

**THE HIGH COURT**

[2022] IEHC 282

**RECORD NO. 2020/3484 P**

**BETWEEN:**

**JOHN CREABY**

**PLAINTIFF**

**AND**

**ALLIED IRISH BANKS PLC, EVERYDAY FINANCE DAC, LINK ASI LTD, TOM O'BRIEN AND  
HILARY LARKIN**

**DEFENDANTS**

**JUDGMENT of Mr Justice Barr delivered on the 11th day of May, 2022.**

**Introduction.**

1. The plaintiff is a gentleman, of 84 years of age. It is accepted that he is indebted to the first defendant in a sum slightly exceeding €4 million. In circumstances which will be dealt with in more detail later in the judgment, the plaintiff consented to a judgment in the sum of €3.3 million in favour of the first defendant on 11th February, 2014. That indebtedness arose out of a guarantee that the plaintiff had given in respect of the indebtedness of a company called Loughcourt Ltd., which was operated by the plaintiff's sons. The remainder of his indebtedness to the first defendant arose as a result of borrowings that he had with them.
2. The first defendant transferred its interest in the judgment and in the loans and other facilities which it had extended to the plaintiff, to the second defendant, in or about August 2018. The third defendant is a company that was retained by the second defendant to manage two properties owned by the plaintiff at nos. 5 and 7 Lower Drumcondra Rd, Dublin 9. The fourth and fifth defendants are the receivers who have been appointed by the second or third defendants over the properties.
3. By a plenary summons issued on 14th May, 2020, the plaintiff alleges that he had an oral agreement, which was evidenced in writing, with the first defendant, whereby it was agreed that a total of five properties owned by the plaintiff and his late wife, would be sold and that the proceeds thereof would be furnished to the first defendant in full and final settlement of all his outstanding liabilities to it.
4. The plaintiff alleges that he has sold a number of the properties that were stipulated in the agreement, and that he has furnished the proceeds of sale thereof to the first defendant. In the circumstances, it is argued that there has been part performance of the contract by the plaintiff. It is further submitted that the second defendant was bound by the terms of the agreement which the plaintiff had entered into with the first defendant in or about 2014. Thus, the plaintiff asserts that when the outstanding properties, being nos. 5 and 7 Lower Drumcondra Rd, Dublin 9, are sold, that will extinguish the plaintiff's liability to the first defendant and by extension, to the second defendant.
5. In this application, the plaintiff seeks an interlocutory injunction to prevent the second, third, fourth and fifth defendants, their servants or agents, entering upon the properties in Lower Drumcondra Road, or otherwise interfering with the occupants thereof, pending the trial of the action.

**Submissions of the Parties.**

6. On behalf of the plaintiff, Mr. Gaffney BL submitted that the key issue in this case was whether there had been a concluded oral agreement between the plaintiff and his late wife of the one part and the first defendant of the other part, which was concluded in or about 2014, which was contained in a document called Heads of Terms which was furnished to the plaintiff and his wife and which terms were accepted by them on or about 13th November, 2014.
7. It was submitted that the essence of the case made by the plaintiff was that there had been a binding oral agreement between the plaintiff and his late wife and Mr. O'Neill on behalf of the first defendant, that five properties owned by the plaintiff and his late wife would be sold in a particular sequence and that the proceeds of sale thereof, would be provided to the first defendant in full and final satisfaction of their joint indebtedness with the bank. It was submitted that in furtherance of that agreement, there have been significant acts of part performance on the part of the plaintiff. In particular, in response to a request that had issued to him by letter from the first defendant, he had consented to entry of judgment in the sum of €3.3 million in favour of the first defendant in February 2014. Furthermore, the plaintiff had sold a number of properties and had furnished the proceeds thereof to the bank in furtherance of the written Heads of Terms, which had been furnished in November 2014. The dates of the sales of these properties and the amounts recovered in respect of same, were set out in the grounding affidavit sworn by the plaintiff on 9th July, 2020.
8. Counsel stated that in breach of the terms of that agreement, and at a time when the plaintiffs were complying with the provisions thereof, the first defendant had wrongfully transferred its interest in the various loans and on foot of the judgment to the second defendant. It was submitted that in further breach of the agreement, the second defendant, through the actions of the third, fourth and fifth defendants, had unlawfully interfered with the plaintiff's ownership of the properties at nos. 5 and 7 Lower Drumcondra Rd and had wrongfully made contact with the tenants of those properties.
9. It was submitted on behalf of the plaintiff that, while it was accepted that the properties in Lower Drumcondra Road, would have to be sold, that could only happen within the terms of the agreement that had been concluded between the plaintiff and his late wife and Mr O'Neill on behalf of the first defendant. That meant that the sale could only take place in circumstances where it was agreed that the disposal of the property and the furnishing of the proceeds of sale thereof to the first or second defendant, will extinguish the plaintiff's liability to them.
10. Counsel submitted that it was clear on the pleadings in the action and having regard to the matters referred to in the various affidavits that had been sworn by the plaintiff, that there was a fair question to be tried at the trial of the substantive action. If the court was satisfied of that, the court would then have to look at where the balance of justice and convenience lay in relation to whether or not to grant an injunction. It was submitted that in this regard, the court should note that the plaintiff had given an undertaking as to damages and had given a further undertaking that he would hold the rent received in

respect of the property between now and the date of the trial of the action, in a separate account and if the court at the trial of the action held that the injunction should not have been given, the rental payments would be transferred to the defendants.

11. In addition, counsel pointed to the fact that the value of the two properties had increased considerably in recent times. In or about 2015, an offer had been made for no. 5 Lower Drumcondra Rd of €400,000. In November 2020, the property was valued at approximately €500,000. In November 2021, the defendants' expert valued the properties at €595,000 each. Thus, the properties had a combined current market value of €1.2 million. Counsel submitted that in these circumstances, where the trial of the action was likely to come on for hearing before the end of 2022, the defendants would not suffer any prejudice if an injunction were granted at this stage, as the value of the properties was likely to continue to rise, or at the very least, was unlikely to drop between now and the trial of the action.
12. It was submitted that in these circumstances, the balance of justice and convenience lay in preserving the status quo until the trial of the action; accordingly, the injunctive relief sought in the notice of motion should be granted.
13. On behalf of the second, third, fourth and fifth defendants, Mr. Flynn BL submitted that the test which had to be applied by the court was that set down in *Campus Oil v Minister for Industry (No. 2)* [1983] IR 88, as more recently stated in *Merck Sharp & Dohme Corporation v Clonmel Healthcare Ltd* [2020] 2 IR 1. This required that the court should first examine whether there was a fair question to be tried at the trial of the action. Counsel accepted that the threshold which had to be crossed by a plaintiff in this regard was not a high one: see *O'Gara v Ulster Bank Ireland DAC* [2019] IEHC 213.
14. Counsel submitted that in this case the plaintiff had not crossed that threshold due to the fact that the letter which was sent by Mr. O'Neill to the plaintiff and his late wife on 13th November, 2014, enclosing the draft Heads of Terms made it clear that it was merely a draft document and did not constitute either a concluded contract or a formal offer. He noted that the letter was headed "subject to contract/contract denied". The letter also made it clear that the Heads of Terms were indicative only and did not constitute an offer to arrange for finance or loan facilities. The letter made it clear that no legal obligation would be deemed to exist until, amongst other matters, the completion of credit approval, the undertaking of legal due diligence and the issuance of a formal offer letter/loan agreement, including the bank's standard terms and conditions, for acceptance by the plaintiff, as borrower.
15. Counsel pointed to the fact that the document that was furnished to the plaintiff on that occasion was headed "Fundamental Restructure Non-Binding Term Sheet. Strictly Confidential and Subject to Contract". The document also went on to reiterate that the terms and conditions outlined in it were indicative only. Counsel submitted that having regard to the terms of the letter and the terms of the document itself, it was abundantly clear that it was not a contract, but was merely a document that had been furnished in the course of ongoing negotiations. It was accepted by all parties, that no further formal

contract had ever issued. There had been a further Heads of Terms document furnished on 19th January, 2016, after the sale of one of the plaintiff's properties. It had been in almost identical terms to the previous document.

16. It was submitted that in these circumstances, the plaintiff's fundamental argument that he had a concluded agreement with the first defendant was simply unsustainable. It was submitted that there was therefore no fair question to be tried at the trial of the action.
17. If the court were against the defendants on that submission, it was submitted that the balance of justice and convenience lay in favour of refusing an interlocutory injunction. This was due to the fact that it appeared to be agreed between the parties that the properties in Lower Drumcondra Road would have to be sold to reduce the indebtedness of the plaintiff with the second defendant, as transferee of the loan and securities from the first defendant. The only point of contention between the parties was whether the furnishing of the proceeds of sale of those two properties would extinguish the total indebtedness of the plaintiff with the first or second defendants, or would merely be in reduction of his indebtedness with them; thereby leaving the second defendant free to pursue the plaintiff in respect of the outstanding balance.
18. Counsel submitted that the essential matter for determination, which would be resolved by the court at the trial of the action, would be whether the proceeds of sale of those properties discharged the plaintiff's indebtedness to the second defendant. If the properties were sold in the interim, that issue could still be determined by the court at the trial of the action and the necessary declaration made, once the court had considered all the evidence that was led at the trial.
19. It was submitted that in considering where the balance of justice lay in relation to the grant or refusal of an interlocutory injunction, the issue of the adequacy of damages was of central importance. It was submitted that if the properties were sold now, the plaintiff would not suffer any appreciable detriment, even if he was successful in establishing at the trial of the action that an interlocutory injunction ought to have been granted. Even if he could establish any loss in that regard, the second defendant was in a position to discharge any award of damages that may be awarded in favour of the plaintiff.
20. Conversely, it was submitted that if the properties were not sold, the undertaking that had been given by the plaintiff was without substance, because he had not set out any unencumbered assets that would be available to meet any award of damages that may be made against him at the trial of the action. In essence, by refusing an injunction at this stage, the defendants were being put on the hazard, such that they may lose the benefit of a reasonably good property market at the present time. It was submitted that that was unjustifiable, given that all parties were in agreement that the properties would have to be sold. In these circumstances, the court was urged to refuse the plaintiff's application herein.

## **Conclusions.**

21. The court is satisfied having regard to the dicta of Barniville J. in the *O'Gara* case, that the threshold which has to be reached in relation to a party establishing that there is a fair issue to be tried at the trial of the action, is a low one. In this regard, the learned trial judge stated as follows at para. 42 of his judgment:

*"It is well established that a plaintiff who seeks to establish a fair question or serious issue to be tried does not have to discharge a particularly heavy burden. The threshold for establishing a fair question or serious issue to be tried has been described as a "low threshold" (see the comments of Laffoy J. in the High Court in Crossplan Investments Ltd. v. McCann & Ors [2013] IEHC 205 which were endorsed by Haughton J. in Wingview). That does not, however, mean that it is not a threshold which must be met. It may be helpful to view the threshold in terms of requiring a plaintiff who seeks an interlocutory injunction to demonstrate that there is a question or issue which would withstand an application to dismiss under the inherent jurisdiction of the court (as observed by Haughton J. in Wingview) or under O. 19, r. 28 RSC as disclosing no reasonable cause of action or as being frivolous or vexatious. The threshold is of that order and so unless the case is unstateable, it is generally not a difficult threshold to meet."*

22. The court is satisfied, having regard to the matters set out in the affidavit sworn by the plaintiff and in his replies to the defendant's notice for particulars furnished on 25th May, 2021, that the plaintiff has established that there is a fair question to be tried at the trial of the action. While the court can see the strength of the argument put forward by Mr. Flynn BL in relation to the meaning of the phrase "subject to contract" in the letter which accompanied the Heads of Terms and having regard to the terms of the documents themselves, nevertheless there is an argument to be made that in the oral negotiations that had preceded the delivery of those documents, an agreement had been reached whereby the first defendant, through Mr O'Neill, had agreed to "cut its losses" as it were, by accepting the offer that was made by the plaintiff and his late wife, to sell five of their properties and to apply the proceeds thereof in full and final settlement of their indebtedness to the bank. This court does not express any view as to whether the contentions made by the plaintiff in this regard, are correct. However, the court is satisfied that he has raised a fair question to be tried at the trial of the action.
23. The court must now look to see where the balance of justice and convenience lies in relation to the issue of whether it should grant an interlocutory injunction pending the trial of the action. In this regard, the court lays particular emphasis on two matters: firstly, the court has to have regard to the fact that the plaintiff is a gentleman of advanced years. Being involved in this litigation and having regard to the high level of his admitted indebtedness to the first defendant, it is clear that he is under considerable stress at the present time. Secondly, by granting an injunction at this stage, the court would not be obliging any of the parties to do anything, it would merely be preserving the status quo pending the trial of the action. These matters support the granting of an interlocutory injunction.

24. There are a number of further matters that support the granting of an injunction. Firstly, the court accepts the evidence that has been proffered on behalf of the plaintiff in relation to the increases in property values in the Dublin area in recent years. The court is entitled to take judicial notice of the fact that property values have been increasing in the Dublin area over the last 18 months due to a combination of factors. The court is satisfied that the risk of there being a drop in the value of properties in the Dublin area between now and the time when the action is likely to come on for hearing, which the court estimates to be in approximately 12 months' time, is very low.
25. Secondly, the court notes that the plaintiff has given a general undertaking as to damages and has given a specific undertaking to retain all of the rent received by him from the two properties pending the trial of the action. He has agreed that if it were determined at the trial, that an injunction should not have been granted, he will transfer the rental payments to the defendants. In these circumstances, the court is not satisfied that there is any prejudice to the defendants if an injunction in the terms sought were granted at this stage.
26. While there is considerable force in the argument put forward by Mr. Flynn BL, to the effect that an injunction should not be granted due to the fact that both parties are essentially in agreement that the two properties will have to be sold, the court accepts the argument put forward by Mr. Gaffney BL that that does not accurately represent the plaintiff's position, which is that he accepts that the two properties will have to be sold, but only in the context of the agreement which he maintains that he had with Mr. O'Neill on behalf of the first defendant, that such sale would be in discharge of all his indebtedness to the bank. Thus, while there is broad agreement that the properties will have to be sold at some time, there is a sharp divergence between the parties as to the context or agreement under which that will take place. In particular, there is conflict between them as to whether the proceeds of sale thereof will discharge the entire indebtedness of the plaintiff to the defendants.
27. For the reasons set out herein, the court will grant an injunction in the terms of paragraph 1 of the plaintiff's notice of motion.
28. The court will also give the following further directions: firstly, in the event that any party wishes to seek discovery of documents from any of the other parties, a request for voluntary discovery must issue within three weeks of today's date. Secondly, if the action is not listed for hearing on or before 1st May, 2023, the defendants have liberty to re-enter the matter with a view to applying to have the injunction lifted. There should be no delay on the part of the plaintiff in bringing the matter on for hearing. Given that he is relying on an oral contract concluded between him and a representative of the first defendant, it is in his interests to get the action on for hearing sooner rather than later.