THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2020] IECA 322
Court of Appeal Record Nos. 2020/175
2020/174
2019/491

Costello J.

BETWEEN/

ULSTER BANK IRELAND LIMITED, PAUL McCANN AND PATRICK DILLON

PLAINTIFFS/RESPONDENTS

- AND -

BRIAN McDONAGH, KENNETH McDONAGH AND MAURICE McDONAGH

DEFENDANTS/APPELLANTS

JUDGMENT of Ms. Justice Costello delivered on the 23rd day of November 2020

Introduction

1. This is my judgment on an application for a stay on the judgments and order of the High Court in these proceedings. The first named plaintiff ("the bank") sought judgment and other reliefs against the three defendants ("the defendants"), who are brothers, in the sum of €22,09302.64 in respect of a loan taken out by the defendants in connection with the purchase of approximately 82 acres of land in Kilpedder, Co. Wicklow ("the Kilpedder site") which was intended to be used as a Data Centre. The defendants purchased the Kilpedder site for €22m. in August 2007 with the assistance of the borrowings from the bank and the defendants had made no repayments on the loan. The bank and the defendants entered into a Compromise Agreement, dated 13 March 2013, pursuant to

which the borrowings of the defendants were to be written-off in a sum of approximately €20m. by the bank in return, *inter alia*, for the sale of certain properties owned by the defendants including the Kilpedder site.

2. There were two key issues for resolution in the proceedings. The first related to disputes between the parties regarding alleged breaches of the Compromise Agreement. The second legal issue concerned s.17(2) of the Civil Liability Act 1961. This arose because the bank sued CBRE for alleged negligence in valuing the Kilpedder site and the defendants argued that the settlement of those proceedings afforded them a complete defence to the bank's claim for repayment of the loan for the Kilpedder site.

3. The bank sued CBRE for allegedly negligently valuing the Kilpedder site at €56m. The bank and CBRE settled those proceedings for the sum of €5m. *i.e.* 18% of the full value of the claim. An issue arises in these proceedings as to the effect, pursuant to s.17(2) of the Act of 1961, of that settlement with one alleged concurrent wrongdoer (CBRE) on the liability of the other alleged concurrent wrongdoer (the defendants) to the bank in these proceedings. In particular, the defendants claim that as the bank settled with one alleged concurrent wrongdoer, CBRE (D1), it must be identified with that other wrongdoer (CBRE) for the purposes of its proceedings against the defendants, the second alleged concurrent wrongdoer, (D2). This means, according to the defendants, that the bank cannot claim from the defendants the difference between the settlement sum (€5m.) it agreed with CBRE and the full amount of the claim against the defendants (€27m.), and in fact the full extent of their liability to the bank was extinguished by the settlement with CBRE.

4. The bank was of the view that the defendants had breached the Compromise Agreement which, therefore, was at an end. They appointed the second and third plaintiffs as receivers over, *inter alia*, the Kilpedder site with instructions to sell the site. They sued

the defendants for the full amount of the loan outstanding, after giving credit for the sums realised from CBRE. The trial was heard over 19 days in the High Court. Twomey J. delivered a judgment on 6 April 2020 in relation to the bank's claim that the defendants breached the Compromise Agreement. The court concluded that the defendants breached the Compromise Agreement in a number of respects: a Heads of Agreement entered into between the defendants and a company, Granja Limited, was not a binding contract of sale, such as was required under the terms of the Compromise Agreement and; the consent of the bank was required for the proposed sale of the Kilpedder site under the terms of the Compromise Agreement, and the mortgage and the consent of the bank was not obtained for the proposed sale of the site. As a result, under the terms of the Compromise Agreement the bank was entitled to seek payment of all sums due from the defendants to the bank under the Facility Letter, subject to the Court's Ruling in relation to the Act of 1961.

5. The court delivered a supplemental judgment on 23 June 2020 dealing with the issue based on the Act of 1961 whether, in the circumstances that CBRE had provided a Valuation Report on the Kilpedder site, it was to be considered a concurrent wrongdoer with the defendants for the purposes of the Act of 1961 in respect of the unpaid loan, and, if so, whether CBRE had a liability for the entire loss caused to the bank so as to reduce (pursuant to s.17(2) of the Act of 1961) the judgment sum being sought by the bank from the defendants.

6. Twomey J. held that the onus was on the bank in a claim for an unpaid debt to prove its case that the debt was extended to the borrower and was not repaid by the borrower. There was no onus on a plaintiff to disprove the defences which the defendant claims apply. The onus is on the defendant to establish any defence which it claims applies. He held that since it was the defendants' defence they were required to prove:

(i) that CBRE was negligent,

(ii) that CBRE's negligence caused the non-repayment of the loan by the defendants (and thus that CBRE was a concurrent wrongdoer),

(iii) that (as required by s. 17 of the Act of 1961) the bank entered into a release and accord with CBRE for 18% of the damage caused to the bank, and,

(iv) that CBRE is liable for 100% (or more than 18%) of that damage.

7. He confirmed that it was not for the bank to disprove any of these four matters.

8. The trial judge held that there was *no evidence* presented to the court, by any party, of the CBRE valuation being negligent, or of that valuation having caused the non-repayment of the loan, and thus, there was no evidence that CBRE was a concurrent wrongdoer with the defendants. He held that if the court was wrong in that regard, and even if the fact of the settlement of the proceedings between the bank and CBRE could be considered as proving that it was a concurrent wrongdoer, no evidence was produced to the court of the blameworthiness of CBRE (relative to that of the defendants) being such as to justify CBRE being held liable for causing 100% (or more than 18%) of the non-repayment of the loan.

9. He concluded that the defendants had failed to discharge the onus upon them to establish that s.17(2) of the Act of 1961 relieved them of liability for the non-repayment of the loan of over €20m. which they received from the bank. On 23 July 2020, he ordered:-

"IT IS ORDERED AND ADJUDGED that the First Named Plaintiff do re-cover against each of the Defendants on a joint and several basis the sum of €22,947,202.85

…

AND IT IS DECLARED THAT

1. The Defendants were, as of 1 October 2014, and continue to be, in breach of the Agreement entered into between them and the first named Plaintiff on or about 13 March 2013 and referred to as the "Compromise Agreement" in these proceedings.

2. The second and third named Plaintiffs were, and continue to be, val-idly appointed as joint receivers by way of Deed of Appointment dat-ed 1 October 2014 over the lands comprised in Folios WW21790F and WW36738F in the Register of Freeholders of the County of Wicklow.

AND IT IS ORDERED that the lis pendens registered by the Defendants in connection with these proceedings at entry numbers 6, 7, and 8 and under Instrument No. D2019LRO38631W on Folios WW36738F and WW21790F in the Register of Freeholders of the County of Wicklow be and is hereby vacated"

10. The trial judge stayed his order for the period allowed for the lodging of an appeal, and in the event of an appeal being lodged within that period and strictly subject to the defendants contemporaneous with the lodgment of such an appeal issuing a motion before the Court of Appeal for a stay on the order, stayed the order until the determination of the motion for a further stay by the Court of Appeal.

11. The second and third named defendants, who are legally represented, filed a Notice of Appeal and a Notice of Motion seeking a stay on the orders of the High Court, pending the determination of the appeal on 21 August 2020. The first named defendant, who is a litigant in person, also appealed the judgments and order and he issued a motion on 5 November 2020 seeking a stay on the orders likewise. The appeals are listed for hearing on 16 and 17 February 2021. The application for a stay was heard on 13 November 2020.

The legal principles

12. The principles the court should apply on an application for a stay in respect of an appeal are not in dispute. In *C.C. v. Minister for Justice* [2016] 2 I.R. 680 Clarke J. referred to the decision of the Supreme Court in *Redmond v. Ireland* [1992] 2 I.R. 362:-

> *"McCarthy J. held that a heavy responsibility lay on the legal advisers of the party seeking a stay to assist the court on the reality of an appeal and further noted that appeals had previously been brought for tactical rather than bona fide reasons. As McCarthy J. held in Redmond v. Ireland [1992] 2 I.R. 362, the fundamental consideration is that the courts maintain a balance so that justice is not denied to either party … .*
>
> *It is clear that the court must, therefore, form some view of the potential outcome of such an appeal.*
>
> *…*
>
> *The judgment in* [Danske Bank t/a National Irish Bank v. McFadden [2010] IEHC 119] *noted that a successful party in a claim at first instance may fail to benefit from that success to a greater or lesser extent and with a greater or lesser amount of permanency because of a stay placed on any order obtained. Similarly, an unsuccessful party at first instance who fails to obtain a stay, but who ultimately succeeds on appeal, may suffer, again to a greater or lesser extent and again with a greater or lesser amount of permanency, as a result of the fact that a court order has been effective against them in the intervening period.*
>
> *…*
>
> *As in all cases, the first question is as to whether there is any stateable or arguable basis for the appeal itself. If there is, then the court has to assess the potential*

injustice which may result from, on the one hand, intervening in favour of the appellant only to find that the appellant loses, as opposed to not intervening in favour of the appellant only to find that the appeal is successful."

13. Clarke J. stated that the stay pending appeal *jurisprudence* applies the same basic principles and tests as were identified in *Okunade v. Minister for Justice* [2012] IESC 49, [2012] 3 I.R. 152. Counsel for the second and third named defendants referred to para. 104 of that judgment and in particular sub-para. (b), and emphasised that the court should consider where the greatest risk of injustice would lie.

14. The decision of the Court of Appeal in *Lobar Limited v. Gladney* [2018] IECA 129 was a decision of Irvine J. on an application to extend the stay granted in the High Court. At paras. 15 and 16 of the judgment she held:-

"15. The aforementioned authorities make clear that the court is bound to engage in what is often described as a two-stage test. First, the applicant must demonstrate that they have an arguable ground of appeal and is one which is bona fide rather than tactical.

16. If the court is not satisfied that the appellant has demonstrated an arguable ground of appeal, that is the end of the stay application. Assuming, however, the appellant demonstrates a bona fide and arguable ground of appeal, then the court must consider where the balance of justice is to be found. As is stated in many of the more recent authorities, a stay brings with it potential detriment to both sides. Thus, it is necessary for the court to consider where the greatest risk of injustice may arise. It must consider the likely effect that granting a stay would have on the respondent should the appeal fail, and must also consider the effect that refusing a stay may have on the appellant should it succeed on

its appeal. In this context, the court may impose a stay in terms which can ameliorate the potential detriment of granting or refusing a stay."

The first stage

15. The first question is to consider whether, as regards either of the two issues in the case, the appellants have shown that they have an arguable and *bona fide* appeal. If they have one arguable ground of appeal that would be sufficient to satisfy the first stage of the test.

16. Counsel for the second and third named defendants said that the defendants had a complete answer to the bank's claim based upon s.17(2) of the Act of 1961. He referred to the recent decision of the Supreme Court in *Defender Limited v. HSBC France* [2020] IESC 37, which considered this very issue on an appeal from a decision of Twomey J. in the High Court on a trial of a preliminary issue. The Supreme Court considered the effect a settlement of a claim against one defendant had on proceedings seeking damages against another defendant, which was alleged to be a concurrent wrongdoer.

17. Section 17(2) of the Act of 1961 provides:-

"If no such intention [that the other concurrent wrongdoers are to be discharged] *is indicated by such release or accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against the other wrongdoers in accordance with paragraph (h) of subsection (1) of Section 35; and in any such action the claim against the other wrongdoers shall be reduced in the amount of the consideration paid for the release or accord, or in any amount by which the release or accord provides that the total claim shall be reduced, or* ***to the extent that the wrongdoer with whom the release or accord was made would have been liable to contribute if***

the plaintiff's total claim had been paid by the other wrongdoers*, whichever of those three amounts is the greatest."* (emphasis added)

18. O'Donnell J. noted that s.17 introduces the concept of identification of the plaintiff with the settling defendant (D1). The plaintiff's claim against the remaining defendant is not discharged but the plaintiff is identified with the settling defendant/wrongdoer and the claim is reduced by one of the three amounts; the amount of the settlement with D1; the amount by which it is provided in the settlement that the claim would be reduced; or the extent to which the settling defendant (D1) would have been liable to contribute if the plaintiff's claim had been paid by the non-settling wrongdoer (D2).

19. In *Defender*, the plaintiff sued the defendants for damage arising from their failure to protect its investment in BLMIS, where HSBC had been appointed to be custodian of the fund managed by BLMIS. There was evidence relevant to the fraud committed by Mr. Madoff and BLMIS which was at the heart of the proceedings. Evidence was given by Mr. Andrew Richmond, a specialist in Government Enforcement and Corporate Investigations from Chicago and he prepared an expert report in respect of the issues involved. There was also evidence adduced or referred to by Defender. The central piece of the evidence was the Settlement Agreement between Defender and Mr. Picard, the Trustee for the liquidation of BLMIS. Having entered into a complex Settlement Agreement, Mr. Picard brought a motion to court recording that the parties had entered into an agreement representing a complete settlement of all disputes between the trustee and the defendants raised in those proceedings, and the customer claim that Defender had submitted in connection with its account in the liquidation of BLMIS. That claim had been submitted by HSBC on behalf of Defender. The Settlement Agreement was approved by the court and provided an express release by the defendants.

20. At para. 95, O'Donnell J. held:-

"The Act in s. 17, as in ss. 35(1)(i) and 35(1)(h), pursues a policy that the remaining defendant should not have to pay more than his or her 'fair' share and the plaintiff must bear the deficiency and thereby recover less than their full damages. It is impossible, therefore, to appeal to some general principle that the plaintiff should always be able to recover in full from the widest range of defendants possible, to override the clear contrary language, and indeed statutory intent of the legislation in this respect."

21. At paras. 97 and 133, he continued:-

"... Once the statute operates to identify the plaintiff with the acts of the settling defendant, the non-settling defendant has its contributing claim converted into ***a claim in contributory negligence against the plaintiff****...."*

...

133. ... I conclude that while the High Court was, at least as a matter of orthodox statutory interpretation, correct in its construction of s. 17 of the [Act of 1961]*, it was, nevertheless, wrong to conclude that the only possible outcome of the application of ss. 17 and 35(1)(h) of the Act was an apportionment of liability of 100% against Defender."* (emphasis added)

22. It is accordingly for the defendant to establish its defence of contributory negligence to be attributed to the plaintiff based on proven facts. It is not *automatically* entitled to an apportionment of liability of 100% simply because a claim against a concurrent wrongdoer has been compromised.

23. In this case, the defendants adduced no evidence at all about the constituents of their deemed case of contributory negligence against the bank. Despite this absence of any factual basis for a counterclaim, counsel for the second and third named defendants argued that the defendants were entitled to such an apportionment of liability. He submitted that

the proceedings brought by the bank against CBRE claimed damages equal to the full loss sustained as a result of entering into the loan, on the basis that if the bank had obtained a fair – as opposed to a negligent – valuation from CBRE of the lands, it would not have advanced the loan. That claim was settled for less than full value (18%). He maintained that this was sufficient *evidence* to *establish* that the defendants were entitled to a release of 100% of their liability, based on provisions of s.17 and s.35(1)(h) of the Act of 1961.

24. It seems to me that this contention is not an arguable ground of appeal. It is clear from the decision of O'Donnell J. in *Defender* that the High Court was wrong to conclude that the only possible outcome of the application in that case was an apportionment of liability of 100% against the plaintiff. In that case, there was evidence over and above the claim advanced against D1 and the fact that the case was settled. It cannot therefore be contended that *Defender* is authority for the proposition that proof that a claim was pleaded in a Statement of Claim and that the proceedings were settled on the basis that D1 paid the plaintiff certain monies was sufficient to establish that D2 was entitled to a release of 100% of D2's liability to the plaintiff.

25. The Supreme Court makes it clear that the Act of 1961 operates to convert the claim of the defendants in these proceedings into a contributory negligence claim against the bank. This does not absolve them of the obligation to prove that contributory negligence. It seems to me that pointing simply to the pleadings of the other action and the fact that they were compromised for a particular sum could not establish the claim of contributory negligence in which they were required to prove. This was the basis upon which the trial judge dismissed this ground of defence. I believe that no arguable or *bona fide* ground of appeal has been demonstrated on this issue and so it cannot form the basis of a stay on the order of the High Court.

26. Separately, the defendants say that they have an arguable appeal that the trial judge erred in holding that they breached the Compromise Agreement entered into between the parties on 13 March 2013. In order to see whether they have an arguable appeal in relation to this issue it is necessary briefly to consider the terms of the Compromise Agreement. At Clause 1, the defendants and each of them acknowledged that the debt was lawfully due and owing to the bank and they confirmed and affirmed the contents of the finance documents. At Clause 3.1 the defendants warranted to the bank *"in utmost good faith that the Updated Statements of Affairs are true and accurate in all respects"* and *"[i]f it transpires that there is any inaccuracy in the Updated Statements of Affairs… this Agreement shall be at an end."* At Clause 3.6, the borrowers agreed to dispose of all of the properties listed in the Schedule for the best price reasonably obtainable by Target Date 3, 31 July 2015**,** and they agree that they shall instruct *"the Agents to liaise fully with and to report and disclose fully and frankly to the Bank all details of the sales process and any negotiations relating thereto."*

27. Clause 3.7 dealt with the disposal of the Kilpedder site in the following terms:-

> *"3.7.1 On or before Target Date 1, the McDonaghs shall procure the engagement of the Agents for the purposes of marketing the Site for sale on the open market with the intent of having the sale of same concluded no later than Target Date 2.*
>
> *3.7.2 The McDonaghs shall ensure that the Bank is, at all times, kept fully appraised as to the nature and extent of all enquiries and interest shown in the Site and shall direct and instruct the Agents to provide such information to the Bank as and when required by the Bank."*

28. Finally, at Clause 4 it provides:-

"In consideration of, but subject always to, the due and continued absolute performance by the Borrowers of the covenants on their part and conditions herein contained:

*4.1 the Bank agrees that this Agreement is and will **when fully implemented** be in full and final settlement of the Accounts as between the Bank and the Borrowers.*

4.2 the Bank agrees not to institute proceedings against the Borrowers in respect of the Debt;

*PROVIDED ALWAYS that in the event of a failure by or on behalf of the Borrowers to comply with the terms of the Agreement or in the event of a breach of any of the covenants herein contained or, **in the event that the Properties have not been disposed of by the Long Stop Date**, the Bank shall be at liberty, without notice to the Borrowers, to take whatever steps it shall, in its absolute discretion, deem fit on foot of the Finance Documents, at law or otherwise."* (emphasis added)

29. As recited above, the trial judge held that the defendants were in breach of the Compromise Agreement and he entered judgment in the full sum outstanding on foot of the loan on a joint and several basis against all of the defendants.

30. The defendants argue that they have complied with the Compromise Agreement and therefore the bank's claim has been satisfied. If no debt remains due and owing to the bank it cannot rely upon its security and, therefore, the receivers may not sell the secured property to satisfy an alleged secured liability. The defendants argue that they complied with the Compromise Agreement by entering into a binding contract for sale in July 2013 with the company, Granja Limited. This is referred to as the Heads of Agreement. The defendants say that this is a binding enforceable contract and the fact that they entered into that agreement amounts to a sale within the meaning of Clause 3.1 of the Compromise

Agreement. That being so, the Compromise Agreement has been performed notwithstanding the fact that it never closed and the trial judge erred in entering judgment against them.

31. I am not satisfied that the defendants have an arguable ground of appeal on this ground either. Even if one accepts that the Heads of Agreement constitutes a binding contract for sale of the Kilpedder site for €1.5m., contrary to what was held by the trial judge, the sale has not closed and can never close. Granja Limited sued the bank and the defendants for specific performance of the Heads of Agreement. After 5 days it withdrew its claim against the bank. It compromised its claim against the defendants by agreeing to await the outcome of these proceedings. Granja Limited is in liquidation. In answer to a question from the court, I was informed that the liquidator does not wish to close the sale and to purchase the lands. This means that the vendors, the defendants, cannot force the purchaser, Granja Limited, now in liquidation, to complete the sale and Granja Limited, acting through its liquidator, has indicated that it has no interest in completing the sale. It seems to me, therefore, that there is no *bona fide* appeal in relation to this point. It could scarcely be argued that the Compromise Agreement has been "fully implemented" or the site "disposed of" by simply *entering into* a contract for the sale of lands which the purchaser *cannot complete* by reason of its insolvency, and the vendor cannot compel the purchaser to complete the purchase by reason of the fact that the intended purchaser is in liquidation and the liquidator has indicated that it will not buy the lands.

32. The defendants' case is that the Compromise Agreement has been performed and their liability in respect of a loan in excess of €20m. has been extinguished by reason of the fact that 7 years ago a contract for the sale of the lands was entered into, which contract cannot be concluded, with the result that the lands remain in their name but no proceeds of sale at all are remitted to the bank. Furthermore, as their liability has been discharged, the

security should be released and the receivers should be discharged. An appeal based on such an argument is, to my mind, tactical and not arguable or *bona fide*.

33. Even if it could be argued that this ground of appeal is an arguable ground of appeal, it does not assist the defendants as the trial judge held that there were other breaches of the Compromise Agreement which entitled the bank to treat it as being at an end. The findings of fact are clearly set out in his written judgment. He held that the first named defendant was party to two forged Declarations of Trust (para. 18); that the first named defendant put a *"fake"* letter, dated 16 June 2014, on his file (paras. 18 and 222); that he gave incorrect sworn evidence which he must have known was false (para. 18); that his reliability as a witness and his candour has been called into question by the courts on more than one occasion (para. 34); that he was an obstructive and evasive witness (paras. 58 and 72 respectively); that he gave false evidence under oath (para. 153); that the funds for the alleged purchase of the lands by Granja Limited were beneficially owned by the first named defendant (para. 138) and to that end Granja Limited was a *"front"* for the first named defendant. In relation to the second named defendant, the trial judge held that he was a *"difficult and evasive witness"* (para. 173) and he gave false sworn evidence in his replies to interrogatories regarding his ownership of a property in Galway (para. 202). In light of these findings and the principle in *Hay v. O'Grady*, the defendants had no real answer to the argument advanced by counsel for the bank that this ground of appeal was not arguable or *bona fide*, and was rather a tactical appeal.

34. I conclude, for the purposes of this application, that the appeal, insofar as it relates to a claim that the defendants did not breach the Compromise Agreement, is not arguable and that the appeal is brought for tactical purposes.

35. The first named defendant argued that he has an arguable ground of appeal on the basis that the bank had failed to comply with the requirements of the Supreme Court

decision *Bank of Ireland v. O'Malley* [2029] IESC 84. That case concerned the adequacy of pleadings in summary proceedings. These are plenary, not summary, proceedings and the trial lasted 19 days in the High Court so the case has no application to the decision under appeal. It is not an arguable ground of appeal.

36. Accordingly, on the basis of the jurisprudence outlined above, the defendants having failed to demonstrate that they have an arguable ground of appeal, I refuse a stay on the order of the High Court.

The second stage: the balance of justice

37. If I am incorrect in holding that the appellants have not demonstrated any arguable ground of appeal, I will consider where the balance of justice lies and whether the justice of the case requires that I grant or refuse a stay based on the factors initially addressed by McCarthy J. in *Redmond v. Ireland*, and reiterated in *C.C.* and *Lobar Limited*.

38. The solicitor for the second and third named defendants swore the affidavits grounding the motion seeking a stay. The only prejudice she identified which the second and third named defendants would suffer in the event that a stay were refused prior to the hearing of the appeal was the possibility of an application being made to bankrupt them. They did not make the case that they would suffer irreparable damage if the lands were sold and they ultimately succeeded on the appeal. The first named defendant swore an affidavit to ground his motion and the only prejudice to which he referred was the prospect of being adjudicated bankrupt.

39. The bank has undertaken that it will not take any steps to commence bankruptcy proceedings against any of the defendants on foot of the judgment pending the determination of the appeal. This deals with the prejudice identified by the defendants. There can be no doubt that the bank is a mark if the defendants succeed on the appeal and the bank, in fact, closes a sale of the lands in the intervening period. In that regard, it is

important to reiterate that the lands were purchased for the purposes of a commercial development and no case was made that they were unique or irreplaceable. It is not the family home of any of the defendants.

40. Mr. Ted Mahon, a senior manager of the bank, swore a replying affidavit on 11 November 2020. He averred that the effect of the actions of the defendants had been to frustrate and prevent the sale of the lands by the receivers. He said that in April or May 2018, the receivers were actively negotiating a sale and that draft contracts had been exchanged but that one of the primary reasons why those contracts were not executed was the continuing registration of a *lis pendens* registered by Granja Limited which it had refused to vacate. The *lis pendens* was vacated by order of the High Court in October 2018 (Haughton J.) on the application of the bank. However, Granja Limited subsequently registered a caution on the lands in November 2018 and the registration of the caution proved to be the death knell for the proposed sale of the lands. The agreed sale price was approximately €8m. Mr. Mahon avers that the bank lost the opportunity of that sale by reason of the actions of the first named defendant's use of Granja Limited as a "front" for his obstruction to the sale of the lands.

41. In the context of these proceedings, the defendants registered a *lis pendens* on 22 March 2019. In May 2019, negotiations for the sale of the lands commenced with a different prospective purchaser and again draft contracts were exchanged. This proposed purchaser was not willing to execute contracts by reason of the *lis pendens* registered by the defendants. The High Court ordered that the *lis pendens* be vacated. Mr. Mahon said he was advised that as a result the proposed purchaser, with whom the receivers were negotiating in 2019, expressed an interest once more in purchasing the lands. Those negotiations commenced in August 2020. The defendants appealed the decision of the High Court, thereby extending the limited stay on the order, *inter alia*, to vacate the *lis*

pendens and issued motions seeking to extend the limited stay granted by the High Court. Mr. Mahon averred that while the contract negotiations commenced in August 2020 and draft contracts have been exchanged, once again the issue of a *lis pendens* is proving problematic. He says:-

> *"If a stay is granted over the entire Order of the High Court it will, I am advised, have the effect of maintaining the lis pendens over the Lands. Should that transpire I firmly believe the proposed purchaser will not execute contracts for the sale of the Lands. It is therefore imperative that a stay not be granted on the Order. If a stay is placed over the entire Order of the High Court, the Receivers will loss yet another opportunity to sell the Lands in an effort to recover part of the monies due and owing."*

42. It has thus been shown that the receivers have twice lost possible contracts for the sale of land and may lose a further contract if a stay on the High Court order is granted. A stay in this case would deprive the bank of the fruits of its victory in the High Court, in circumstances where the defendants borrowed almost €22m. in 2007, and thirteen years later they have not made one single repayment.

43. The only recovery on the loan was the proceeds of the settlement of the proceedings issued by the bank against CBRE. Not only have the defendants made no repayments, they contend that they have no means to repay the facility or any part of it, yet they wish to continue to prevent the sale of the lands in an effort to recover part of the monies owing.

44. It would not be sufficient merely to refuse to stay the order directing that the *lis pendens* be vacated. In view of the fact that the bank is a mark and no prejudice in relation to the sale of the lands was advanced, the injustice which the bank would suffer by the granting of the stay in the event that it succeeds in the appeal is greater than any injustice

the defendants may suffer if the lands are sold prior to the conclusion of the appeal and they succeed in the appeal.

45. I am satisfied that the balance of justice in this case lies in favour of refusing the stay in the circumstances. The prejudice identified by the defendants has been met by the undertaking offered by the bank and the defendants are not in a position to give any undertaking which would reduce or mitigate the prejudice likely to be suffered by the bank if the stay is continued. For this reason, I refuse the reliefs sought.

46. This judgment is to be delivered electronically. I will list the matter for hearing at 2pm on 27th November, 2020 to hear the parties' submissions on the costs of the motion.