THE HIGH COURT

[2022] IEHC 484

[RECORD NO 2021 5794. P]

BETWEEN

MICHAEL NIHILL

PLAINTIFF

AND

EVERYDAY FINANCE DAC, KEN TYRELL AND WILSONS AUCTIONS

DEFENDANTS

Judgment of Mr. Justice Dignam delivered on the 29th day of July, 2022.

1. The Plaintiff seeks an interlocutory injunction in the following terms:

> *"An Order in the nature of an injunction prohibiting the Defendants by themselves, their servants and/or agents from offering by way of an internet auction on the platform of the website of Wilson Auctioneers, being the third named Defendant on 13th of October 2021 of all that and those the lands contained in the respective folios of Folios 7211F County Tipperary and 262F County Tipperary."*

2. The immediate background to the institution of these proceedings and to this application for an injunction was the proposed sale of a number of parcels of land. This in turn arises from secured borrowings which the Plaintiff had with the First-named Defendant's predecessor, Allied Irish Banks, and the appointment of the Second-named Defendant as receiver over the lands by the First-named Defendant. There is in fact very little dispute between the parties as to the factual background but, given the points raised by the Plaintiff in support of his application for an injunction, it is necessary to set out the background in some detail.

3. The affidavits of the Applicant are deficient in the manner in which they set out the facts. I have therefore had to rely on the affidavit filed on behalf of the Defendants (sworn by Ms. Adrienne Fitzgibbon) to gain a proper understanding of the factual background and to set out the facts in this judgment, highlighting, where necessary, any disputes between the contents of that affidavit and those sworn by the Plaintiff.

4. By loan facility letter dated the 28th August 2012 Allied Irish Banks agreed to advance to the Plaintiff three separate loan facilities in the amounts of €15,000, €106, 276, and €340,652 respectively. These facilities were stated to be repayable on demand and the security would be an all-sums mortgage over various properties, including certain properties at Cullen and Moher East, County Tipperary. The full amounts were drawn down by the Plaintiff. The facility letter was not exhibited by the Plaintiff. He explains in his third affidavit that it was not exhibited because he did not have a copy when swearing his grounding affidavit.

5. Two mortgages were granted by the Plaintiff:

(i) A deed of mortgage dated the 14th May 2001 in respect of the property comprised in Folio 262F of County Tipperary (this was registered in the Land Registry Folio on the 23rd December 2003); and

(ii) A deed of mortgage dated the 24th June 2008 in respect of the properties comprised in inter alia Folios 7211 and 7213 of County Tipperary (this was registered in the Land Registry Folios on the 30th March 2009).

6. Neither mortgage was exhibited to the Plaintiff's affidavits and in fact there was not even a reference to the second mortgage. The Plaintiff explains this on the basis that he did not have copies of the mortgages in his possession when swearing his grounding affidavit.

7. I refer to the terms and conditions of these mortgages in detail in the discussion below. They include contractual powers of enforcement in addition to the statutory powers, including a contractual power to appoint a receiver to the properties the subject of the mortgages.

8. By global deed of transfer dated the 14th June 2019 AIB assigned to the First-named Defendant all rights, title, interests and benefits which it held on foot of those loan facilities and mortgages and the Plaintiff was notified of the assignments by letters of the 20th June 2019 and the 20th August 2019. The Plaintiff makes no reference to having received these notifications but does not dispute having received them in reply to Ms Fitzgibbon's affidavit. The assignment of the first mortgage (14th May 2001) was

registered on the Folios on the 30th August 2019 and the assignment of the second mortgage was registered on the 13th September 2019.

9. In her affidavit on behalf of the Defendants, Ms. Fitzgibbon says that the Plaintiff failed to make the payments required by the terms and conditions of each of the facilities. The Plaintiff does not dispute this and does not suggest that the monies are not owed. By letter of the 21st January 2020, Link ASI Limited (a service provider for the First-named Defendant) informed the Plaintiff that there was an amount outstanding of €501,427.62 and that he had been *"classified as not co-operating under the Regulations on Lending to Small and Medium-Sized Enterprises (SME Regulations)" a*nd that the consequences of this include that a Receiver may be appointed over the secured facilities, that legal action may be commenced for the repossession of the secured properties or recovery of monies owed, and that fees, charges and surcharge interest may be applied to his loan account. A letter of formal demand was made by Link ASI (subsequently renamed BCM Global ASI Limited but referred to in this judgment as "Link") on the 16th October 2020 for the amount of €517,462.73 plus continuing interest. This letter also warned the Plaintiff that in the event of non-payment all of the First-named Defendant's rights, including the right to appoint a receiver, would be exercised.

10. No payments were made by the Plaintiff and the Second-named Defendant was appointed to act as receiver by two instruments of appointment of the 11th February 2021. These instruments are at the centre of the dispute between the parties, and it is therefore necessary to quote them in full. Before doing so, in light of the challenges raised by the Plaintiff, it must be noted that the instruments are signed by a David Geraghty and Mona Samadi as "*authorised officers*" of Link "*as Attorney for and on behalf of Everyday Finance Designated Activity Company Under a Power of Attorney dated 14 June 2019"*. I return to this below as the validity of this power of attorney and therefore the execution of the instruments of appointment by Mr. Geraghty and Ms. Samadi forms a central part of the Plaintiff's case.

11. One instrument stated that the appointment was made *"supplemental to and made pursuant to the powers contained in a Mortgage/charge dated 24 June 2008 between (1) Michael Nihill (the Mortgagor) and (2) AIB Mortgage Bank and Allied Irish Banks plc (collectively AIB)"* and went on to state:

"*WHEREAS*

A. *Under and by virtue of the Mortgage/Charge, the Mortgagor did thereby grant in favour of AIB which definition includes any successor in title thereto), fixed*

charges and/or a mortgage over the mortgage property as charged by the Mortgage/Charge and as stated in the Schedule hereto ***(the Mortgaged Property****) as security for the repayment of the "Total Debt" (as defined in the Mortgage/Charge) (****the Secured Liabilities).***

B. Prior to the execution of this Appointment AIB transferred, conveyed, assigned and/or otherwise assured all of its right, title and interest in the Secured Liabilities, the Mortgage/Charge and the Mortgaged Property to EFDAC.

C. The Secured Liabilities have now become payable by the Mortgagor to EFDAC.

D. Defined terms in the Mortgage/Charge shall have the same meaning when used in this Appointment.

NOW THIS APPOINTMENT WITNESSETH *as follows:*

1. ***EFDAC HEREBY APPOINTS*** *the Receiver to be the receiver over the Mortgaged Property* ***TO THE INTENT*** *that the Receiver may exercise all the powers conferred on the Receiver in relation to the Mortgaged Property whether under the Mortgage/Charge or by law or otherwise.*

2. *The Receiver hereby agrees and undertakes that he shall act as such receiver and exercise all of the powers conferred upon him by the Mortgage/Charge or by law or otherwise subject to and in conformity with the provisions in that behalf contained in the Mortgage/Charge.*

12. The schedule described the lands as:

*"****ALL THAT AND THOSE*** *the property comprised in Folio TY7211 County Tipperary, Folio 7213 County Tipperary, Folio 19087F County Tipperary and Folio 7199 County Tipperary subject to the leasehold interest comprised in Folio 4558L County Tipperary described in the Schedule to the Mortgage/Charge as*

"ALL THAT AND THOSE

1. *Part of the property comprised in Folios 7211 and 7213 Co. Tipperary more particularly the subject matter of the Deed of Transfer dated the 24th June 2008 and made between William Horan of the one part and the mortgagor of the other part; and*

2. All of the property comprised in Folio 19087F Co. Tipperary; and

3. *Part of the property comprised in Folio 7199 Co. Tipperary excluding the area as outlined in red on the map attached."*

13. The appointment was accepted by the Second-named Defendant in the following terms *"I…accept my appointment as receiver of all the Mortgaged Property and DO HEREBY AGREE to act as receiver of the Mortgaged Property and as agent of EFDAC in accordance with the terms of this Appointment".* This is noteworthy because the instrument of appointment itself did not purport to appoint Mr. Tyrrell as "*agent of EFDAC*". The terms of the acceptance formed a central part of the Plaintiff's case.

14. The second instrument of appointment and the acceptance by the Second-named Defendant were in identical terms save that the instrument referred to the mortgage of the 14th May 2001 and the schedule referred to the lands as "*ALL THAT AND THOSE the property comprised in Folio 262F County Tipperary."*

15. The Plaintiff says in his grounding affidavit that the appointment of and acceptance by the Second-named Defendant relate to Folio 262F and not TY7213 and TY7211. That is correct insofar as it goes but it ignores the other instrument of appointment referred to above.

16. The Plaintiff was informed of the appointment of the Receiver by letter of the 11th February 2021 with which the instruments of appointment were stated to be enclosed. The subject line of the letter identified the properties in question as being 68 acres of land in Cullen, Longstone, Co Tipperary (Folios TY262F, TY7213 AND TY7211 and 42 acres in Moher East, Cappawhite, Co. Tipperary (Folios 7199).

17. In or about May 2021 (after the appointment of the Receiver) there was some contact between solicitors for the Plaintiff and the Second-named Defendant in respect of a proposal by the Plaintiff. There is a dispute about precisely when this contact

commenced and about the proper characterisation of it. There was also a dispute at the beginning of the hearing about the admissibility of documents relating to it in circumstances where some were headed "*without prejudice"* but it was not necessary for the court to resolve this dispute in circumstances where the parties reached agreement in relation to it at the hearing. In short, the Plaintiff's solicitor proposed a broad outline of a payment structure and Link, on behalf of the First-named Defendant, sought various details in order to consider the proposal but no such further details were provided by the Plaintiff.

18. When the properties were advertised for sale the Plaintiff's solicitors emailed Link on the 17th September 2021 stating that the Plaintiff had not received any notification of the proposed sale and that the parties had been in discussions. Link replied to say that they had sought details in response to the original proposal and that as the receiver had been appointed by the First-named Defendant they would require any proposal to ensure repayment of the debt within 3 months.

19. The properties were advertised for sale from the 14th September 2021 and were due to be auctioned on the 13th October 2021.

20. By letter of the 11th October 2021 the Plaintiff wrote to the auctioneer stating:

> *"I note that you are offering the following lands for sale, the lands comprised in Folios TY213, TY7211 and TY262F. Please note that the lands comprised in Folio TY213 are not owned by me and that the lands comprised in Folio TY7211 are not subject to any receivership, therefore I would be obliged if you would immediately confirm on what basis you are offering these lands for sale.*
>
> *Please note that if I do not receive confirmation that the lands are being withdrawn from auction the appropriate application for injunctive relief will be made without further notice to you."*

21. Proceedings were instituted on the 12th October 2021 and Allen J granted an interim injunction restraining the sale on that date.

The legal principles

22. The parties were agreed as to the correct approach to an application for a prohibitory interlocutory injunction. That approach was set down in *Campus Oil v Minister for Industry and Energy (No. 2) [1983] IR 88),* was restated in *Okunade v Minister for Justice & Ors [2012] 3 IR 152* and was recalibrated by the Supreme Court in *Merck Sharpe & Dohme v Clonmel Healthcare [2019] IESC 65* where O'Donnell J stated:

> *"…it may be useful to outline the steps which might be followed in a case such as this: -*
>
> *(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief pending the trial could be granted;*
>
> *(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the American Cyanamid and Campus Oil approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;*
>
> *(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;*
>
> *(4) The most important element in that balance is, in most cases, the question of adequacy of damages;*
>
> *(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;*
>
> *(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it may be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial.*
>
> *(7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the*

balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;

(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined."

23. I consider whether, if the Plaintiff succeeded at the trial, a permanent injunction might be granted after I have considered whether a fair issue has been established.

24. This, the second step outlined above, i.e., whether a fair question has been established, is often described as a "*threshold"* test in the sense that if the applicant does not reach that threshold then he is not entitled to an injunction and the Court does not need to consider the other matters such as the balance of convenience including the adequacy of damages and how matters should be arranged pending trial.

25. That threshold, in the case of a prohibitory injunction – whether there is a fair or serious or bona fide question to be tried - is a low hurdle. Barniville J in *O'Gara v Ulster Bank Ireland DAC [2019] IEHC 213* described the test in the following terms:

"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…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 un-stateable, it is generally not a difficult threshold to meet."

26. Collins J in *Betty Martin Financial Services Ltd v EBS DAC [2019] IECA 327* said:

"Neither party takes issue with the judge's view that the requirement to show a fair question/serious issue does not mean that the Agent must establish a very strong case and that the threshold to be surmounted is generally recognised as low (paragraph 11 of the judgement under appeal). It may be useful to regard this threshold as akin to the threshold that applies where a party seeks to dismiss a claim against it pursuant to the inherent jurisdiction and that was the approach taken by the High Court in a number of decisions cited to us including Wingview Ltd v NS Property Finance DAC (per Haughton J, paragraph 14) and O'Gara v Ulster Bank DAC (per Barniville J paragraph 42)"

Is there a fair question to be tried?

27. The Plaintiff raises a number of points on which he claims he has an arguable case:

(i) The Second-named Defendant was appointed as receiver and as agent of the First-named Defendant and that this gives rise to a conflict of interest;

(ii) There were ongoing negotiations between the parties and the properties should therefore not have been put up for sale;

(iii) There are two issues in relation to the identity of the properties being sold;

(iv) The Second-named Defendant does not have a power of sale and is purporting to sell the properties;

(v) The instruments of appointment are invalid;

(vi) The marketing of the properties or manner of sale would not secure the best price. This complaint was raised for the first time at the hearing.

28. I propose to deal with these in a different order, taking them in chronological order commencing with the complaint that the receiver should not have been appointed in circumstances where there were ongoing negotiations between the parties, then addressing the complaints about the actual appointment of the receiver, moving to the complaints about the receiver's powers and then dealing with the marketing and manner of sale (and, indeed, the effect of this having been raised at the hearing for the first time).

29. It is important to note that in the course of his affidavits the Plaintiff also makes other complaints; for example, he says that he was never furnished with a list of the names of those authorised to sign deeds of appointment. I have not considered it necessary to consider these individually as they were not the focus of the submissions at the hearing and they seem to me to be subsumed into the overall heads of complaint.

(i) ***Ongoing negotiations***

30. The Plaintiff submitted that the properties should not have been put up for sale because there were discussions going on between the parties.

31. Almost no detail of these discussions was given by the Plaintiff. The only detailed evidence about the interactions between the Plaintiff and the Defendants is contained in the affidavit of Ms. Fitzgibbon on behalf of the Defendants. The Plaintiff initially objected to Ms. Fitzgibbon opening up the detail of the discussions, such as they were, and to her exhibiting the correspondence which was exchanged between the parties on the basis that they were without prejudice discussions. There was an incongruity in this position given that it was the Plaintiff who raised the fact that there were discussions and sought to call them in aid to challenge the lawfulness of the proposed sale but, in any event, the objection was not maintained at the hearing so I can therefore have regard to the substance of the discussions.

32. Even a cursory glance at the substance of these interactions establishes that they could not act, in the circumstances of this case, as a bar on the appointment of a receiver or indeed on the sale of the lands. What is disclosed by the evidence is that a proposal was put to the Defendants by the Plaintiff and the Second-named Defendant reverted on the 31st May 2021 to seek details in relation to the proposal but none of the details sought were ever provided by the Plaintiff. Put simply, the discussions never got off the ground.

33. I have serious doubts whether discussions could ever, in themselves, absent an express agreement or at least a representation that the parties will not take any steps pending the outcome of the discussions, amount to a bar on the lender enforcing its security. In this regard, I was referred by the Defendants to *Tyrell v Wright [2017] IEHC 92* and *[2018] IECA 295, Donore Garages Limited v Tennant [2017] IEHC 178* dealing with whether and when a creditor may be estopped from claiming the full amount of a debt by his promise to accept a smaller amount and when a temporary estoppel may become permanent, and to *Ryan v Danske Bank [2014] IEHC 236* and *Irish Bank Resolution Corporation Limited (In Special Liquidation) v Morrissey [2013] IEHC 208* in relation to whether there is an obligation to consult with the borrower or to give the borrower an opportunity to be heard and to deal with the arrears or for the creditor to act reasonably before appointing a receiver. The Courts rejected any such obligation. In any event, I do not need to resolve this on the facts of this case where the evidence shows that the Plaintiff made a proposal which was considered by the First-named Defendant (evidenced by the Defendant having sought more detail) and where I am satisfied that the discussions were at best at a very early stage and the Plaintiff simply did not advance the discussions in any meaningful way. It is also relevant that the First-named Defendant had expressly stated in its letters of January and October 2020 that it intended to exercise its enforcement rights. I am not satisfied that the Plaintiff has established an arguable case on this point.

(ii*) Instruments of Appointment are Invalid*

34. Two representatives of Link signed the instruments of appointment. The Plaintiff claims that neither Link nor its representatives had the power to do so because their power to do so is contained in the Power of Attorney between the First-Named Defendant and Link and the Power of Attorney may have been completed by the First-named Defendants before the completion of the Global Deed of Transfer which transferred the facilities and mortgages from AIB to the First-named Defendant, i.e. at a time when they had not yet been transferred to the First-named Defendant. He points to the fact that the Global Deed of Transfer and the Power of Attorney were both signed on the same day and that the Deed of Power of Attorney was signed in England by one of the parties.

35. Essentially, the Plaintiff makes the point that in the absence of the court knowing the exact chronology of the signing of these two documents there is a question about whether the authorised officers had been properly appointed as such at the time they purported to appoint the receivers in February 2021.

36. This seems to me to amount to nothing more than raising a cloud of suspicion about these documents. While the threshold for a prohibitory injunction is low, it is not enough for a Plaintiff to simply raise a suspicion. There must be an evidential basis for the complaint that is raised. There is nothing in the evidence to suggest that there is anything untoward about the chronology of the documents. The mere fact that they were signed on the same day, even where one of the parties to one of them (but not the other) signed it in England, is not sufficient.

37. In any event, no authority or arguments were opened to the Court that a pre-emptive appointment of an attorney was somehow invalid or unlawful. In the absence of any such authority or argument I am not satisfied that the Plaintiff has established an arguable that there is a bar on an individual or company appointing an attorney to perform powers on behalf of the donor once those powers become vested in the donor.

38. I note that the Defendants have not dealt with this in Mr Fitzgibbon's affidavit but their failure to deal with it is not enough for the Plaintiff to have discharged the burden of proof.

39. It also bears note that the signatures that appear to have been affixed in England were on behalf of a different "Link" company than the one involved in the receivership. The Power of Attorney was signed on behalf of Link ASI Limited and Link

Mortgage Services Limited. The former has an address in Ireland and the latter has an address in London. The *"London signatures"* were on behalf of the latter.

Role of the Second-named Defendant — Conflict of Interest

40. The Plaintiff raises a concern in relation to the status of the Second-named Defendant, contending that his appointment is invalid because the instruments of appointment appoint him as both a receiver (in which capacity he is the agent of the mortgagor) and as agent for the First-named Defendant and that this gives rise to a conflict of interest.

41. It is not necessary for me to determine the point of principal as to whether a dual appointment as a receiver and as the agent of the mortgagee gives rise to a conflict in circumstances where I am satisfied that the Plaintiff has not established an arguable case that the Second-named Defendant was appointed as agent of the First-named Defendant. Firstly, the Defendants do not claim that the Second-named Defendant is the agent of the mortgagee. Ms. Fitzgibbon, on behalf of the Defendants, deposes that *"[A]s receiver of the Properties, the Second Defendant is the agent of the Plaintiff as a matter of law, subject to the limitations of that agency which I believe and am advised by the solicitors for the First Defendant are well-established*." In submissions, Counsel for the Defendants stated that the instruments of appointment only appoint the Second-named Defendant as receiver and not as agent of the First-named Defendant. In their written submissions the Defendants state "*As is explained in the affidavit of Ms. Fitzgibbon, the Second Defendant has been appointed to act as receiver only".* It must be noted that this is not in fact what Ms Fitzgibbon says in her affidavit. She states in paragraph 42 of her affidavit (quoted above) *"As receiver of the Properties, the Second Defendant is the agent of the Plaintiff as a matter of law…"* That does not amount to an averment that the Second-named Defendant has not been appointed as agent of the First-named Defendant. Of course, the averment in Ms. Fitzgibbons affidavit and indeed the submission on behalf of the Defendants are focused on whether the instruments of appointment appointed the Second-named Defendant as agent of the First-named Defendant. However, it seems to me that it would be misleading if there was another document appointing the Second-named Defendant as agent of the First-named Defendant and the Plaintiff and the Court were not told of this. I can not presume that the Defendants would deliberately mislead the Court in that way and it seems to me that while the averment and the submission refers to the instruments of appointment only that is because they were replying to the Plaintiff's complaint that those instruments purport to appoint the Second-named Defendants as the First Defendant's agent. The position of the Defendants is, therefore, that the Second-named Defendant is not the agent of the First-named Defendant. This has consequences for the powers which the Second-named Defendant can exercise which I return to below.

42. In any event, even if that were not the position of the Plaintiff, I am satisfied that the instruments of appointment do not appoint or purport to appoint the Second-named Defendant as agent of the First-named Defendant. The limits of the Second-named Defendant's appointment are clear from the instruments of appointment. They state, inter alia:

> *"EFDAC HEREBY APPOINTS the Receiver to be the receiver over the Mortgaged Property TO THE INTENT that the Receiver may exercise all the powers conferred on the Receiver in relation to the Mortgaged Property whether under the Mortgage/Charge or by law or otherwise" and "The Receiver hereby agrees and undertakes that he shall act as such receiver...".*

43. Nothing in the instrument purports to appoint him as agent of the First-named Defendant.

44. Confusion undoubtedly arises from the terms of the acceptance signed by Mr. Tyrrell in which he states that he accepts his appointment as receiver and goes on to agree to *"act as receiver of the Mortgaged Property and as agent of EFDAC in accordance with the terms of this Appointment.*". [**Emphasis added**]. No explanation for this has been put on affidavit and it was undoubtedly liable to give rise to confusion and concern, but it seems to me that the terms of Mr Tyrell's acceptance can not change the terms or status of his appointment. He can not make himself agent of the First-named Defendant by purporting to accept an appointment which has not been made by the First-named Defendant.

The Receiver is Wrongly Exercising a Power of Sale

45. The Plaintiff alleges that the Second-named Defendant is purporting to exercise a power of sale which he does not possess on the basis that he has carriage of the sale and that the draft Contract of Sale states that the Vendor is "*Michael Nihill (acting by the Receiver Ken Tyrell").* The Defendants' response is (i) that the Second-named Defendant has not sought to exercise a power of sale and (ii) even if the Second-named Defendant "*does not enjoy a free-standing contractual entitlement to sell the Properties, this issue can be overcome by the First- named Defendant being a party to any conveyance of the Properties in the exercise of its power of sale".*

46. A receiver only has those powers which are conferred on him or her by the security document or by statute.

47. There is nothing in either of the mortgages in this case which confer a power of sale on the Second-named Defendant qua receiver. Clause 8.01 of the mortgage of the 14th May 2001 deals with the appointment and powers of a receiver and states:

> *"Any receiver appointed by the Bank under the power to appoint a receiver shall be deemed to be the agent of the Mortgagor and the Mortgagor shall be solely responsible for the acts and defaults of such receiver and for his remuneration and the Bank shall not under any circumstances be answerable for any loss or misapplication of the rents and profits of the mortgaged property or any part thereof by reason of any default neglect or breach of trust of or by such receiver for the time being and all moneys received by any such receiver after providing for the matters specified in paragraphs (i) to (iii) of sub-section 8 of Section 24 of the Act of 1881 and the renumeration of such receiver and the discharge of all costs or expenses of or incidental to the exercise of any of the powers of such receiver may and shall if the Bank in its discretion shall so direct be applied in or towards satisfaction of the secured moneys and in such order as the Bank may from time to time conclusively determine"*

48. There is a similar provision in the mortgage of the 24th June 2008. Neither of these clauses provide for a power of sale by the Receiver.

49. The First-named Defendant as mortgagee undoubtedly enjoys a power of sale both under the security documents and statute.

50. I am satisfied that the Plaintiff has established an arguable case that the Second-named Defendant was exceeding his powers by purporting to exercise a power of sale for the two reasons set out above, i.e., he appears to have carriage of the sale and he is stated in the draft contract to be vendor (as Receiver, on behalf on the Plaintiff). The real question though, is whether the fact that a contract has not yet been entered into and that ultimately the contract for sale can be and is intended to be concluded by the First-named Defendant being a party to the contract (through the Second-named Defendant) cures this issue. The draft contract provides that the contract will be entered into by the Receiver as agent of the mortgagee.

51. However, it seems to me that the Court must take the facts as they are at the time of the application. The facts are that the draft contract clearly states that the property is being sold by the Receiver acting on behalf of the Plaintiff, Special Condition 5.4 reflects this in stating:

> *"5.4. Ken Tyrell of PWC, One Spencer Dock, North Wall Quay, Dublin 1 (the Receiver) has been appointed as receiver to the Subject Property pursuant to the appointments listed in the Documents Schedule (the Appointments). The Purchaser Accepts the Receiver's appointment as valid and subsisting and shall raise no objection, requisition or enquiry in relation to same and accepts the copy of the Appointment as evidence of the Receiver's appointment".*

52. Special Condition 5.5 provides that the Receiver will enter the contract as agent of the Receiver:

> *5.5. This Contract shall be entered into by the Receiver as agent of the mortgagee and the Purchaser Accepts that the Receiver has full authority to enter into this Contract without further objection, requisition or enquiry in relation thereto. The Purchaser hereby expressly acknowledges that the Receiver is executing this Contract in his capacity as agent of the mortgagee for the sole purpose of facilitating the acquisition of the Subject Property by the Purchaser. Nothing contained in this Contract, nor any agreement or matter connected herewith shall in any way affect the estate or property of the Receiver (or any other partner(s) or staff of the Receiver's firm) who is executing this Contract solely in his capacity as receiver and in no other capacity whatsoever. The Purchaser shall make no objection nor raise any requisition or enquiry in relation thereto."*

53. However, the Second-named Defendant has not been appointed as agent of the First-named Defendant. As is set out above, that is clear from the instruments of appointment and the position adopted by the Defendants. No other appointment documents have been referred to or exhibited, and the Defendants have not stated that he has been appointed as the First- named Defendant's agent.

54. Thus, the current state of the evidence/facts is that the vendor is stated in the contract to be the Plaintiff acting through the Receiver and that he, as Receiver, will enter the contract *"as agent of the mortgagee*" but he has not been appointed as such agent.

55. In my view, in those circumstances, the Plaintiff has established an arguable case that the purported sale is in excess of the Second-named Defendant's powers has been established.

The Properties Being Sold

56. The Plaintiff alleges that the Second-named Defendant is (i) purporting to sell property which does not belong to the Plaintiff and (ii) purporting to sell land which does not form part of the receivership properties. The Plaintiff stated in a letter to the Third-named Defendant on the 11th October 2021 that "*I note that you are offering the following lands for sale, the lands comprised in Folio TY213, TY7211, TY262F. Please note that the lands comprised in Folio TY7213 are not owned by me and that the lands comprised in Folio TY7211 are not subject to any receivership…".*

57. The complaint that the proposed sale included property that is not owned by the Plaintiff arises from the terms of the advertisement of sale. That advertisement stated, "*The lands are contained within Folio TY213, TY7211, TY262F and amount to 27.4ha — c. 67.07 acres*" [**Emphasis added**] and the Plaintiff relies on this to ground the case that the receiver was purporting to sell lands which were not owned by the Plaintiff because the lands in Folio TY213 are owned by a Mr. Joseph Morris. There is no dispute that the Plaintiff owns the lands in Folio TY7213.

58. I am satisfied that the reference to lands in Folio TY213 was simply a mistake and there was no question of the Second-named Defendant attempting to sell those lands. It was clearly intended to refer to the lands TY7213, but the number 2 was omitted. That this is the case is clear from the fact that the advertisement states that the "*Property Location*" is "*Longstone, Cullen, Co. Tipperary*" whereas, as is clear from Folio TY213 exhibited to Mr. Nihill's second affidavit, the lands in Folio TY213 are in Mullinahone. Furthermore, the maps and images of the three parcels of land attached to the advertisement show that the properties being sold are contiguous plots of land located at Cullen, County Tipperary. Finally, prospective purchasers could inspect the draft contract of sale and this draft contract correctly described the lands being offered for sale as "*the property comprised in Folio 7213, County Tipperary, Folio 7211 County Tipperary and Folio 262F County Tipperary*."[**Emphasis added**]

59. The reference to Folio TY213 clearly had the potential to create a degree of confusion for prospective purchasers but it does not constitute an attempt by the receiver to sell lands which are the property of another person, and any confusion would have been rectified by a cursory review of the advertisement in its totality and a cursory review

of the draft contract of sale. Thus, the error on the advertisement could not go to the validity of the sale.

60. In any event, an attempt by the receiver to sell lands which are owned by a third party is a matter for the third party and not for Mr. Nihill. He described his concern as being that he would be exposed to being called a "*land-grabber*" and of being guilty of slander of title as the sale was being done in his name. I am satisfied that even the most cursory of inquiries made by any reasonable person would have disclosed that part of the advertisement to have been a mistake. In any event, even if Mr. Nihill suffered damage through this error in the advertisement through, for example, Mr. Morris suing for slander of title, Mr. Nihill could sue the receiver/estate agent.

61. The Plaintiff also complains that the receiver was purporting to sell lands which were not part of the receivership. He stated this in his letter of the 11th October 2021 where he wrote "*…the lands comprised in folio TY7211 are not subject to any receivership…".* He repeated this in his second affidavit sworn on the 12th October 2021, where he stated, "*I further say and believe that the lands comprised in Folio TY7211 are owned by me but are not included in this receivership*".

62. These statements clearly mean that the receivership simply does not apply to the lands in Folio 7211 and are, in that respect, manifestly wrong. The schedule to the relevant instrument of appointment (the instrument based on the mortgage of the 24th June 2008) describes the land to which the receivership applies as:

> *"ALL THAT AND THOSE the property comprised in Folio TY7211 County Tipperary…*
>
> *ALL THAT AND THOSE 1. Part of the property comprised in Folios 7211 and 7213 Co. Tipperary more particularly the subject matter of the Deed of Transfer dated the 24th of June 2018 and made between William Horan of the one part and mortgager of the other part…"*

63. When this was pointed out by Ms. Fitzgibbon in her affidavit the Plaintiff persisted in his claim of the "*wrongful inclusion of property comprised in Folio 7211 that was not in the receivership*" but then in his third affidavit shifted position to say that part of Folio 7211 is not covered by the receivership.

64. When Counsel for the Plaintiff was asked about the basis for this contention during the course of the hearing, he referred to having seen a map, but the matter was put no further than that. It is a matter for the Plaintiff to discharge the burden of proof and in those circumstances, I am not satisfied that he has done so.

65. This was the sole basis advanced during the hearing for the claim that the receiver was purporting to sell lands which were not in the receivership.

66. However, for completeness, I have considered paragraph 33 of Mr. Nihill's third affidavit in which he first made the assertion that the receivership did not apply to part of the lands in that Folio (as distinct from his original assertion that the receivership did not apply to the lands in Folio 7211. In that paragraph, he stated:

> *"I beg to refer to paragraph 63 of Ms. Fitzgibbon's affidavit and I say that my assertion that the property comprised in Folio 7211 is being offered for sale in spite of not being in the receivership is correct as Ms. Fitzgibbon curiously refers to a draft contract for sale as exhibited by her as "Tab 20" that the part entitled " Particulars and Title" refers to "ALL THAT AND THOSE the property comprised in Folio 7213 County Tipperary, Folio 7211 County Tipperary and Folio 262F County Tipperary." I say that part of Folio 7211 County Tipperary is not covered by the receivership and yet the said draft contract for sale does not reflect this reality."*

67. This suggests that the Plaintiff's case on this point might have been based on the fact that the draft contract described the lands as "*ALL THAT AND THOSE the property comprised in Folio 7211…"* whereas the mortgage and instrument of appointment described the lands to which those instruments applied as "*ALL THAT AND THOSE Part of the property comprised in Folio 7211"* lands which were not in the receivership were being sold.

66. This paragraph was not expanded or relied upon at the hearing and no submissions were made on foot of it and therefore I can not even attempt to express a concluded view as to any argument which might have been made. Subject to full argument it seems to me at this stage that it does not give rise to an arguable case that the receiver is purporting to sell lands which are not part of the receivership. The description of the lands in the draft contract for sale can only be seen as a drafting error in circumstances where the mortgage and the instrument of appointment is clear as to what lands are involved. The contract is a draft and the error is capable of being corrected

prior to completion. The receiver (or indeed the First-named Defendant) could not sell lands which are not part of the receivership, even if he had a power of sale, and I do not think a draft can be read as an attempt to do so.

67. It seems to me that the receiver can not sell lands to which he does not have title and therefore even if the lands are misdescribed in the draft contract for sale that is a matter which will be addressed and resolved during the sale and conveyancing processes.

The Marketing of the Property

68. The Plaintiff claimed during the hearing that the manner in which the lands had been marketed ensures, or could have the effect, that they would be sold at a depressed price. It is long-established that a mortgagee/receiver must exercise all reasonable care to obtain the best price reasonably obtainable. Ó Dálaigh CJ stated in *Holohan v Friends Provident and Century Life Office [1966] IR 1 t*hat the test to be applied was whether the defendant acted as a reasonable man would in selling the plaintiff's property.

69. This was not one of the grounds of complaint raised by the Plaintiff in his affidavits and it was only raised for the first time during the course of the hearing. No written submissions were filed on behalf of the Plaintiff so the Defendants were not even put on notice of the point by the delivery of such written submissions. I consider the effect of this below.

70. The Plaintiff's core point about the alleged shortcoming in the marketing is that the property is being sold without vacant possession though, through the significant reliance placed by the Plaintiff on the judgment of Allen J in *Hennessy v Tyrrell & Everyday Finance [2022] IEHC 109*, part of his complaints related to other features of the marketing process. In *Hennessy,* the lands in question were also being sold without vacant possession. However, in that case there was also an "*apparent suddenness*" in the decision to sell and there was no "*meaningful marketing of the land*" both of which were central to Allen J's decision.

71. Allen J first dealt with the issue of the sale without vacant possession. He did not accept the suggestion on behalf of the defendant that the plaintiff's apprehension that a lower price would be achieved without vacant possession was mere speculation but went on to say that the plaintiff had not made out a strong case that the defendant was not entitled to offer the land without vacant possession.

72. It is clear that he would not have held in favour of the plaintiff on the question of a sale without vacant possession alone because, having made the point that a decision to sell without vacant possession is not necessarily in breach of a receiver's duty, he held that *"[W]hat tips the balance in this case is the apparent suddenness of the decision to sell; the absence, as far as the evidence goes, of any previous demand for possession; and the absence of any meaningful marketing of the land."*

73. In this case there was no evidence of a "*suddenness in the decision to sell*" or of the absence of any meaningful marketing of the land. In *Hennessy* the complaint about the marketing of the land was that the lands were only advertised for a little over two weeks and were only advertised on the auctioneer's website. In this case, the lands were advertised for a month and the Plaintiff was aware of them being advertised from at least the 17th September 2021.

74. Even if these aspects of the process had formed a central part of the Plaintiff's case, I would not be satisfied that the Plaintiff had discharged the burden of establishing an arguable case that the sales process was deficient on those grounds. It is not sufficient for a plaintiff to simply assert that the sales/marketing process is deficient without adducing some expert evidence as to what a reasonable vendor/auctioneer would do or would have done in the particular circumstances. For example, it may be that a one month advertising period is too short or it may be that there is a legitimate view that a short advertising campaign is most effective or that there are diminishing returns from a more extended period. Similarly, while it may be said that only advertising on the auctioneer's website limits the pool of possible purchasers, it may also be said that the costs incurred in placing advertisements elsewhere would not achieve a sufficient benefit for the cost involved. The court can not speculate as to these matters and, in general, it is a matter for a plaintiff who wishes to rely on such factors to adduce the necessary evidence. To the extent that this Plaintiff has sought to rely on these factors, I could not be satisfied that the Plaintiff has discharged the burden of proof in the absence of such evidence.

75. Expert evidence was not required by Allen J in *Hennessy,* but it must be borne in mind that in *Hennessy* the motion for an injunction was issued on the 17th February and it was heard on the 23rd February because the Defendants were anxious to proceed with the proposed auction. This necessarily meant that the opportunities for the parties to deal with certain matters on the evidence were more confined than in this case where the application came on at a more leisurely pace with a full exchange of affidavits and ample opportunity for appropriate evidence to be placed before the Court.

76. In any event, as noted above, the Plaintiff's case about the marketing of the property was focused on the fact that the lands are being sold without vacant possession, although even this was only raised at the hearing and was not mentioned in the Plaintiff's grounding or supplemental affidavits.

77. The Court can accept as a general proposition that a sale without vacant possession is in general likely to lead to a lower price than a sale with vacant possession. As Allen J put it in *Hennessy*, "*Mr. Tyrrell [the defendant], in his replying affidavit suggests that Mr. Hennessy's apprehension that a lower price would be achieved without vacant possession is mere speculation. I will content myself by saying that Mr. Hennessy appears to me to have the better end of that argument.*" Perhaps more on point, he said, "*… it is fairly clear that the buyer of a farm with the farmer in possession is in all probability if not inevitably buying a lawsuit which will depress the price…"*. However, a sale without vacant possession, even if it is likely or very likely to achieve a lower price, does not necessarily constitute a breach of the receiver's duty. As Allen J put it in *Hennessy* in holding that while the purchase without vacant possession "*is in all probability if not inevitably buying a lawsuit which will depress the price*", "*on the other hand it is not necessarily unreasonable for a mortgagee to take into account in deciding what it will do the time effort and expense of what might turn out to be a protracted campaign of litigation to achieve vacant possession."*

78. Allen J also held, and was correct to do so, in my view, that on the authority of *Holohan*, the onus of proving that the mortgagee is acting unreasonably is on the plaintiff. It seems to me that very often this will not require a plaintiff who is seeking relief on the basis of a decision to sell without vacant possession to adduce evidence that the sale without vacant possession will achieve a lower price. As noted above, the court, for the purpose of considering whether an arguable case has been established, will often be able to safely proceed on the basis that a sale without vacant possession will achieve a lower price. If the sale without vacant possession will achieve a lower price, then in the absence of any explanation by the defendant as to why the property is being sold without vacant possession (as in this case) and, therefore, most probably for a lower price than might otherwise be achieved, a court could often safely conclude that the burden of establishing an arguable case is satisfied without expert evidence being adduced, particularly having regard to the low threshold as set out in *O'Gara v Ulster Bank Ireland DAC [2019] IEHC* 213 and *Betty Martin Financial Services Ltd v EBS DAC [2019] IECA 327.*

79. However, that presupposes that the defendant has had an opportunity to address the allegation that he or she is acting in in breach of duty by selling the property

without vacant possession. In this case, as noted above, there is absolutely no reference made in the grounding affidavit or in the supplemental affidavits or in the exhibits to a concern about the property being sold without vacant possession and the likely consequences of that. In order to find that an arguable case has been established by the Plaintiff on this point I would have to conclude that the Defendant should have given an explanation for selling the lands without vacant possession in circumstances where no concern in that regard had been raised by the Plaintiff. This goes to the substance of the case sought to be made by the Plaintiff because the Defendant could well have a good and reasonable explanation for its decision, and also goes to the fairness of the hearing. In those circumstances I can not conclude that the Plaintiff has discharged the burden of proof.

Balance of Justice/Convenience

80. As I am satisfied that the Plaintiff has established an arguable case on the question of the allegation that the Second-named Defendant is acting in excess of his powers in purporting to sell the lands I must consider the balance of convenience and the balance of justice when considering how matters should be arranged pending the trial of the action.

81. Before doing so, I should refer to the first step in the *Merck Sharpe & Dohme* approach, i.e., whether it is likely that a permanent injunction would be granted. This was a matter which was considered by Allen J *in Hennessy* also. It can not be said that the Plaintiff could secure a permanent injunction to restrain the sale of the lands at all. However, it does seem to me, given that I am satisfied that the Plaintiff has established an arguable case as to the receiver's power of sale on the basis of the evidence as to his appointment, that he might secure a permanent injunction restraining its sale on the basis of the current sales process, ie. the current marketing and draft contract. It seems to me that this is sufficient to satisfy the first point in *Merck Sharpe & Dohme.*

82. Turning to a consideration of the balance of convenience, it is clear from the judgment in *Merck Sharpe & Dohme* that while the adequacy of damages is no longer to be treated as determinative it is still the most important element in assessing where the balance of convenience lies.

83. Any consideration of the adequacy of damages must consider their adequacy for the Plaintiff if he is refused the injunction but is ultimately successful in the proceedings and the adequacy of damages for the Defendant on foot of the Plaintiff's undertaking as to damages, i.e., if the injunction is given but the Defendant ultimately succeeds in defending the action.

84. Point 5 in *Merck Sharpe & Dohme* requires that *"In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy."* The starting point is that the Plaintiff's farm is a business. Indeed, the covering letter with the facility letter describes the loan as a *"Business Loan"* and the facility letter contains special conditions requiring the provision by the Plaintiff of information with regard to the construction of a wind turbine on the lands and requiring the provision of audited accounts. However, in my view it would be artificial for the Court to proceed on the basis that a farm of this size was a purely commercial enterprise. For very many farmers in Ireland, while farming is a commercial enterprise, it is also a way of life with strong emotional and historic bonds to the specific lands and therefore often cannot be considered as a pure commercial entity. Limited regard can be had to this in this particular case where there is no specific evidence as to the nature of the farm or the Plaintiff's connection with these specific lands. By contrast, for example, *in Doran v Charleton & Dolliver [2022] IEHC 331* the evidence was that the Plaintiff had farmed the particular lands for fifty years and they had been in his family for longer than that. Nonetheless, I think I can properly consider that the lands/farm is not a purely commercial enterprise and therefore while I must continue to have regard to the fact that there is a significant commercial element to the enterprise, the scepticism with which I must approach the claim that damage would not be an adequate remedy should be slightly lessened.

85. Step 6 and 7 in *Merck, Sharpe & Dohme* does acknowledge that difficulty in assessing damages and a number of other factors may come into play and can be taken account of. On one level it could be said that there would be no difficulty in assessing damages in the event that the lands are sold and the Plaintiff is ultimately successful in the proceedings. The value of the lands could be readily calculated, as could any other losses, such as the sale of crops or the herd. However, the court can not ignore the fact that the lands would have been lost and there could be no guarantee that the Plaintiff, if he wished to resume farming, could do so and certainly no guarantee that he could do so in the same area because he may not be able to purchase alternative lands. This is a factor which I am entitled to have regard to though its weight may be greater in another case where, for example, there may be specific evidence of the Plaintiff's connection to an area and his desire to keep farming: for example, in *Doran v Charleton & Dolliver,* the Plaintiff had a long historic connection with the lands in question and was of advanced years and, in the event that he lost the farm but was ultimately successful, he would have lost his herd.

86. The Plaintiff says that any sale would affect his ability to claim or retain basic farm payments. It seems to me that this is readily compensated by an award of damages. He also says that any sale would affect his ability to comply with his responsibilities under

the Nitrates Directive. But, of course, he would no longer have such obligations if he was no longer the owner of the land.

87. I must also have regard to the passage in *Hennessy* where Allen J said:

> *"20. In balancing the competing interests with a view to fashioning an order which will give rise to the least risk of injustice I give considerable weight to the observation of Ó Dálaigh CJ in Holohan at p. 26 of the report, where he said that: -*
>
> *"No question of a remedy in damages between the parties before the Court can arise: the contract of sale is either properly made or it is not. If not, then it cannot be permitted to be completed, and the appropriate remedy is an injunction".*

88. Following what Allen J says in paragraph 20, it seems to me that, having held that there is an arguable case that the purported sale is invalid, I must give considerable weight to the observation of Ó Dálaigh CJ.

89. I must also consider whether damages would be an adequate remedy for the Defendant. The starting point in any such consideration must be that the Plaintiff is indebted in the sum of at least €517,462 and that strongly suggests that the Plaintiff would not be able to discharge an award of damages on his undertaking. However, relevant to this consideration is the fact that the advised minimum value for the lands proposed to be sold was €750,000 which far exceeds the Plaintiff's indebtedness. Thus, it seems to me that I can not conclude that damages would be an adequate remedy for the Defendants.

90. I must also weigh in the balance the Plaintiff's alleged delay in seeking relief.

91. In Ms. Fitzgibbon's affidavit she sets out the relevant chronology to illustrate how the Plaintiff could have moved much earlier. The receiver was appointed on the 11th February 2021 and the Plaintiff was informed of his appointment by letter of the same date so he knew of the appointment since at least the 12th February 2021. Indeed, Ms. Fitzgibbon points out that the Plaintiff had been informed by letters of the 21st January 2020 and the 16th October 2020 of the possibility of the appointment of a receiver but nonetheless did not issue proceedings challenging that appointment until the 12th October 2021 immediately before the proposed sale. She also makes the point that in the period between the appointment of the receiver in February 2021 and the institution of

proceedings the receiver had incurred considerable expense of nearly €26,000. The Plaintiff in fact complains about the receiver's delay in proceeding to sell the lands and blames that delay for the said cost. I am not satisfied that there is any basis for that complaint and in fact it is inconsistent with the Plaintiff's substantive complaints.

92. While it is appropriate that I have regard to the Plaintiff's inaction, I do not consider that it is such as to weigh against the grant of an injunction given the basis upon which I have concluded that he has established an arguable case. The delay would certainly be an important factor if I had held that there was an arguable case on the grounds relating to, for example, the validity of the appointment of the Receiver. However, the only arguable case which has been established by the Plaintiff concerns the purported sale. The Plaintiff could not have moved against the Defendants in respect of this point until the sale was put in train.

93. As is clear from O'Donnell J's judgment in *Merck, Sharpe & Dohme*, once the Court is satisfied that the threshold test has been met the fundamental objective of the Court in determining what should happen pending the full trial (when the legal rights of the parties will be determined) is to minimise injustice. Bearing that in mind and weighing the different factors discussed above, it seems to be that the appropriate way to arrange matters pending the trial of the action is to restrain the Defendants from selling the lands on the basis of the draft contract and the marketing process held on foot of that.

94. I will hear from the parties as to the precise terms of the Order.