

THE HIGH COURT

**[2024] IEHC 202
[Record No. 2022/5534 P]**

Between

Tom O'Brien and Promontoria (Finn) Limited

Applicant

and

**Thomas Markham and Persons Unknown Occupying the Premises at 12 Woodford
View, Clondalkin, Dublin 22**

Respondent

Judgment of Mr. Justice Dignam delivered on the 12th day of April 2024.

Introduction

1. This is my judgment in respect of the plaintiffs' interlocutory application for the following reliefs:

"1. An Order directing the Defendants, and each of them, their respective servants and/or agents and all persons having notice of the making of the said Order, to vacate and deliver up possession of the property described in the First Schedule to the Plenary Summons herein ("the Property") to the Plaintiffs, their servants or agents.

2. An Order restraining the Defendants, their servants and/or agents, and any other person having notice of the said Order, from interfering with the functions and office of the First Named Plaintiff as receiver over the Property.

3. *An Order restraining the Defendants, their servants and/or agents, and any other persons having notice of the said Order, from trespassing upon, entering upon or otherwise attending at the Property.*

4. *An Order restraining the First Named Defendant, his servants and/or agents, from contacting any tenants occupying the Property, or from otherwise holding himself out as having any entitlement to possession of the Property or to deal with the Property in any way.*

5. *An Order compelling the Defendants, their servants and/or agents to forthwith deliver up to the First Named Plaintiff herein, all keys, fobs, magnetically readable cards, RFID devices, other electronic access devices, access codes and alarm codes in their possession, power and/or procurement to the Property."*

2. The reliefs sought are in essence interlocutory injunctions but they will have the practical result of determining the proceedings because it is the intention of the plaintiffs to sell the property if they obtain the reliefs.

3. On the same day as this application, I also heard an application for an Order vacating a lis pendens which had been registered by the first-named defendant herein ("Mr. Markham") in proceedings entitled "*Promontoria (Finn) Limited v Thomas Markham Record No. 2022/153 MCA*". That application is the subject of a separate judgment. Different considerations obviously apply to this application.

4. There was no appearance by or on behalf of the second-named defendants, ie. the persons unknown occupying the property ("the occupants"). I was satisfied as to service. The only opposition to the application was therefore made by Mr. Markham.

Legal principles and approach

5. The general principles applicable to applications for interlocutory injunctions are well established. They were set down in *Campus Oil v Minister for Industry and Energy (No. 2)*[1983] IR 88) and restated in *Okunade v Minister for Justice & Ors* [2012] 3 IR 152 and recalibrated by the Supreme Court in *Merck Sharpe & Dohme v Clonmel Healthcare* [2019] IESC 65 where O'Donnell J considered the nature and availability of the relief and the applicable principles in detail. He emphasised the inherent flexibility of the relief, a point which has also been emphasised in subsequent decisions. O'Donnell J also set down an

eight step approach to such applications. For the purposes of this application, the core questions remain whether the plaintiffs have established a sufficiently strong case and, if so, whether the balance of convenience or balance of justice favours the grant or refusal of the injunction.

6. In relation to the first of these, in the case of prohibitory interlocutory injunctions the applicant must establish that there is a fair issue or serious question to be tried (those terms being used interchangeably). In some circumstances, where the grant of an interlocutory injunction would carry a greater risk of more serious injustice, the applicant will have to satisfy a higher standard, i.e. will have to establish a strong case that he is likely to succeed at the trial. Those circumstances include, but are not necessarily limited to, where the injunction sought is mandatory in nature (*Maha Lingham v Health Service Executive* [2005] IESC 89).

7. In *Charleton v Scriven* [2019] IESC 28, a case which has similarities to the current case, Clarke CJ said at paragraph 4.5:

"There can be little doubt, therefore, that the strength of a plaintiff's case can be required to be assessed against a higher standard in certain categories of case, precisely because the grant of an injunction in such cases, in circumstances where the plaintiff ultimately failed, would run a greater risk of more serious injustice. There is equally no doubt that the jurisprudence regards a mandatory injunction as coming within the category of case to which that higher standard applies."

8. One circumstance where the higher standard will apply is where the result of the interlocutory application will effectively determine the proceedings (it is seldom that a prohibitory injunction will have this effect whereas a mandatory injunction will more frequently have the consequence of effectively bringing the proceedings to an end which is why we are inclined to speak in terms of different standards applying to prohibitory and mandatory injunctions). Clarke CJ put it thus in *Charleton v Scriven*:

"4.3 It should also be noted that in my judgment in Okunade, I made the following comment concerning the test to be applied in relation to certain applications for interlocutory injunctions at para. 9.16:-

"...It is, therefore, hardly surprising that, in such cases, where the result of the interlocutory application will either completely, or significantly, decide the case, the courts have felt it necessary to impose a higher standard before an

injunction can be granted (normally the Maha Lingham standard). That variation from the pure Campus Oil test can be seen as nonetheless still coming within the general principle of attempting to fashion an order which runs the least risk of injustice for if the grant or refusal of an interlocutory order will go a long way towards deciding the case then the risk of an injustice is even greater and the court requires a greater degree of assurance before intervening."

9. What standard applies in this case? It was submitted on behalf of the plaintiffs that this was of little practical significance because the plaintiffs' entitlement to relief is so clear (see paragraph 6.13 of *Charleton v Scriven*). It was also submitted that the relief sought is a mixture of mandatory relief and prohibitory relief. It was submitted that Relief 1 is mandatory as against the occupants and prohibitory as against Mr. Markham (because, according to where Mr Markham describes himself as living, he is not in occupation of the property) and that Reliefs 2, 3 and 4 are prohibitory. It was accepted that Relief 5 is in its terms mandatory but it was submitted that it is really ancillary to the other reliefs. It was suggested (though the point was not vigorously pursued) that the lower, fair issue test, should be applied to the prohibitory reliefs and the higher, *Maha Lingham* standard, should be applied to the mandatory relief.

10. There is a logic to this approach and it has some basis in the approach of Clarke CJ *Charleton v Scriven*. However, in my view, in this case it carries with it a risk of not having sufficient regard to the fact that the effect of the grant of the overall relief would be to effectively determine the proceedings. As noted above, this is the case in circumstances where the plaintiffs have made clear that they intend to sell the property if the relief is obtained. Clarke CJ said at paragraph 6.12:

"...having regard to the underlying principle of attempting to fashion an order which runs the least risk of injustice, there may well be an important distinction to be made in receivership cases between situations where the receivers concerned simply intend to maintain the situation pending a trial and ones where the substance of the interlocutory order sought is one designed to, in practice, bring the proceedings to an end. There is considerable logic in the view that, for example, a receiver who wished to obtain possession of residential property or a family farm so that it could be sold would need to make out a strong arguable case for it to be appropriate, having regard to the greatest risk of injustice test, to allow such an order to be made. On the other hand, where the matters are essentially financial or where there are strong grounds for believing that a receiver is necessary to ensure that property

is properly managed and maintained pending a trial, very different considerations may apply."

11. Thus, it seems to me that while there is a logic to the approach contended for by the plaintiffs, there is a strong argument that the higher standard must apply to all of the reliefs where the stated intention of the plaintiffs is to sell the property. However, I do not have to resolve this issue in the circumstances of this case as, for the reasons set out below, I am satisfied that whether the traditional fair issue test or the higher strong case test is applied the plaintiffs have made out a sufficiently strong case. I will therefore apply the higher *Maha Lingham* test to the reliefs.

12. Mr. Markham drew my attention to the statement by Clarke CJ at paragraph 7.12 that "[I]nterlocutory injunctions should not be treated as a means of attempting, in practice, to obtain summary judgment." Indeed, Allen J referred to this in *Charleton v Hassett [2021] IEHC 746*. However, this statement was made by Clarke CJ in the context of warning against applicants securing an interlocutory injunction and then not prosecuting the substantive proceedings. It was not stated as a bar to the grant of an interlocutory injunction even where the effect of it may be to practically bring the proceedings to an end. That is clear from the rest of paragraph 7.12 (where he went on to say "*While there will inevitably be some cases where the result of an interlocutory injunction may, in practical terms, bring the proceedings to an end, it remains the case that there is an obligation on any party which has obtained an interlocutory injunction not to rest on their laurels, but to bring the matter on for full hearing.*") The possibility of the grant of an injunction in such circumstances was also expressly acknowledged in paragraph 6.12 of Clarke CJ's judgment.

Factual Background

13. I propose to set out the facts as deposed to on behalf of the second-named plaintiff ("Promontoria") by Mr. Dónal O'Sullivan in his affidavit of the 27th October 2022 and by the first-named plaintiff ("Mr. O'Brien" or "the receiver") on the 2nd November 2022. I will then turn to the replying affidavits of Mr. Markham. He swore replying affidavits to Mr. O'Sullivan's and Mr. O'Brien's affidavits on the 5th December 2022. When dealing with Mr. Markham's affidavits I will also have to refer to an affidavit sworn by the plaintiffs' solicitor, Mr. Keith Vaughan, on the 14th December 2022. I adopt this approach where, while Mr. Markham puts the plaintiffs on proof of their claims and makes certain complaints and points in his affidavits, he does not specifically deny most of the contents of the plaintiffs' affidavits. The only specific denial is a denial that he owes Promontoria a debt.

14. The facts as deposed to by Mr. O'Sullivan and Mr. O'Brien are as follows.
15. Pursuant to a letter of loan offer dated the 17th November 2005, which was accepted by Mr. Markham on the 10th December 2005, First Active plc advanced to Mr. Markham a loan facility of €260,000. The security was to be a mortgage over the property. By a Deed of Mortgage dated the 18th December 2006, Mr. Markham charged the property in favour of First Active as security for all sums which were then or might thereafter become due and owing by Mr. Markham to First Active.
16. On the 15th February 2010, Ulster Bank Ireland Limited acquired all rights accruing to First Active on foot of any existing loan or security instruments pursuant to the terms of the Central Bank Act 1971 (Approval of Scheme of First Active plc and Ulster Bank Ireland Limited) Order 2009 [SI 481/2009].
17. The mortgage was registered as a burden in favour of Ulster Bank Ireland Limited on Folio DN65271F on the 24th January 2011.
18. Mr. O'Sullivan exhibited copies of the loan offer and acceptance, the Deed of Mortgage and the Folio.
19. It was also deposed that pursuant to a Global Deed of Transfer dated the 29th September 2015 between Ulster Bank and Promontoria, Ulster Bank conveyed, assigned, transferred and assured to Promontoria all of its right, title, interest, benefit and obligation (past, present and future) in and under the loans and related security identified in the schedule thereto. A copy of the Global Deed of Transfer is exhibited. The Schedule to the Deed of Transfer is heavily redacted. It does, however, identify the loan offer and acceptance referred to above and the mortgage of the 18th December 2006 between First Active plc and the respondent.
20. On the 15th October 2015, Promontoria was registered as the owner of the charge on the Folio.
21. By a letter dated the 5th November 2015, Capita Asset Services wrote to Mr. Markham on behalf of Promontoria to advise him that this loan facility and security with Ulster Bank had been transferred to Promontoria.
22. It was deposed that Mr. Markham went into default under the loan facility and, by demand letter of the 25th April 2018 Promontoria stated that the amount due and owing on foot of the facility was €359,652.11 and demanded repayment, failing which all of their rights including the right to enforce the security and appoint a receiver would be exercised. Following this, Promontoria appointed Mr. Tom O'Brien as receiver over the property by

Instrument of Appointment dated the 25th May 2018. Mr. O'Sullivan exhibited copies of the letter of the 25th April 2018 and the Instrument of Appointment.

23. When the receiver was appointed, the property was being rented by Mr. Markham to tenants. They vacated the property at Mr. O'Brien's request and his agents secured possession on the 17th April 2020. The property was boarded up and put up for sale by online auction.

24. On the 25th June 2020, the receiver entered into a contract for sale in respect of the property at a price of €231,000. The sale was due to close within four weeks of the contract for sale. Prior to completion, however, the purchaser's solicitors informed the receiver of the existence of a pending application before the Property Registration Authority for the registration of a *lis pendens*. The solicitors acting for the receiver made inquiries and discovered that Mr. Markham had issued proceedings on the 15th July 2020 and had, on the same day, filed a *lis pendens* in the Central Office and subsequently applied to the Property Registration Authority to have the *lis pendens* registered as a burden on the Folio. This was registered on the 22nd July 2020.

25. By letter of the 25th September 2020, solicitors for Promontoria and Mr. O'Brien wrote to Mr. Markham noting that it appeared that he had issued proceedings and filed an application for registration of a *lis pendens*, indicating that they had authority to accept service of the proceedings and requesting that he serve a copy of them immediately.

26. No response was received to that letter and the solicitors wrote again on the 30th November 2020, *inter alia*, requesting that Mr. Markham deliver the Plenary Summons within ten days.

27. On the 9th December 2020, Mr. Markham replied to the Managing Partner of the solicitors acting for Promontoria and the receiver by letter entitled "Notice of Demand" objecting to receipt of correspondence from the solicitors. The Plenary Summons was not enclosed with the letter despite it being in reply to the solicitor's letter of the 30th November in which the Summons was sought.

28. It seems that at some point prior to the 22nd August 2022 persons went into possession of the property. Mr. O'Brien's agents brought it to his attention on that date that a steel door which they had installed on the property had been removed. Mr. O'Brien's solicitors inquired with the purchaser's solicitors whether they had anything to do with this and they informed the receiver's solicitors that they did not and went on say that while they did not consider themselves to be bound by the contract they would be in a position to complete the purchase should the property be restored to its proper condition.

29. On Friday, 2nd September 2022, the receiver's agents changed all the locks but on Monday, the 5th September, these agents attended at the property and the locks had been broken. An individual was living there and he advised the agents that he had paid a deposit of €5,000 and was paying rent of €2,400 per month to Mr. Markham.

30. The solicitors for the plaintiffs wrote to Mr. Markham on the 16th September 2022 to request undertakings that he would deliver vacant possession of the property and that he would not interfere with or impede the plaintiffs in their efforts to take possession and that he would not hold himself out as having any entitlement to sell or rent the property, failing which proceedings would issue.

31. On the same date the plaintiffs' solicitors wrote to the occupant of the property informing them that Mr. O'Brien had been appointed as receiver and had entered a contract for sale and that Mr. Markham did not have the right or entitlement to let or take possession of the property and any lease was therefore invalid and of no legal effect. Undertakings were sought that they would vacate the property, failing which proceedings would issue.

32. There then followed exchanges with a representative of a housing charity on behalf of the occupants(s). In an email of the 19th September 2022 to the solicitors for the plaintiffs the representative stated, inter alia, "*...the occupier has been misled by Mr. Thomas Markham as to his ability to enter into an enforceable lease with the occupier. Mr. Markham has charged the occupier three months rent upfront alongside a deposit. The occupier understands that they may have to leave the property as the lease they have signed is potentially unenforceable. They are requesting a temporary stay on the action to recover the property as the timescale for vacation of the property by 22.09.22 would place them in an extremely difficult situation. We will be assisting the occupier to recover the amount fraudulently obtained from them by Mr. Markham, and supporting them in their efforts to find alternative accommodation...*" The solicitors for the plaintiffs indicated to the representative that they would take instructions.

33. In the meantime, on the 23rd September 2022, a letter was received by the solicitors for the plaintiffs from a party claiming to be the "occupant" of the property stating, inter alia, that they had received unsolicited correspondence from those solicitors in relation to the property, that they had discussed the issue with the landlord and he assured them that he is the lawfully registered owner of the property, and that they had been advised that if the solicitors' clients (the plaintiffs) had an eviction order they, the occupant(s) would have no option but to vacate the property and requesting a copy of such order, if there was one.

34. When receipt of this correspondence (which was at odds with the conversation with the representative of the housing charity) was raised with that representative he reverted to say that he had been in touch with the actual occupant who claimed not to have emailed the solicitors directly and that he had asked the occupant to confirm this directly with the plaintiffs' solicitors.

35. In these exchanges with the housing charity the identity of the occupant was not disclosed and the representative indicated that he did not have authority to release that identity.

36. The plaintiffs claim that Mr. Markham was indebted to Promontoria in the sum of €435,349.21 on the 6th October 2022 on foot of the loan facility and that no payment has been made to the account since December 2016. A Statement of Account is exhibited to Mr. O'Sullivan's affidavit.

37. Mr. Markham swore two replying affidavits. He does not directly engage with any of these matters in any meaningful way. For example, he does not specifically deny the loan offer, that he accepted it, that he drew down the loan, that he executed the mortgage, that he went into arrears, that a letter of demand was served on him on behalf of Promontoria (in fact he accepts this – paragraph 5 of his replying affidavit to Mr. O'Sullivan's affidavit), that the receiver went into possession, that he retook possession or that he rented the property to third parties after the receiver took possession. In paragraph 10 of his affidavit replying to Mr. O'Brien's affidavit he says that he *"totally rejects the contents of the affidavit of the First-Named Plaintiff, Mr. Tom O'Brien"*. However this seems to relate to those parts of Mr. O'Brien's affidavit which are based on information from Promontoria as he goes on in the same sentence to give the reason why he rejects them, saying *"as he is relying completely on the bona fides of the information provided to him by the Second Named Plaintiff which information is based completely on hearsay evidence as set out in the affidavit of Mr. Donal O'Sullivan."* Indeed, it appears from the following paragraph, paragraph 11, that he accepts that he retook possession and rented the property to third parties as he says *"In paragraph 21 of his affidavit Mr. O'Brien suggests that I have no right to occupy my property or to use my property as I see fit at the same time he believes he and his agents have the right to break and enter my property, cause damage to the doors and windows and board up my property without at least the pretence of due process."*

38. The only specific denial is his denial that he owes Promontoria a debt. He does not expand on this. For example, he does not say that he does not owe them a debt because he did not accept or draw down the original loan, or because he paid it off, or because it was not assigned to Promontoria.

39. Rather, the approach of Mr. Markham in his affidavits is to put the plaintiffs on proof of their claims and to make certain points. I set these out below.

40. He also makes a number of other factual averments.

41. He deposes to sending letters on the 11th December 2018, the 11th February 2019 and the 22nd February 2019 entitled 'Notice of Demand', 'Notice of Default' and 'Second Notice of Default and Dishonour' respectively in which he demanded proofs, inspection and receipt of true copies of "alleged unaltered un-defaced original wet ink signed" documents. Counsel for the plaintiffs told the Court at the hearing that the plaintiffs had not received these. However, this was not on affidavit and I therefore proceed on the basis that they were received. A significant point about these letters is that despite being sent in response to a letter of demand from Promontoria – the first expressly refers to Promontoria's letter of the 25th April 2018 - they do not include any sort of straightforward denial that a sum of money was owed to Promontoria on foot of the loan.

42. Mr. Markham also avers that from the time of Mr. O'Brien's appointment as receiver on the 25th May 2018 he had no direct communications with him or his agents, did not have sight of the Instrument of Appointment and was not aware of what he describes as "the activities" of Mr. O'Brien or his agents. This is disputed by the plaintiffs. In an affidavit sworn on the 14th December 2022 by the solicitor for the plaintiffs, Mr. Vaughan (in which he deals with a number of matters, including the bases upon which Mr. Markham had obtained adjournments, and that he had been unable to provide the Court with the names or details of the occupants of the property), Mr Vaughan exhibits a number of pieces of correspondence between Mr. O'Brien's office and Mr. Markham. In one letter dated the 28th May 2018 addressed to Mr. Markham at the address which he gives as his address in the affidavits sworn in these proceedings, Mr. O'Brien informed Mr. Markham of his appointment as receiver and requested details of various matters relating to the property. The second letter is a letter to the "Occupier" of the property dated the 10th July 2019. It states that "*...I, Tom O'Brien, was formally appointed Receiver under the terms of the Instrument of Appointment dated 25th May 2018 to the above property...*" and called on the occupant(s) to deliver vacant possession. The third piece of correspondence is two emails of the 18th July 2019 which appear to be from Mr. Markham and addressed to Mr. O'Brien's office. In the second of these Mr. Markham states that a representative of Link Asset had assured Mr. Markham that there would not be any eviction or repossession of the property the following day or in the near future as "*suggested by your threatening letter of 10th July to the present tenants (sic)*". Mr. Markham did not deny receiving or sending these pieces of correspondence. The reference in Mr. Markham's email of the 18th July to the letter of the

10th July clearly seems to be a reference to the letter sent to the occupiers referred to above which clearly suggests that Mr. Markham was aware of the contents of that letter and therefore of the appointment of the receiver.

43. Mr. Markham also makes the point that the Statement of Account was prepared by a third party, BCM Global, and also says that *"the opening balance is listed in the Statement of Account...as being €338,703.07 on the 24th October 2015. There is no historical information provided by the Second Named Plaintiff as to the veracity of the opening balance or how it came to total €338,703.07."*

Defendants' grounds of opposition

44. No affidavit was filed on behalf of the occupants of the property and there was no appearance or submissions on their behalf at the hearing.

45. In summary, the points of opposition in Mr. Markham's affidavits appear to be:

- (i) The plaintiffs are on proof of all matters;
- (ii) The plaintiffs' affidavits consist of hearsay, which, he says, is not evidence;
- (iii) He does not owe a debt to Promontoria;
- (iv) The plaintiffs have not proven that Promontoria had authority to appoint a receiver;
- (v) He is entitled to inspect original documents under section 91 of the 2009 Act and that despite sending three letters (on the 11th December 2018, 12th February 2019 and the 22nd February 2019) he has not been provided with inspection or with true copies of the originals and that while Mr O'Sullivan exhibits documents, he does not say that the copies are true copies of the originals and they are not attested to be true copies of the originals.
- (vi) The Schedule to the Global Deed of Transfer is heavily redacted;
- (vii) He had no contact from or with the receiver;

(viii) The Statement of Account was provided by a third party and it does not provide the historic basis for the opening balance.

46. In addition to these points, Mr. Markham made the following points at the hearing:

(a) He claimed that the receiver had neglected the property; that he, Mr. Markham, had received calls from neighbours about the property's condition and there were concerns that people would move into the property, so he had no option but to retake possession and to spend money to put it into repair;

(b) He had discussions with a representative of Link Assets (on behalf of Promontoria) in April 2022 and he had been given an opportunity to buy the property. Furthermore, he had a buyer for the amount of €270,000 in 2018 and that purchaser is still available;

(c) Properties in the area are now worth €300,000;

(d) The loan is invalid because it is stated to be a 2006 loan but there is no reference to a 2006 loan on the Folio.

47. There was no evidence before me in respect of matters (a) – (c). Mr. Markham had every opportunity to deal with these matters on affidavit and did not do so. I therefore can not have regard to them. Furthermore, by not putting these matters on affidavit the plaintiffs were deprived of the opportunity of replying to them.

48. One of the problems with some of the remaining grounds of opposition is that Mr. Markham did not expand upon them or explain how they have the consequences which he seemed to be contending for, i.e. that the plaintiffs are not entitled to the relief. In those circumstances, the Court is left guessing to a certain degree as to what the point is in respect of some of the grounds.

Discussion and Conclusion

49. I am satisfied that the plaintiffs have established a strong case that they would be likely to succeed at the trial of the action. I have considered all of the points of opposition. I

do not believe that it is necessary to expressly deal with them all separately. I will deal with some of them expressly. I will do so in a slightly different order.

50. The plaintiffs have established a strong case that Mr. Markham accepted a loan from First Active and executed a mortgage over the property on the 18th December 2006 as security for same, and that the loan and mortgage were assigned to Ulster Bank by SI 489/2009 and were then subsequently assigned to Promontoria by Ulster Bank by Global Deed of Transfer. The following documents have been exhibited: a loan offer dated the 17th November 2005 in the amount of €260,000 and a signed loan acceptance of 10th December 2005; an executed Deed of Mortgage dated the 18th December 2006 (I return to the contents of this mortgage below); the redacted Global Deed of Transfer between Ulster Bank and Promontoria dated the 24th September 2015 which shows the above loan and security (and following which Promontoria was registered as the owner of the charge previously held by Ulster Bank); and the relevant Land Registry Folio 65271F which shows the charge in favour of Ulster Bank and the subsequent registration of Promontoria as owner of that charge on the 15th October 2015. It is true that, as Mr. Markham says, the schedule to the Global Deed of Transfer is heavily redacted. The reasons for this are given in paragraph 10 of Mr. O'Sullivan's affidavit. In any event, the loan and mortgage are clearly identified in the Schedule. Furthermore, Promontoria's ownership of the charge has been registered on the Folio. The averments of Mr O'Sullivan in relation to some of these matters are, as pointed out by Mr. Markham technically hearsay. Of course that does not mean that it is not evidence but rather goes to the questions of admissibility, whether the Court should rely on it and what weight should be attached to it. The Court is entitled to rely on hearsay in an interlocutory application. A significant factor in answering whether it should be admitted is, of course, that while it is an interlocutory application, the grant of the relief would effectively determine the proceedings. A further significant factor is that Mr. Markham does not deny many of these fundamental matters. Furthermore, Mr. O'Sullivan deposes that his means of knowledge includes a perusal of Promontoria's books and records. I am satisfied in those circumstances that I am entitled to admit and rely on this evidence.

51. I am also satisfied that the plaintiffs have established a strong case that Mr. Markham defaulted in his repayments and that Promontoria were entitled to appoint a receiver. Mr. O'Sullivan exhibits a letter of the 5th November 2015 from Capita Asset Services informing Mr. Markham of the transfer to Promontoria; a letter of demand from Promontoria dated the 25th April 2018 demanding repayment of the loan, the balance of which was stated to be €359,652.11, and warning that in the event that it was not repaid within 10 working days, the right to appoint a receiver would be exercised; and an Instrument of Appointment of Mr. O'Brien as receiver. Mr Markham expressly accepts that

he received the letter of demand of the 25th April 2018. The correspondence exhibited by Mr. Vaughan clearly suggests that Mr. Markham was aware of the appointment of Mr. O'Brien as receiver. Mr. Markham did not take issue with the contents of Mr. Vaughan's affidavit. What is striking for present purposes is that there is no evidence of any correspondence from Mr. Markham denying the debt, or the amount claimed, or taking issue with the transfer to Promontoria or the claim that there was a debt owed to Promontoria or with the appointment of the receiver. The reality is that the furthest Mr. Markham goes in respect of many of these matters is to put the plaintiffs on proof of them.

52. Mr. Markham makes a point about the Statement of Account not showing the historic basis for the opening balance (€338,703.07 on the 24th October 2015). But in fact the figure in this statement for April 2018 is €359,905.55 which largely reflects the figure set out in the letter of demand of the 25th April 2018 (€359,652.11) and there is no evidence whatsoever of Mr. Markham having challenged that amount other than his Notices of Demand and Default seeking, for example, wet-ink versions of various documents. He did not say that he did not owe monies.

53. Mr. Markham is entitled to inspect the original documents (see section 91 of the 2009 Act) but it does not necessarily follow from the fact that he was not provided with such opportunity that the plaintiffs have failed to establish a strong case that they would succeed at trial. The 2009 Act does not provide that the mortgagee's remedies will not be available to them unless there is compliance with section 91. Nor is the fact that the copies which are exhibited to the affidavits are not attested to be true copies of those documents fatal to the application. The deponents have sworn on oath that they are copies of the documents. There is no reason to suspect that the copies which have been exhibited are not correct copies – this is particularly so where Mr. Markham does not in fact even suggest that they are inaccurate and has not even denied that he executed some of the documents. Furthermore, Counsel for the plaintiffs stated during the hearing that there were certified copies of the documents in court. Mr. Markham did not seek time or seek to avail of that opportunity to inspect the copies.

54. An important issue in Allen J's judgment in *Charleton v Hassett* (in which he refused an interlocutory injunction in circumstances where the financial institution/receiver intended selling the house) was the failure by the financial institution (Everyday) and the receiver to provide copies of the relevant documents. However, there was a very particular set of circumstances in that case, including that there was a question about who was in possession, non-peaceable entry, uncertainty as to who was the receiver(s), and whether the original appointment of a receiver had been novated. Everyday claimed to have taken AIB's interest (AIB had originally appointed the receiver) and, as Allen J put it at paragraph

55 of his judgment, *"all that Mr. Hassett had been provided with was a copy of the deed of appointment by AIB which could not by itself have authorised Mr. Charleton to do anything on behalf of Everyday."* While Mr. Markham did seek to inspect the originals, these issues do not arise in the same way in this case. Furthermore, while this was an important issue in the *Charleton v Hassett* case, ultimately Allen J refused the relief on the basis that the plaintiffs had not discharged the burden of proof (see for example paragraph 49 where he said in that case, and his unease about the manner in which possession was obtained by the plaintiffs (see, for example, paragraph 49 of his judgment where he said *"I am not satisfied that the plaintiff has adduced sufficient evidence of the novation by Everyday of his appointment but what prompted me to give a written judgment is what I will quite frankly say is my disquiet as to the circumstances in which the dispute as to the entitlement to possession of this house arose and was thereafter escalated."*). He did not refuse the relief on the basis simply that the plaintiffs had not provided copies of the relevant documents and failed to comply with section 91.

55. Mr. Markham also makes the point that the loan is invalid because it was not registered on the Folio. I think he must mean the mortgage rather than the loan as (i) the loan itself would not be registered on the Folio and (ii) he refers to the "loan" of 2006 but it is the mortgage that is dated 2006 (the loan is 2005). In my view, this is not fatal to the establishment of a strong case. Promontoria took a transfer of the charge which was in Ulster Bank's name. Ulster Bank's ownership of the charge was registered in the Folio on the 24th January 2011. That there is a strong case that this was the 2006 charge is clear from the fact that the dealing number of that registration (D2011LR01925ON) also appears on a stamp on the copy of the 2006 mortgage which is exhibited to Mr. O'Sullivan's affidavit.

56. I am also satisfied that Promontoria has established a strong case that they were entitled to appoint a receiver. Mr. Markham did not point to any specific basis upon which he suggested that Promontoria had no authority to do so. Indeed, all he says is that they have not yet proven that they had authority to do so. It is therefore difficult to deal with this point. However, condition 12 of the mortgage provides, inter alia:

"(d) The provisions of Section 24 of the Conveyancing Act 1881 with the exception of Sub-section 8 shall apply to the Mortgage and to any Receiver appointed by the Lender.

(e) Any Receiver appointed by the Lender shall have the following powers in addition to those granted by statute:-

- (i) *to enter upon and take possession of, collect and get in the Mortgaged Property or any part thereof and for that purpose take proceedings in the name of the Borrower or otherwise as he may deem fit;*
- (ii) *to manage, sell, let, repair, decorate, alter, develop, improve or add to the Mortgaged Property or any part thereof in any manner whatsoever and with all the powers of an absolute beneficial owner."*

57. As set out above, by notice of the 25th April 2018, Promontoria called on Mr Markham to repay the debt, failing which they would, inter alia, appoint a receiver.

58. I am also entirely satisfied that there is a strong case that Mr. Markham did rent out the property after the receiver had been appointed and had gone into possession and was not entitled to do so. The first element of this is not denied by Mr. Markham. His position is, rather, that he was entitled to do so as he was entitled to do as he wished with his property. This ignores the provisions of the mortgage. Condition 5 of the Mortgage provides, inter alia:

"The Borrower covenants so long as the Mortgage is subsisting:-

(e) Not to exercise the powers of leasing or agreeing to lease and of accepting surrenders of leases conferred on a mortgagor in possession by the Conveyancing Acts 1881 to 1911 and not to create any lease or tenancy or part with or share the occupation or possession of the Mortgaged Property.

...

(h) Not without the consent of the Lender to make any disposition of the Mortgaged Property subject to the Mortgage or create or purport to create any rent charge affecting it and not to create or permit to exist any mortgage or charge on the Mortgaged Property or the Life Policy or any other Life Assurance which will rank after the Mortgage."

58. I am therefore satisfied that there is a strong case that he was not entitled to rent out the property and therefore the second-named defendants are not entitled to be in occupation.

59. I am therefore of the view that the plaintiffs have established a strong case that they would be likely to succeed in securing the relief against the defendants at the trial of the action. In those circumstances I must consider how matters should be arranged pending that trial. In reality, given that the intention is to sell the property, what this means is that I must consider whether the balance of justice favours the grant or refusal of the interlocutory injunction in those circumstances. What the Court seeks to achieve in assessing the balance of convenience or justice is to minimise the risk of injustice. Particular care must be taken in assessing the balance of justice in circumstances where the practical effect of the grant of the reliefs would be to determine the proceedings.

60. As noted above, no evidence has been adduced on behalf of the occupants. Therefore, I have no specific evidence in relation to them or their current circumstances. Nonetheless, I think I can take account of the fact that any order requiring possession to be given up will have an adverse, and perhaps significantly adverse, impact on them and this must be part of the assessment of the balance of justice. However, I can and must also have regard to the fact that they have known since at least the 16th September 2022 that the plaintiffs have claimed that Mr. Markham was not entitled to rent out the property and have been aware of this application and the possibility of orders being made for a very considerable period of time at this stage. Furthermore, the interests of justice can be addressed by an appropriate stay being granted.

61. In respect of the reliefs against Mr. Markham, I am of the view that the balance of justice favours the grant of the orders sought. There are a number of features which lead to this conclusion including (i) the fact that Mr. Markham issued separate proceedings against the plaintiffs on the 15th July 2020 in which he registered a *lis pendens* but did not progress those proceedings even to the point of serving the Plenary Summons, and (ii) the evidence is, at this stage, that he rented the property to tenants before the appointment of the receiver and has been in receipt of considerable sums of money from the tenants to whom he rented the property after the receiver's appointment and has made no payments or offers of payment in respect of the loan which he does not deny he took out. Furthermore, as noted above, the adequacy of damages is now to be considered as part of the overall assessment of the balance of justice rather than as a separate matter. While it is not to be treated as determinative in its own right (as it once was), it is nonetheless a central consideration in the balance of justice. I must consider the adequacy of damages for both the plaintiffs and the defendant. It seems to me that damages would likely not be an adequate remedy for the plaintiffs, if there is any damage, as the evidence at this stage is that Mr. Markham has not repaid a loan which he took out in 2005, has made no payments since 2016 and seems to owe somewhere in the region of €400,000. He has not sought to suggest that he would be able to pay any award of damages. However, balanced against

this must be the consideration that there is no evidence as to the value or estimated value of the property and no suggestion that the property is deteriorating and therefore no evidence that the plaintiffs will suffer a loss if the sale is delayed pending determination of the substantive proceedings. Thus, a balance has to be struck between the likelihood that damages would not be an adequate remedy for the plaintiffs because there is no evidence that an award of damages could be discharged by Mr. Markham and the absence of evidence that damage would in fact be suffered by the plaintiffs.

62. In relation to the adequacy of damages for the defendants, the plaintiffs have given an undertaking as to damages and I am entirely satisfied that damages would be an adequate remedy for Mr. Markham in the event that the plaintiffs were to obtain the injunction but fail in the substantive proceedings. Crucially, it is clear that this is a rental property. It is currently rented out and was rented out in the past. Indeed, in all the documentary evidence, Mr. Markham's address is given as a different address, clearly suggesting that he lives elsewhere and rents this property out. He has not asserted that there is anything particular about this property which might mean that damages would not be an adequate remedy, such as, for example, that it is a family farm which could not be replaced or is his family home. In those circumstances, if the plaintiffs obtain the injunction but are unsuccessful at trial, then the damage suffered by Mr. Markham will be financial and readily calculable.

63. Taking all of those factors into account, in my view the balance of justice favours the grant of the reliefs. This is subject to the point that Clarke CJ made in *Charleton v Scriven* about an interlocutory injunction not being used as a form of summary judgment. The plaintiffs are not entitled to secure an injunction and then not prosecute their proceedings. That would amount to using the interlocutory injunction application as a form of summary judgment procedure. The defendant is entitled, if he wishes, to a determination of those proceedings and, indeed, to pursue a counterclaim, and, if it transpires that the injunction was incorrectly given, to seek damages on foot of the plaintiffs' undertaking. I will in those circumstances make directions to get the matter ready for trial. I will, in the first instance, give the parties an opportunity to propose appropriate directions and, in the event of disagreement, I will determine an appropriate set of directions.

64. In all of those circumstances, I will grant the reliefs sought in terms of the Notice of Motion. As indicated above, I believe the proper balance of justice in respect of the occupant(s) would warrant a stay being placed on the reliefs in respect of them and I will consider such a stay if an application is made for one.