[2020] IEHC 306

THE HIGH COURT
COMMERCIAL

2019 No. 7845P

BETWEEN:
DOWNES AND HOWARD LIMITED, WAYMILL LIMITED, LAPOVO LIMITED, NIALL HOWARD, ROBERT HOWARD AND P.J. HOWARD

PLAINTIFFS

-AND-
EVERYDAY FINANCE DESIGNATED ACTIVITY COMPANY

DEFENDANT

JUDGMENT of Mr. Justice Quinn delivered on the 19th day of June, 2020

1. This judgment relates to an application by the plaintiffs for an injunction to restrain the appointment of receivers over a portfolio of properties on which the defendant holds mortgages and charges, and for an injunction directing the defendant to remove receivers already appointed.

2. The plaintiffs claim that the appointment of receivers is in breach of the terms of a certain Amended Settlement Agreement which they had made with Allied Irish Banks Plc and AIB Mortgage Bank ("the banks") before the banks sold the plaintiffs' loans and attendant security to the defendant.

3. I have concluded that on the evidence before the court in this application the plaintiffs have not established a fair bona fide question to be tried as to the existence of the Amended Settlement Agreement relied on by them. Therefore, the injunction should be refused.

Background

4. During the years from 2003 to 2013 the plaintiffs borrowed from the banks to part finance the purchase and construction of 56 commercial and residential properties. The properties were located in Cork, Limerick, Ennis, Kilkee, Nenagh, Tipperary and Tullamore.

5. The facilities granted to the plaintiffs were amended and replaced from time to time and on 24 February, 2016, a Deed of Settlement was entered into between the plaintiffs and the banks. By this Deed of Settlement the banks agreed to accept in full and final settlement of all the loans then due by the plaintiffs the amount of €9,850,000 provided that amount was paid by 30 June, 2016 ("the Latest Repayment Date").

6. It was also a condition of the settlement that pending the Last Repayment Date two of the plaintiffs would make interim payments which between them amounted in total to €50,000 per month and the banks reserved the right to apply these interim payments in their discretion against interest or principal amounts then due.

7. The Deed of Settlement provided that on payment of these amounts the plaintiffs would be released from the balance of all of the facilities and all security held by the banks would be released.

8. It was a condition of the settlement that there be produced to the banks a valuation by a valuer appointed by the banks confirming that the aggregate open market value of the secured properties did not at that time exceed €9.6 million.

9. The Deed of Settlement contained a number of standard conditions including the provision of valuations, certain corporate certificates and mandates.

10. Clause 21 concerning "Variation" was in the following terms:

> *"No variation of this Deed shall be effective unless it is in writing and signed by the parties."*

11. No evidence was given on this application as to the total amounts originally advanced by the banks or as to the balance due at the time when the original settlement was made. It was said in submissions that a balance in the order of €25 million was due at the time of the application for the injunction. There was exhibited by the defendant certain letters of demand which were served by it on 26 November, 2019, totalling a sum of €22.8 million, due at that time.

Extensions of Last Repayment Date

12. The Last Repayment Date of 30 June, 2016, was extended twice by agreement between the parties, firstly to 30 December, 2016, and then to 30 June, 2017.

13. These extensions were not agreed in writing, although there was exhibited by the plaintiffs the draft of an amended Deed of Settlement said to have come into existence on or about 17 October, 2016, providing for the first of these extensions through to 31 December, 2016. The version of this document exhibited is unsigned and it is not claimed by any of the parties that it was signed.

Amended Settlement Agreement

14. The plaintiffs claim that in or about June 2017 a third amendment was agreed, this time to the effect that the Last Repayment Date would be extended indefinitely, provided the plaintiffs continued to make the monthly interim payments. It is not contended that that variation was made in writing. This is referred to as the "Amended Settlement Agreement".

15. As to when the third amendment was agreed, the plaintiffs say in replies to particulars that it was made "*when the latter date [being 30th June, 2017] expired*".

16. In the Plenary Summons the plaintiffs seek a declaration that the original Settlement Agreement was amended by agreement between the banks and the plaintiffs to the effect that the Last Repayment Date was indefinitely extended for as long as the monthly interim payments were made. They also seek an order for specific performance of the Amended Settlement Agreement, such that the defendant as the banks' successor-in-title would release the plaintiffs from their loans and release all the security in return for payments amounting in total to €9,850,000.

17. The plaintiffs say that in circumstances where they are now ready, willing and able to implement that Settlement, the defendant cannot rely on the demand letters of 26 November, 2019, which call for payment of the entire balance of €22.8 million and in default of such payment, appoint receivers.

18. The defendants admit that the first two amendments were made, namely the extensions to 30 December, 2016, and to 30 June, 2017. They deny that the third amendment was made and assert that the original Deed of Settlement, as amended twice by the extensions to 30 December, 2016, and 30 June, 2017, has expired and can no longer be relied on by the plaintiffs.

19. The plaintiffs were relying on securing alternative sources of finance to implement the settlement, and these efforts were ongoing when the two time extensions were agreed. These efforts continued after 30 June, 2017. During the second half of 2017 and through 2018 correspondence continued between the banks on the one hand and the plaintiffs' financial and legal advisors, being Mr. Harry Gleeson and Messrs. Thornton Solicitors, on the other hand.

20. The exhibited correspondence between the bank and Mr. Gleeson between October 2017 and March 2018 shows Mr. Gleeson indicating to the bank that progress was being made in terms of the refinancing and shows the bank pressing for updates from time to time.

21. The plaintiffs' case is that all of these communications took place in the context of an effort by the plaintiffs to implement the Amended Settlement Agreement and they claim that these communications evidence the existence of such an agreement. The defendants deny this.

22. The contents of a number of the emails exchanged between Mr. Gleeson and Mr. Egan in AIB are informative. Mr. Egan states on more than one occasion that the Settlement Agreement originally made expired on 30 June, 2017, and is therefore *"now expired/defunct"* (Mr. Egan's email 17 November, 2017). In his email of 1 December, 2017 Mr. Egan stated as follows:

> *"Again I will point this out that the deadline of 30th June, 2017 is twelve months beyond the original drop dead date and now nearly 22 months since the now expired/defunct Settlement Agreement was entered into. No bank approval is in place. Can you please send me a copy of the letter of sanction for the refinance and advise when this deal will close?*
>
> *There has been an inordinate level of forbearance in this case, I need to update the bank's credit committee and based on the lack of progress the bank is reserving its rights beyond this date again (30th June, 2017)."*

23. This reservation of rights position is repeated on a number of occasions by Mr. Egan, culminating in an email dated 16 March, 2018.

24. On 26 March, 2018, Messrs. Thornton wrote to Mr. Egan confirming the status of the plaintiffs' efforts to secure alternate finance and stated:

> *"I understand from our clients that they are most eager to forge progress here and are quite appreciative of the forbearance granted by AIB towards them thus far. I believe that our clients are continuing to make in full the repayments as agreed under the Settlement Agreement entered into previously and so are continuing to rely on the terms of the Settlement Agreement and goodwill of AIB for the short term."*

25. This assertion of reliance on the Settlement Agreement was not made in any of the earlier communications from Mr. Gleeson, even in reply to Mr. Egan's statements that that Agreement had expired in June 2017.

26. On 28 March, 2018, Mr. Egan replied in the following term:

> *"Dear Ms. Clancy,*
>
> *Please be advised the Settlement Agreement has expired since the 1st July, 2017 and the same terms are not approved by the bank. This has been communicated to Mr. Harry Gleeson for a number of months including March 2018.*
>
> *The bank originally approved the settlement in December 2015, executing a Settlement Agreement in February 2016 with a settlement closing date of 30th June, 2016. The bank extended the settlement date until 31st December, 2016 and a further extension to the 30th June, 2017.*
>
> *The Bank will be very happy to enter new negotiations with your client but we will require up to date financial information and we would require up to date valuations on all the properties. The proposal would have to go through the Bank's Credit Committee as the Settlement Agreement has expired."*

27. The affidavits do not disclose what transpired during the remainder of 2018 and into early 2019. It appears from later correspondence that the plaintiffs continued in their efforts to secure alternate financing and in the meantime continued to make the monthly interim payments of €50,000 per month.

Transfer of loans to defendant

28. On 14 June, 2019 the defendant acquired the loans and securities from the banks pursuant to a Global Deed of Transfer.

29. No issue was taken by any of the parties concerning the validity of the transfer and it is accepted that the defendant succeeded to the banks' rights, remedies and obligations under the relevant loans and security.

30. No evidence has been given as to what transpired in the immediate aftermath of the transfer.

31. The plaintiffs claim that by August 2019 they had secured alternative financing and they exhibited a facility letter dated 6 August, 2019, from First Citizen Finance, which they say would have enabled them to implement the settlement. Again, no evidence was given as to the state of the dialogue between the plaintiffs and the defendant at this time.

Link Asset Services

32. The plaintiffs exhibited and place reliance on two emails from Ms. Mona Samadi, a Senior Asset Manager employed by Link Asset Services, which is a loan servicer acting on behalf of the defendant following the acquisition of the loans.

33. On 16 September, 2019, Ms. Samadi emailed the plaintiffs' then solicitor, Mr. Swaine, in the following terms:

> *"I refer to our telephone conversation this morning.*
>
> *I wish to confirm that my client Everyday Finance DAC will not be taking any receivership action until such time as I give you at least 48 hours' notice on this matter.*
>
> *As discussed I would like to establish where the rent has been lodged to – so if you can find out for me from the borrowers before I revert to my client on this.*
>
> *I wait to hear from you.*
>
> *Kind Regards."*

34. On 30 September, 2019, Ms. Samadi sent a second email to Mr. Swaine as follows:

> *"Dear Mr. Swaine,*
>
> *We spoke to AIB in relation to the settlement agreement dated 2016 for Downes and Howard accounts.*
>
> *They have notified us that given the lack of progress by your clients the settlement agreement was withdrawn in March 2018 and demands were issued in November 2018 with a view to appointing receivers over the properties.*
>
> *As it stands there is no valid agreement in place – and their current proposal to honour the expired agreement at a level of €9,850,000 has not been accepted by my client.*
>
> *Should you wish to discuss this with your client and revert in due course with an increased offer – I will certainly bring that forward to my client.*
>
> *In the meantime, I will be issuing the borrowers a letter declining their current proposal."*
>
> *I await hearing from you on this urgent matter."*

35. The demands of November 2018 were not exhibited. Nor was the reference to the making of such demands contradicted.

36. No evidence was given as to the nature of the "current proposal" .

37. On 26 November, 2019, Link Asset Services wrote to the plaintiffs on behalf of the defendant demanding the repayment in full of the balances the due on the facilities, claimed to be €22.8 million. Notice was given that if the full amount owing was not paid on or before 5pm on 4 December, 2019: -

> *"…the [defendant's] rights, including without prejudice to the generality of the foregoing, [the defendant's] right to enforce the Security and appoint a receiver or take any other steps as necessary in order to recover the debt, will be exercised without giving you further notice or warning."*

38. The narrative of events around the time of these emails and when the demands were delivered was not detailed by either party in the affidavits before the court.

These proceedings

39. On 9 October, 2019, the plaintiffs commenced these proceedings. The reliefs sought in the Plenary Summons were the following: -

> *"(a) A declaration that a written Settlement Agreement was made on or about 24 July 2016 (the Settlement Agreement) between the plaintiffs on the one hand and Allied Irish Banks plc and AIB Mortgage Bank (the Banks).*
>
> *(b) A declaration that the terms of the Settlement Agreement were amended by the agreement of the Plaintiffs and the Banks whereby the 'Latest Repayment Date' of 30 June 2016 specified at Clause 1.1 thereof was indefinitely extended for as long as a recurring interim monthly payment of €34,000 was made by the first plaintiff and a recurring interim monthly payment of €16,000 was made by the second plaintiff (the Amended Settlement Agreement).*
>
> *(c) A declaration that the defendant is the lawful successor in title of the bank's interest in the Settlement Agreement and the Amended Settlement Agreement.*
>
> *(d) A declaration that the Amended Settlement Agreement remains extant between the plaintiffs and the defendant.*
>
> *(e) Specific performance of the Amended Settlement Agreement whereby the defendant as the bank's successor in title agrees to release each of the Plaintiffs from their respective obligations and to release the security interests as set out in the Schedule to this Plenary Summons in return for the payment of the following sums…"*
>
> [There was then listed the payments to be made by the various plaintiffs, totalling the settlement sum of €9.85m.]

"(f) Damages for breach of contract in lieu of or in addition to specific performance of the Amended Settlement Agreement."

40. On 25 November, 2019, the proceedings were entered in the Commercial List of the court by consent order.

41. On 20 December, 2019, the plaintiff delivered a Statement of Claim and I shall return later to the contents of that pleading.

42. On 24 February, 2020, the defendant appointed Mr. Ken Fennell of Deloitte receiver of four of the charged properties.

43. On 26 February, 2020, the defendant appointed Mr. Fennell receiver of the remaining properties.

44. On 3 March, 2020, the plaintiffs initiated this application for an injunction. The application was given an initial return date of 5 March, 2020. Directions were made for the exchange of affidavits and the interlocutory application was heard on 20 May, 2020.

45. Although this motion was issued after the appointment of the receivers the interlocutory orders sought included an order restraining the appointment of a receiver and the forms of the orders sought in the application were as follows:

    (1) An order prohibiting the defendant from appointing a receiver over any of the premises comprising the secured property pending the resolution of the within proceedings, together with an order for an interlocutory injunction directing the defendant to remove any receiver already appointed.

    (2) An order prohibiting the defendant from publicising the appointment or purported appointment of a receiver.

    (3) An order requiring the defendant to ring-fence any monies collected by any receiver appointed.

    (4) An order pursuant to O.28, r.1 permitting the plaintiffs to amend their indorsement of claim in the Plenary Summons and the Statement of Claim to take account of the fact of the appointment of the receiver so that the relief now sought includes a permanent injunction prohibiting the appointment of a receiver and an order directing the defendant to remove a receiver already appointed.

46. The defendant makes no objection to the amendments to the summons or Statement of Claim. It opposes the making of any other interlocutory orders.

Interlocutory injunctions.

47. In *Merck Sharp & Dohme Corporation v. Clonmare Health Care Limited* [2019] IESC 65, ("MSD"), the Supreme Court reviewed the law applicable to the grant of interlocutory injunctions and the principles derived from *American Cynamid Company v. Ethicon Limited* [1975] AC 396 and *Campus Oil v. Minister for Industry (No. 2)* [1983] IR 88.

48. In his judgment in *MSD*, O'Donnell J. referred to the traditional approach following the decisions in *American Cynamid* and *Campus Oil* to the effect that a court should consider firstly the question of whether the plaintiff has raised a fair question to be tried, secondly, questions considering the adequacy of damages, and thirdly the balance of convenience. He said that on a closer review of those judgments it would be an error to treat the observations in *American Cynamid* and *Campus Oils* as akin to statutory rules. He said that in his view a proper understanding of the jurisdiction is that the formula by reference to these three tests was not one of strict guidelines to be followed sequentially. He said that: -

> *"The preferable approach is to consider adequacy of damages as part of the balance of convenience, or the balance of justice, as it is sometimes called. That approach tends to reinforce the essential flexibility of the remedy. It is not simply a question of asking whether damages are an adequate remedy. As observed by Lord Diplock, in other than the simplest cases, it may always be the case that there is some element of unquantifiable damages. It is not an absolute matter: it is relative."*

49. The court continued: -

> *"While the question of the adequacy of damages to either party and the capacity of the parties to pay them is often the largest single element in the balance of convenience, and will often be decisive in most cases, there are other factors which are relevant and which, in a closely balanced case, may tip the balance."*

50. Of particular importance in the context of this case, is the consideration by O'Donnell J. of the first limb of the test, namely the question as to whether a plaintiff has established a fair question or issue to be tried. O'Donnell J. referred to the historic approach before *American Cynamid* which was thought to require that a plaintiff establish a *prime facie* case or, and that "…*on the balance of probabilities it was more likely than not that the plaintiff would succeed at the trial of the action*."

51. O'Donnell J. continued as follows:

> *"Lord Diplock's speech comprehensively dismantled the basis for any such supposed rule. The logic of an interlocutory application is that it is heard and determined in advance of the trial. It would make little sense for valuable and expensive court time to be used in an attempt to predict, on the balance of probabilities, the outcome of a case which is yet to be heard where the evidence had not yet been ascertained and, more relevantly, had only been adduced on affidavit, and where the arguments were not fully developed. Accordingly, Lord Diplock concluded that there was no rule that a prime facie case should be established before an injunction could be granted. Instead, the court should consider whether a fair issue was to be tried, which means no more that the case not being frivolous or vexatious. If so the court should then proceed to consider how the matters should best be regulated pending the trial which involved a consideration of the balance of convenience."*

52. In *Dunne v. Dun Laoghaire Rathdown County Council* [2003] 1 IR 567, Hardiman J. emphasised the importance of the court not making any final determinations on matters of fact or law at the interlocutory stage when he said: -

> *"In dealing with an interlocutory motion, the court is not finally deciding any factual or legal aspect of this controversy. On a full hearing the evidence may be different and more ample. The law will be debated at greater length…"*

53. He continued: -

> *"The difficulty for a court in dealing with any case on an interlocutory basis is that there is an ever present risk, either in granting or withholding relief, of doing an injustice to the party who succeeds in the end. One has to balance the risks of injustice to the respective parties. In this context it is significant that, if no relief is granted, the court will be effectively deciding the issue by inaction, since the apprehended interference with the alleged national monument will be complete long before the action can be tried".*

54. Hardiman J. continued that in that particular case the court was not making a final decision that a consent was required under the National Monuments Act 1930 but he continued *"on the present state of the evidence, that appears to be so. This state of affairs is an essential element of the plaintiff's claim to relief*" and he determined that it was appropriate in that case to grant the relief sought.

55. I must be cautious not to embark on a determination of factual disputes which can only be resolved at a plenary hearing. Nonetheless, I am required to at least consider the evidence which is put forward to contend that the plaintiff has established a fair case to be tried, in this case as to the existence of the Amended Settlement Agreement.

56. *In Beltany Property Finance DAC v. Doyle* [2019] IEHC 307 Allen J. repeated this principle when he said: -

> *"It is long established that at the hearing of an interlocutory injunction the court cannot determine factual matters in dispute between the parties. This, however, does not prevent the court from assessing the credibility of what is said by the defendant".*

57. In relation to the matter of credibility Allen J. decided that it was appropriate to apply criteria similar to those which are applied in testing the credibility of a defence offered in summary summons proceedings, the principles for which were set out by Clarke J. (as he was then) in *IBRC v. McCaughey* [2014] 1 IR 749 where he said:

> *"Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual*

assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances. … It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."

58. In *Beltany*, Allen J. was considering the question of whether a defendant in occupation of premises against whom an injunction was sought had presented a bona fide arguable case that he was in occupation without permission in the context of an assertion of adverse possession. Having examined the evidence before him Allen J. found that no *bona fide* issue had been established by the defendant.

59. The facts in *Beltany v. Doyle* were more complex than in this case and the court was concerned in that case with the credibility of the defendant's position. However, it is clear from these authorities that it is appropriate for the court on this application to examine whether any evidence of the Amended Settlement Agreement has been advanced by the plaintiff. In the absence of such evidence, or at least the indication of the nature of such evidence to be given, the claim would rest at the level of mere assertion.

60. In examining this question the court is also informed by the principle that the threshold for analysing the existence or otherwise of a fair question to be tried is a low one (see *Crossplan Investments v. McCann* [2013] IEHC 205).

The case as pleaded

61. Pleadings and particulars are not evidence, but it is instructive to consider the pleaded case for the Amended Settlement Agreement. Paragraph 22 of the Statement of Claim refers to the Agreement made on 24 February, 2016. The description of the original Settlement Agreement is somewhat incomplete in that it refers to the requirement to make payments totalling €9,850,000 but makes no reference to the interim payments of €50,000 per month.

62. Paragraph 23 contains in its second sentence the plaintiffs' entire description of the Amended Settlement Agreement as follows:

"23. The Settlement Agreement was subsequently amended by the agreement of the plaintiffs and the banks whereby the 'Latest Repayment Date' of 30 June, 2016 specified at Clause 1.1 thereof was extended, first to 31 December 2016 and subsequently to 30 June 2017. The Settlement Agreement was then indefinitely extended for as long as a recurring interim monthly payment of €34,000 was made by the First Plaintiff and a recurring interim monthly payment of €16,000 was made by the Second Plaintiff. (The Amended Settlement Agreement)."

63. The Statement of Claim then refers to the assignment of the facilities to the defendant in 2019, which is not in dispute.

64. A notice for particulars was raised by the defendant on 16 January, 2020, and replied to on 28 February, 2020.

65. In para. 3 the defendant sought detailed particulars in relation to *"each alleged agreement to extend the time for payment*". The only particulars provided in response were in para. 3.1 of the replies as follows:

> *"A memorandum of the Amended Settlement Agreement was issued on or about 17 October 2016. However, the memorandum contained a repayment date of 31 December 2016 and in or around 10 December 2016 it was agreed that this would be extended to 30 June 2017, but no further written memorandum was issued to reflect this change. When the latter date expired, the amended settlement agreement was extended indefinitely by the Bank's acceptance of the cumulative sum of €50,000 per month from the Plaintiffs."*

66. The plaintiffs replied that the agreements were made "*partly written, partly oral*". The only writing referred to was the "*memorandum of the amended settlement agreement issued on or about 17 October 2016",* which was the version extending the last repayment date to 30 December, 2016.

67. Reference was also made to a telephone conversation in or around 10 December, 2016, between Mr. Gleeson on behalf of the plaintiffs and Mr. John Callanan of AIB Financial Solutions on behalf of the banks. The plaintiffs declined to furnish particulars as to the "*words spoken, or the substance of what was spoken"* claiming that these were a matter for evidence.

68. The references to a memorandum of 17 October, 2006, (which was the unexecuted draft of a second version of the Settlement Agreement), and the reference to a telephone conversation on 10 December, 2016, related to the extension of the Last Repayment Date from 30 June, 2016, to 30 December, 2016, or possibly– but not so stated – to the next 6 month extension, to 30 June, 2017.

69. In para. 3.5 the defendants requested particulars of the consideration alleged to have flowed to the banks in return for agreeing to extend the time for payment. No reply was made to that question.

70. In para. 3.6 the plaintiff raised the following question:

> *"As regards the alleged agreement to indefinitely extend the time for payment, as long as the two interim monthly payments continued, please explain when or how on the plaintiffs' case that arrangement would (or could) terminate or determine."*

No reply was furnished to this question.

The evidence

71. The plaintiffs' evidence regarding the Amended Settlement Agreement is to be found in para. 7 of the affidavit of Robert Howard grounding this application sworn on 2 March,

2020. The remarkable feature of that paragraph is that it is a verbatim repeat of para. 23 of the Statement of Claim, quoted at para. 62 above, and no more. It is therefore no more than one sentence containing a bare assertion of the existence of the Amended Settlement Agreement. No information whatsoever is given as to how the agreement came to be made, when exactly it was made, who were the persons who made the agreement on behalf of the parties or what words were used in the making of the agreements. No documents were exhibited to evidence the agreement or any of its terms. There was no information or evidence provided of any of the ingredients which would classically be required to evidence the formation of a contract, such as the terms of an offer made, terms of acceptance, or description of any consideration.

72. In para. 9 Mr. Howard states that "the plaintiffs remain ready, willing and able to perform their respective obligations under the Amended Settlement Agreement". In para. 17 he states "*I believe that the Amended Settlement Agreement remains extant between the plaintiffs and the defendant and the plaintiffs remain willing, ready and able to perform their obligations under it".*

73. In submissions it was suggested that the defendant had not denied the description of the agreement as set out by Mr. Howard. This is incorrect. In a replying affidavit sworn by Ms. Samadi, she states in para. 9 that the fact of the extension to 30 December, 2016, and later to 30 June, 2017, is not denied. She continues "*What is denied, however, is the, with respect, unlikely claim that upon expiration of the extended term (i.e. 30 June, 2017) the term of the Settlement Agreement was extended indefinitely by the Banks' alleged acceptance of the aggregate sum of €50,000 per month."*

74. Despite the defendant's denial of the agreement, Mr. Howard's second affidavit sworn on 23 March, 2020, contains no facts about the making of the amended agreement other than to repeat his statement that the plaintiffs continued paying the sum of €50,000 per month *"because we were required to pursuant to the terms of the Amended Settlement Agreement".*

75. In his affidavits Mr. Howard canvasses a number of arguments by reference to events which occurred after 30 June, 2017, to which I shall refer later. But nowhere in the affidavits does he go any further than the level of a bare assertion contained in the second sentence of para. 23 of the Statement of Claim.

Other evidence and submissions

76. It is not in dispute that the plaintiffs continued to make the monthly interim payments of €50,000. The plaintiffs claim that this constitutes evidence of the Amended Settlement Agreement by asserting that it amounts to compliance with the Agreement. The fact of these payments is also relied on by the plaintiffs in response to submissions made by the defendant that because the agreement alleged is capable of lasting for more than one year and has not been made or evidenced in writing it does not comply with the Statue of Frauds. The plaintiffs claim that the acceptance of these payments amounts to an act of part performance of the settlement such as would meet a defence based on the Statute of Frauds. This, and other issues discussed below can be further canvassed at the trial of the

proceedings if the plaintiffs have first adduced evidence of the making of the Amended Settlement Agreement. In the absence of such evidence at this interlocutory stage, I regard the making of these payments as evidence only, as the defendant submits, of reduction of the debt, for which the plaintiffs were liable.

77. The plaintiffs rely on the emails from Ms. Samadi to Mr. Swaine on 16 and 30 September, 2019, quoted at para. 33 and 34 above.

78. It is submitted that the email of 16 September, 2019, constituted some form of undertaking or established an "estoppel" in as much as Ms. Samadi indicated that the defendant would not be taking any receivership action until such time as she had given at least 48 hours-notice on the matter.

79. No other evidence was given by either party as to the state of the communications between the parties between the dates of these emails and the date on which the demand letters were served on 26 November, 2019. Those demand letters constituted the clearest of notice of the intention on the part of the defendant to enforce its security, and included an express reference to an intention to "*appoint a receiver*" unless the loan balances were discharged. The appointments were made some two months later.

80. It was suggested that in the email of 30 September, 2019, Ms. Samadi had committed to sending to the borrowers a letter "*declining their current proposal*". The plaintiffs sought to rely on this email to introduce confusion as to whether the defendant was denying that it had succeeded to the bank's obligations under the Settlement Agreement. No such denial was made.

81. No evidence of a "*current proposal*" was given. On a full reading of the email of 30 September, 2019, it is clear that Ms. Samadi was indicating an intention to decline a "current" proposal made by the plaintiffs and that in the same letter she was repeating a position which had been previously adopted by the banks prior to the transfer of the loans to the effect that the original Settlement Agreement had expired and was no longer in force by the time the loans had transferred to the defendant.

82. The defendant referred extensively in argument to the provisions of Clause 21 which provided that no variation of the original Deed of Settlement would be effective unless made in writing and signed by the parties.

83. The plaintiffs contended that the banks had waived Clause 21 in respect of the first two amendments, namely the extensions to 30 December, 2016, and to 30 June, 2017, and that they are precluded from now invoking it to deny the efficacy of the third amendment. The first two extension agreements are not in controversy in these proceedings and no evidence was advanced of any waiver of the provisions of Clause 21. This is an issue which will have to be considered fully at the trial of the action. If at the trial the plaintiffs can establish as a matter of evidence that the third amendment was agreed between the parties, then the court will need to consider as a matter of law the efficacy or otherwise of Clause 21. The arguments which have been made in submissions by the parties do not

assist the court in establishing whether any evidence has been advanced of the making of the third amendment in the first place. Only if such an agreement were proved to have been made orally between the parties would it then be necessary for the court to consider the application of Clause 21.

84. A number of other issues were canvassed at the interlocutory hearing which I consider are more appropriate for the trial and on which I do not propose at this time to make findings. These include such issues as the follows:

    (a) The defendant's characterisation of the third amendment to the Settlement Agreement as being "inherently implausible" in that it would constitute an agreement made for no consideration to the effect that the plaintiffs could make payments in a sum of €50,000 per month indefinitely until such time as the plaintiffs were ready, willing and able to make the payment of €9.85 million.

    (b) Arguments concerning the effect of the no variation clause.

    (c) Arguments concerning the absence of consideration.

    (d) Arguments relating to the Statute of Frauds.

    (e) Submissions by the defendants that it was more than two years after the expiry of the settlement as extended to 30 June, 2017, when the plaintiffs first asserted an entitlement to specific performance of the Amended Settlement Agreement.

85. Having concluded that the plaintiffs have failed to establish the existence of a fair issue to be tried, that should be the end of the matter. Questions concerning the adequacy of damages and the balance of convenience do not therefore arise. For completeness however, I shall briefly consider the submissions which were made regarding adequacy of damages and balance of convenience.

Adequacy of damages

86. Reliance was placed by the plaintiffs on AIB v. Diamond [2011] IEHC 505 as authority for the general proposition that damages are not an adequate remedy in cases of interference with enjoyment of a property right. That case concerned the plaintiffs' property rights in its business, good will and confidential information. The court found that on the facts damages could not be an adequate remedy from the perspective either of the plaintiffs or of the defendants should they succeed at trial.

87. Clearly the judgment in *AIB v. Diamond* is not authority for the proposition that in every case concerning property rights the court should presume that damages are not an adequate remedy. In this case no issue has been raised as to the validity of the mortgages or the transfer of the loans and mortgages to the defendant. That being the case, the mortgages over the properties confer on the defendant legal ownership of the properties subject to the plaintiffs' equity of redemption. It will be a matter for the trial judge to determine the substance of the plaintiffs' claim, which goes to the conditions for exercise of that equitable right.

88. The plaintiffs say that irreparable harm will be caused to them if the receivers are not removed. They refer to the reputational damage caused because the receiver has notified all tenants that rent should be paid to him and not the plaintiffs. In a third affidavit of Mr. Howard sworn on 18 May, 2020, he refers to the relationship with tenants and says that he has been personally involved as a landlord for approximately 20 years. He says that the plaintiffs relationship with the tenants has created a high degree of trust, which is absent when the receiver conducts his business through third party letting agents. Whilst asserting that he does not criticise the receiver personally or professionally, he is critical of the manner in which the letting agents have conducted themselves towards certain tenants.

89. The plaintiffs also claim that the receivership appointments amount to an attempt to engineer a situation where the plaintiffs cannot meet their repayment obligations which in turn they claim will preclude them from securing specific performance of the Amended Settlement Agreement.

90. It is not unusual for a receiver to discharge the function of collecting rents which in turn are applied in reduction of the underlying debt. If the plaintiffs establish at trial that the receivers were unlawfully appointed, the damage to the plaintiffs' reputation and any damage or diminution to the value of their property interests will be capable of being compensated, albeit that the exercise of measuring quantum may not be simple.

91. The plaintiffs refer also to the facility which they have secured with First Citizen and say that unless the receivers are discharged or removed, First Citizen will revoke its offer, deeming the receivership appointments to be a change in circumstances under their facility agreements. This is to overlook the fact that the mere removal of receivers would not of itself clear the way to implement the refinancing with First Citizen. Only when the legal mortgages are cleared can such a refinancing proceed. The plaintiffs' case is that they are entitled to secure releases of the mortgages at any time by payment of the amount of €9.85 million. Because I have concluded that the plaintiffs have not in this application established even a fair issue to be tried, the prospect of the availability of alternative finance based on the alleged Amended Settlement Agreement is insufficient to persuade the court to grant the relief sought.

92. The defendant submits that in circumstances where the quantum of its demands, for a total sum of €22.8 million as of 26 November, 2019, and continuing interest, are not in themselves contested, damages can never be an adequate remedy for it if the injunction is granted and the defendant succeeds at trial. No evidence was advanced as to the current values of the secured properties or as to the ability of the plaintiffs to perform on their undertaking as to damages, whether by recourse to the secured assets or otherwise. If the defendant succeeds at trial, the plaintiffs' debt will be at the level of the amounts demanded and more. The formulaic undertaking as to damages offered in Mr. Howard's affidavit does not persuade me that the defendant can be compensated in damages for the loss it would have suffered.

Balance of convenience.

93. The principal argument advanced by the plaintiff by reference to the balance of convenience is to rely on the email of 16 September, 2019, from Ms. Samadi to Mr. Swain indicating that no receivership action would be taken until at least 48 hours' notice was given. No other evidence was proffered as to the status of the parties' communications at that time, and this email was overtaken by the very clearly stated demand letters served on 26 November, 2019.

94. The plaintiffs contend that the balance of convenience favours the granting of an injunction as this would have the effect of maintaining the *status quo* prevailing prior to the commencement of the proceedings.

95. The proceedings were commenced on 9 October, 2019. The receivers were appointed on 24 and 26 February, 2020, and the injunction application was issued on 3 March, 2020. For the purpose of ascertaining the *status quo ante* there is an argument to be made to the effect that the court should lean in favour of discharging the receivers as they had been appointed four months after the commencement of the proceedings, and the application for interlocutory relief was made one week after their appointment. If all other considerations were finely balanced there could have been force in that submission. However, they are not finely balanced, since I have come to the conclusion that the plaintiffs have failed to establish even a fair or serious issue to be tried and that damages will be an adequate remedy if the plaintiffs succeed at trial.

96. This decision is based on the evidence placed before the court on the hearing of this application. It does not mean that the plaintiffs cannot succeed at trial, or that the defendant would succeed in any other application which it might bring in the proceedings. A court considering the matter at a trial or on any other application will determine the matter having regard to all of the evidence available to it at any such hearing.

97. I shall, by consent, grant leave to the plaintiffs to make the amendments sought to the plenary summons and Statement of Claim (reflecting the event of receivership appointments) and refuse the application for an injunction.