Neutral Citation [2013] IEHC 288

THE HIGH COURT

[2012 No. 7358P]

BETWEEN

PAUL McCANN

PLAINTIFF

AND

JOHN MORRISSEY, NORTHBROOK PROPERTY MANAGEMENT LIMITED, IGBIS LIMITED, CYAN TECHNOLOGIES LIMITED, CAPITAL D PROPERTY PLC AND DARREN LANCASTER

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 21st day of June, 2013.

Factual background

1. These proceedings relate to the premises 22, Northbrook Road, Ranelagh in the City of Dublin (the Premises). The first defendant (Mr. Morrissey) is the owner of the Premises. By a deed of mortgage and charge dated 11th June, 2008 (the Mortgage) Mr. Morrissey mortgaged a number of properties, including the Premises, to Ulster Bank Ireland Limited (the Bank). Subsequent to the creation of the Mortgage, the Bank, by facility letter dated 26th January, 2009 (the 2009 Facility Letter), advanced further facilities to Mr. Morrissey and his wife subject, *inter alia*, to the condition that the facilities would be secured on, *inter alia*, the Premises by virtue of the Mortgage.

2. By deed of appointment dated 2nd November, 2010, the Bank appointed the plaintiff (the Receiver) as receiver of and over certain mortgaged properties, including the Premises, and to exercise all powers of a receiver and manager given in the Mortgage and by law. That appointment was preceded by a demand made by the Bank on Mr. Morrissey and his wife, which was dated 26th October, 2010, demanding payment of all monies and liabilities owed or incurred to the Bank not later than 29th October, 2010. It was stated in the letter of demand that the amount then outstanding, being principal and accrued interest, was €14,170,044.04.

3. After the appointment of the Receiver there was interaction between the Receiver, on the one hand, and Mr. Morrissey and accountants acting on his behalf, Baker Tilly Ryan Glennon, on the other hand. Eventually, by letters dated 3rd July, 2012, the Receiver's solicitors, on behalf of the Receiver, requested Mr. Morrissey, the second defendant and the third defendant to vacate the Premises by close of business on 12th July, 2012 and intimated that the Receiver would attend the Premises on 13th July, 2012 for the purposes of changing locks and securing possession of the Premises without further notice. The addressees were requested to ensure that the Premises had been vacated and emptied of all goods or other property belonging to them by that date.

The proceedings and the application

4. The Receiver not having recovered possession of the Premises on foot of those demands, these proceedings were initiated by a plenary summons which issued on 26th July, 2012. Simultaneously, the Receiver issued a notice of motion seeking certain reliefs by way of prohibitory and mandatory interlocutory injunction against the defendants and their servants and agents. The prohibitory orders sought were orders restraining the defendants from –

> (a) preventing, impeding or obstructing the Receiver from gaining access to and taking possession of the Premises and collecting the rents and the licence fees associated with the Premises;
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> (b) interfering with the functions and office of the Receiver as Receiver and Manager of the Premises;
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> (c) collecting or attempting to collect the rents and licence fees and from contacting tenants and licensees in occupation or possession of the Premises; and
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> (d) trespassing upon or entering upon or otherwise attending the Premises.

The reliefs sought by way of mandatory injunctions were for orders directing the defendants –

> (i) for an account of all rents and licence fees received by them since 2nd November, 2010 in respect of the Premises and to pay the same to the Receiver forthwith;
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> (ii) to deliver up forthwith to the Receiver all books and records held by them relating to the Premises, including leases and licence agreements; and
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> (iii) to deliver up to the Receiver possession of the Premises including the keys, alarm codes, locks and all other security and access devices and equipment in respect thereof.

5. An order was made by consent of the parties by the Court (Murphy J.) on 12th October, 2012 directing the defendants to deliver to the plaintiff/Receiver the keys, alarm codes, locks and other security and access devices in respect of the Premises, subject to the proviso, which was without prejudice to the Receiver's position in the proceedings, that the plaintiff/Receiver would attend the Premises for inspection purposes only, that he would give forty eight hours written notice by e-mail of an inspection and that the inspection would take place in the presence of the representatives of the defendants.

6. This judgment concerns the application for the interlocutory injunctive relief, the hearing of which concluded on 6th June, 2013.

Representation of the defendants

7. Mr. Morrissey had separate representation on the hearing of the interlocutory application. As regards the remainder of the defendants, some had representation and some had not. It is necessary to consider the position of each of the other defendants.

8. The second defendant (Northbrook) and the fourth defendant (Cyan) were represented by the same legal team. The third defendant (Igbis) and the fifth defendant (Capital) were not represented and an appearance was not entered on their behalf. The sixth defendant (Mr. Lancaster) appeared in person, having entered an appearance in person. I will now outline the status of the defendants other than Mr. Morrissey.

Northbrook
9. A copy of the annual return (B1) filed by Northbrook in the Companies Registration Office (CRO) for the period up to 13th August, 2011 discloses that the directors of the company are Mr. Lancaster and Mr. Morrissey. The only shareholder is named as "Morrissey Family Trust".

10. Northbrook claims to be in possession of part of the Premises, described as "87.50% (7/8th) of the open-plan area of 22, Northbrook Road", the precise location of which is not identified, with rights of access and two car park spaces under a lease dated 1st July, 2010 (the Northbrook lease) made between Mr. Morrissey of the one part and Northbrook of the other part for the term of four years and eleven months from 1st July, 2010 to 31st May, 2015. The Northbrook lease was expressed to be made in consideration of a premium sum of "Ten pounds" (sic) and the rent payable was expressed as follows:

> "YIELDING AND PAYING . . . during the said Term and so in proportion for any less period that a Rent of €220,000 to be paid. The exact timing of the payment of the rent shall be agreed between the parties and will principally be driven by the cash flow requirements of the tenant.

Both the identification of the lessee's "take" and the reservation and mode of payment of the rent provided for were extremely unusual and certainly did not comply with normal business practice.

Cyan
11. The Form BI filed in relation to Cyan in the CRO for the period up to 30th September, 2011 discloses that Mr. Morrissey is one of its directors and that the shareholders include Mr. Morrissey and "The Morrissey Family Trust", although the address given for that entity is different from the address given in the Form B1 in relation to Northbrook, in which the address given of "Morrissey Family Trust" was Mr. Morrissey's home address. However, Mr. Morrissey has averred that he is not a shareholder in either Northbrook or Cyan.

12. Cyan claims to be in possession of part of the Premises, being the balance of the open plan area of the Premises, which is described in similar terms as the "take" of Northbrook ("12.50% (1/8th) of the open plan area of 22 Northbrook Road") under a lease dated 1st July, 2010 from Mr. Morrissey to Cyan (the Cyan lease) for the term of four years and eleven months from 1st July, 2010 to 31st May, 2015. The lease records that consideration of a premium sum of £10 was paid and the provision in relation to payment of rent is in the same terms as contained in the Northbrook lease, save that the amount is €35,400 rather than €220,000.

Igbis
13. Igbis was joined as a defendant on the basis of the understanding of the Receiver that it was in occupation of all or part of the Premises.

14. The Form B1 filed in the CRO in respect of Igbis up to 14th August, 2011 discloses that the directors of Igbis are Mr. Morrissey and Mr. Lancaster and that the shareholder is "Morrissey Family Trust", the address of which is Mr. Morrissey's home address. Mr. Morrissey has averred in an affidavit sworn by him on 7th September, 2012 that office space was let to Igbis, which manages all his personal properties, and that rental payments have been offset against the management fees due. However, the Receiver has pointed out that that is contradicted in a letter of 17th July, 2012 from Mr. Morrissey's solicitors to the Receiver's solicitors, but Mr. Morrissey has acknowledged that there was a mistake in the letter of 17th July, 2012. No lease in favour of Igbis has been exhibited. While the factual position is confusing, for present purposes, I am assuming that there is no lease in existence in favour of Igbis.

Capital
15. Capital is a public limited company, with a registered office at the Premises. Mr. Morrissey is one of its three directors. There is no evidence that Capital has a leasehold interest or a tenancy in the Premises. As I understand it, Capital was joined as a defendant because its registered office is recorded as the Premises.

Mr. Lancaster
16. By a letting agreement dated 1st July, 2010 made between Mr. Morrissey of the one part and Mr. Lancaster of the other part, based on a standard form "Residential Letting Agreement", apparently prepared and approved by the Dublin Solicitors Bar Association, the dwelling described as "22 Northbrook Road, with 2 bed spaces" was let to Mr. Lancaster for a term of four years commencing on 1st July, 2010 at the rent of €100 per month. Mr. Lancaster's tenancy is registered with the Private Residential Tenancies Board (PRTB), but, on the basis of the extract from the register put before the Court, it would appear that it was first so registered on 5th July, 2012. It is impossible to identify precisely to what portion of the Premises the tenancy agreement relates. However, Mr. Lancaster has also averred that the Premises are not his primary residence.

17. Mr. Lancaster has averred that when the Receiver's agents arrived at the Premises on 18th July, 2012 at 7.46am he was distressed and intimidated by them, as he had received no prior notice of the proposed visit. In consequence, he has lodged a dispute with the PRTB against Mr. Morrissey. That dispute, which I consider to be a separate issue from the issues the Court has to determine, is still pending before the PRTB.

Payment of rent reserved by leases/tenancy
18. In an affidavit sworn by him on 10th September, 2012 in his capacity as a director of Northbrook, Mr. Lancaster has averred that the sum of €221,833 has been paid by Northbrook to Mr. Morrissey in respect of the rent reserved by the Northbrook lease. Accordingly, even though the Northbrook lease has just less than two years to run, the defendants' position is that all the rent due in respect of the entire term has been paid to Mr. Morrissey.

19. Mr. Paul Hayes, a director and company secretary of Cyan, in an affidavit sworn by him on 10th September, 2012 has averred that the sum of €34,624.79, which is slightly less than the rent for the entire term, was paid by Cyan to Mr. Morrissey in respect of rent due under the Cyan lease.

20. Mr. Lancaster in the affidavit sworn by him on 10th September, 2012 dealing with his own tenancy has averred that he paid the sum of €4,800 at the commencement of the lease, €3,600 by way of deposit and €1,200 in respect of rent. Strangely, the tenancy agreement refers to a deposit of €100.

21. Bank statements of the various defendants were exhibited to support the averments that the rent payable under the leases and the tenancy were discharged in the manner averred to. Understandably, the bank statements are heavily redacted. It is not the Court's function on this application to make a finding as to whether or not the rents alleged to have been paid actually found their way ultimately to the landlord, Mr. Morrissey.

22. Summary proceedings were instituted by the Bank to recover the debt due by Mr. Morrissey which is secured on the Premises. The proceedings (Record No. 2010/6092S) have not been progressed, for whatever reason.

The issues on the interlocutory application

23. The position of the Receiver is that the criteria for determining whether the Receiver is entitled to the interlocutory relief sought are those laid down by the Supreme Court in *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88, namely:

> (a) whether the Receiver has established that there is a serious issue to be tried;
>
> (b) whether damages would be an adequate remedy for the Receiver, if he was successful at the trial, and, conversely, whether, if he was not successful at the trial, the entitlement of the defendants to resort to the undertaking as to damages, which was given to the Court by the Receiver, would be an adequate remedy for them; and
>
> (c) whether the balance of convenience lies is granting or refusing the interlocutory injunction.

Counsel for the Receiver have characterised the Receiver's claim as a claim to restrain trespass and, on the authority of the decision in *Keating v. Jervis Shopping Centre Ltd.* [1997] 1 I.R. 512, they contended that the burden is on the defendants to establish that they are not trespassing, so that, as regards the mandatory reliefs sought by him, the Receiver is not obliged to meet the "strong clear case" test as enunciated by Fennelly J. in *Maha Lingham v. Health Service Executive* [2006] 17 ELR 137. However, it is the position of the Receiver that he has established a strong clear case that the leases and tenancy created by Mr. Morrissey are void for failure to obtain the consent of the Bank in writing in advance of their creation.

24. In broad terms, the position adopted by counsel for Mr. Morrissey in relation to the first criterion was that the Court should be slow to determine the issue as to the validity of the leases and tenancy on this interlocutory application, because there are underlying disputes in relation to factual matters which the Court cannot resolve and deciding the issue would, in effect, determine the entire proceedings. Counsel suggested that, while the validity of the leases and tenancies was raised in the endorsement of claim in the plenary summons, in that the Receiver sought an order setting aside "any lease agreements purportedly entered into between Mr. Morrissey and each or all of the remaining defendants contrary to the provisions of the

. . . Mortgage", he submitted that such relief was not reflected in the notice of motion. While acknowledging that the Receiver had stepped into Mr. Morrissey's shoes qua landlord, it was submitted that the order made by Murphy J. by consent of the parties on 12th October, 2012, which was characterised as having permanent effect, had been complied with, which I understood to be an argument that the Receiver had obtained sufficient relief against Mr. Morrissey under that order at the interlocutory stage and the rest of the issues should be determined at the plenary hearing.

25. Counsel for Northbrook and Cyan also acknowledged that the Receiver had stepped into Mr. Morrissey's shoes qua landlord. However, he too submitted that it would be inappropriate for the Court to decide the issue of the validity of the leases at this interlocutory stage, because of the factual dispute, which it was submitted goes to the heart of the knowledge of the Bank in relation to the creation of the leases, which he asserted exists.

26. It is true that there is an element of inconsistency on the affidavit evidence as to the relief the Receiver is pursuing. In the Receiver's second affidavit sworn on 28th September, 2012, he averred that, on this application, he is not seeking to set aside the lease agreements purportedly entered into between Mr. Morrissey and the other defendants, but his position was that the affidavits of Mr. Morrissey and Mr. Lancaster which had been filed at that stage did not disclose any reason why he should not be entitled "to gain possession of the [Premises] and receive the rents received and/or due under any purported lease agreements". In a subsequent affidavit sworn by Will Stafford, a staff member of the Receiver, on behalf of the Receiver, it was averred that he had been advised that any alleged leases entered into between Mr. Morrissey and the other defendants were null and void and the defendants do not have any legal entitlement to possession of the Premises. It was specifically averred that the Receiver is entitled to possession of the Premises "free from any alleged tenancies, none of which arise pursuant to a valid or enforceable lease agreement". Notwithstanding that obvious inconsistency, it was made clear by counsel for the Receiver in her closing submissions that the Receiver is seeking all of the reliefs set out in the notice of motion. As regards the claim for an order preventing the defendants from excluding the Receiver from possession, it was made clear that what was being sought is only enforcement of the Receiver's entitlement to possession on an interlocutory basis, that is to say, until the hearing of the substantive action.

27. It was submitted on behalf of the Receiver that there is authority for the Court determining the issue as to the validity of the leases at an interlocutory stage: the decision of the High Court in *ICC Bank Plc v. Verling & Ors.* [1995] 1 ILRM 123.

Source of alleged invalidity of leases and tenancy issue

28. The clause of the Mortgage on which the Receiver relies in contending that the Northbrook lease and the Cyan lease and Mr. Lancaster's tenancy are null and void is Clause 5(c) which provides:

> "The Borrower shall not let or part with possession or occupation of the Mortgaged Property or any part thereof nor shall the statutory Powers of leasing or agreeing to lease be exercisable by the Borrower without the consent in writing of the Bank."

Counsel also referred to Clause 5(f), which provides that the Bank may enter into possession of the Premises at any time during the continuance of the security. That did not happen and I do not see that clause as being of any relevance to the issues the Court has to determine. Nor do I see the clauses in relation to the appointment and powers of the Receiver being of relevance, because no challenge was articulated by any of the defendants to the appointment of the Receiver or to his powers. Accordingly, as regards compliance with the provisions of the Mortgage, the issue is whether the Bank consented in writing to the creation of the leases and the tenancy by Mr. Morrissey. It is common case that the Bank did not.

29. It is absolutely clear on the documentation before the Court that the Bank understood that the security it was getting was security over properties which were, or would be, let by Mr. Morrissey and produce rent, not properties occupied by Mr. Morrissey. Counsel for Mr. Morrissey pointed to certain clauses in the 2009 Facility Letter. As I have already recorded, it was stipulated that the security of the Bank consisted of the Mortgage over, *inter alia*, the Premises. The security provision went on to stipulate a "security

assignment over all rental income" in relation to the secured properties, including the Premises. There was a special condition which provided that the Bank might release 27% of the rental income of the secured properties to fund Mr. Morrissey's ongoing management costs up to a maximum amount of €100,000 per annum and release of those funds would be made on a quarterly basis against valid invoices and/or proof of expenditure satisfactory to the Bank. That, of course, was clearly at the discretion of the Bank. Finally, counsel for Mr. Morrissey referred to another special condition which provided that the Bank was to receive copies "of all existing and future lease agreements in relation to the secured properties", including the Premises, and that provision said nothing about the obtaining of the prior consent of the Bank in writing to the creation of a future lease. In relation to that point, in my view, the 2009 Facility Letter cannot be taken as in any way varying the effect of Clause 5(c) of the Mortgage.

30. There is no doubt that, as counsel for Mr. Morrissey put it, things were going on in the background, initially between Mr. Morrissey and the Bank, and subsequently between Mr. Morrissey and the Receiver, some of the engagement being on a without prejudice basis. There is also no doubt that in the first half of 2010 the Bank was concerned that no rental income was being generated from the Premises. By an e-mail dated 11th April, 2010, Mr. Morrissey informed the Bank that he planned to lease out most of the office space at the Premises on a short-term basis and to maximise rental income. Subsequent to a meeting the previous day, the official of the Bank who was dealing with Mr. Morrissey, Lesley Keppel (Ms. Keppel), by e-mail dated 21st April, 2013 noted that in relation to the Premises, her understanding was that Mr. Morrissey would come back to her by mid-May with proposals for renting the property, specifically what market rent was achievable for the space. Ms. Keppel stated that, as had been discussed at the meeting, the Bank's view was that, in the event that the Premises could not be let "at a meaningful market rent", a sale of the Premises should be sought. Baker Tilly Ryan Glennon were subsequently in negotiations with the Bank on behalf of Mr. Morrissey. By letter dated 29th June, 2010 to Ms. Keppel at the Bank, which followed a "recent meeting", Baker Tilly Ryan Glennon outlined three options in relation to addressing Mr. Morrissey's liability to the Bank. However, there is nothing in that letter which indicates that the leases and tenancy which were about to be created two days later were part of the discussions with the Bank.

31. The foregoing is based on averments contained in Mr. Morrissey's first replying affidavit sworn on 7th September, 2012 and e-mails and correspondence exhibited. In a subsequent affidavit filed on behalf of the Receiver and sworn by Graham Roche (Mr. Roche), an official of the Bank, on 27th November, 2012, Mr. Roche averred that he was informed at the meeting referred to in the letter of 29th June, 2010, which had taken place on 9th June, 2010, that there were no leases then in place in respect of the Premises. He further averred that by letter dated 4th August, 2010 to Mr. Morrissey and his wife, the proposals contained in the letter of 29th June, 2010 were rejected. There was no acknowledgement by the Bank of any leases allegedly having been entered into, because the Bank had not been informed of the leases by Mr. Morrissey. Mr. Roche averred that at the time of the appointment of the Receiver, the Bank had not been notified "of the creation of any alleged leases" over the Premises, nor had it been requested to provide its consent to the creation of any such alleged leases.

32. It is clear from the documentation put before the Court that the interest of Mr. Morrissey in the Premises is a fee simple interest and the title is unregistered title. Accordingly, by virtue of the Mortgage, the fee simple was vested in the Bank, subject, of course, to the equity of redemption. The Mortgage was registered in the Registry of Deeds on 24th June, 2008.

The law

33. The leasing powers of Mr. Morrissey, as mortgagor, are governed by the law in force prior to the commencement of the Land and Conveyancing Law Reform Act 2009 on 1st December, 2009 (the Act of 2009). Section 112(5) of the Act of 2009 provides that the power of leasing conferred by s. 112 "applies only to mortgages created after the commencement of this Part".

34. The most relevant of the authorities relied on by the Receiver is the decision of the High Court (Lynch J.) in *ICC Bank Plc. v. Verling* [1995] 1 ILRM 123. The judgment of Lynch J. is of particular significance in the context of this application because it was given on an application by a mortgagee for interlocutory relief, both prohibitory and mandatory. The facts in that case were that the first defendant (Mr. Verling), the owner of the property in issue, which was used as an off-licence, executed a mortgage dated 31st May, 1991 in favour of the plaintiff. The mortgage contained a provision that during the continuance of the security the statutory and other powers of leasing, letting and entering into agreements for leases or lettings in relation to the mortgaged property were not exercisable by the borrower, Mr. Verling. Further, Mr. Verling, as borrower, could not, *inter alia*, part with the possession of the same without obtaining the prior consent in writing of the plaintiff lender.

35. Before the commencement of the Act of 2009, the leasing powers of a mortgagor were governed by s. 18 of the Conveyancing Act 1881 (the Act of 1881). Sub-section (13) of s. 18 provided as follows:

> "This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained."

The difference between Clause 5(c) of the Mortgage in this case and the provision in the mortgage in favour of the plaintiff in *ICC Bank Plc v. Verling,* which has been summarised, in my view, is immaterial. Moreover, the difference in status of the Receiver, who has brought these proceedings as Receiver, and the plaintiff in that case, who brought the proceedings as mortgagee, is immaterial. On the material facts, this case is indistinguishable from *ICC Bank Plc v. Verling*.

36. To return to the facts of the latter case, on 23rd March, 1993, Mr. Verling purported to let the premises to the third defendant, a company, for two years and nine months from 1st January, 1993. The excise licences pertaining to the premises were transferred into the name of the second defendant, as nominee of the third defendant. On 20th July, 1993 the plaintiff's solicitors had written to the solicitors acting for the second and third defendants informing them that, as the plaintiff had not consented to the granting of the lease, it was void. It was not until 27th April, 1994 that the plaintiff instituted the proceedings in which it sought, *inter alia*, possession of the premises. The plaintiff also simultaneously sought interlocutory injunctions: a mandatory injunction to compel the defendants to deliver up vacant possession of the premises to the plaintiff together with the benefit of the excise licence; and a prohibitory injunction restraining the defendants from selling, dealing or purporting to charge the premises. After the proceedings were instituted, Mr. Verling wrote to the plaintiff indicating that he wished to return the keys of the premises. Accordingly, the dispute on the interlocutory application was fought out between the plaintiff and the second and third defendants, who claimed that, by virtue of the plaintiff's delay and acquiescence, they had expended money on the property, so that the plaintiff was estopped from claiming that the lease was void. In particular, it was argued that the plaintiff had been put on notice of the lease because of the fact that the excise licence had been transferred to the second defendant and that had been advertised in a national newspaper.

37. In his judgment, Lynch J., having referred to s. 18 of the Act of 1881 and having quoted sub-section (13) thereof, stated (at p.129):

> "Clause 15 of the mortgage deed of 31 May 1991 which I have quoted above, is of course such a contrary intention as is

> referred to in s. 18(3) of the Conveyancing Act 1881 and it is clear therefore and indeed counsel for the second and third defendants conceded that the lease of 23rd March, 1993 was null and void when it was first granted by the first defendant to the second and third defendants. Counsel, however, contended that the plaintiffs should now be estopped from disputing that lease in view of the delay which has since taken place."

Having rejected the suggestion that the plaintiff should be regarded as on notice of the lease because of the newspaper advertisement and having stated that, in contrast to the plaintiff, the second and third defendants must be regarded as being on notice of the mortgage, which had been duly registered in the Registry of Deeds, so that the information was available to them had they thought fit to do a search in the Registry of Deeds, Lynch J. stated (at p. 130):

> "The plaintiffs have never acquiesced in or recognised the lease by any express or positive conduct such as by demanding or accepting rent thereunder in place of the first defendant. The fact that the plaintiffs have not rushed into litigation is hardly blameworthy in my opinion especially as such delay as has occurred has not to the detriment of the defendants but rather to their benefit as they are enjoying the use of the premises without payment any rent."

38. As regards the mandatory injunctive relief sought by the plaintiffs, Lynch J. acknowledged that he should look for something more from the plaintiff than a mere arguable case. He found, but without in any way purporting to decide the issues in any final manner, that the plaintiff had made out "a strong *prima facie* case". One of the factual features of that case which was noted by Lynch J. was that the lease would expire by an effluxion of time just fourteen months after his judgment was delivered. He was conscious that a mandatory interlocutory order would therefore effectively conclude the whole action as against the second and third defendants. He weighed the plaintiff's usual undertaking as to damages, which he was satisfied was of value sufficient to compensate the second and third defendants if the interlocutory relief was granted but they ultimately won the action, in the balance against the fact that he was satisfied that the plaintiff would suffer substantial loss if he refused interlocutory relief, which he was satisfied the defendants would not be in a financial position to make good. Aside from those considerations, he was of the view that the balance of convenience lay with the plaintiff.

39. Counsel for Mr. Morrissey submitted that, because of the delay on the part of the Receiver in initiating these proceedings, which were not initiated until nineteen months had elapsed after his appointment, the plaintiff's claim, which is for equitable relief, is defeated by the doctrine of *laches*. Counsel relied in particular on the following passage from the judgment of the High Court (Keane J.) in *Nolan Transport (Oaklands) Ltd. v. James Halligan & Ors.* (High Court, Unreported, 22nd March, 1994):

> "In all cases of this nature where interlocutory relief is sought the courts expect the parties to move with reasonable expedition where they are seeking interlocutory relief because it is of the essence of such relief that if it turns out that it has been wrongly granted one party has suffered an injustice. It is therefore a remedy which should not be lightly invoked; and if invoked, it should be invoked rapidly and where a party simply awaits events as they unfold he cannot expect to find the court amenable to the granting of this relief, as it would where a party moves expeditiously to protect its rights."

The response made on behalf of the Receiver was that, if a claim for equitable relief is to be defeated by *laches*, it must be demonstrated that the party pleading *laches* is prejudiced by the delay. It was submitted that no prejudice had been asserted on behalf of Mr. Morrissey or any of the other defendants in this case.

40. As is pointed out in Delany on *Equity and the Law of Trusts in Ireland* (5th Ed.) (at p. 524) the defence of *laches* is said by Spry to arise if two conditions are satisfied:

> "[F]irst, there must be unreasonable delay on the part of the plaintiff in the commencement or prosecution of the proceedings, and secondly, in view of the nature and consequences of that delay it must be unjust in all the circumstances to grant the specific relief that is in question, whether absolutely or on appropriate terms or conditions."

Delany observes later that the courts will take a realistic view of what constitutes undue delay and unless it is of appreciable length or some serious prejudice has been suffered by reason of it, it will not be a bar to relief.

Application of the law to the facts

41. By analogy to the decision of Lynch J. in *ICC Bank Plc v Verling*, without in any way purporting to decide the issues in any final manner, I have come to the conclusion that the Receiver has made out a strong *prima facie* case against Mr. Morrissey and the other defendants that he is entitled to an interlocutory injunction restraining his exclusion from possession of the Premises as against Northbrook, Cyan and Mr. Lancaster, on the basis that the leases and tenancy created by Mr. Morrissey in their favour do not affect the interest of the Bank as mortgagee. In fact, I am of the view that the Receiver's case is even stronger than the case of the plaintiff in *ICC Plc v. Verling* against the second and third defendants in whose favour Mr. Verling had made the lease. There is no suggestion in the report of that case that the lease was other than an "arm's length" transaction.

42. However, in this case, to put it mildly, the Northbrook lease, the Cyan lease and the tenancy of Mr. Lancaster are most peculiar, both in relation to the lessees' "take" and the manner of payment of the rent reserved and, in the case of Mr. Lancaster's tenancy, the quantum of rent. On the latter point, while there is no valuation evidence before the Court, the Court must be entitled to take judicial notice of the fact that a two bed residential letting in Dublin 6 would fetch rent which would be many multiples of the rent of €100 per month payable by Mr. Lancaster. There is also the obvious connection between Mr. Morrissey and Northbrook, Cyan and Mr. Lancaster. Without in any way "lifting the veil" of incorporation, it is reasonable to infer, even at this interlocutory stage, that the leases and the tenancy created by Mr. Morrissey in favour of Northbrook, Cyan and Mr. Lancaster were not "arm's length" transactions. Apart from that, no evidence has been adduced of anything by reference to which the Bank could be regarded as having knowledge of, or having acquiesced in, the creation of the leases and the tenancy prior to the appointment of the Receiver or, indeed, after such appointment. In fact, the leases were not stamped until at the hearing the Court made it clear that, in their unstamped condition, they were not admissible in evidence. Accordingly, I have absolutely no doubt that the Receiver has met the first criterion which the plaintiff has to establish in order to be granted interlocutory injunctive relief, including mandatory relief.

43. As regards the second criterion, the adequacy of damages, the situation in this case, if anything, is more favourable to the plaintiff Receiver than the situation in *ICC Plc v. Verling* was to the plaintiff mortgagee in that case. Mr. Morrissey is indebted to the Bank in an amount in excess of €14m. He is "connected", using that term in a non-technical sense, with Northbrook, Cyan and Mr. Lancaster in the context of the leases and tenancy affecting the Premises, none of whose financial status has been addressed in evidence. As counsel for the Receiver pointed out, in *Westman Holdings Ltd. v. McCormack* [1992] 1 I.R. 151 (at p. 158), Finlay C.J. identified two limbs in the adequacy of damages criterion in relation to whether an interlocutory injunction should be granted: whether in fact damages were an adequate remedy for the plaintiff; and whether "there is a defendant liable to pay such damages who is able

to do so, and thus the appropriate compensation could be actually realised".

44. The reality of the situation in this case is that there is no evidence before the Court that if an interlocutory injunction is refused, and following the hearing of the substantive action, the Receiver is found to be entitled to compensation for the period over which he has been deprived of possession and receipt of the rents and profits of the Premises, such compensation could be actually realised against any of the defendants. On the other hand, again by analogy to the decision of Lynch J. in *ICC Plc v Verling*, if the interlocutory relief sought by the Receiver is granted and it subsequently transpires that it should not have been granted, then the Receiver's undertaking as to damages will be capable of compensating each of the defendants who is able to establish that he or it suffered damage as a result of the grant of an interlocutory injunction.

45. In this case the balance of convenience certainly lies in favour of the grant of the interlocutory injunctive relief sought. Mr. Morrissey is indebted to the Bank in excess of €14m. The Receiver's objective is to realise the security given by Mr. Morrissey for that debt with a view to reducing Mr. Morrissey's liability, which, with interest accruing, is growing daily and which, in addition to being secured liability, is also personal liability of Mr. Morrissey. That being the case, I find it difficult to comprehend why Mr. Morrissey is not co-operating with the Receiver and with the Bank. As regards the other defendants, apart from Mr. Lancaster, who has acknowledged that he only uses the Premises as "a city centre accommodation which [he uses] when carrying on voluntary work", there is no evidence as to the extent to which Northbrook, Cyan and Igbis actually occupy and use the Premises, so that there is nothing to suggest that it is necessary to consider any factor other than the adequacy of damages as a remedy for them, if it were to transpire that the granting of an injunction to the Receiver would wrongfully deprive them of possession of the Premises pending the hearing of the substantive action.

46. On the issue of *laches*, which was raised on behalf of Northbrook and Cyan as well as on behalf of Mr. Morrissey, no prejudice to any of those parties has been identified. While the Court is not in a position, and, in any event, it would not be appropriate, to analyse "the things going on in the background", the position is that, by analogy to the position in *ICC Plc v Verling*, the delay, if one is entitled to infer from the timeframe that there was delay, has not been to the detriment of the defendants but rather to their benefit, as they have had the use of the Premises over the period since the appointment of the Receiver, insofar as they use them. Of course, unlike the situation in *ICC Plc v. Verling*, the defendants, other than Mr. Morrissey, assert that they have paid rent for the entire terms of the leases and tenancy to Mr. Morrissey, but that is an aspect of the matter which is adequately covered by the Receiver's undertaking as to damages. Similarly, Mr. Morrissey's complaint that, since his appointment, the Receiver has not taken responsibility for the cost of utilities, maintenance and suchlike, estimated at €2,000 per month, which seems to be a very unmeritorious complaint given that the Receiver has been deprived of possession and receipt of the rents and profits of the Premises since he was appointed, will be adequately covered by the undertaking as to damages, if it transpires that Mr. Morrissey is entitled to recourse to the undertaking, because the injunction should not have been granted.

Orders
47. There will be orders in favour of the Receiver in the terms sought in the notice of motion.