Neutral Citation [2012] IEHC 162

THE HIGH COURT

[2012 No. 3008P]

BETWEEN

FERGUS LOWE

PLAINTIFF

AND

GERARD BURNS AND ANNE BURNS

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 17th day of April, 2012.

1. The application and its history

1.1 The plenary summons in this matter was issued on 23rd March, 2012. On the same day, the Court gave the plaintiff leave to issue a notice of motion returnable before the Court on 28th March, 2012.

1.2 In the notice of motion the plaintiff sought prohibitory injunctions restraining the defendants, and each of them, their servants and agents and all persons acting in concert with them from-

> (a) interfering with and/attempting to frustrate the activities of the plaintiff as receiver over the premises identified in the schedule to the notice,
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> (b) harassing or intimidating any occupant of the premises identified in the schedule, and
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> (c) entering on to the premises identified in the schedule without express consent of the plaintiff,

all of the foregoing orders being sought pending further order or the determination of the proceedings. The premises described in the schedule to the notice are:

> (i) the property registered on Folio 22133F of the Register of Freeholders County Meath and more commonly known as commercial premises at Metges Lane, Watergate Street, Navan, County Meath (the Navan Property);
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> (ii) apartment 29, Emmet Court, Inchicore, Dublin, 8;
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> (iii) apartment 4, 109 Parnell Street, Dublin, 1; and
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> (iv) the property registered on Folio 110613F of the Register of Freeholders County Dublin and more commonly known as 11 Ashmount, Clonsilla, Dublin, 15.

I will refer to the properties at (ii), (iii) and (iv) above collectively as "the Dublin Properties".

1.3 When the matter was before the Court on 28th March, 2012 the first defendant (Mr. Burns) attended in person and he was accompanied by a McKenzie friend. The second defendant (Mrs. Burns) did not appear. Mr. Burns sought an adjournment to enable him file a replying affidavit. That application was acceded to. The matter was adjourned for hearing to 30th March, 2012.

1.4 The plaintiff's application was heard on 30th March, 2012. Once again, Mr. Burns appeared in person accompanied by the McKenzie friend. There was no appearance by or on behalf of Mrs. Burns and the Court established that she was not in Court. Mr. Burns indicated that she was a "silent partner" and that she was consenting to the position he was adopting. Counsel for the plaintiff informed the Court that the plaintiff has no specific complaint against Mrs. Burns, except that, by being a party to correspondence to which I will refer later, she subscribed to Mr. Burns' activities. The title position in relation to the properties with which the Court is concerned is that Mr. Burns is the sole owner of the Navan Property and Mr. Burns and Mrs. Burns are joint owners of each of the Dublin Properties.

1.5 On 30th March, 2012, the affidavit evidence was opened in Court and the Court heard submissions from counsel for the plaintiff and from Mr. Burns. The Court adjourned the matter until 2pm on that day. When the matter was back in Court at 2pm, the Court, having noted the plaintiff's undertaking as to damages, made interlocutory orders in the terms sought on the notice of motion. The Court indicated that it would give its reasons in writing for that decision on the first available opportunity, Tuesday, 17th April, 2012.

1.6 The purpose of this judgment is to set out the reasons for that decision.

2. The basis of the plaintiff's claim for relief

2.1 The plaintiff has brought the proceedings a receiver appointed by Danske Bank A/S (the Bank). In the case of the Navan property and in the case of each of the Dublin Properties the form of security held by the Bank is identical. Therefore, in the first instance, I propose considering the plaintiff's status as receiver and his powers in that capacity by reference to the Navan Property).

2.2 As the description in the notice of motion discloses, the Navan Property is registered on Folio 22133F of the Register of Freeholders County Meath. Mr. Burns was registered as full owner with absolute title on that folio on 9th April, 2008. On the same day a charge was registered as a burden of the folio. The charge is described as a charge "for present and future advances repayable with interest". The Bank is registered as owner of the charge on the folio.

2.3 The Navan Property is a commercial property which is let to two tenants. The tenant on the ground floor carries on the business of seamstress and pays a weekly rent. The offices on the first and second floors are let to Ormonde Mining Plc, but, according to the plaintiff, are currently not being used owing to a dispute with Mr. Burns over the terms of the lease.

2.4 The charge in favour of the Bank was created by a deed dated 20th December, 2007 made between Mr. Burns of the one part and the Bank of the other part (the Navan Charge), which, as I have stated, is registered as a burden on Folio 22133F. It contained the following provisions:

> (a) Mr. Burns charged the property registered on Folio 22133F, that is to say, the Navan Property, with payment to the Bank of all sums of money from time to time becoming payable under the covenants contained therein. The charge was an "all sums" charge (Clause 3 and Clause 4(1)).
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> (b) It was declared that the secured monies should be deemed to become due within the meaning of the Conveyancing Acts 1881 to 1911 immediately on demand for payment being made by the Bank (Clause 6(1)).
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> (c) It was declared that the powers of sale and appointing a receiver conferred by the Conveyancing Act 1881 should apply at any time after such demand was made by the Bank (Clause 6(2)).
>
> (d) It was declared that a receiver appointed by the Bank should, in addition to the relevant statutory powers, if the Bank should so direct, have the following powers-
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> > (i) to enter upon and take possession of the mortgaged property or any part thereof,
> >
> > (ii) to sell the mortgaged property,
> >
> > (iii) to do all such acts and things as an absolute owner could do in the management of the mortgaged property, and
> >
> > (iv) to exercise the further powers set out therein, which is not necessary to outline (Clause 6(3)).

2.5 By letter dated 17th January, 2012 to Mr. Burns, having recorded that Mr. Burns had failed to make payment to the Bank on the accounts itemised in the heading of the letter, the Bank demanded immediate payment from Mr. Burns of the sum of €1,334,295.38, being the aggregate amount due for principal and interest at the date of the letter on the itemised accounts. The Bank threatened that, in the event that it did not receive payment of the amount due immediately, it would take action for recovery of the amount. I understand that summary proceedings are in being in the High Court to recover that amount and, presumably, interest which has accrued in the interim. That is a separate issue and does not impinge on the plaintiff's application. It was further threatened that the Bank might proceed to exercise all or any of the rights available to it under the security documentation, including the appointment of a receiver.

2.6 In fact, by deed executed on 27th January, 2012 the Bank appointed the plaintiff to be receiver of the assets charged by the Navan Charge, that is to say, the Navan Property, and to enter upon and take possession of the assets in the manner specified in the Navan Charge and to exercise all powers conferred by the Navan Charge and by law. The plaintiff accepted the appointment on 3rd February, 2012, which is the date of the appointment.

2.7 Following the appointment of the plaintiff as receiver, his solicitors, Peter Morrissey & Co., who are acting for him on this application, wrote to Mr. Burns advising him of the appointment and inviting him to contact the plaintiff. Mr. Burns' response of 14th February, 2012 to them was to the effect that the plaintiffs solicitors were acting without authority and had no legal standing. It continued:

> "We do not have a contract, any permission that YOU believe you may have from us is hereby withdrawn. If you believe you have the power of attorney or any authority to act on our behalf, you are hereby fired, and any consent that you think you may have, tactic or otherwise, is hereby withdrawn. Please look up the doctrine of privity in contract law."

There followed accusations of potential breaches of, *inter alia*, the "Protection from Harassment Act 1997", which is an English, not in Irish, statute, and the "Data Protection Acts 1998/2003", the reference to 1998 presumably being a typographical error for 1988. The response also contained threats of complaints by Mr. Burns to the Data Protection Commissioner, the Law Society and the Minister for Justice, Equality and Law Reform. The letter dated 14th February, 2012 was also signed by Mrs. Burns.

2.8 In summary, the authority of the plaintiff in relation to the Dublin Properties has arisen as follows:

> (a) Apartment 29, Emmet Court is the subject of a mortgage dated 25th October, 2006 made between Mr. Burns and Mrs. Burns of the one part and the Bank of the other part, which was in the same form as the Navan Charge. It was registered in the Registry of Deeds on 27th November, 2008.
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> (b) Apartment 4, 109 Parnell Square is the subject of a mortgage dated 25th October, 2006 made between Mr. Burns and Mrs. Burns of the one part and the Bank of the other part, which was in similar terms to the Navan Charge. It was registered in the Registry of Deeds on 3rd June, 2009.
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> (c) The property registered on Folio 110613F of the Register of Freeholders County Dublin, of which Mr. Burns and Mrs. Burns are registered as full owners, is the subject of a charge dated 11th March, 2007 made between Mr. Burns and Mrs. Burns of the one part and the Bank of the other part, which was also in similar terms to the Navan Charge. That charge was registered as a burden on Folio 110613F on 16th January, 2008 and the Bank is registered as owner of the charge on the folio.

Letters of demand dated 12th January, 2012 were issued separately to Mr. Burns and Mrs. Burns demanding immediate repayment of

the sums secured on the Dublin Properties (€148,209.73, €186,882.81 and €228,097.55). By deed of appointment executed on 20th January, 2012 the Bank appointed the plaintiff to be receiver of the Dublin Properties and the plaintiff accepted that appointment on 25th January, 2012. The deed of appointment was similar to the deed of appointment in relation to the Navan Property, in that the plaintiff was expressly empowered to enter upon and take possession of the Dublin Properties and to exercise all powers conferred on him by the relevant mortgages and charge and by law. The reaction of Mr. and Mrs. Burns to the appointment of the receiver over the Dublin Properties was similar to their reaction to his appointment as receiver over the Navan Property.

2.9 There is absolutely no doubt but that the Bank has valid securities over the Navan Property and the Dublin Properties as outlined above. Moreover, there is no doubt but that when the Bank appointed the plaintiff as receiver over both the Navan Property and the Dublin Properties its power to do so under the various security documents was exercisable. Indeed, Mr. Burns made it clear that he was not challenging the entitlement of the Bank to appoint the plaintiff as receiver. *Prima facie*, the plaintiff was validly appointed as receiver with the authority to exercise the powers conferred on him by the various security documents in relation to both the Navan Property and the Dublin Properties.

2.10 In the interests of clarity, I should record that each of the Dublin Properties is let and that the defendants are not in occupation of any of those properties.

3. The evidence adduced by the plaintiff

3.1 The application is grounded on the affidavit of the plaintiff, which was sworn on 23rd March, 2012. The plaintiff has averred that on 16th February, 2012 he attended at the Navan Property to take possession of it. He was accompanied by a local estate agent, Michael Farrelly of Sherry Fitzgerald Harlan Farrelly, whom he had engaged to place the Navan Property on the market. He also brought a locksmith with him. The locks on the Navan Property were changed. He spoke to the tenant of the ground floor and informed her that he was taking possession of the Navan Property on behalf of the Bank and that she should henceforth pay her rent to him directly. The first and second floors were vacant.

3.2 There followed in the plaintiff's affidavit an outline of information he obtained from various sources. For instance, he has exhibited an e-mail of 16th February, 2012 from Mr. Farrelly, who had attended at the Navan Property later on 16th February, 2012 and who informed the plaintiff that Mr. Burns was there. There was also a locksmith engaged by Mr. Burns there who changed the locks on the premises once again. Mr. Farrelly reported that the tenant on the ground floor was distressed. Arising out of that contact and out of contact which the plaintiff received directly from the tenant of the ground floor, the plaintiff's solicitors wrote to Mr. Burns and Mrs. Burns by letter dated 23rd February, 2012 setting out the plaintiff's entitlement to the rent payable by the tenant and threatening injunction proceedings. On the same day, 23rd February, 2012, the plaintiff engaged a security firm, Pinnacle Security, to attend at the Navan Property daily from 8am to 8pm. He also contacted An Garda Siochana at Navan Garda Station to apprise them of the situation. The locks were changed once again on 23rd February, 2012 on the direction of the plaintiff.

3.3 Thereafter, the plaintiff has exhibited a series of documents, each of which is described as an "Incident Report", made by security officers of Pinnacle Security. On the basis of what is reported, it is clear that Mr. Burns, in combination with associates of his, has acted in a manner which has interfered with and frustrated the activities of the plaintiff in relation to the plaintiff's rights as receiver validly appointed in relation to the Navan Property. Moreover, I am satisfied that, whether intentional or not, Mr. Burns, in combination with his associates, has harassed the tenant occupant of the ground floor of the Navan Property. The contents of three Incident Reports describing what happened on 9th March, 2012 when, at the behest of Mr. Burns, the locks on the property were changed once again demonstrate that. A later Incident Report in relation to events on 20th March, 2012, which was also exhibited by the plaintiff, indicates that Ormonde Mining Plc has been locked out of the first and second floors of the Navan Property through the actions of Mr. Burns.

3.4 The plaintiff also exhibited an e-mail from an official of his firm, Sherry Fitzgerald Kennedy Lowe, sent on 15th March, 2012, which contains evidence, which has not been disputed by Mr. Burns, that Mr. Burns has intimidated at least one of the tenants of one of the Dublin Properties.

3.5 Although he did not avail of the opportunity in his replying affidavit, which was sworn on 29th March, 2012, to address the matters of fact outlined in the plaintiffs affidavit, at the hearing of the application Mr. Burns objected to the evidence in relation to harassment of the occupants of the property.

3.6 I am satisfied that it is proper for the Court to rely on the hearsay evidence contained in the plaintiff's affidavit. As is pointed out in Delany and McGrath on *Civil Procedure in the Superior Courts* (3rd Ed.) at para. 20 -70, Order 40, rule 4 of the Rules of the Superior Courts 1986 lays down the important principle that, except on interlocutory applications, an affidavit should be confined to facts within the first hand knowledge of the deponent. In relation to an affidavit sworn in an interlocutory application, the authors state as follows at paras. 20 - 71:

> "'In an affidavit sworn in relation to an interlocutory application, it is permissible to include hearsay, this is to say, averments of facts that are not within the knowledge of the deponent. Indeed, it appears that it is possible for a deponent to give second-hand hearsay evidence whereby he avers that he has been informed of something by X who in turn has been informed by Y. However, rule 4 requires that the grounds for the belief stated by the deponent must be given."

The plaintiff in his affidavit has been astute in identifying the grounds for his belief in the information he has obtained from third parties to which he deposes and in every case has exhibited a document signed by the third party, which corroborates his averment.

4. Mr. Burns' answer to the application and the plaintiff's response

4.1 Mr. Burns' replying affidavit is more concerned with making assertions as to what he believes to be the relevant law than to setting out factual matters. In it he has asserted that the plaintiff has an equitable duty of care to him and to the Bank, that the plaintiff performed his duty of care to the Bank with great diligence but was completely negligent in his duty of care to Mr. Burns. He has exhibited a letter of 9th March, 2012, which he had sent to the plaintiff, in which he raised various questions starting with the question: "Do you have a duty of care to me?" That letter contained a range of questions which, in my view, are wholly immaterial to the issues which the Court has to determine on the interlocutory application. For instance, the question was raised as to what steps the plaintiff had taken "to ensure that my mortgages have not been securitised". There is no evidence before the Court to indicate

that the Bank has in any way ceased to be the mortgagee or chargee in relation to the properties the subject of this application or to suggest that the Bank has divested itself of its legal powers as mortgagee or chargee. Two bulky documents, which between them run to 340 pages, exhibited by Mr. Burns and designated Exhibit A, which appear to be prospectuses for the issue of so-called "Credit Linked Notes" by a company incorporated in this jurisdiction and a company incorporated in the Federal Republic of Germany do not suggest otherwise, in that a cursory glance at the first page of each document reveals that each "Reference Loan", as defined, is secured on property located in Denmark. Further, it was asserted by Mr. Burns that the appointment of the plaintiff is flawed, which, having regard to his submissions, I understand to be based on his belief that the securities which he and Mrs. Burns gave the Bank have been securitised.

4.2 In his replying affidavit, Mr. Burns also exhibited correspondence from Padraig O'Connell to the Bank. In the first letter, dated 7th February, 2012, Mr. O'Connell stated that he was acting as "a Mediator" in order to resolve the outstanding amount due by Mr. Burns and Mrs. Burns. In a subsequent letter dated 16th February, 2012, Mr. O'Connell made reference to what I understand to be the summary proceedings in this Court by the Bank against Mr. Burns and asked to be contacted with regard to setting up a meeting to discuss the matter. There was a further letter dated 20th February, 2012 from Mr. O'Connell to the Bank seeking a meeting. Finally, there was a letter dated 13th March, 2012 from Mr. O'Connell of "O'Connell Mediation Services", setting out "a proposal" to the Bank and seeking a meeting. Mr. Burns complained that the Bank had not provided a meeting, as requested. I am satisfied on the evidence that Mr. O'Connell was one of the associates of Mr. Burns and was involved in a number of the incidents reported by officers of Pinnacle Security to have taken place at the Navan Property.

4.3 In his submissions Mr. Burns relied on a decision of the Court of Appeal of England and Wales delivered on 26th May, 1999 and furnished the Court with a copy of the judgment as approved by the Court. In fact, the authority in question has been reported as *Medforth v. Blake* [1999] 3 All ER 97. The facts in that case were that the plaintiff owned a pig farming business which was financed by loans from a bank, which were secured by a charge over his farm. The bank appointed receivers over the mortgaged property. The receivers managed the farm business under a power contained in the charge. The plaintiff was dissatisfied with the management of the business, alleging, in particular, that the receivers had failed to obtain freely available discounts on feed. Accordingly, he commenced proceedings against the receivers, contending, *inter alia*, that they had owed him a duty of care in managing the farm business. On the trial of a preliminary issue, the receivers contended that they owed the plaintiff no duty beyond one of good faith. The decision of the Court of Appeal is succinctly summarised in the head-note as follows:

> "Where a receiver managed mortgaged property, his duties to the mortgagor and anyone else interested in the equity of redemption were not necessarily confined to a duty of good faith. Rather, in exercising his powers of management, the receiver owed a duty to manage the property with due diligence, subject to his primary duty of attempting to create a situation where the interest on the secured debt could be paid and the debt itself repaid. Thus although due diligence did not oblige the receiver to continue a business at the mortgaged property, it did require him to take reasonable steps to manage it profitably if he did choose to continue that business. Such a duty, like the duties owed by a mortgagee to the mortgagor, was imposed by equity."

The foregoing summary accurately reflects the conclusions of Sir Richard Scott V.-C. at page 111. Responding to Mr. Burns' reliance on that authority, counsel for the plaintiff stated that it is not disputed that the plaintiff, in his capacity as receiver, owes a duty of care to Mr. Burns, in the case of the Navan Property, and to Mr. Burns and Mrs. Burns, in the case of the Dublin properties. However, counsel submitted that there is no evidence of a breach of that duty of care.

4.4 Mr. Burns also submitted that he had "fired" the receiver because the receiver did not realise that he had an equitable duty to him. He submitted that the Conveyancing Act of 1881 and also s. 108(2) of the Land and Conveyancing Law Reform Act 2009 (the Act of 2009) are biased towards receivers and banks. Section 108(2) of the Act of 2009 provides that a receiver appointed under s. 108(1) is the agent of the mortgagor, who is solely responsible for the receiver's acts or defaults, unless the mortgage provides otherwise. Mr. Burns submitted that he must have power to dismiss the receiver because, if the position were otherwise and he was required to be responsible for an agent, that situation would be against his human rights and unlawful.

4.5 In responding to that point, counsel for the plaintiff relied on the decision of the Court of Appeal of England and Wales in *Gomba Holdings UK Ltd. & Ors. v. Minories Finance Ltd & Ors*. (I 989) 5 BCC 27 and, in particular, the following passage from the judgment from Fox L.J. in relation to the nature of a receiver's agency (at p. 29):

> "The agency of a receiver is not an ordinary agency. It is primarily a device to protect the mortgagee or debenture holder. Thus, the receiver acts as agent for the mortgagor in that he has power to affect the mortgagor's position by acts which, though done for the benefit of the debenture holder, are treated as if they were the acts of the mortgagor. The relationship set up by the debenture, and the appointment of the receiver, however, is not simply between the mortgagor and the receiver. It is tripartite and involves the mortgagor, the receiver and the debenture holder. The receiver is appointed by the debenture holder, upon the happening of specified events, and becomes the mortgagor's agent whether the mortgagor likes it or not. And, as a matter of contract between the mortgagor and the debenture holder, the mortgagor will have to pay the receiver's fees. Further, the mortgagor cannot dismiss the receiver since that power is reserved to the debenture holder as another of the contractual terms of the loan. It is to be noted also that the mortgagor cannot instruct the receiver how to act in the conduct of the receivership."

4.6 In my view, what is stated in that passage reflects the law in this jurisdiction. As regards the Navan property, Mr. Burns cannot dismiss the plaintiff, as receiver, nor can he instruct the plaintiff, as receiver, how to act in the conduct of the receivership. The same applies to the position of Mr. Burns and Mrs. Burns vis-á-vis the Dublin Properties.

4.7 In a nutshell, Mr. Burns' answer to the plaintiff's application is misconceived, being based on an erroneous belief as to the relevant legal principles.

5. Conclusions on the plaintiff's entitlement to an interlocutory injunction

5.1 The objective of the plaintiffs application for an interlocutory injunction is to obtain an order from the Court regulating the relationship of the plaintiff, as receiver appointed by the Bank as mortgagee/chargee, on the one hand, and the defendants, as mortgagors/chargors, on the other hand, pending the determination of the substantive proceedings. The tests to be applied by the Court in determining whether such an order should be made are the tests laid down by the Supreme Court in *Campus Oil Ltd. v. Minister for Industry and Energy* (No. 2) [1983] I.R. 88.

5.2 As regards the Navan Property, of which Mr. Burns is the owner, he entered into the Navan Charge with the Bank whereby he

agreed that, at any time after demand for repayment of the monies secured by the Navan Charge, the Bank could appoint a receiver who could enter upon and take possession of the Navan Property. That is what has happened. The Bank demanded repayment of the monies secured by the Navan Charge, and, Mr. Burns not having complied with the demand, the Bank appointed the plaintiff as receiver and, as he was entitled to do, the receiver entered into possession of the Navan Property on 16th February, 2012. What has happened since then is that Mr. Burns has endeavoured to prevent the receiver retaining possession and from receiving the rents and profits of the Navan Property. Mr. Burns has adduced no evidence whatsoever, nor has he made any argument on the basis of which it is possible to conclude, that he has any entitlement to oust the plaintiff from possession or receipt of the rents from the Navan Property. I have absolutely no doubt that the plaintiff meets the first test on an application for an interlocutory injunction, in that there is a fair issue to be tried that he is entitled to remain in possession and is entitled to receipt of the rents and profits of the Navan Property, pending the determination of the substantive proceedings. The same applies to the Dublin Properties.

5.3 As regards the second test, whether damages would be an adequate remedy for the plaintiff, if he were to establish an entitlement to a permanent injunction at the substantive hearing but an interlocutory injunction had been refused, the glaring reality of the situation, on the basis of the evidence put before the Court by Mr. Burns, is that Mr. Burns and Mrs. Burns would not be able to meet a claim for damages. It is interesting to note that the "proposal", formulated as two alternative proposals, made by Mr. O'Connell on his behalf to the Bank in the letter of 13th March, 2012 were: to sell the property at its best possible selling price, and "for the remainder of the loan to be a write off'; or to "bring down the loan to the actual market value at present, therefore lower repayments will be passed on to a possible tenant". Mr. O'Connell also stated in the letter that, having reviewed Mr. Burns' finances, those proposals seem to be the only way forward. On the other hand, the plaintiff has given an undertaking as to damages on foot of which Mr. Burns and Mrs. Burns could be adequately compensated for any loss which they might sustain by reason of the grant of an interlocutory injunction, if it were to transpire on the determination of the substantive proceedings that the interlocutory injunction should not have been granted.

5.4 I am also satisfied that the third test, whether the balance of convenience lies in favour of the grant of an interlocutory injunction, has been met by the plaintiff. Before the Bank demanded repayment of the monies secured by the various mortgages, Mr. Burns and Mrs. Burns had not been meeting their undenied and undeniable obligations to the Bank. I think it is reasonable to infer that, if they were allowed to continue in receipt of the rents out of the various properties, they would not rectify that situation, in consequence of which their joint liability to the Bank, which is now just short of €1.9m, would increase in circumstances in which it is obvious on Mr. Burns' own evidence that they will not be able to discharge the liability. Apart from that, I consider that it is appropriate that the Court should have regard to the position of the tenants in the various properties and to the strong evidence, which was not contradicted on affidavit, that some at least of those tenants are being harassed and intimidated by Mr. Burns and his associates and, as a matter of probability, will not continue to put up with that conduct. In the circumstances, I am satisfied that the balance of convenience favours the grant of, and the continuance in force of the interlocutory injunction which I granted on 30th March, 2012.

5.5 Accordingly, all the relevant tests having been met, the interlocutory injunction will continue until the determination of the substantive proceedings, or further order.