HIGH COURT

COMMERCIAL

2016 No. 7746 P

[2016 No. 126 COM]

DERMOT MURPHY, ERIC BRUNKER, ANTHONY KIDNEY, GABRIEL BYRNE AND STEPHEN HAMILTON all trading as THE FIRSTWOOD PARTNERSHIP

PLAINTIFFS

AND

LAUNCESTON PROPERTY FINANCE LIMITED

And by Order of the Court

STEPHEN TENNANT

DEFENDANTS

Judgment of Ms. Justice Kennedy delivered on the 10th day of February, 2017

1. The proceedings commenced by way of plenary summons dated 26th August, 2016 in which the plaintiffs seek a number of declaratory and injunctive reliefs. On the 5th October, 2016 the plaintiffs made an *ex parte* application to the High Court (O'Connor J.) seeking certain interim orders. Interim relief was granted to the plaintiffs restraining the second named defendant from taking possession of or otherwise taking steps on foot of a deed of appointment in respect of properties, the subject matter of these proceedings.

2. On 17th October, 2016, it was ordered, inter alia, that the proceedings be entered in the Commercial list and an undertaking was given by the plaintiffs through their counsel in open court:-

> *"That their servants or agents, will hold all rents and income generated by the secured properties in escrow pending the determination of the proceedings or until further order".*

The matter came before this Court for hearing on 3rd February, 2017 wherein the plaintiffs seek an interlocutory injunction pending the determination of these proceedings. This judgment is given following the hearing of the application for an interlocutory injunction.

Background

3. The first to fifth named plaintiffs are members of, and trade as, The Firstwood Partnership which was created in May, 2000 for the purpose of investing in and managing property and specifically to acquire the property the subject matter of these proceedings, being a multi-storey car park complex including office and retail units in Dublin 2.

4. In order to finance the purchase of the Property, monies were advanced by Anglo Irish Bank Corporation plc ("Anglo") to the partnership by Facility Letter dated 27th April, 2000, and a brief amendment letter issued in 2007. A Deed of Mortgage, Charge and Assignment was executed by the Partnership dated the 28th April 2000, ("the 2000 mortgage"). The original facility was amended and restated by facility letter dated the 15th September 2008 and a Deed of Mortgage, Charge and Assignment was executed dated the 24th September 2008 with the 2000 Mortgage remaining. An amortisation schedule was attached to the original facility and the 2008 facility.

5. The first named defendant purchased the rights of Irish Bank Resolution Corporation Limited ("IBRC") as successor to Anglo under the partnership's facility and attendant mortgages in and around March, 2014, the transfer taking effect on 23rd May, 2014.

6. On 20th May, 2016, the first named defendant wrote to the plaintiffs' agents (Glenrock Capital Ltd.) requiring that the plaintiffs pay all rent received from the property to the first named defendant pursuant to clause 13.1 of the 2008 facility. In that letter the first named defendant stated that a failure to remit the rent constituted an event of default as provided pursuant to clause 17.3 of the 2008 facility. The plaintiff was afforded 28 business days to do so otherwise the first named defendant stated that it would appoint a receiver over the property. By letter dated 27th September, 2016, the first named defendant issued a demand for full repayment in the sum of €6,702,497.31.

7. A receiver; the second named defendant, was subsequently appointed on 30th September, 2016 by Deed of Appointment.

The Issues

8. The plaintiffs contend as follows:

> (1) The agreements, when properly constructed shows that the true contractual obligation is to repay the debt in accordance with the amortisation schedule.
>
> (2) That having regard to the course of dealing between the parties for the purposes of the 2008 facility and the security being 2000 and 2008 mortgages, the repayment of the facility in accordance with the amortisation schedule constitutes full compliance.
>
> (3) Further and/or in the alternative and arising from the course of dealing between the parties the plaintiffs claim that the first named defendant is estopped from claiming that the 2008 facility is in default and consequently is estopped from appointing the second named defendant as receiver in circumstances where the plaintiffs are in full compliance with the amortisation schedule.

9. In support of its case, the plaintiffs rely upon communications between the plaintiffs and Anglo and its successors. This material is exhibited in the first affidavit of Ronan O'Byrne. The plaintiffs contend that on foot of these communications, it is clear that no representation was made to the partnership by Anglo or its successors that there was any failure to comply with the terms of the 2008 facility or that the loan was in default or that Anglo was reserving its rights in respect of the terms of the 2008 facility or seeking to rely on any non-waiver provisions in either the 2008 facility, the 2000 mortgage or the 2008 mortgage.

10. The plaintiff further relied upon two affidavits sworn by two former employees of Anglo, Mr. Murray who was employed by Anglo from 1988 until 2007 and Mr. Dowling who was employed by Anglo from 2004 to 2014. Both Mr. Murray and Mr. Dowling aver that Anglo would not have considered the 2008 facility to be in default.

11. In summary, the defendants submit that the first defendant has invoked a contractual entitlement requiring the plaintiffs to remit the rent from the secured properties in order for it to be applied towards their indebtedness. The defendants argue that a proper construction of the security documents only permits the conclusion that the plaintiffs are in default of the loan agreements. Further, that the course of dealing between the parties does not affect the defendants' entitlement to rely upon the wording of the security documents and that the plaintiffs' estoppel argument fails. The defendants say that the elements of estoppel; a representation, reliance and detriment are absent. They contend that a prior course of dealing cannot deprive the four written contracts; those being, the original facility, the 2000 mortgage, the 2008 facility and the 2008 mortgage of their plain and ordinary meaning. Further, that the plaintiffs have produced no evidence of an amendment of the terms; that there is no evidence to support an estoppel or a waiver and finally that the contracts expressly state that any failure to exercise a right does not operate as a waiver.

12. The defendants say that whilst the 2008 facility and 2008 mortgage largely mirror the original facility and the 2000 mortgage, that the 2008 mortgage goes further than the 2000 mortgage in that it specifically assigns the rental income from the property to Anglo. The defendants also contend that the amortisation schedule was a minimum requirement, notwithstanding that the word minimum is not reflected in the security documentation.

13. It should be noted for the purpose of this hearing that the following appears not to be in dispute:-

(i) The lending expires in 2020;

(ii) The loan is in good health;

(iii) The accepted valuation of the secure property as of November, 2014 is in the region of €13.55 million;

(iv) The outstanding debt is in the region of €6.7 million.

14. It was also accepted by the defendants during the course of submissions that the plaintiffs did not pay rent to Anglo and that Anglo acquiesced to that course of action.

15. The defendants contend that the affidavits from Mr. Murray and Mr. Dowling are inadmissible. I do not intend to determine this issue at this stage.

The Clauses

16. The various contractual provisions relied upon were opened to me and I do not intend to set them out at this juncture with the exception of the following clauses:-

(i) Clause 12.4 of the 2008 facility which provides that:

"the Borrower shall procure that all rents payable in respect of the Occupational Leases of the Property shall be paid directly by the Occupational Lessees to the Bank to be applied by the Bank in meeting the obligations of the Borrowers in accordance with para. 13.1 hereof".

(ii) Clause 17.1 of the 2008 facility:-

"the Borrowers fail to make repayments of principal in respect of the Facilities so as to reduce the outstanding balance in accordance with the Amortisation Schedule contained in the Schedule hereto or otherwise fail to repay all or any part of the principle in respect of the Facilities within seven Business Days of the due date".

The 2000 and the 2008 Facility each incorporate an Amortisation Schedule.

17. The plaintiffs submit as follows:

(i) That there is a fair question to be tried.

(ii) That damages are an inadequate remedy if t0he injunction is not granted and the plaintiffs ultimately succeed at trial.

(iii) That damages are an adequate remedy for the defendant should an injunction be granted and the defendants ultimately succeed at trial.

(iv) If the court is of the view that damages would not fully compensate either party the balance of convenience lies in granting the injunction and maintaining the status quo which has existed for circa the past sixteen years.

The legal principles

18. It is common case that the principles in respect of interlocutory injunctions are governed by the Supreme Court decision in *Campus Oil Limited and Ors. v. Minister for Industry and Ors. (no.2)* [1983] I.R. 88. These principles can be summarised as follows. The party seeking an injunction must show that there is a fair question to be tried, if so the court must then proceed to consider the adequacy of damages, if damages would not fully compensate either party, the court may then proceed to consider the balance of convenience and if all matters are equally balanced, the court should attempt to preserve the status quo.

19. An interlocutory injunction is granted to preserve the status quo pending a full determination of the issues in dispute. As such, it is temporary in nature and it is not a determination of the merits of the proceedings. The court must consider each step of the cumulative test as set out in Campus Oil and will only reach the point of assessment as to where the balance of convenience lies if the applicant has satisfied the court that damages would not be an adequate remedy. In approaching the issue as to the balance of convenience, this must be approached on the basis of attempting to achieve a solution which minimises the risk of injustice. Finally, the defendants have raised the issue of non disclosure and it is the case that if the duty of disclosure is not observed by an applicant in an application for interim relief, a court may then proceed to exercise its discretion to discharge the *ex parte* order and may refuse

the plaintiff any further reliefs.

A fair question to be tried
20. I have already briefly summarised the plaintiffs' and the defendants' position on this application. Firstly, as stated above, the plaintiffs assert that having regard to the course of dealing between the parties, repayment of the facility in accordance with the amortisation schedule constitutes full compliance with their obligations. In support of this argument the plaintiffs seek to rely on a series of communications between the plaintiffs and the parties, which the plaintiffs contend indicate an acceptance of the aforementioned situation. I do not intend to detail the correspondence at this juncture. It has been accepted by the defendants that no rental income was paid to Anglo or IBRC and that Anglo acquiesced to this course of conduct. The plaintiffs further rely on the affidavits of Mr. Murray and Mr. Dowling who aver that Anglo would not have considered the 2008 facility to be in default.

21. The defendants maintain that the contracts must be strictly construed and for the plaintiffs' argument to succeed certain clauses must in effect be ignored. Further, that it is not permissible for the plaintiffs to construe the 2008 facility by reference to the subsequent behaviour of the parties. The submission on behalf of the plaintiffs however, is that the various clauses are entirely subject to the course of dealing between the parties since the commencement of the original facility in 2000. It is submitted by the plaintiffs that the plaintiffs never arranged for the payment of rent to Anglo or IBRC and nor did Anglo or IBRC seek to require them to do so, with no account being set up into which this rental income could be paid.

22. The defendants rely upon the decision of McGovern J. in *Komady Limited v. Ulster Bank Ireland Limited* [2015] IEHC 314 in support of its contention that the plaintiffs cannot rely on the course of dealing, or an estoppel claim which they seek to make in these proceedings. The plaintiffs argue that the factual matrix in the instant case is entirely different to the factual matrix which applied in the *Komady* case and they rely upon the aforementioned correspondence between the parties which they say demonstrates a clear acceptance by Anglo and its successors of a course of dealings. They further rely on the averments in the affidavits of Mr. Dowling and Mr. Murray. Furthermore the plaintiffs argue, inter alia that the loan facility is not a demand facility; there was no requirement that accounts be opened, into which, the rents would be paid; that in Komady the plaintiffs did not adduce any material demonstrating a waiver on the part of the lender. In the instant case affidavits have been sworn by two individuals who were employees of Anglo during a substantial period of the relevant time. As regards the reservation of rights issue, the defendants assert that a reservation of rights letter was sent to the plaintiffs by Anglo on 12th July, 2011. However, it is submitted on behalf of the plaintiffs that they did not receive this letter and that the only version of this letter produced by the defendants is an unsigned copy which has been categorised as a draft document. There is therefore a conflict as regards this particular matter which is not for resolution at this stage of the proceedings. The defendants furnished a letter from Pepper Finance Corporation (Ireland) Limited (its agent) dated 3rd October, 2014 seeking to reserve its rights.

23. Whilst the plaintiffs properly accept the principles applicable to the construction of contracts, they argue that such principles must be applied in the appropriate context and that this is subject to the agreed course of dealings between the parties as established on the evidence.

The Estoppel Argument
24. In the instant case the plaintiffs further contend that arising from the course of dealing between the parties, the defendants are estopped from claiming that the 2008 facility is in default and from appointing Mr. Tennant as receiver. In this regard the plaintiffs place a heavy emphasis upon the decision of Charleton J. in *National Asset Management Agency v. McMahon and Ors.* [2014] IEHC 71 wherein the law of estoppel in this jurisdiction was considered in detail. Charleton J. said the following:-

> *"Estoppel can arise pursuant to an oral or written representation, and that is the normal situation. It can also arise by virtue of an assumption, perhaps tacit, shared by parties. In that instance, however, there must be conduct which establishes an objective state of affairs whereby the party otherwise bound by the legal relations is placed in circumstances whereby it is understood that a new state of affairs governs the relations between the parties. This clearly requires some action or behaviour or representation by the party who is to be bound by the new state of affairs. People cannot just jump to conclusions that matters must be so, with no foundation in the behaviour of the party whose rights in law are to be estopped, and then claim what is in essence an altered state of obligation. Estoppel is not based on bare assumption. Estoppel is based either on representations or on situations of behaviour that, reasonably construed, clearly withdraw or alter the strictures of legal obligations in such a way that it would be unfair to later enforce these. Where the matter is one of representation, it should be easy to identify the legal term supposedly altered and the representation directed in this regard. Where it is a matter of both parties proceeding on the basis of a common understanding, the mutual convention of the parties may suffice as a foundation for estoppel. If it is so, it is because of that common understanding. In Treitel's The Law of Contract, 13th Ed. (London, 2011) at 3.094 the learned editor sets out the law thus:*
>
> > 'Estoppel by convention may arise where both parties to a transaction "act on an assumed state of fact or law, the assumption being either shared by both or made by one and acquiesced in by the other". The parties are then precluded from denying the truth of that assumption, if it would be unjust or "unconscionable" to allow them (or one of them) to go back on it. Such an estoppel differs from estoppel by representation and from promissory estoppel in that it does not depend on any "clear and unequivocal" representation or promise. It can arise where the assumption was based on a mistake spontaneously made by the party relying on it, and acquiesced in by the other party, though the common assumption of the parties, objectively assessed, must itself be "unambiguous and unequivocal".'"

25. The plaintiffs submit that an estoppel by convention arises in the instant case as a result of the course of dealing between the parties, which when objectively assessed, leads to the "unambiguous and unequivocal" conclusion that there is compliance with the 2008 facility following the repayment in accordance with the amortisation schedule. A party cannot rely on an estoppel by convention, on foot of a simple empty assumption made by a party. The plaintiffs clearly contend in this instance that the plaintiffs are not moving on a bare assumption but on a course of dealings over a considerable number of years by the relevant parties.

26. It is necessary for the moving party to demonstrate that there is a fair question to be tried. This is the threshold criterion in considering an application for injunctive relief. Each case must of course be considered on its own facts. I am satisfied that the plaintiffs have demonstrated that there is a fair question to be tried.

Adequacy of Damages
27. On this aspect of matters, I must assess as to whether the plaintiffs will be adequately compensated by an award of damages for any loss suffered between the hearing of this injunction and the trial of the action, if the injunction is not granted and in the event that the plaintiffs ultimately succeed at trial. If damages would be an adequate remedy, then the interlocutory injunction must be

refused. This, of course, is subject to the proviso that the defendants would be in a position to pay such damages. I am satisfied that the defendants would be able to meet an award of damages.

28. In the instant case, it is contended by the plaintiffs that damages would be extremely difficult to quantify. It is averred in the second affidavit of Mr. O'Byrne that:-

> *"The asset is a pension type investment of considerable quality, with scope for further development and for significant price appreciation. Measuring the value of the plaintiffs' loss on the determination of the plenary action is not only an extremely difficult if not impossible task, it deprives the plaintiffs of the opportunity to sell the asset at a time of their choosing…"*

It is the position in accordance with the Supreme Court decision of *Curust Financial Services Limited v. Loewe-Lack-Werk* [1994] 1 I.R. 450 that a difficulty as opposed to an impossibility should not lead a court to a conclusion that damages are an adequate remedy. The plaintiffs argue that the repayment is to be made on foot of the 2008 facility by April, 2020. They argue, therefore, that there is a limited time period between the hearing of the plenary action in these proceedings and that date. In addition, that the property is a particularly high quality asset and that it cannot be asserted with any confidence that a similar type of asset could be acquired by the plaintiffs and, therefore, the plaintiffs would be denied continued ownership of an asset and the opportunity to benefit from it.

29. Reliance is placed by the plaintiffs upon the decision of Barrett J. in *Bainne Alainn Limited v. Glanbia PLC* [2014] IEHC 482 where, on considering the issue as to when it will be impossible to measure damages in the context of the *Curust* decision, he set out three categories the third being the most apposite in my mind to this case where he stated:-

> *"The third is where the alleged loss can conceivably be reduced to damages but where the quantification of these damages is not capable of reasonably precise estimates. In the last regard, nothing is impossible to an accountant or an actuary: if asked to quantify a loss he or she will do so but such estimates may and sometimes will be little more than informed guesswork. In other words one will reach a point where it is possible still to quantify the amount of damages but impossible to do so with any meaningful accuracy."*

Having considered the submissions made on behalf of the plaintiffs and taking into account that the partnership is entirely solvent, I am satisfied that damages would not be an adequate remedy for the plaintiffs.

30. In those circumstances it is necessary to decide whether damages would be an adequate remedy to the defendants should the plaintiffs obtain injunctive relief but fail at the trial of the action. I am satisfied that the plaintiffs would be in a position to pay such damages in the event of such a situation arising.

31. It is contended by the plaintiffs in this regard that the defendants' interest is in obtaining immediate repayment of the principal balance outstanding on the 2008 facility. Therefore, the plaintiffs argue that damages are an entirely adequate remedy in such circumstance. Furthermore it is submitted that any damages incurred by the defendants are easily quantifiable, being the differential between the ultimate sale price pending the determination of the proceedings and the remaining outstanding balance on the 2008 facility. The security is twice the outstanding value of the loan.

32. In light of the fact that the partnership is solvent and having regard to the aforementioned matters, I am satisfied that damages would be an adequate remedy for the defendants. Therefore, I propose to grant the injunctive relief sought.

Balance of Convenience

33. Nonetheless, I have also considered the balance of convenience in the instant case. It is the position that I must approach this issue on the basis of trying to achieve a solution which minimises the risk of injustice. It appears to me on a consideration of the evidence and the submissions made, that the balance of convenience favours maintaining the status quo and that, in the circumstances, the injunctive relief should be granted.

The allegation of material non-disclosure at the *ex parte* hearing

34. Allegations of non-disclosure have been made by the defendants in respect of the plaintiff in the conduct of the *ex parte* application for interim relief. The defendants refer to the transcript of the proceedings on the 5th October, 2015 and in particular to the undisputed fact that there was no disclosure by the plaintiffs that the plaintiffs had, two days prior to the interim application, received a payment of rental income in the region of €230,000. The argument put forward by the defence in oral submission varied somewhat from the argument set forward in written submission on this point. In effect the defendants argued that two days prior to the application for interim relief the plaintiffs had received a rental payment, of in and around, €230,000. This rent was paid on the first day of every quarter and therefore the rent was not due again for another three months. The application for interim relief was moved on the basis of urgency as is the norm in this type of situation but, the defendants argue, there cannot have been any urgency that the plaintiffs would lose the rental income because it had already been paid. This was the thrust of the defendants' submission. It is important to look at the timeline in relation to the rental arrangement. The rental payment fell due on the first day of every quarter and was therefore paid on 1st October, 2016, the plaintiffs became aware of the deed of appointment on 4th October, 2016 and the application was moved on the Wednesday, 5th October, 2016. Therefore, the rental income was received before the plaintiffs became aware that a receiver had been appointed.

35. In the course of the application for interim relief it was indicated to the court through counsel for the plaintiffs that the receiver could seek to collect the rent and therefore alter the practice of the preceding sixteen years.

36. In *Bambrick v. Cobley* [2005] IEHC 43, having reviewed the relevant authorities, Clarke J. distilled the factors that the court should consider in deciding whether to exercise its discretion to set aside an *ex parte* order in the event of a material non-disclosure and he set them out as follows:-

> *"1. The materiality of the facts not disclosed.*
>
> *2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless, significantly culpable in failing to disclose.*

3. The overall circumstances of the case which lead to the application in the first place."

I consider the following to be relevant:-

(i) In the affidavit of Ronan O'Byrne, his concluding averments do not make any reference to a concern regarding the collection of rents.

(ii) On a consideration of the transcript dated 5th October, 2016, the first concern voiced by Mr. Fanning S.C. on behalf of the plaintiffs was that the receiver would conduct an overnight sale which would be hugely detrimental in his submission to the members of the partnership. The reference to a concern regarding the rents comes about in the latter stages of the application.

It is indeed the position that parties must be scrupulous in ensuring accuracy in all applications and this is of particular moment in an application for interim relief. I am not satisfied that the failure to disclose that rental income had been received amounts to a material fact. The rental income received seems to me to be pertinent only towards the urgency of the application. The real concern was the possibility of the sale of the secured properties.

Conclusion

37. On the basis of the undertaking as to damages I will grant an order in terms of paragraph 1 of the notice of motion.

38. I do not see that it is necessary that the undertakings as given to McGovern J. continue, that is, that the rents and income generated by the secured properties be held in escrow pending the determination of the proceedings or until further order. The market value of the secured property is twice the value of the outstanding debt. The debt continues to be paid.