtedness" of the Company and Mr. Halpin to the Lender.

20. Apropos of what has been averred by Ms. O'Connell as to the reluctance of the purchaser of Merrion Hall to complete while the issue as to the validity of the appointment of the Receiver over that property remains undetermined, which, as a matter of common sense, is understandable, I cannot see what benefit is to be gained if this application is determined by this Court in these proceedings, when it is common case that the core issue falls to be determined in the s. 316 proceedings in just over a month's time. However, given that a whole day of Court time was taken up with this application, it seems that the proper course is to determine it.

Criteria on application for an interlocutory injunction and their application

21. On the first criterion identified by the Supreme Court in *Campus Oil Limited v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88, whether a fair *bona fide* question has been raised by the person seeking relief, counsel for the plaintiffs argued that an arguable case had been made out that the appointment of the Receiver over Merrion Hall is invalid. On the other hand, counsel for the Receiver argued that no such arguable case had been made out, in broad terms, submitting that the Lender had complied with the requirements of Clause 8E of the 2009 Mortgage by issuing the letter of demand dated 15th February, 2012 and that letter did not constitute a waiver of the rights of the Lender under the 2009 Mortgage and, in any event, the Lender's interpretation as to the meaning of "close of business" in the letter of demand, which was that it occurred at 4pm on 17th February, 2012, prevails. It is generally recognised that the threshold for compliance with the "fair *bona fide* question" test is a low threshold. Notwithstanding that, given that it is common case that the issue as to the validity of the appointment of the Receiver over Merrion Hall, which is being advanced on the same ground as is relied on in these proceedings, falls to be determined in just over a month's time in the s. 316 application, in my view, it would be inappropriate for this Court to embark on any detailed analysis of the submissions made by the parties on the arguability of the issue. For present purposes, I consider that the appropriate course to adopt is to proceed on the assumption that the test has been complied with.

22. The second criterion is the adequacy of damages, and there are two elements to that criterion, namely:

> (a) whether, if the plaintiffs were to succeed at the trial in establishing their right to a permanent injunction, they could be adequately compensated by an award of damages; and
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> (b) whether, if the Receiver was successful at the trial, he could be adequately compensated under the plaintiffs' undertaking as to damages for any loss which he would have sustained by reason of the grant of interlocutory relief.

23. As regards the first element, the adequacy of an award of damages as compensation for the plaintiffs if they succeed in establishing that the Receiver was not validly appointed, it is the plaintiffs' contention that, in that eventuality, the relief they should be afforded is to recover possession of Merrion Hall. If that happened, they could explore the possibility of applying to court under the Companies (Amendment) Act 1990 (the Act of 1990) to have an examiner appointed over Merrion Hall. That outcome, in my view, is highly improbable. As counsel for the Receiver submitted, at present, there is no undertaking or enterprise operating as a going concern which would require to be protected by invocation of the Act of 1990. Merrion Hall is a "half complete" hotel, which has not traded for over a year. It has no employees. Substantial investment would be needed before it could start trading again. Given the financial circumstances of both plaintiffs, and, in particular, their liability to the Lender, even if they eventually succeed in establishing the invalidity of the appointment of the Receiver on the ground asserted, there is no reality in the Company recovering and retaining possession of, and trading in, Merrion Hall in the future. Accordingly, in my view, the plaintiffs have not established that they would not be adequately compensated by an award of damages.

24. However, the plaintiffs have also asserted that, given that the Bank is in Special Liquidation and, they contend, is insolvent, the probability is that an award of damages would not be met. In support of their contention that the Bank is insolvent, the plaintiffs have exhibited an affidavit sworn by Kieran Wallace, one of the two joint Special Liquidators appointed to the Bank on 7th February, 2013 pursuant to the Act of 2013, which was filed in proceedings in the Commercial Court between the Bank and others, as plaintiffs, and Sean Quinn and others, as defendants (Record No. 2011/No. 5843P). In response, a letter from Mr. Wallace to Beauchamps has been exhibited in an affidavit sworn on 29th April, 2013 by Mark Heslin, a solicitor in Beauchamps. In his letter, which was dated 26th April, 2013, and which was written for the purposes of these proceedings, Mr. Wallace has made the obvious observation that the Bank is not a party to the proceedings and that no injunctive relief has been sought against the Bank. He has also made the points that under the security documents the Receiver is the agent of the Company, not the agent of the Bank, and that pursuant to s. 316(2) of the Act of 1963, the Receiver is entitled to an indemnity out of Merrion Hall. I express no view on those points. However, Mr. Wallace concluded as follows:

> "While it is not possible to give any firm current valuation of the total assets, based on information available to me, in my opinion the asset position of [the Bank] is far greater than any award of damages that I understand could be made in favour of the plaintiffs in relation to the value of Merrion Hall. I should point out that no concession is made whatsoever that [the Bank's] financial position is relevant to the question of whether damages are an adequate remedy".

It would be purely speculative to attempt to assess whether, if the plaintiffs were successful in their challenge to the validity of the appointment of the Receiver over Merrion Hall, the plaintiffs would be in a position to recover compensation for whatever loss they incurred as a result of being deprived of possession of Merrion Hall from whomever is responsible for the loss occasioned by the wrong, that is to say, the invalid appointment of the Receiver, whether it is the Bank or some other party. For present purposes, I am not satisfied that the defendants have established that they would not, as a matter of probability, recover the damages, or that damages would not be an adequate remedy, if they were successful.

25. As regards the second element (as set out at para. 22(b)), the adequacy of the undertaking as to damages proffered by the plaintiffs, it was characterised by counsel for the Receiver as being of "no worth". Given the existence of a judgment of €20m against Mr. Halpin, albeit that it is under appeal to the Supreme Court, it is impossible to conclude that Mr. Halpin's undertaking has any

worth. As regards the Company, the Receiver exhibited the most recent annual returns filed in the Companies Registration Office. Counsel for the Receiver referred the Court, in particular, to a statement by the Company's auditors dated 14th November, 2011 expressing concern as to the Company's ability to continue as a going concern and the availability of continued financial support, the Company, at the time, being dependent on the continuing support of lending institutions. There is no conclusion open other than that the Receiver is not adequately protected by the undertaking as to damage proffered by the plaintiffs.

26. While, strictly speaking, it does not arise in view of the conclusions I have reached that damages would be an adequate remedy for the plaintiffs but that the plaintiffs' undertaking as to damages does not adequately protect the Receiver, it is not necessary to address the question of the balance of convenience. However, I propose considering what the Receiver has stated on this topic. He has averred that an injunction restraining the sale could have far-reaching and damaging consequences. In addition to the significant cost to the Company, meaning, I assume, the cost incurred in advertising and marketing the property and the legal costs in connection with the agreement to sell, Merrion Hall is likely to be tainted. The Receiver has further averred that the "intended purchasers are operators of hotels in the hospitality industry" and that his belief is their intention is to complete a schedule of works to start trading as soon as possible. The Receiver has averred that, if the sale cannot be completed, there will be obvious and untold negative consequences. What is not clear is whether, having regard to the averment in Ms. O'Connell's affidavit referred to at 19 above, even if an injunction is refused the sale will be completed. That is the Receiver's problem. The conclusion I have come to is that the balance of convenience does not favour granting the injunction because of the risk of losing the sale, which, having regard to what is outlined at para. 18 above, has been a well handled project but an obviously expensive project.

27. There remains the submission made on behalf of the Receiver of acquiescence on the part of Mr. Halpin, and, by extension, on the part of the Company, in the sale by the Receiver of Merrion Hall, of which Mr. Halpin was aware for almost a year before he initiated these proceedings, and delay in seeking injunctive relief. Obviously, this Court's understanding of what has transpired to date is hampered by the existence of the s. 316 application, which is proceeding in another Court. However, whatever action was taken by the plaintiffs to challenge the validity of the appointment of the Receiver and to pursue the overcharging issue in other proceedings, no step was taken by the plaintiffs to restrain the sale of Merrion Hall, of which Mr. Halpin has been aware for almost a year, until these proceedings were initiated and this application was brought before the Court. I consider that there was unreasonable delay on the part of the plaintiffs. Further, it is probable that it will be detrimental to the value of the security, which it is the Receiver's function to realise, and to the Lender, if the contract for sale cannot be completed. In the circumstances, I consider that it would be unconscionable to grant injunctive relief at this point in time to the plaintiffs.

Order

28. There will be an order dismissing the plaintiffs' application.