Neutral Citation No. [2010] IEHC 162

THE HIGH COURT

2009 10071 P

BETWEEN

MOYLIST CONSTRUCTION LIMITED

PLAINTIFF

AND

THOMAS DOHENY, DELOITTE & TOUCHE, ULSTER BANK LIMITED AND TOM O'CARROLL

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 21st day of April, 2010.

The background

1. The fourth defendant in these proceedings is the owner of a development site comprising eighteen holiday homes known as The Greens at Ballybunion, County Kerry, to which I will refer as "the development". The development is registered on Folio 3855F of the Register of Freeholders County Kerry. The fourth defendant has been registered as owner on the Folio since 29th November, 2006.

2. By a mortgage dated 21st June, 2006 made between the fourth defendant of the one part and the third defendant of the other part (the mortgage), which was an "all sums" mortgage, the fourth defendant charged the lands registered on Folio 3855F in favour of the third defendant. The charge was registered as a charge for present and future advances repayable with interest as a burden on Folio 3855F on 27th February, 2008 and the third defendant was registered as owner of the charge. While there was no express power to appoint a receiver in the mortgage, the statutory power under s. 19 of the Conveyancing Act 1881 applied and by virtue of clause 8 was exercisable at any time after demand. It was provided in clause 11 that any receiver appointed might enter and manage the development and provide services and carry out repairs and suchlike. It was provided in clause 12 that any receiver appointed should be deemed to be the agent of the fourth defendant and the fourth defendant should be solely responsible for the receiver's acts or defaults and for his remuneration.

3. After the mortgage was created, by a building agreement dated 31st July, 2006 (the building agreement), which was in the standard form published by R.I.A.I., the plaintiff contracted to execute and complete the works involved in the construction of the eighteen holiday homes with associated site development and ancillary works (the Works) on the development at a contract price of €2.672m. The provisions of the building agreement which were adverted to at the hearing and their effect were the following:

(a) Clause 2 defined the scope of the contract and the plaintiff's obligation to carry out and complete the Works.

(b) Clause 28, in conjunction with the Appendix, provided that possession of the development would be given to the plaintiff on 1st August, 2006 and that the plaintiff would thereupon begin the Works and regularly proceed with and complete same on or before 28th August, 2007, subject nevertheless to provisions for extension of time contained in the building agreement.

(c) Clause 30 dealt with delay and extension of time. It provided that, if the Works were delayed by reason of certain factors listed in Clause 30, the Architect (identified in the Articles of Agreement) should make a fair and reasonable extension of time for completion of the Works. The factors listed ranged from force majeure and strike to any act or default of the fourth defendant causing delay in the progress of the works.

(d) Clauses 33 and 34 provided for determination of the building agreement by the fourth defendant and the plaintiff respectively. The plaintiff's position is that neither party has invoked his or its termination provision. However, counsel for the plaintiff has placed emphasis on the provisions of Clause 34, namely,:

(i) on paragraph (a) of Clause 34 which provided:

"If the [fourth defendant] does not pay the [plaintiff] within the period for honouring certificates … the [plaintiff] after five working days notice to the [fourth defendant] may suspend the Works for a period of ten working days and upon the expiry of this period unless payment shall have been made in the meantime may determine his own employment under this Contract as from the date of such expiry. When work is suspended under this provision the time for completion shall be extended by two working days for each working day of each suspension."

(ii) on the proviso to paragraph (b) of Clause 34, which is in the following terms:

"Provided that in addition to all other remedies the [plaintiff] upon the said determination may take possession of and shall have a lien upon all unfixed materials and goods intended for the Works which may have become the property of the [fourth defendant] under [the building agreement] until payment of all money due to the [plaintiff] from the [fourth defendant]."

While, in accordance with paragraph (b) of Clause 34 that lien would arise, inter alia, where a receiver is appointed over the assets of the fourth defendant, and that situation has arisen here, the lien only relates to "unfixed materials and goods", not to the structures and apparatus which have been affixed to the site of the development.

(e) Clause 35(a)(i) provided for the setting up of a "Guaranty Account" in a bank to be named in the Appendix to the building agreement for the protection of the plaintiff. However, the Appendix makes it clear that this provision was not

applicable.

4. The third defendant demanded repayment of the monies secured by the mortgage, which aggregated €3.637m at the time, by letter dated 14th October, 2009. On 15th October, 2009 the fourth defendant appointed the first defendant to be receiver and manager of all the undertaking, property and assets whatsoever and wheresoever charged by the mortgage, so that he would have the powers conferred on a receiver and manager by the mortgage and by law. It was expressly provided that the first defendant, in accordance with the terms of the mortgage, would be the agent of the fourth defendant and that the fourth defendant should be responsible for his remuneration. By a separate deed, the third defendant appointed the first defendant as its agent of all the undertaking, property and assets whatsoever and wheresoever charged by the mortgage, so that he should have the powers conferred on the bank as mortgagee under the mortgage and at law including power to enter and take possession of the property the subject of the mortgage.

5. On the evening of his appointment, the first defendant took possession of, and effectively secured, the development. That move, and, indeed, the appointment of the first defendant as receiver, was instigated by information given by the plaintiff to the agents of the third defendant that it was the intention of sub-contractors to enter on the development to re-possess items which had been supplied by them, apparently, under retention of title clauses. In these proceedings, in an affidavit sworn on 11th December, 2009, the plaintiff has acknowledged that he "misrepresented" the position that his sub-contractors were threatening to remove materials from the development.

6. By the time the first defendant was appointed as receiver, the position on the ground, according to the first and third defendants, was that the eighteen holiday homes were to all intents and purposes completed, although the plaintiff's position is that the Works had not been completed under the building agreement. The plaintiff had suspended work on the development as of 21st December, 2007 until outstanding payments due to it had been made. On 14th April, 2008 the plaintiff issued a summary summons in this Court (Record No. 2008/845S) against the fourth defendant claiming payment of €328,297.88, being the balance of monies due and owing by the fourth defendant to the plaintiff in respect of works done and services rendered. Around the beginning of November 2009 the plaintiff brought a motion in the summary proceedings seeking liberty to enter final judgment against the fourth defendant. It appears from an affidavit sworn on 2nd November, 2009 by Michael Mulvihill, the Managing Director of the plaintiff, to ground the motion for judgment, that the plaintiff invoked Clause 34(a) in suspending the work. On the motion the plaintiff claims the higher sum of €332,579.32 which it is claimed is the amount owing by the fourth defendant to the plaintiff.

The proceedings

7. Against that background these proceedings were initiated by a plenary summons which issued on 9th November, 2009. The statement of claim was delivered on 3rd December, 2009. The case pleaded by the plaintiff against the defendants is as follows:

> (a) that the first and second defendants have been appointed "as the Receiver" on foot of the mortgage and have unlawfully entered the development as trespassers and secured the same, thereby expelling the plaintiff, by reason of trespass and of waste the plaintiff has suffered loss and damage;
>
> (b) that the trespass was "instructed by" or "colluded in" by the third defendant and the fourth defendant as a result of which the third defendant and the fourth defendant "are also guilty of trespass and waste" and conspiracy to commit trespass and waste, by reason of which the plaintiff has suffered loss and damage;
>
> (c) that the first, second and third defendants induced the fourth defendant to commit a breach of contract, namely, the unlawful taking back of the development and the breach of the plaintiff's contractual licence to remain on the development until the completion of the Works and/or any lawful termination of the building agreement, it being pleaded that -;
>
> (i) the Works have not been completed, and
>
> (ii) the building agreement has not been terminated and the plaintiff has not operated Clause 34(b),
>
> so that the building agreement still subsists and the plaintiff is entitled to continue to possess the development until completion of the Works.
>
> (d) that there is €328,297.88 due and owing to the plaintiff by the fourth defendant pursuant to architect's/surveyor's Recommendations;
>
> (e) that the fourth defendant, in breach of Clause 35(a)(i) failed to comply with the provisions in relation to the guarantee account; and
>
> (f) that "as the funder" of the building agreement, which characterisation, apparently, is based on Clause 35 of the building agreement, the third defendant owed a duty of care to the plaintiff to ensure that the fourth defendant complied with the terms and conditions of the building agreement, but, in breach of that duty of care, failed to ensure that the fourth defendant established the guarantee account and further the third defendant was in breach of its duty of care by failing to ensure that the plaintiff continued in possession of the development until the completion of the works, which the plaintiff alleges have not been completed.

Arising out of the foregoing pleas, the plaintiff claims the following relief in the statement of claim:

> *(I) an order that the defendants forthwith relinquish possession of the development to the plaintiff;*
>
> *(II) an order restraining the defendants from removing, selling or in any other manner interfering with all goods, materials and equipment situated on the development whether attached to the same or otherwise;*
>
> *(III) an order restraining the defendants from in any way restricting or interfering with the plaintiff's access to the development, its contractual licence to exclusive possession thereof or any other rights under the building agreement in respect of the construction of the works;*
>
> *(IV) as against the first and second defendants, an order for payment of the sum of €328,297.88 and interest forthwith;*
>
> *(V) a declaration that the sums owed to the plaintiff by the defendants rank in advance in equity of any mortgage*

proved by the defendants to exist;

(VI) damages;

(VII) judgment in the sum of €328,297.88 against all four defendants; and

(VIII) interest

8. The second defendant is the accountancy firm by which the first defendant is employed and of which the first defendant is a director, but not a partner. It is unquestionably the case that the first defendant was appointed as sole receiver of the property the subject of the mortgage by the third defendant and as sole agent for the third defendant, although he was identified in both deeds of appointment by reference to the second defendant's firm. The joinder of the firm as a defendant is these proceedings, in my view, is totally misconceived.

The applications
9. There are three applications before the Court.

10. Chronologically, the first is the plaintiff's application for interlocutory relief on foot of a notice of motion filed on 12th November, 2009. The interlocutory relief sought by the plaintiff against the defendants is interlocutory relief in the terms of the injunctive relief set out in the prayer in the statement of claim. The plaintiff also seeks an order against the first and second defendants for the payment of the sum of €328,297.088. That order would not be an appropriate order to make on an interlocutory application. Similarly, the declaration sought by the plaintiff that the sums owed to the plaintiff rank in advance in equity of any mortgage proved by the defendants to exist, is not an appropriate relief to seek on an interlocutory application. Therefore, consideration of the interlocutory application will be confined to consideration of the injunctive relief claimed by the plaintiff.

11. The Court was informed that the plaintiff's motion has not been served on the fourth defendant. Accordingly, the plaintiff's application falls to be considered as against the first, second and third defendants only.

12. The second application is the application of the first and second defendants for the following orders:

(a) pursuant to Order 19, rule 28 of the Rules of the Superior Courts striking out the statement of claim insofar as it relates to these defendants on the ground that it discloses no reasonable cause of action and/or staying or dismissing the proceedings against these defendants on the basis that the same were frivolous and vexatious;

(b) an order pursuant to the inherent jurisdiction of the Court striking out the proceedings as against these defendants on the basis that they are unsustainable and bound to fail and/or are frivolous and vexatious.

The application of the first and second defendants was brought on foot of a notice of motion dated 8th December, 2009.

13. As I have already indicated, I consider the joinder of the second defendant in these proceedings to be totally misconceived. As early as 20th November, 2009, the solicitors for the first and second defendants, Arthur Cox, wrote to the plaintiff's solicitors advising them that it was the first defendant who was appointed as receiver and agent by the third defendant and enclosing copies of the relevant deeds. In the same letter the plaintiff was informed that the first defendant is not a partner of the second defendant. The continuance of the proceedings against the second defendant, in my view, was an abuse of process from that point on. I consider that the plaintiff's claims against the second defendant must be struck out under the Court's inherent jurisdiction.

14. The third application is the application of the third defendant, on foot of a notice of motion of 30th November, 2009, seeking to strike out the claims against the third defendant either under Order 19, rule 28 or the Court's inherent jurisdiction.

15. I propose to consider the applications in the following order: the plaintiff's application first; then the application of the first and second defendants; and finally the application of the third defendant. That seems to me to be the logical order in which to consider the applications. However, I propose first analysing the plaintiff's case as to its current status under the building agreement and vis-à-vis the first and third defendants.

Analysis of the plaintiff's case
16. As I understand the plaintiff's case against the first defendant, the receiver, and the third defendant, the mortgagee which appointed the first defendant as receiver, it is based on two propositions. The first is that under the building agreement the plaintiff has a contractual licence to remain in possession of the development until it comes to an end when the Works are completed. The Works have not been completed and, accordingly, vis-à-vis the fourth defendant, the plaintiff is entitled to remain in possession until it is paid the balance of the monies due to it by the fourth defendant. It is not clear that the plaintiff was at any stage, or is, committed to completing the Works it contends remain unfinished, if the balance of the monies alleged to be owing by the fourth defendant are paid. The second proposition is that neither the first defendant, as receiver, nor the third defendant, as mortgagee, can be in any better position than the fourth defendant.

17. In support of the first proposition, counsel for the plaintiff relied entirely on the decision of the High Court of England and Wales in Hounslow L.B.C. v. Twickenham G. D. Ltd. [1971] 1 Ch. 233, which it is necessary to consider in detail. In that case, the plaintiff council, which had entered into a building contract with the defendant contractors, was relying on a clause in the building contract which provided that, if the contractors made default by failing to proceed regularly and diligently with the works, the architects could give notice specifying the default and, if the contractors continued such default for fourteen days thereafter, could give notice to determine their employment, but such notice was not to be given unreasonably or vexatiously. The works were beset by industrial relations problems which gave rise to delays. After the works had resumed the condition in the contract was invoked by the council. At the end of the fourteen day notice period, the council, on the basis that the contractors had failed to proceed with the works regularly and diligently purported to determine the contractors' employment. The contractors refused to accept what they called "repudiation" of the contract and elected to proceed with the work on the site. The council issued a writ claiming against the contractors damages for trespass in failing to vacate the site and an injunction to restrain trespass. They also sought an interlocutory injunction restraining the contractors from entering on the site pending judgment. A number of issues were raised by the contractors in that case which do not arise on the plaintiff's argument here, for example, a challenge to the validity of the architect's notice and an argument that the contractors had a licence coupled with an interest. The plaintiff's argument as I understand it is based on the consideration by Megarry J. of the effect of a contractual licence created in a building agreement.

18. On that point, counsel for the plaintiff relied on the following passage from the judgment of Megarry J. (at p. 247):

> *"Quite apart, then, from the question whether the contractor has a licence coupled with an interest, there is the question whether the contractor has a contractual licence which either expressly or by implication is subject to a negative obligation by the borough not to revoke it. If this is so, then, on the law laid down by the Court of Appeal, equity would interfere to prevent the borough from revoking the licence or if it had been revoked, from acting on the revocation. A fortiori, equity would refuse to grant the borough an injunction to enforce the revocation.*
>
> *Now in this case the contract is one for the execution of specified works on the site during a specified period which is still running. The contract confers on each party specified rights on specified events to determine the employment of the contractor under the contract. In those circumstances, I think there must be at least an implied negative obligation of the borough not to revoke any licence (otherwise than in accordance with the contract) while the period is still running, …. "*

19. Later, Megarry J. (at p. 248) emphasised the fact that the plaintiff council was seeking equitable relief, namely, an injunction to expel what on one view might be a trespasser and another view might be someone with a contractual right to remain, and on the latter view the council was asking the Court to assist it in breaking its contract. Megarry J. stated the general principle that equity will not assist a man to break a contract. Accordingly, he concluded that, if the council had not validly determined the employment of the contractors under the condition in issue, one of the grounds on which the contractors could resist an injunction to leave the site was that the council was seeking to evict in breach of contract.

20. There was another ground on which it was sought to resist the injunction: that the contractors had a licence coupled with an interest. In the consideration of that ground, Megarry J. "broadly" summarised the position in relation to contractual licences as follows (at p. 254):

> *"(1) A licence to enter land is a contractual licence if it is conferred by a contract; it is immaterial whether the right to enter the land is for the primary purpose of the contract or is merely secondary. (2) A contractual licence is not an entity distinct from the contract which brings it into being, but merely one of the provisions of that contract. (3) The willingness of the court to grant equitable remedies in order to enforce or support a contractual licence depends on whether or not the licence is specifically enforceable. (4) But even if a contractual licence is not specifically enforceable, the court will not grant equitable remedies in order to procure or aid a breach of licence."*

Megarry J. made further observations elaborating on that summary. Of significance for present purposes is that later (at p. 254) he stated:

> *"… I find it difficult to see how a contractual licensee can be treated as a trespasser so long as his contract entitles him to be on the land; and this is so whether or not his contact is specifically enforceable. I do not think that the licence can be detached from the contract, as it were, and separately revoked; the licensee is on the land by contractual right, and not as a trespasser. I may add that I say nothing about the rights of licensees against third parties."*

21. The outcome of the Hounslow case, that the council was refused the interlocutory injunction, occurred because Megarry J. considered that, although the council had established some sort of a case for having validly determined the contract, that case fell "considerably short of any standard upon which … it would be safe to grant this injunction on motion". The case pre-dated the decision in the House of Lords in American Cyanamid v. Ethicon Ltd. [1975] AC 396. The principles and standard applied by Megarry J. in determining whether an interlocutory injunction should be granted are at variance with the principles and standard laid down by the House of Lords and adopted in this jurisdiction by the Supreme Court in Campus Oil Ltd. v. Minister for Industry and Energy (No. 2) [1983] I.R. 88. Therefore, the outcome of the Hounslow case is of no assistance in determining the issues on the plaintiff's application.

22. Insofar as it is of precedential value on the broader issue of the status of the contractual licence which arose under the building agreement, as I will demonstrate later, there is an inherent unreality in attempting to apply the ratio of the aspect of the Hounslow decision relied on by the plaintiff. If it were to be applied, the questions which would arise are whether, in relation to the current contractual position of the plaintiff and the fourth defendant under the building agreement, the plaintiff's contractual licence still subsists and is subject to a negative obligation (implied, given that there is no express provision in the building agreement) that the fourth defendant will not revoke the licence except in accordance with the building agreement and whether the fourth defendant is in breach of that obligation. In addressing the first question, the Court is being invited to assume that the following propositions advanced on behalf of the plaintiff are correct at this interlocutory stage in the proceedings:

> *(a) that the expiration of the period for completion stipulated in the building agreement on 28th August, 2007 is immaterial;*
>
> *(b) that the Works have not been completed;*
>
> *(c) that the fourth defendant has not yet determined the building agreement in accordance with its terms;*
>
> *(d) that in December 2007 the plaintiff validly suspended the Works in accordance with Clause 34(a) and that the fourth defendant did not make payment as required under that clause; and*
>
> *(e) that the plaintiff has not determined the building agreement either under Clause 34(a) or Clause 34(b).*

23. The essence of the plaintiff's case is that, having invoked Clause 34(a) and not having received payment from the fourth defendant, the plaintiff can continue the suspension of the Works and remain on the development in accordance with its contractual licence indefinitely, if it is not paid the sums due to it. As counsel for the plaintiff put it, time has been put at large by the suspension. The plaintiff's case is that while the suspension continues, the licence subsists and cannot be determined in accordance with the building agreement by the fourth defendant, who, in any event, is not before the Court on these applications.

24. The unreality inherent in attempting to apply the decision in the Hounslow case in the manner suggested by counsel for the plaintiff is that, in a situation analogous to the situation which arose in the Hounslow case, the fourth defendant would be seeking an injunction against the plaintiff on the basis that determination of the contractual licence had occurred. In that hypothetical situation, it defies reason and common sense to assume that the fourth defendant would sit back and regard the plaintiff's licence as continuing indefinitely. It is reasonable to assume that there would be a dispute between the plaintiff and the fourth defendant as to whether there had been a valid determination of the licence in accordance with the terms of the building agreement and that the fourth defendant would be seeking to have the dispute determined either in the proceedings in which he was seeking an interlocutory

injunction or on arbitration. All of that is hypothetical. However, if it were to happen, the likelihood is that, in accordance with the principles laid down in the American Cyanamid case the Court would grant the injunction to the fourth defendant on the basis that the balance of convenience favoured that course.

25. That is what happened in Tara Civil Engineering Ltd. v. Moorfield Developments Ltd. (1989) 46 BLR 72, a decision of the Queen's Bench Division of the English High Court, which counsel for the plaintiff brought to the Court's attention. In that case, the employer served a notice on the contractor condemning certain works and notified the contractor that it intended to expel it from the site. The contractor obtained an ex parte injunction restraining the employer from removing it from the site pending the determination by arbitration as to whether the termination of the contract was effective. The interim order was discharged on the application of the employer. Referring to a submission based on the decision of Megarry J. in the Hounslow case, Judge Bowsher Q.C. stated:

> *"As I understand the submission [of counsel for the plaintiff], it is said that until the arbitrator has determined the disputed facts it is to be assumed that Tara Civil Engineering Limited is not in breach of contract and that it would be wrong for the court to assist Moorfield Developments Limited to break the contract by putting Tara Civil Engineering Limited off the site and preventing them from performing the contract. I am not at all sure that that is what Megarry J. decided, but if that was his decision, it seems to me to disregard the agreement of the parties as to what should be done between a dispute arising and the determination of that dispute by an arbitrator. At this stage there is no intention by the court to take sides in the determination of the ultimate disputes between the parties. The concern of the court is far from seeking to assist either party to break the contract. It is impossible to decide at this stage what is the conduct which would be in breach of the substantive terms of the contract. The court's present concern is to enforce the terms of the contract with regard only to the matters presently under consideration, namely, the regulation of the conduct of the parties pending the resolution of the substantive dispute by arbitration."*

26. As I have said, in my view, there is an unreality in attempting to apply the ratio of the aspect of the Hounslow case relied on by the plaintiff to the situation which prevails here. What might happen if the fourth defendant took an active position in relation to the status of the contractual licence is wholly hypothetical. The most important factor, of course, is that, as the fourth defendant is not before the Court, it would be inappropriate to reach any conclusion as to the current status of the contractual licence as between the plaintiff and the fourth defendant. Therefore, it seems to me that, when one proceeds to the second proposition advanced on behalf of the plaintiff, it must be approached in the abstract, in the sense of not having reached any conclusion in relation to the contractual position of the plaintiff vis-à-vis the fourth defendant.

27. The essence of the second proposition is that, if the contractual licence of the plaintiff is ongoing and the fourth defendant could not oust it from the development, the first defendant, as receiver, can have no better rights against the plaintiff whether he is acting as agent for the third defendant or as agent for the fourth defendant. Counsel for the plaintiff asserted that the rights of the third defendant under the mortgage do not have priority over the rights of the plaintiff under the building agreement, even though the mortgage was first in time, because the mortgage was not registered on the folio until after the building agreement came into existence. Apart from that, it was submitted that the third defendant knew that the fourth defendant was entering into a standard form building agreement when it advanced money to the fourth defendant and took the mortgage. Therefore, in equity, the third defendant's rights under the mortgage and the first defendant's right to possession are in suspension until the building agreement properly comes to an end either by completion or proper determination. It was also submitted that, even if the mortgage is regarded as the first in time, that is not sufficient to entitle the first defendant, as receiver, to possession because the lands changed in character after the creation of the mortgage by reason of the construction of the holiday homes.

28. Those submissions were made against the backdrop of the stated position of the plaintiff being that it has no objection to the appointment of the first defendant as receiver and is not seeking the termination of the appointment of the first defendant as receiver. The plaintiff's complaint is as to the manner in which the receiver has acted in taking possession of the development.

29. The proposition that the first defendant, as receiver, appointed under the mortgage, is in no better position in relation to the implementation of the building agreement than the fourth defendant, is based on the premise that the first defendant, in that capacity, is bound by the building agreement. That premise, in my view, is incorrect.

30. Most of the authorities dealing with the liability of a receiver relate to situations in which the receiver was appointed by a company, rather than by a natural person. However, I am satisfied that the position of the first defendant, as a receiver appointed on foot of the mortgage, which was given to the third defendant by the fourth defendant, a natural person, rather than by a company, is no different than if the mortgagor in the mortgage had been a company. In Courtney on the Law of Private Companies (2nd Ed., Tottel Publishing, 2000) the position of a receiver is outlined as follows (at para. 22.063):

"A receiver will not as a general rule, in the absence of bad faith, while acting within his authority be liable for a breach of contract by the company, nor be guilty of inducing a breach of contract."

In support of that proposition, Courtney cites a decision of the Queen's Bench Division of the High Court of England and Wales in Lathia v. Dronsfield Bros. Ltd. [1987] BCLC 321. There, the first defendant company had contracted to supply the plaintiff with equipment. On the failure of the first defendant to deliver the equipment, the plaintiff commenced an action for breach of contract and joined the second and third defendants, who had been appointed receivers and managers of the first defendant, claiming damages from them for inducing a breach of the contract to supply. An application by the second and third defendants to strike out the action against them on the ground that the statement of claim showed no reasonable cause of action was successful. Delivering judgment, Sir Neil Lawson stated as follows (at p. 324):

> *"The receivers can adopt or decline to adopt a contract which the company has entered into and which is unexecuted. It follows from this, and the agency clause, that the agent is personally immune from claims for damages for breach of contract or procurement of breach of contract. The agent has an immunity from a claim for inducing breach of contract unless he has not acted bona fide or acted outside of the scope of his authority, i.e. he has not acted as agent.*
>
> *… So far as the authority is concerned, the authority of the receivers is to be found under cl 8 of the debenture. Furthermore their authority resides on a general obligation to act so as to effect the best realisation of the company's assets for the debenture holders.*
>
> *On authority, one must look at the context to determine to whom the duties are owed. Primarily, they owe a duty to the debenture holders, and also as agents of the company. In my judgment, they do not owe a duty to the general creditors, to contributors, to officers of the company and members."*

31. A similar view was adopted in this jurisdiction in Ardmore Studios (Ireland) Ltd. v. Lynch [1965] I.R. 1. The decision of the High Court (McLoughlin J.) in that case arose in the context of an industrial relations dispute, where the receiver and manager of the plaintiff company had refused to recruit electricians from a seniority list in accordance with an alleged agreement between the company and a trade union, which pre-dated the appointment of the receiver. The Court held that, even if the alleged agreement between the company and the union was in existence at the date of the appointment of the receiver, it was not binding upon him. McLoughlin J. stated (at p. 40) as follows:

"The defendants' arguments put most reliance on the clause in the debenture deed that the receiver is made the agent of the Company, but it should be pointed out that this does not make him the servant of the Company … As agent for the company, the company is made fully responsible for his acts but it is not a corollary to this that he is bound by all Company contracts and agreements entered into by the Company before the date of his appointment.

The mortgaged property of which the receiver entered into possession as defined by the deed includes also the property charged and assigned, i.e., all the undertaking and assets, machinery, book debts and goodwill; the argument of the defendants amounts to this: that he also took over, by operation of law, the obligations of the Company under the alleged agreement …

I have no hesitation in holding that there is no legal basis for their contention that the agreement as to the seniority list, even if it existed as an agreement on the date of the appointment of the receiver, became binding on him."

32. The position of receiver was also considered by the Chancery Division of the High Court of England and Wales in Astor Chemicals v. Synthetic Technology [1990] B.C.L.C. 1. Having quoted from Buckley on the Companies Acts (14th Ed., 1981), that a receiver appointed by a debenture holder is not under any personal liability on the company's contracts current at the date of his appointment, as they are not his contracts and as between himself and the other parties he has an undoubted right to decline to fulfil them, although in so doing may render the company liable in damages for breach, Vinelott J. stated (at p. 9):

> *"To that extent the receiver is in a better position than the company. Similar statements will be found in other leading textbooks. The principles are most fully stated in a passage in Lightman and Moss in Law of Receivers of Companies (1986) …. It is in these terms (at p. 81):*
>
> *(1) If a person is granted a charge on property with actual knowledge of a contractual obligation in favour of another person inconsistent either with the grant or enforcement of the charge, the grant or enforcement will constitute a tort and an injunction may be granted to restrain its commission.*
>
> *(2) In the absence of such knowledge, the chargee (and the receiver as his agent) is free (vis-à-vis the third parties) to cause the company to repudiate or ignore its outstanding contractual obligations to third parties, though this course may give rise to a claim in respect of the loss occasioned by the company if involving an unnecessary and unreasonable exercise of their powers.*
>
> *(3) The receiver as agent for the company is equally free of liability to third parties for causing the company to breach its contracts with them, for no person can be liable for the tort of interference with contractual relations if he acts as agent for one of the contracting parties. ….*
>
> *(4) Neither the receiver nor the debenture holder can interfere with existing equitable rights of third parties over property of the company having priority to the charge. A threat of such action may be restrained by injunction …"*

The tort referred to in paragraph (1) is obviously inducement of breach of contract.

33. Counsel for the plaintiff stated that the plaintiff is relying on paragraph (1) of the quotation from Lightman and Moss. He submitted that the fourth defendant knew, and the third defendant knew or ought to have known, that the building agreement was about to be entered into with the plaintiff. On the same basis, he submitted that there is no absence of knowledge, so that paragraph (2) has no application. I do not accept those submissions as being correct.

34. First, paragraph (1) applies where the mortgagee has "actual knowledge" of the contractual obligation to the third party. On the facts before the Court, there is no evidence that the third defendant had actual knowledge before the mortgage was created that the fourth defendant would enter into a building agreement with the plaintiff. Neither the loan sanction on foot of which it was created, which was dated 16th September, 2005, nor the charge itself, nor any other evidence adduced establishes, or even gives an impression of, actual knowledge.

35. Secondly, paragraph (1) preserves a contractual obligation which is inconsistent either with "the grant or the enforcement of the charge". For example, an enforceable contract by the fourth defendant to sell the development to a third party, which pre-dated the charge and of which the third defendant was aware, would be inconsistent with a subsequent attempt by the third defendant to enforce the charge by selling it, say, by auction. In such circumstances, the third defendant would be bound and the third party would be protected both by paragraph (1) and paragraph (4). The building agreement between the fourth defendant and the plaintiff, in my view, could not be said to be inconsistent with either the grant or the enforcement of the charge over the development in favour of the third defendant. Moreover, it did not create any equitable right in favour of the plaintiff.

36. To illustrate the point that the plaintiff's contractual right under the building agreement is not inconsistent with the enforcement of the mortgage, it is instructive to refer to an authority relied on by counsel for the third defendant in a different context. In dealing with the plea in the statement of claim in relation to Clause 35 of the building agreement, which, as I have stated earlier, did not apply to the contractual relationship of the plaintiff and the fourth defendant, counsel for the third defendant referred the Court to a report of a judgment of the Court of Appeal in England and Wales in MacJordan Construction Ltd. v. Brookmount Erostin Ltd., reported in The Times, 29th October, 1991 (and also reported at [1992] B.C.L.C. 350). In that case, the Court of Appeal held that, where a property developer had failed to set up a retention fund in breach of the terms of a building contract with a builder and became insolvent, the builder's contractual rights to have the retention fund established could not take precedence over a bank's charge, even though the bank had express notice of the building contract when its charge was executed. The building contract pre-dated the charge which contained a floating charge. The judgment of the Court of Appeal was delivered by Scott L.J. The report records that he identified the question for determination as "whether the bank was bound in equity to give effect to the builder's contractual right to have the retention fund appropriated and set aside". Scott L.J. is reported as having stated that, when the charge was executed, the bank had express notice of the terms of the building contract. He stated that there are circumstances in which notice of contractual rights will be held to bind persons who acquired interests in property affected by those contractual rights, referring to De Mattos v. Gibson (1858) 4 De G & J 276 and the analysis of it contained in the judgement of Browne-Wilkinson J. in Swiss Bank

Corporation v. Lloyds Bank [1979] 2 All ER 853. Scott L. J. is also reported as having stated that he was not satisfied that the case before him was covered by the De Mattos proposition, which is reflected in paragraph (1) of the passage from Lightman and Moss, because there were two distinguishing features in the case before him. The first was that in De Mattos the contractual rights in question related to a specific item of property, a ship, whereas the contractual right in the case before him did not relate to any specific assets. The second, which is of no relevance to the facts of this case and which has been the subject of criticism (e.g. in the 3rd Ed. of Lightman and Moss, 2000, at para. 7 - 056), was that the bank's charge in the case before him was not, when granted, inconsistent at all with the builder's contractual right, because the terms of the charge did not, until the crystallisation of the floating charge, prevent effect being given to the builder's contractual right.

37. A contracting party's obligation in relation to a specific asset, for example, to a third party under a charter party in relation to a ship, is essentially different to the obligation which the plaintiff contends the fourth defendant is under on the facts of this case. The contractual licence in the building agreement exists to enable the plaintiff to fulfil its obligations to the fourth defendant whose obligation, in turn, is to pay the plaintiff for performing its obligations. In reality, the breach of contract for which it is alleged the fourth defendant is liable, is his failure to make payment to the plaintiff. The exercise of its rights under the mortgage by the third defendant, including the taking of possession by the first defendant of the development on foot of the powers in the mortgage, in my view, does not interfere with the performance by the fourth defendant of his contractual obligation which it is alleged has been breached.

38. On the application of paragraph (4) quoted by Vinelott J., counsel for the plaintiff described the reliance by the first defendant and the third defendant on the mortgage being prior in time to the building agreement as semantics. The fact is that the mortgage was prior in time to the building agreement. The fact that it was not registered as a burden on the folio when the building agreement was entered into is immaterial. By analogy to the decision of Costello J. (as he then was) in Gale v. First National Building Society [1985] I.R. 609, when the mortgage was created, and before the third named defendant was in a position to exercise its statutory rights as the registered owner of a charge under the Registration of Title Act 1964, as amended, the third defendant, and a receiver appointed by the third defendant, had a contractual licence to enter, take possession of and manage the development pursuant to the terms of the mortgage.

39. For completeness, I should say that, in my view, none of the conclusions I have reached earlier is affected by the fact that by the second deed of appointment of 15th October, 2009 the third defendant appointed the first defendant as its agent. As is made clear in the deed, the first defendant was to be the agent of the third defendant in the exercise of the powers conferred on the third defendant as mortgagee under the mortgage. Insofar as such powers are exercised by the first defendant he will be acting as agent of his principal, the third defendant.

The application of the plaintiff
40. Adopting the pithy summary of the factors to be considered on an application for an interlocutory injunction, as set out by Geoghegan J. in his judgment in

Ó Murchú t/a Talknology v. Eircell Ltd. (the Supreme Court, 21st February, 2001) [2001] IESC 15 at p. 25, they are:

> *(a) Is there a serious question to be tried?*
>
> *(b) Are damages an adequate remedy?*
>
> *(c) Does the balance of convenience favour the granting rather than refusing an injunction?*

41. In his replying submissions, counsel for the plaintiff identified the serious issue which he contended requires to be tried as follows: under the standard R.I.A.I. contract does a receiver in the case of a charge created by a private individual, not a company, appointed as agent of the "funder" and the employer, have a right to terminate the contractual licence of the builder to remain on the site in the absence of an allegation of breach of contract against the builder? I am satisfied, on the authorities referred to earlier, that the position of a receiver is well settled. In this case, the first defendant, as receiver, in exercise of his powers on foot of the mortgage was entitled to enter the development and take possession of it to the exclusion of the plaintiff and notwithstanding whatever rights the plaintiff had against the fourth defendant under the building agreement. As regards the third defendant, I am satisfied that the third defendant is not in possession of the development, but, if it were, its entitlement to take and remain in possession to the exclusion of the plaintiff would be the same as that of the first defendant, as receiver.

42. In the event, I have absolutely no doubt that damages would be an adequate remedy for the plaintiff. The plaintiff's objective is to be paid the sum of €332,579.32 which he alleges the fourth defendant owes to him and also an unidentified sum in retention money due to him by the fourth defendant on completion of the building agreement. Quite frankly I cannot see how there could be any difficulty in quantifying any additional damages which may be due by the fourth defendant to the plaintiff. I have no doubt that damages will be an adequate remedy for the plaintiff in this case if he is refused an injunction and, indeed, it is quite clear that his objective is to get money and nothing else.

43. On the question of the balance of convenience, one is entitled to ask whether any useful purpose would be served from any perspective if an injunction in the terms sought were granted to the plaintiff. The only reasonable inference which can be drawn from the facts is that the plaintiff has no intention of carrying out any further works on the site because the reality is that he has no prospect of being paid by the fourth defendant for any additional work performed. Therefore, in my view, it is not unreasonable to infer that the objective of the plaintiff in seeking to exclude the receiver from possession of the development is to put pressure on the third defendant to do a deal with it in relation to the monies due by the fourth defendant. On the other hand, if an interlocutory injunction is granted, it will mean that the first defendant, whom the plaintiff accepts has been validly appointed as receiver, will be unable to fulfil his functions as receiver for the benefit of the persons to whom he owes a duty. I have no doubt that the balance of convenience lies in favour of refusing the injunction.

44. As the plaintiff fails to comply with all three factors, its application must be dismissed.

45. Having regard to that conclusion, it is unnecessary to consider the submission advanced on behalf of the third defendant that, because of the misrepresentation made by the plaintiff which led to the appointment of the receiver and his taking of possession of the development, the plaintiff does not come with clean hands and should not be afforded equitable relief.

The application of the first defendant
46. The Court's jurisdiction to strike out proceedings under Order 19, rule 28 or under its inherent jurisdiction is well settled. The question for consideration here is whether it is clear that the plaintiff's claims against the first defendant and the third defendant

must fail (per Costello J., as he then was, in Barry v. Buckley [1981] I.R. 306, 308). While conscious of the oft repeated caveat that the jurisdiction of the Court should be exercised sparingly, nonetheless, I have come to the conclusion that this is a case in which the jurisdiction may and should be exercised on the application of the first defendant.

47. The wrongs alleged against the first defendant are:

(a) trespass and waste; and

(b) inducement of breach of contract.

It is clear that, as a matter of law, the first defendant, as receiver, lawfully took possession of the development and lawfully remains in possession. It is also clear as a matter of law that, irrespective of the contractual position of the plaintiff vis-à-vis the fourth defendant, the first defendant as receiver cannot be liable in tort for inducement of breach of contract. Further, as a matter of law, the first defendant could not be made liable for any of the reliefs claimed by the plaintiff in the statement of claim.

48. Accordingly, in my view, the plaintiff's case against the first defendant is bound to fail and will be struck out under the Court's inherent jurisdiction.

Application of the third defendant
49. The principles set out at 46 above also apply to the application of the third defendant to have the proceedings struck out.

50. The wrongs alleged against the third defendant are:

(a) trespass and waste and conspiracy to commit trespass and waste;

(b) inducement of breach of contract; and

(c) breach of duty of care to the plaintiff to ensure that the fourth defendant complied with Clause 35 of the building agreement and to ensure that the plaintiff was left in possession of the development until the development was completed.

51. It is the first defendant who is in possession of the development. To the extent that the first defendant is in possession as agent of the third defendant, it is clear that, as a matter of law, he is there lawfully and the allegation of trespass and waste against the third defendant must fail as must the allegation of conspiracy to commit trespass and waste.

52. As a matter of law, the third defendant, as mortgagee, and as principal of the first defendant, has no duty at law to ensure that the fourth defendant's outstanding contractual obligations to the plaintiff are fulfilled. As a matter of law, irrespective of the position as between the plaintiff and the fourth defendant on foot of the building agreement, the third defendant cannot, as a matter of law, be liable for inducement of breach of contract. As I have already stated, it is clear that Clause 35 of the building agreement was intended to have no application to the contractual relationship between the plaintiff and the fourth defendant. The letters "N/A" appear in the appendix opposite "Guaranty Account" 35(a)(i) Bank". The third defendant is not mentioned at all in the building agreement. For the avoidance of doubt, if the assumption I have made that the third defendant is characterised "as the funder of " the building agreement on the basis of Clause 35 is incorrect and the plaintiff is contending for a wider duty of care by a lender to a developer owed to third parties contracting with the developer, in my view, as a matter of law, no such duty exists. If it did it would totally stifle lending.

53. I am satisfied that, as a matter of law, the plaintiff is not entitled to any of the reliefs claimed against the third defendant. Accordingly, for the foregoing reasons, the plaintiff's claim against the third defendant is bound to fail and must be struck out under the Court's inherent jurisdiction.

Orders
54. The following orders will be made:

> *(a) an order striking out the plaintiff's claims against the second defendant for the reasons set out in paragraph 13 above;*
>
> *(b) an order dismissing the plaintiff's application for an interlocutory injunction against the first, second and third defendants for the reasons set out at para. 44 above;*
>
> *(c) an order striking out the plaintiff's claims against the first defendant for the reasons set out at 48 above; and*
>
> *(d) an order striking out the plaintiff's claims against the third defendant for the reasons set out in para 53 above.*