UNAPPROVED

THE COURT OF APPEAL

Appeal Number: 2022/147
Neutral Citation Number [2023] IECA 250

Donnelly J.
Faherty J.
Pilkington J.

BETWEEN/

BRENDAN O'REILLY AND DARREN O'REILLY

APPELLANTS/
PLAINTIFFS

- AND -

PROMONTORIA (FINN) LIMITED, PAUL MCCLEARY, JIMMY MURPHY AND DAMIEN HARPER

RESPONDENTS/
DEFENDANTS

Judgment of Ms. Justice Faherty dated the 17th day of October 2023

1. This is the plaintiffs' appeal against the judgment and Order of the High Court (Egan J.) dated 11 May 2022 wherein the court refused to grant injunctive relief to the plaintiffs. The plaintiffs had sought interlocutory orders that the defendants deliver up possession of two properties in County Meath and/or restraining the defendants from selling or marketing the properties. Egan J. (hereinafter "the Judge") determined that the plaintiffs had not raised a fair issue to be tried in respect of any of the five separate issues they had advanced (which themselves were divided into numerous sub-issues). She thus

determined that the plaintiffs had failed to pass the first hurdle for interlocutory injunctive relief, the test for such relief having been refined by O'Donnell J. (as he then was) in *Merck Sharpe and Dohme Corporation v. Clonmel Healthcare* [2019] IESC 65. As O'Donnell J. made clear, the two relevant factors are (1) the fair issue or serious issue to be tried (without which no interlocutory injunction could ever be granted) and (2) whether the balance of convenience (or the balance of justice) is in favour of or against the grant of the interlocutory injunction sought, with the adequacy of damages being considered as part of that balance rather than as a separate component of the test.

2. The Judge went on to note that the balance of convenience was against the granting of the first relief sought by the plaintiffs. In respect of the second relief, she considered that the balance of convenience was evenly balanced between the parties. In such circumstances, she determined that had she been satisfied that the plaintiffs had raised a fair issue to be tried, she would have granted the plaintiffs the second interlocutory relief on the basis of undertakings which they had tendered to the court for the first time during the hearing of the application. However, as no fair issue to be tried had been established, this did not ultimately arise.

3. Thereafter, the matter was listed on 5 May 2022 before the High Court for the purpose of dealing with costs and ancillary orders. On that date, the plaintiffs also sought interim relief pending an appeal to this Court.

4. On 11 May 2022, Egan J. delivered an *ex tempore* judgment and, in summary, made orders in the following terms:

(i) There would be "No Order" as to the plaintiffs' costs of the interlocutory injunction application.

(ii) The defendants' costs of the injunction application would only be costs in the cause.

(iii) The cost of both parties of the supplemental hearing of 5 May 2022 to be costs in the cause.

(iv) refusing the plaintiffs' application for an interim injunction pending the bringing of an appeal.

5. Furthermore, on the application of the plaintiffs, the Judge fixed directions for the prosecution of the proceedings.

6. The background to all the foregoing is as follows:

7. By a loan facility dated 6 April 2006, Ulster Bank Limited ("Ulster Bank") advanced the sum of €262,000 ("the First Facility") to the plaintiffs which was secured by a mortgage ("the First Mortgage") dated 8 September 2006 over a property in County Meath (hereinafter referred to as "the First Property"). By a loan facility dated 21 June 2006, ("the Second Facility") Ulster Bank advanced a further €323,000 to the plaintiffs which was secured by a mortgage ("the Second Mortgage") dated 29 June 2007 over a different property in County Meath (hereinafter "the Second Property"). The interest of Ulster Bank in the First and Second Mortgages was duly registered as a burden on the respective folios.

8. It is not disputed that the monies were advanced to the plaintiffs pursuant to the aforesaid loan facilities, nor that the plaintiffs defaulted on their repayment obligations.

9. On 25 February 2013, Ulster Bank wrote to the plaintiffs in connection with the Second Facility demanding repayment of €332,645.96. No repayment was made by the plaintiffs on foot of this demand. In or about 2013, receivers were appointed by Ulster Bank over the Second Property.

10. Pursuant to a Global Deed of Transfer dated 29 September 2015, the loan facilities were transferred by Ulster Bank to the first defendant ("Promontoria") and Promontoria's interest in the mortgages was duly registered as a burden on the respective folios.

11. By Deed of Discharge dated 8 January 2016, the receivers previously appointed over the Second Property were discharged. On the same date, Promontoria appointed the third defendant as receiver over the Second Property and the plaintiffs were apprised of the appointment of the third defendant as receiver by letter dated 25 February 2016.

12. On 14 March 2017, letters were sent by Promontoria to the plaintiffs in respect of the First Property demanding €284,652.00 by close of business on 21 March 2017. Again, there is no dispute but that the plaintiffs did not make repayment on foot of that demand.

13. On 15 May 2017, the second defendant was appointed as receiver over the First Property. Due to a typographical error in the instrument of appointment, the second defendant was discharged as receiver by Deed of Discharge dated 9 October 2019. On the same date, he was re-appointed as receiver over the First Property and by letter dated 9 October 2017, the plaintiffs were informed of the re-appointment of the second defendant.

14. The within proceedings issued by way of plenary summons on 7 September 2020.

The application for interlocutory relief

15. The plaintiffs' notice of motion for interlocutory relief issued on 14 September 2020 wherein they sought an injunction directing the defendants to deliver up possession of the Properties and/or an injunction restraining the first, second and third defendants from marketing for sale or selling the Properties. The application was grounded on the affidavit of the second plaintiff sworn 10 September 2020.

16. At para. 7 of his affidavit, the second plaintiff averred that there was no lawful basis for the purported appointment of the second and third defendants as receivers over the respective properties and that even if the receivers were validly appointed, they had no substantive right to possession or to exercise any power of sale over the properties. At para. 8 it was averred that Promontoria had not provided any meaningful proof that the plaintiffs had a liability to Promontoria and any such claimed liability was denied.

17. Without prejudice to those general denials, at para. 12, the second plaintiff referred to a report obtained from Mr. Eddie Fitzpatrick of "BANKcheck" which, the second plaintiff deposed, "demonstrates that there has been over-charging of interest in the sums of €58, 987.33 and €73, 050.56 respectively in respect of the Loan Accounts". He goes on to state:

> "13. As appears from this report, the interest rate for both Loan Accounts was governed by the 'ECB rate plus 1.35% and, in Mr. Fitzpatrick's view, the 'ECB rate' being applied by [Ulster Bank] was the 'Main Refinancing Operations Minimum Bid Rate', which rate ceased to exist and/or operate from 9th October 2008.
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> 14. However, notwithstanding the aforesaid, I say that it appears that [Ulster Bank] nonetheless, thereafter, unlawfully sought to calculate interest by reference to the 'fixed rate' tender rate of the ECB Main Refinancing Operations, which it had no legal or contractual right to do so.
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> 15. Therefore, I say and am advised that, where such a breach of contract has occurred, it would be unconscionable for [Ulster Bank], (and any/or any valid assignee) and/or said parties would be estopped from seeking to claim any interest on the Loan Accounts subsequent to 9 October 2008, hence the figures of €58,987.33 and €78.050.56, which equal a total sum of €132,037.89.
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> 16. Alternatively, I say and am advised that [Ulster Bank] and/or any valid assignees would be limited to a margin of 1.35%, which (itself) leads to overcharging of sums of €17, 950.84 and €22,069.90 respectively, which equal a total of €40,020.74."

18. Mr. Fitzpatrick in his report stated that whilst "there is no clarity over which ECB rates was being used by way of reference (either in the main body of the facility letter or

the general terms and conditions)…" he could confirm based on the statements that the rates being applied by the Bank was the "Main Refinancing Operations Minimum Bid Rate" which, Mr. Fitzpatrick said, would have been the key reference rate for tracker products at the time. Mr. Fitzpatrick went on to advise as follows:

> "It is the client's instruction that the ECB rate was to be used for the purpose of interest calculation is the Main Refinancing Operations Minimum Bid Rate which ceased to exist from 9 October 2008 (to be replaced by what was known as a fixed rate tender and therefore the argument is that the reference rate from that point onwards is Zero percent (indicating a total rate of 1.35%, being the applicable margin)".

19. Essentially, the plaintiffs' argument is that the MRO minimum bid rate ceased to exist on 9 October 2008 and that, thereafter, the Bank unlawfully sought to calculate interest by reference to the "fixed rate" tender rate of the ECB's main refinancing operations which, the plaintiffs contend, the Bank had no legal or contractual entitlement to do so. They claim that as a result of this breach of contract, the Bank and Promontoria are estopped from seeking to claim any interest subsequent to 9 October 2008 or, alternatively, are limited to recovering purely the margined rate of 1.35%.

20. At paras. 17-19 of his grounding affidavit, the second plaintiff took issue with the second defendant's appointment as receiver over the First Property pursuant to the Global Deed of Transfer. Without prejudice to that complaint, he went on to aver that there was no valid basis for the second defendant's appointment in circumstances where the plaintiffs "would not have been in arrears and/or as much arrears at the time of the said appointment…". Largely, the same criticisms are made, at paras. 25-29 of the affidavit, in respect of the appointment of the third defendant as receiver over the Second Property.

21. At para. 30, the second plaintiff referred to correspondence sent by the plaintiffs to the defendants since in and around August 2009. It is averred, at para. 31, that this correspondence highlighted the issue of the over-charging of interest on the loan accounts. The correspondence exhibited included a letter sent by the plaintiffs' solicitors on 9 June 2020 referring to the plaintiffs having been overcharged interest on the two loan accounts in question to a total of €132,037.89 and stating that "[d]ue to the breach of contract by Ulster Bank on the 9 October 2008 …no interest can be applied to our [clients'] [accounts] from that date onward…". The claim of overcharging of interest was repeated in correspondence sent by the solicitors on 20 July 2020.

22. On 30 September 2020, Mr. Kieran Dowling of Capita Asset Services (Ireland) Limited ("Capita") (Promontoria's service provider) swore an affidavit in response to the second plaintiff's affidavit. With regard to the claimed overcharging of interest on the loan accounts, Mr. Dowling drew the court's attention (at para. 11) to the applicable interest rate in respect of the First Facility, described in the 6 April 2006 letter of offer as 3.8500%. He went on to aver that as appeared from the Special Conditions, the interest rate applicable to the loan "…tracks ECB rate with a margin which is fixed for the life of the Home Loan term. The margin for this Home Loan is ECB rate plus 1.35%." At para. 25, he deposed that the interest rate applicable to the Second Facility was stated in the letter of offer of 21 June 2006 to be 4.1000% and that the applicable interest rate "…tracks ECB rate with a margin which is fixed for the life of the Home Loan term. The margin for this Home Loan is ECB rate plus 1.35%."

23. At para. 52, Mr. Dowling averred that Ulster Bank was fully entitled to transfer the loan facilities to Promontoria and that the second and third defendants were duly appointed as receivers pursuant to the terms and conditions of the First and Second Mortgages. He went on to state, at para. 54:

"Furthermore, I say and am advised by my solicitors that the Plaintiffs have not demonstrated that there is any issue to be tried herein, still less a serious issue. Although a matter for legal submission, I say and believe that the plaintiffs' application herein falls at the first hurdle."

24. The plaintiffs' allegation of overcharging of interest was addressed in the following terms:

"56. The Plaintiff have sought to advance an argument that there has been an overcharging of interest by [Ulster Bank]… As I understand it, the Plaintiffs assert that the alleged overcharging arises in circumstances where the European Central Bank (the "ECB") altered the method by which the main refinancing operations rate would be calculated by moving from a variable rate tender to a fixed rate tender process.

57. I say and believe that the Plaintiffs' assertion that this amounted to a breach of contract or otherwise unlawful act on the part of the Bank is wholly misconceived and is, in fact, a misunderstanding of what occurred on 8 October 2008."

25. With reference to the plaintiffs' reliance on Mr. Fitzpatrick's report, Mr. Dowling averred that Mr. Fitzpatrick "is simply incorrect" in his conclusion that the ECB's decision on 8 October 2008 resulted in an ECB rate of 0% being applicable to the plaintiffs' loan facilities. He continued, at para. 59:

"I say and believe that the ECB 'minimum bid procedure' allowed for banks to bid for a pool of money that the ECB was prepared to lend into the system. I further say and believe that due to the pressures placed on the global financial system in September and October 2008, the ECB decided to alter the method by which the main refinancing operations rate would be calculated by moving from a variable rate tender to a fixed rate tender process."

26. Mr. Dowling went on to refer to and exhibit a press release published by the ECB on 8 October notifying the market of its alteration in the method by which main refinancing operations would be calculated. He further referred to and exhibited a copy of the table on the ECB's website dealing with "Key ECB Interest Rates". He averred that, as appeared from the table, "the only change which occurred on 8 October 2008 is that the main refinancing operations changed from being calculated by variable rate tenders to fixed rate tenders. The key interest rate which was being tracked remained the main refinancing operations." He went on to state that the plaintiffs "and indeed Mr. Fitzpatrick accept that Ulster Bank applied the main refinancing operations rate to the loan". He deposed that the plaintiffs in their grounding affidavit "accept that [an] interest rate of 1.35% was applied on top of the ECB rate". He further stated that the interest rate applicable to the plaintiffs' loans "has remained to be the ECB rate plus 1.35% and thus there is no evidence of overcharging in respect of the Plaintiffs' loans".

27. At para. 69, Mr. Dowling deposed to the plaintiffs having made no loan repayments since 24 October 2015 and that their current indebtedness to Promontoria was €664,633.24.

28. For the purposes of the interlocutory application, the second and third defendants also swore affidavits on 30 September 2020, each detailing the difficulties they had encountered in exercising their functions as receivers by reason of certain alleged actions and conduct of the plaintiffs, in particular the installation by the plaintiffs of tenants in the Properties and the collection of rent which was not passed on to the receivers.

29. The second plaintiff swore a supplemental affidavit on 9 November 2020 responding to the defendants' affidavits. At paras. 74-82 thereof, he took issue with Mr. Dowling's averments in respect of the ECB rate (specifically the averment that the

plaintiffs and Mr. Fitzpatrick accepted that Ulster Bank applied the main refinancing rate to the loans), stating, at para. 80:

> "…I say that it is clear from our case that the interest rate for the loans-specified as the 'ECB rate'- was intended to specifically track the *'Minimum Bid Rate'*, and not the broader Main Refinancing Operations. Further, and insofar as it is necessary, I say that where there is any ambiguity in respect of the interpretation of the term 'ECB rate' in the facility letters and, namely whether it was intended to refer either to (a) the 'Minimum bid rate' or (b) the 'Main Refinancing Operations rate simpliciter, I say and am advised that said ambiguity should be resolved in favour of this Deponent and the First Named Plaintiff by virtue of the *contra- proferentem* rule.
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> 81. Further, and/or alternatively, even if the ECB rate could be held to refer to the Main Refinancing Operations Rate more generally (which is denied), I say and am advised that any change in the interest rate was required to be 'published at least once in a national newspaper'…For our part, we do not believe that this occurred…".

30. On 4 February 2021, Ms. Adrienne Fitzgibbon of Link Asset Limited (the successor to Capita) swore an affidavit in response to the second plaintiff's supplemental affidavit advising, *inter alia*, that Promontoria was in the process of obtaining an expert report to support its position regarding the plaintiffs' alleged claims of overcharging of interest.

31. There followed the second plaintiff's second supplemental affidavit following which Mr. Dowling swore a further affidavit in response.

32. The defendants duly produced a report of Mr. Barry Robinson, Chartered Accountant and Director of BDO Simpson Xavier, in response to the arguments canvassed on behalf of the plaintiffs. On 10 May 2021, Mr. Robinson swore an affidavit for the purpose of

exhibiting his Expert Accountant's report which he avers he was instructed to undertake by way of "independent review" of the report of Mr. Fitzpatrick and to give his expert opinion on whether the ECB rate used by Ulster Bank to calculate interest on the plaintiffs' loans ceased to exist in July 2008.

33. The defendants' position was that when the loans in issue here were advanced, the ECB rate which applied was the main refinancing operations rate ("the MRO"). At that time the MRO was calculated using a variable rate, the minimum bid rate. In October 2008, the ECB altered the method by which the MRO was calculated from the minimum bid rate to a fixed rate. The defendants say that what occurred was merely an alteration in the manner in which the MRO was calculated and did not have the effect of abolishing the MRO in its entirety.

34. At para. 215 of his report, Mr. Robinson sets out the ECB's definition of the key ECB rates as follows:

a) The interest rate on the Main Refinancing Operations (MRO), which provide the bulk of liquidity to the banking system.

b) The rate on the deposit facility, which banks may use to make overnight deposits with the euro system.

c) The rate on the marginal lending facility, which offers overnight credit to banks from the euro system.

In Mr. Robinson's view, the term "ECB rate" referred to by the Bank in its terms and conditions would have to have been one of the above rates. Mr. Robinson canvassed a different view of the term "ECB rate" as it appears in the letters of offer to that offered by Mr. Fitzpatrick.

He stated:

"2.17 In my opinion, the ECB rate that was used by Ulster Bank was the "Main Refinancing Operations" rate, or "MRO" rate, which according to the ECB in its "Key ECB Interest Rate" Schedule…. was calculated by the ECB under:

(i) a 'Fixed rate" tender procedure from 4 January 1999 to 28 June 2000;

(ii) a 'Minimum Bid Rate" tender procedure from 28 June 2000 to 15 October 2008; and

(iii) reverted to a "Fixed Rate" tender procedure from 15 October 2008 to date."

Whilst he noted that the plaintiffs' expert, Mr. Fitzpatrick, had referred to a rate called the "MRO minimum bid rate", Mr. Robinson did not consider that to be one of the three key rates as defined by the ECB. He considered that the correct terminology to describe the "ECB rate" used by Ulster Bank to be the "interest rate on the main refinancing operations (MRO)", as defined by the ECB.

The High Court judgment

35. The application for interlocutory relief came on for hearing before the High Court on 30 November and 1 December 2021. Judgment was delivered by Egan J. on 7 April 2022. As can be seen from the judgment, the plethora of points raised by the plaintiffs as to the serious issue to be tried were duly considered by the Judge. Those arguments had included that the Global Deed of Transfer was legally invalid (albeit this argument was not maintained at the hearing of the injunction application), the alleged invalidity of the notice of transfer, the invalidity of the demand letters, arguments as to the exclusivity of remedies and the alleged invalidity of the appointments of the receivers.

36. Amongst the matters that fell to be considered by the Judge was the plaintiffs' claim that they were overcharged on their accounts in respect of both loan facilities by reference to the interest rate, a matter which, the defendants contend, received only ten minutes of airtime in the High Court. In essence, the plaintiffs contended in the court below that the

tracker rate applicable to their loans (the ECB MRO) had been abolished in its entirety in October 2008 when the ECB altered the method by which it determined its main refinancing operations (MRO) from a minimum bid rate to a fixed tender procedure.

37. In aid of their arguments on the alleged overcharging, the plaintiffs relied on the judgment of the High Court (McGrath J.) in *Governor and Company of Bank of Ireland v. Phelan* [2020] IEHC 484. There, in the context of possession proceedings, it was held by McGrath J. (applying the low threshold for remittal to plenary hearing that arises in summary summons cases**)** that the defendant/borrower had established an arguable defence that *"the effect of the decision by the ECB on 8 October 2008 and the failure of the plaintiff/bank to certify the unavailability of [the minimum bid rate] resulted in no interest being chargeable thus leading to overcharging of interest"*.

38. What was under consideration in *Phelan* was Clause 11A of the facility letter at issue in those proceedings. Clause 11A read as follows:

> *"11A. Subject to Part B of this condition, the interest rate applicable to the loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than 1.25% above the European Central Bank Main Refinancing Operations Minimum Bid Rate ("REPO rate") for the term of the loan. …"*

39. Clearly, in *Phelan,* the facility had referred to the applicable rate as "the Main Refinancing Operations Minimum Bid Rate" for the term of the loan. The issue which McGrath J. had to determine was whether the bank in that case was stuck with the minimum bid rate after 15 October 2008, i.e. an interest rate calculated in a particular way specific to and identified with precision in the loan contract (as argued by the borrower in *Phelan*) or, whether, as argued by the bank, the minimum bid rate described merely a tendering process.

40. Ultimately, McGrath J. determined, by reference to the wording in clause 11A of the loan contract, that the defendant/borrower had advanced an arguable ground of defence that the effect of the decision by the ECB on 8 October 2008 and failure of the bank to certify "the unavailability of the rate" resulted in no interest being chargeable thus leading to an overcharging of interest.

41. At para. 61 of his judgment, McGrath J. described the issue that arose in the case in the following terms:

> *"61. The debate on this issue has centred on whether the phrase "minimum bid rate" in clause 11 of the facility letter/contract describes, as argued by the [Bank], a tendering process, or, as advocated by the experts retained by the defendant, an interest rate calculable in a particular manner specific to and identified with precision in the contract and which interest rate no longer exists. A significant conflict arises on the affidavits. …"*

42. Ultimately, McGrath J. held, at para. 66:

> *"While there may be strong grounds for arguing that the expression "minimum bid rate" is referable to the tender process rather than being a reference to a specific and separate interest rate, I do not believe that the issue raised by the defendant may safely be described as unarguable. I am satisfied that the conflicting views expressed are such that it would be inappropriate to determine this issue without further hearing. There is a clear conflict, which this court is unable to resolve simply on a consideration of the contents of the affidavits. Further, I cannot be satisfied, to adopt the dicta of McKechnie J. in Harrisrange, that there are no issues of law which require fuller argument and greater thought for a better determination of such issues. The applicability, operation and effect of the contra*

proferentem principle, in my view, is also one which would benefit from further argument."

43. At para. 67, he continued as follows:

"Consideration must now be given to the consequences of the court's finding that an arguable point has been raised in relation to the alleged overcharging of interest. In this regard, Mr. O'Neill S.C. submits that even if Mr. Greijmans and Mr. Butler are correct, this defence does not assist the defendant. Allowing for alleged overcharging, he submits that it is clear from the evidence that the defendant was in default when demand was made. Arrears had accumulated even if one discounts the amount claimed to have been overcharged and the defendant was in any event in default at the time demand was made and the loan called in on 8th January, 2016. On Mr. Griejmans' calculations, alleged overcharging at that time amounted to €92,432.20, whereas the arrears as notified to the defendant were €96,914.16. He submits that there was default sufficient to entitle the mortgagee to issue the demand and to recover possession of premises."

44. Addressing the plaintiffs' arguments concerning the "ECB rate" in the present case, the Judge was in agreement with the defendants that the plaintiffs' reliance on *Phelan* was not appropriate, finding that *Phelan* was distinguishable "because in that case the relevant facility letter specifically stated that the applicable rate was the *'MRO minimum bid procedure'* and provided that if the lender certified that rate as being unavailable, its home loan rate would apply. Therefore, as the lender had not appropriately certified that the MRO minimum bid rate was unavailable, it was not appropriate to apply an alternative rate." By contrast, as far as the present case was concerned, the Judge found that "the facility letter merely states that the applicable rate is the 'ECB rate plus 1.35%' and the borrower therefore has no specific contractual entitlement to assert that the method by

which the MRO was calculated must be by means of the minimum bid rate." She went on to state:

> "Needless to say, this court cannot enter upon an adjudication of the competing arguments of the parties' respective accountancy experts. However, it is clear that the loan facility does not support the proposition that the minimum bid rate was the only applicable rate. Further, [whilst] the expert report exhibited by the plaintiffs states that 'it is the client's instruction that the ECB rate was to be used for the purpose of interest calculating is the main refinancing operations minimum bid rate which ceased to exist from 9 October 2008' this understanding does not appear to be averred to in any of the plaintiffs' affidavits and is therefore evidence of little weight."

Accordingly, the Judge found that the plaintiffs had not raised any fair issue to be tried in respect of the interest rate issue.

45. As alluded to earlier, all other matters in respect of which the plaintiffs said a fair issue to be tried arose were rejected by the Judge. Specifically, she found that the plaintiffs had not established a fair issued to be tried that the notice of the transfer of 5 November 2015 was insufficient to constitute an express notice of transfer. Similarly, she found no fair issue to be tried that the demand in respect of the first property was invalidated by a prior agreement or any estoppel arising from same. Nor had the plaintiffs raised a fair issue to be tried that any principle of exclusivity of remedies prevented or rendered invalid the appointment of receivers. She also went on to find that the plaintiffs had failed to demonstrate a fair issue to be tried that there was any legal invalidity or infirmity in the relevant deeds of appointments of the receivers.

46. Albeit having found that the plaintiffs had failed to surmount the first hurdle in their application for injunctive relief and that it was "not strictly specifically necessary to

consider the balance of convenience", the Judge went on to address the balance of convenience.

47. One of the arguments advanced by the defendants in the court below was that damages would be an adequate remedy for the plaintiffs, the defendants emphasising that the properties in question were commercial properties and that whilst the plaintiffs averred to an emotional attachment to the First Property, it had not been averred that it was a family home. On the authority of *Ryan v. Dengrove* [2021] IECA 38, the Judge accepted that as the First Property was a commercial entity the court should be "robustly sceptical" of any claim that damages are not an adequate remedy for plaintiffs should they ultimately succeed at trial. She also accepted the defendants' contention that they would not be compensated by damages by the temporary suspension of their right to enforce the facilities given that it is "entirely unclear" whether the plaintiffs would be capable of meeting either any undertaking as to damages, or any claim for damages by the defendants should the plaintiffs fail at trial. The Judge noted that the receivers had not been able to take up possession of the Properties. For that reason, insofar as the plaintiffs had sought that the receivers deliver up possession, she refused such relief.

48. The Judge also noted the defendants' submission that whilst it was possible if the receivers entered into possession that Promontoria could take up possession as mortgagee in possession and thereby attempt to effect a sale, there was no imminent or anticipated risk of this occurring. The defendants, however, had not tendered any undertaking that if the receivers obtained possession Promontoria would not in due course, and in advance of the trial, attempt to exercise their power of sale. She observed that it would not be an efficient use of the parties' resources or of the court's time to require the plaintiffs to reapply to the court should those circumstances present. She considered that if the plaintiff

succeeded at trial in establishing the invalidity of the appointment of the receivers, then the power of sale "will never have become exercisable in the first place".

49. Overall, it seemed to the Judge "that the balance of convenience/balance of justice in respect of the second relief sought is evenly balanced between the parties". She considered that in light of the undertaking offered by the plaintiffs that they would hold rent proceeds from the Properties in escrow pending the determination of the proceedings, "injunctive relief would have been merited". She went on to state:

> "In such circumstances, were I satisfied that the plaintiffs had raised a fair issue to be tried, the scales would have been tipped in favour of the plaintiffs by reason of the fact that, at the hearing before this court, they tendered an undertaking that between the date of the order of this court and the date of the ultimate resolution of the proceedings they would retain the rental income from the properties in an account in the name of their solicitor, furnish information on the lettings and accounts in relation to the defendants on a three monthly basis and undertake not to sell or otherwise dispose of the property other than by way of short term lease for a period to be ordered."

50. As, however, the Judge had determined that no fair issue to be tried arose, her assessment of where the balance of justice lay could not avail the plaintiffs.

The *ex tempore* judgment delivered on 11 May 2022

51. As already referred to, the costs of the interlocutory application were addressed in the *ex tempore* judgment delivered by the Judge on 11 May 2022. Ultimately, she determined that the risk of injustice to either party would be minimised by making no order as to the plaintiffs' costs of the interlocutory application and by ordering that the defendants' costs be treated as costs in the cause.

52. Addressing the plaintiffs' application for an interim injunction pending an appeal to this Court, the Judge considered that the first issue to be addressed was whether there was any statable or arguable basis for an appeal. She noted that although a month had passed since she had delivered the substantive judgment on the injunction application, "no draft notice of appeal had been prepared". In the course of a short hearing on 5 May 2022, the plaintiffs had indicated that they intended to appeal the High Court judgment in two respects, namely the validity of the transfer from Ulster Bank to Promontoria and the ECB rate. The Judge noted that "no specific argument was canvassed by the plaintiffs at the supplemental hearing in relation to the alleged invalidity of the Notice of Transfer of 5 November 2015". Thus, she found no basis upon which to conclude that any appeal on that point was arguable. In respect of the ECB rate argument, she went on to state as follows:

> "24….counsel for the plaintiffs indicated that the primary point for argument was that the court had failed to refer in its judgment to the argument made at para. 55 of their legal submissions to the effect that the *contra proferentem* rule applied. However, the *contra proferentem* rule would be applicable only insofar as the court may consider that there is some ambiguity pertaining to the 'ECB rate'. This court did not so conclude. Rather, looking at the text of the facility letter and interpreting it as a reasonable reader [apprised] of the facts would do, I formed the view the loan facility simply did not support the proposition that the minimal bid rate was the only applicable rate.
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> 25. More importantly, I also found against the plaintiffs on the ECB rate for a separate reason. I found that the plaintiffs had failed to lay the evidential groundwork for the issue that they raised in respect of the ECB rate. Specially, the plaintiffs had not at any stage averred to a contemporaneous understanding on their

part that the minimum bid rate was the applicable rate. Nor, was there any evidence that the plaintiff's had queried or challenged the interest rate applied at any stage prior to the issue of the proceedings, something that one would expect them to have done if they had understood that a different rate ought to have been applied. As the plaintiffs will be unable, without leave of the Court of Appeal to place any further evidence before the court in relation to this issue, I do not believe that there are arguable grounds for concluding that the appeal on this issue will succeed."

53. The Judge again addressed the balance of justice "for the purposes of the application for an interim injunction", stating:

"26. It is true to say that in the interlocutory judgment, I determined that the balance of convenience was evenly balanced and that in light of the undertakings tendered by the plaintiffs, had they raised a fair issue to be tried, I would have granted interlocutory relief in respect of the second order sought. However, this does not necessarily mean that the balance of convenience must be approached in the same manner in ascertaining whether or not the plaintiffs ought to be granted an interim injunction pending an appeal. In this regard, it is relevant to note the status quo before the injunction was sought and indeed for several years prior to that, is that the receiver had been unable to carry out his duties because the plaintiffs had installed tenants on the properties and were collecting rents which they did not hand over to the receiver. No payments at all had been made by the plaintiffs to the defendants since 2015 and the current total debt, albeit it is disputed, stands at €665,000.

27. Proceedings were commenced by plenary summons in September of 2020. The plaintiffs have yet to deliver a Statement of Claim. If the plaintiffs had delivered a Statement of Claim and brought forward their proceedings, rather than

> unsuccessfully seeking the relevant interlocutory relief, then it is likely that proceedings would shortly be coming to trial. Having so delayed matters, I do not consider it just or appropriate for the plaintiffs to be ordered the interim relief now sought.
>
> 28. In reality, it seems to me that the plaintiffs are merely trying to renew their application for interlocutory relief which application had already been refused by this court on the grounds set out in the interlocutory judgment. I find that the plaintiffs have not established a stateable or arguable basis for the appeal itself and, furthermore, that in the light of the plaintiff's delay heretofore, the balance of convenience does not favour, the further interim relief now sought."

54. In the context of the proceedings generally, the plaintiffs were directed to deliver their statement of claim within a period of three weeks from the date of the order of the High Court (perfected on 18 May 2022). The defence of the defendants was to be delivered within three weeks thereafter and the replies to the defence within a further two weeks. Voluntary Discovery letters were to be exchanged a further two weeks thereafter, with a further two weeks for replies to such requests, if any.

The pleadings

55. Ultimately, the plaintiffs delivered their statement of claim on 17 October 2022 (it should be said considerably late in the day and after two separate directions issued by the High Court). Save the complaint at paras. 19 – 28 of the statement of claim relating to the appointment of the second to fourth defendants as receivers, the ECB rate issue is the only other complaint advanced by the plaintiffs. I think it is fair to say that the nub of the plaintiffs' claim rests on how the term "ECB rate" as it appears in the relevant letters of offer is to be constructed.

56. In their statement of claim, the plaintiffs plead as follows with regard to the interest rate issue:

> "6. It was an express term of both loan facilities that the interest rate applicable to the loans was the "*ECB rate plus 1.35%".*
>
> 7. It was further an express term of the loan facilities that:
>
> > "*Variations in [the] Ulster Bank Home Loan Rate may occur at any time and notice of each variation will be published at least once in a daily newspaper*".
>
> 8. There is no clarity as the definition of *'ECB rate'* or indeed, *'Home Loan Rate'*, in the loan facilities. However, at all material times, the loan facilities were intended to track the *'ECB Main Refinancing Operations Minimum Bid Rate'* (the **'Minimum Bid Rate'**). The Minimum Bid Rate is a 'rate' and not a 'tender process'. It represents the *'minimum interest rate at which counterparties may place bids'* and meant that the loan facilities would 'track' the lowest (or 'minimum') interest rate being paid by the Bank during the relevant lending operation." (emphasis in original)

57. At para. 9, it is pleaded that "the loan facilities were never intended to track the ECB main refinancing operations *simpliciter*." At para. 10, it is pleaded that "insofar as there is ambiguity as to whether the reference to the *'ECB rate'* was intended to refer to the Minimum Bid Rate or to the *'Main Refinancing Operations'* more generally, and/or whether the Minimum Bid Rate is a *'rate'* or a *'tender process',* said ambiguity should be resolved in favour of the Plaintiffs by virtue of the *'contra proferentem'* rule. ". At para. 14, it is pleaded that in breach of contract, negligence and/or breach of duty, the Bank thereafter sought to unlawfully track the 'Main Refinancing Operations fixed rate' (the 'Fixed Rate'), which it had no contractual right and/or entitlement to do so."

58. The plaintiffs go on to plead, at para. 15, that at no point did the Bank *"notify*" the plaintiffs that the interest rate applicable to the loans had been varied, in accordance with the terms of the loan facilities. Para. 16 pleads that as a result of the aforesaid, Ulster Bank and/or Promontoria "had no contractual right or entitlement to apply any interest to the loan facilities subsequent to 15 October 2008. At para. 17 it is pleaded:

> "17. Alternatively, the Bank and/or the First Named Defendant are limited to a *'margin'* of 1.35% on the loan facilities".

The appeal

59. The plaintiffs' notice of appeal was filed on 14 June 2022. In essence, the plaintiffs identify a single "net point" of appeal, namely that the Judge erred in finding that they had not established a fair issue to be tried in respect of the interest rate issue. This involves, it was said, the construction of the interest rate clauses in the two letters of offer concerning the properties in County Meath. In this regard, the following grounds of appeal were advanced:

- The Judge erred by failing to determine that there was a serious issue to be tried on the correct interest rate to be applied to the letters of offer of 6 April 2006 and 21 June 2006, and from 8 October 2008 onwards, and, consequently, whether the plaintiffs were overcharged by €132,072.89.
- The Judge placed undue emphasis on the fact that in *Phelan*, the relevant facility letter referred to the minimum bid rate.
- The Judge failed to consider a number of arguments addressed by the plaintiffs in relation to the ECB rate.
- In her *ex tempore* judgment of 11 May 2022, the Judge erred in determining that there was no ambiguity pertaining to the term "ECB rate".

- The Judge failed, whether adequately or at all, to take account of the opinion of Mr. Fitzpatrick that there was *"no clarity"* over which ECB rate was been used.
- The Judge failed, whether adequately or at all, to take into account that the defendants' expert opined that the ECB rate used by the bank was the MRO rate.
- The Judge failed to consider whether the minimum bid rate was a rate or method of calculation, in line with the decision in *Phelan*.
- Despite stating otherwise, the Judge entered into an adjudication of the competing arguments of the parties' respective experts.
- The Judge erred in holding that the plaintiffs had failed to put in evidence that their belief was that the ECB rate was specifically intended to track the minimum bid rate.
- The Judge erred in holding that the plaintiffs had not raised the issue of the interest rate "at any stage prior to the issue of proceedings".
- The Judge placed undue emphasis on the subjective interpretation by the parties of the letters of offer, rather than the objective interpretation of the facility letters.
- The Judge erred in determining the *contra proferentem* rule had no application to the letters of offer.
- The Judge erred in failing to hold that there was ambiguity in the use of "ECB rate" which should be determined or resolved in favour of the plaintiffs.
- The Judge failed, whether adequately or at all, to consider Clause 2 of the General Conditions that any change of interest was required to be *"published*

at least once in a national daily newspaper", which the plaintiffs did not believe had occurred.

- The Judge failed to hold, in all the circumstances, that there was a serious issue to be tried on the "ECB rate".
- The Judge failed in refusing to grant an interim order pending the first/return date/directions hearing before the Court of Appeal.

60. In their respondent's notice, the defendants oppose the appeal in its entirety. By way of "Preliminary" to their grounds of opposition, they assert as follows:

> "The Respondents oppose the Appellants' specific grounds of appeal on the basis set out and ask the Court of Appeal to affirm the decision of the learned High Court Judge dismissing the Appellants' application for injunctive relief on the basis that they had failed to establish any fair issue to be tried. Without prejudice to that position, the Respondents reserves its entitlement to contend at the hearing of the within appeal that the learned High Court Judge erred in concluding that the balance of convenience would otherwise have favoured the granting of injunctive relief."

61. The defendants go on to assert that the Judge was correct in determining there was no fair issue to be tried in respect of the interest rate to be applied to the Letters of Offer of 6 April 2006 and 21 June 2006 from 9 October 2008 onwards. In essence, the defendants' position is that the Court should uphold the High Court on the fair issue to be tried and, in any event, refuse the injunction sought by the plaintiffs on the grounds that the Judge erred in finding that, had a fair issue to be tried been established, the balance of justice favoured the grant of injunctive relief.

62. I should add at this juncture that the *status* of the defendants' arguments as regards the balance of justice was very much in issue before this Court, the plaintiffs arguing that the balance of justice was not before the Court by dint of the defendants' failure to file any

cross-appeal against the Judge's finding that had the plaintiffs had established a fair issue to be tried the balance of convenience favoured the granting of the second relief sought by the plaintiffs. I will return to this later in the judgment.

A fair issue to be tried

63. For reasons that will shortly be explained, rather than pronouncing on the correctness or otherwise of the Judge's finding that no fair issue to be tried arose in respect of the "ECB rate", I consider that the within appeal can be disposed of by a consideration of where the balance of justice lay for the purposes of the relief sought by the plaintiffs. However, it is perhaps instructive to set out the parties' respective submissions on the question of a fair issue to be tried, if only to frame what is likely to be the crux of the plaintiffs' action at trial.

An overview of the plaintiffs' argument

64. Counsel for the plaintiffs submits that the essential question in the context of the fair issue to be tried is what is meant in the facility letters by the term "ECB rate", in other words, have the plaintiffs established a fair issue to be tried as to whether the "minimum bid rate" is a rate in and of itself (as the plaintiffs contend) or whether it is merely a tender process (the defendants' position). The plaintiffs say that the "ECB rate" means the "minimum bid rate" and that the "ECB rate" as specified in the facility letters was intended to be the "minimum bid rate". They point to the report compiled by Mr. Fitzpatrick wherein Mr. Fitzpatrick has opined that the minimum bid rate is a rate in and of itself.

65. Much of the plaintiffs' arguments to the effect that the Judge erred in finding no fair issue to be tried on the interest rate centred on the decision of the High Court in *Phelan.* Counsel submits that the Judge was wrong, particularly on an interlocutory application, to hold that *Phelan* was distinguishable on the basis that the relevant facility letter in *Phelan*

specifically stated that the applicable rate was the "MRO minimum bid rate" and provided that if the lender certified that rate as being unavailable, its own home rate would apply.

66. Whilst in the present case, unlike in *Phelan*, the "Main Refinancing Operations Minimum Bid Rate…" was not specified in the respective letters of offer, the plaintiffs contend that the reference in both letters being only to the "ECB rate" nevertheless raises an ambiguity such that the *contra proferentem* rule should apply. Counsel characterises the asserted ambiguity as being whether the "ECB rate" means the MRO rate *simpliciter* or the MRO minimum bid rate. He asserts that, if anything, the *contra proferentem* rule applies with more force to the plaintiffs' loan accounts in circumstances where the facility letters at issue simply refer to the "ECB rate".

67. It is submitted that the Court should not be influenced by the *obiter* comments of Noonan J. in *Tanager DAC v. Kane* [2019] IEHC 801. There, the relevant interest rate stipulated in the letter of offer was 1.25% over the European Central Bank Main Refinancing Operations Rate. In that case, the borrowers contended that that rate had been abolished with effect from 15 October 2008 with notice to the borrower and that BOSI had then unilaterally altered the interest rate without notice to the borrower. The borrower also maintained that he had never been informed of what new rate was applied to his account. Noonan J. found on the facts that the borrower's contentions were not feasible in circumstances where the borrower had opted on 15 June 2007 to have the ECB tracker rate disapplied. Noonan J. went on to state (*obiter*) that even if there had been substance in the borrower's contention, the argument was based on a misunderstanding of the relevant rate which *"was not in fact abolished as the [borrower] contends"*.

68. The plaintiffs argue that the application of the *contra proferentem* rule is significant in light of their claim of overcharging by the defendants. Counsel asserts that the overcharging amounts to a total of €132,037.89 on the basis that no interest is recoverable

post 9 October 2008 or, alternatively, that only a total sum of €40,020.72 interest is recoverable if the Bank/Promontoria are limited to a margin of 1.35%. It is said that this is significant where, in respect of the purported demand dated 25 February 2013 in respect of loan account no. …6294, the specified arrears are alleged to be in the sum of €21,568.29. He submits that it is clear, upon a consideration of Mr. Fitzpatrick's report, that as of 25 February 2013, there would have been overcharging in the sum of between €36,432.42 and €37,026.67 if no interest applied, or between €17,786.54 and €18,019.17 if a margin of 1.35% applied. The plaintiffs also say that even if the margined rate of 1.35% applies, the letter of offer as regards loan account no. … 6294 specifies "default" of "three months" repayments. It is contended that it is entirely unclear whether there would have been any arrears at the time of this purported demand on 25 February 2013.

69. In respect of the purported demand dated 14 March 2017 in respect of account no. …6347, Mr. Fitzpatrick's report sets out that in or around that time there would have been overcharging of between €46,846.38 and €47,141.36 if no interest applied, and between €17,219.26 and €17,237.10 if a rate of 1.35% applied. Counsel submits that matters are more complicated in respect of this account by reason of the fact that there are no alleged arrears specified in the 14 March 2017 letter.

70. The plaintiffs do not accept the argument advanced by the defendants that even if there was overcharging of interest, any such deferential has been overtaken by the arrears on the loan accounts. This, counsel says, is in circumstances where one of the arguments the plaintiffs advance is that no interest at all applied after October 2008. The plaintiffs' overall position is that even if the defendants can recover the margined rate of 1.35%, an issue still arises (especially in respect of loan account no. 6294) as to whether there were arrears at the time the demands were made.

71. In countering the observations in Mr. Robinson's report, counsel queried why the letter of offer at issue in *Phelan* had referred to the "Main Refinancing Operations Minimum Bid Rate" if it had not been intended as a rate in and of itself rather than just as a process of calculation. He reiterated that the plaintiffs' position is that the minimum bid rate was a rate and was the intended rate as far as the letters of offer in issue in the present case are concerned. Hence, there is, counsel says, ambiguity in the term "ECB rate" as it appears in the letters of offer in respect of which the *contra proferentem* rule should be invoked.

72. It is contended that insofar as the Judge determined that the facility letters here did not support the plaintiffs' proposition that the minimum bid rate was the only applicable rate, the Judge wrongfully entered into an adjudication on the issue and that she went too far in determining there was no fair issue to be tried.

73. The plaintiffs also say that *ex tempore* judgment of 11 May 2022, which dealt with, *inter alia*, the application for an interim injunction pending an appeal to this Court, the Judge erred in the manner in which she addressed the argument that she had failed in her substantive judgment to refer to the plaintiffs' submission that the *contra proferentem* rule applied. They further say that the Judge was wrong to address that argument by reference to their failure, at any stage, to refer to their contemporaneous understanding that the minimum bid rate was the applicable rate. They contend that the parties' subjective intentions are not relevant to the contractual interpretation of the facility letters (see *O'Reilly v. Irish Life Assurance Plc* [2005] IEHC 499 and *Analog Devices BV v. Zurich Insurance Company* [2005] 1 IR 274). Moreover, in this regard also, counsel points to the second plaintiff's averments as to the plaintiffs' belief that the loans were intended to track the "minimum bid rate".

74. The plaintiffs' overall argument is that the Judge wrongly ruled on the applicability of the *contra proferentem* rule in circumstances where the facility letters themselves do not define the term "ECB rate". They say that there is a need for clarity in order to *"reduce or eliminate any possibility of ambiguity"* as per MacMenamin J. in *O'Reilly v. Irish Life Assurance Plc* [2005] IEHC 449. As said by MacMenamin J., *"As a matter of law, insofar as ambiguity or difficulty of interpretation arises, such ambiguity must be resolved in favour of the plaintiff",* applying the *contra proferentem* rule.

75. By reason of all of the foregoing, the plaintiffs say that there is a fair issue to be tried as to whether the minimum bid rate was a rate in and of itself (as the plaintiffs contend), or merely a process of calculation, as maintained by the defendants.

The defendants' submissions

76. As regards the fair issue to be tried, the defendants advance the following arguments. First, they point out that it is not disputed by the parties that the facility letters in issue here refer only to the "ECB rate". Secondly, both parties accept that Ulster Bank applied the MRO rate to the loan accounts. Where the parties differ is as to whether the plaintiffs can make out a case that at the time on entering into the relevant contracts, Ulster Bank bound itself not just to the MRO rate but also the method by which that rate was determined.

77. Counsel for the defendants says that it is not disputed, and is a matter of fact, that at the time the loans were entered into the method of calculation of the MRO rate was the minimum bid rate. He submits, however, that the plaintiffs are in error in describing the MRO as having two different *rates* – a minimum bid rate and thereafter a fixed tender rate. He points to the ECB's own document (at bullet points 2 and 4), as exhibited to Mr. Robinson's report, as supportive of the defendants' argument that the minimum bid process and the fixed tender process refer to methods of calculation that applied up to and post 9 October 2008.

78. The defendants' contention is that McGrath J.'s findings in *Phelan* were specific to the wording of the facility letter at issue in that case (and hence the Judge was correct in finding *Phelan* distinguishable from the present case). They argue that no such wording appears in the facility letters in issue in the present case and point to the fact that this distinguishing factor was noted by Phelan J. in *Governor and Company of Bank of Ireland v. Matthew Wales* [2022] IEHC 433 when she referred to the High Court judgment in issue here.

79. It is submitted that, here, Ulster Bank did not bind itself to the minimum bid process. The defendants also point out that insofar as the plaintiffs rely on Mr. Fitzpatrick's report, one of the features of that report is that Mr. Fitzpatrick specifically records that it was the *plaintiffs* who had instructed him that the ECB rate used for the purpose of interest calculation was the MRO minimum bid rate: this was not a view Mr. Fitzpatrick had arrived at independently.

80. Counsel for the defendants also points to the fact that the plaintiffs' first complaint in relation to the overcharging of interest was on 9 June 2020. He submits that the Judge was correct to view the absence of any contemporaneous complaint from 2008 to June 2020 as going to the plaintiffs' credibility as far as their argument regarding the ECB rate is concerned.

81. With reference to loan account …6347, it is submitted that even taking Mr. Fitzpatrick's figures, there remains significant arrears on this loan account. The loan was not demanded by the receivers until 2017. Hence, the defendants' position is that within three months of May 2012, any putative overcharging had already been eaten up by the arrears on the account as no repayments had been made by the plaintiffs since 2012.

82. With regard to loan account no. …6294, that loan was called in on 25 February 2013. As of that date, the arrears stood at €21,568.20. Mr. Fitzpatrick's report documents

that as of February 2013 the deferential was €17,706. It is submitted that that being the case, even if the plaintiffs were to be given full credit for Mr. Fitzpatrick's deferential, they were still somewhere between €3,500 and €4,000 in arrears when the demand was made in February 2013. The defendants thus contend that in all of those circumstances, *Phelan* cannot avail the plaintiffs. It is submitted that the Judge was correct to conclude that no ambiguity arose in the relevant contracts and that any reasonable reader of the contracts would conclude that the ECB rate referred to was the MRO rate *simpliciter*. Even if the defendants' submission in this regard is not accepted, counsel says that the plaintiffs' argument goes nowhere because of the significant arrears on the loan accounts.

Discussion and decision

83. Clearly, in this appeal, the Court is being asked to adjudicate on whether the Judge erred in finding that the plaintiffs had failed to establish a fair issue to be tried on the issue of the interest rate applicable to the two loans facilities the subject of the proceedings. As can be seen, the parties' respective arguments centre on how the term "ECB rate" is to be constructed. While I accept entirely that all that is (or could) be sought from this Court is a determination as to whether the Judge was correct to find no fair issue to be tried had been established by the plaintiffs, that determination is being sought at a time when the plaintiffs have delivered (albeit, as I have said, considerably late in the day) their statement of claim, further to the directions given by the Judge (including that the defendants had three weeks after the delivery of the statement of claim to file their defence) and where, as the Court has been advised, a request for voluntary discovery limited to three categories of discovery has been made by the plaintiffs.

84. In effect, the proceedings have progressed such that the parties are very considerably nearer a trial date than when the matter was before the Judge for the purposes of the application for interlocutory relief. I consider that the progress the proceedings have now

made, the likelihood of an early trial date and the fact that, as the statement of claim discloses, the likely principal issue at the trial will be the construction to be put on the "ECB rate" indicate strongly that the Court should not, at this remove, determine whether or not the Judge was correct in finding the plaintiffs had not established a fair issue to be tried for the purposes of the application for interlocutory relief. My view in this regard is compounded by my further conclusion that, for reasons shortly to be explained, even if the plaintiffs had established a fair issue to be tried in respect of the ECB rate the balance of justice in any event favoured the refusal of the plaintiffs' application for injunctive relief.

85. In light of the foregoing factors, no useful purpose would, in my view, be served by this Court embarking on an analysis of the fair issue to be tried in relation to the applicable interest rate in circumstances where the arguments put forward by the parties as to how the term "ECB rate" is to be constructed will shortly be determined at the trial of the action (together with the arguments the plaintiffs canvass in relation to the appointment of the receivers).

86. At the end of the day, however one describes the MRO rate, the key question for the trial judge will be what is meant in the facility letters by the "ECB rate" and whether, as the plaintiffs maintain, the "minimum bid rate" was the intended "ECB rate" as far as the contracts in issue here are concerned. It will ultimately be a matter for the trial judge as to whether the minimum bid rate is a rate in and of itself, as argued by the plaintiffs, or merely a process of calculation, as advocated by the defendants. I note that in his oral submissions to this Court, counsel for the plaintiffs argued that the best place for the determination of what was meant in the letters of offer by the "ECB rate" is the trial of the action.

87. In summary therefore, I find that embarking on a consideration of the parties' respective arguments as to the applicable interest rate would merely add an unnecessary

layer to the proceedings in circumstances where the proceedings have progressed to the stage they have and, as I have already alluded to, where the application for injunctive relief can more readily be determined by a consideration of where the balance of justice properly lies, the issue to which I now turn.

The balance of justice

88. Of course, the first matter to be addressed is whether it is open to this Court at all to adjudicate on where the balance of justice lies in this case.

89. Whilst the plaintiffs accept that the balance of convenience was raised in defendants' respondent's notice, they say that the Judge's finding that the balance of justice favoured granting them injunctive relief (had they established a fair issue to be tried) cannot be disturbed in the absence of any cross-appeal by the defendants against the Order of the High Court. In this regard the plaintiffs rely on O.86A, r.15 of the Rules of the Superior Courts ("RSC") which deals with appeals to this Court.

90. Rule 15 provides, in relevant part:

> "15. (1) Each respondent served with a notice of appeal shall, within 21 days after service on him of the notice of appeal, lodge in the Office and serve on the appellant and every other respondent a notice in the Form No 7 (in this rule, the respondent's notice), which:
>
> (a) Shall state if that respondent opposes the appeal, in whole or in part and, if so, sets out concisely the grounds on which the appeal is opposed;
>
> (b) If that respondent intends, on the hearing of the appeal, to contend that the judgment or order appealed from should be affirmed on grounds other than those set out in the judgment or order of the court below, sets out a concise statement of the additional grounds on which it is alleged the judgment or order appealed from should be affirmed;

(c) If that respondent intends, on the hearing of the appeal, to contend that the judgment or order appealed from should be varied, shall include a separate section entitled 'notice of cross appeal', which sets out a concise statement of grounds on which it is alleged the judgment or order appealed from should be varied;

(d) Shall set out the orders sought from the Court of Appeal and,

(e) Shall include a list of any additional documents not identified in the notice of appeal on which the respondent intends to rely on the hearing of the appeal."

The plaintiffs say that the defendants did not appeal any aspect of the High Court Order. They assert that the defendants are now endeavouring to vary the Judge's assessment of the balance of justice in the absence of any cross-appeal against that finding. It is also submitted that the defendants have not, either in their respondent's notice or written submissions, laid the groundwork for any variation of the Judge's assessment of where the balance of justice lay.

91. On the other hand, the defendants submit that the plaintiffs are fundamentally wrong in asserting that the balance of justice is not before this Court. Counsel for the defendants points out to what is set out in the defendants' respondent's notice (as reprised at para. 60 above) and in the defendants' written submissions as evidence that the issue of the balance of justice has properly been put before this Court.

Discussion and Decision

92. I am entirely satisfied the issue of the balance of justice is before the Court. The argument the plaintiffs advance is not feasible by reference to what is actually set out in the defendants' respondent's notice and their written submissions. Moreover, the plaintiffs'

argument flies in the face of the *dicta* of Keane C. J. in *AA v. Medical Council* [2003] IESC 70.

93. In *AA*, the applicant was acquitted of charges of sexual assault. He subsequently became the subject of a disciplinary inquiry by the Medical Council. He applied for judicial review to prevent the holding or continuance of the inquiry. He brought two sets of proceedings. The first set related to the alleged double jeopardy and breach of natural justice in the form of multiple proceedings in the same matter.

94. The second set of proceedings concerned the alleged breach of natural justice by reason of the Medical Council's failure to provide legal aid for the applicant. In the second set of proceedings the Medical Council contended that the applicant had been guilty of delay which put him outside the time limits for judicial review. It was further contended that the applicant had failed to explain why the relief sought in the second proceedings had not been sought in the first proceedings. In its statement of opposition, the Medical Council, in addition to denying that the applicant was entitled to any of the reliefs sought, gave notice that it would contend at the hearing that the court should exercise its discretion against granting relief on the ground (a) that the application for judicial review had been brought outside the requisite time limits and that the applicant was guilty of gross, inordinate and inexcusable delay in bringing the proceedings, and (b) the applicant was precluded by reason of his failure to raise the issue of legal aid and/or legal representation in the earlier judicial proceedings from maintaining the second proceedings and that his conduct in maintaining them amounted to an abuse of the process of the court.

95. At the hearing of the application, the Medical Council relied on the aforesaid grounds in addition to contending that Part V of the Medical Practitioners Act 1978 could not be read so as to empower the Medical Council to ensure that the applicant had legal representation.

96. The High Court judge ultimately determined that Part V of the 1978 Act was not invalid having regard to the provisions of the Constitution. Having so found he did not consider it necessary in the circumstances to determine the application on the discretionary basis advocated by the Medical Council.

97. On the hearing of the appeal in the Supreme Court, counsel for the applicant objected to the Medical Council relying on grounds of opposition relating to the discretionary nature of the remedy sought because this had not been the subject of any adjudication by the High Court. It was said that any such consideration would amount to a denial of the right of appeal from a decision of the High Court. In addition, counsel submitted that the Medical Council, having failed to serve a notice to vary the judgment or order appealed from pursuant to Order 58, r. 10 RSC, should not be permitted to argue the issue relating to the discretionary nature of the relief granted.

98. Addressing the applicant's arguments, Keane C.J. agreed in the first instance with the view expressed by Finlay C.J. in *K.D. (otherwise C.) v. M.C.* [1985] IR 697 that *"save in the most exceptional circumstances, the court should* not *hear and determine an issue which has not been tried and decided in the High Court*." However, Keane C.J. found the case before him *"manifestly distinguishable"* stating:

> "*Not merely did the Statement of Opposition expressly rely on the discretionary nature of the relief sought in the proceedings and the circumstances which, as the Respondent urged, should preclude its being granted in this case; the matter was fully argued by Counsel when the case came on for hearing. The learned judge, having decided that the Applicant had not established that he was entitled to any of the reliefs claimed, concluded that it was not necessary for him to express any view on whether, in any event, the Applicant should also have been refused the reliefs sought in exercise of the court's discretion."*

99. He went on to state that it would seem to him unjust where a particular ground had been raised and fully argued in the High Court, that a party should be precluded from obtaining a decision on that ground on appeal through no fault of his own.

100. Order 58, r.10 RSC (as it then stood) provided:

> "It shall not, under any circumstances, be necessary for a person served with notice of appeal to give notice by way of cross appeal, but if such person intends, upon the hearing of the appeal, to contend that the judgment or order appealed from should be varied, he shall within four days of such service upon him or within such extended time as may be allowed by the Supreme Court give notice of such intention to any parties who may be affected by such contention. Every such notice shall be a four day notice and the appeal shall not be listed before the expiration thereof. The omission to give such notice shall not diminish the powers conferred by statute or these rules upon the Supreme Court, but may, in the discretion of the Supreme Court, be ground for an adjournment of the appeal or for a special order as to costs."

In *AA*, it was conceded by the Medical Council that no notice to vary had been served in the case.

101. Keane C.J. considered that the effect of Order 58, r.10 was *"reasonably clear"* stating:

> *"An appellant must, in every case, serve a notice of appeal stating the grounds of the appeal and the relief sought or the order (if any) in lieu of the judgment or order appealed from sought by the appellant. Rule 10 makes it plain that there is no analogous or corresponding obligation on the Respondent. The only circumstance in which he is under any obligation to serve a notice of any sort is where he intends to contend that the judgment or order appealed from should be 'varied'. Thus, to take a relatively straightforward example, the plaintiff in a personal injuries action whose*

damages have been reduced because he was found guilty of contributory negligence, if he wishes to contest that part of the order, must serve a notice to vary."

102. Keane C.J. went on to address the submission of the applicant that a respondent to an appeal was obliged to give notice to the appellant under Order 58, r.10 if he intended to contend that the judgment or order should be upheld for reasons other than those given by the High Court judge. Keane C.J. could find no warrant for that construction of the rule, *"least of all in the use of the expression 'judgment or order'"*. He stated:

"Those words are used virtually interchangeably throughout the rules and I see no basis for treating the word "judgment" in this rule as referring to the reasons, whether in written or ex-tempore form, given by the High Court judge for his or her judgment or order. The members of this court are incapable of "varying" the reasons given by the High Court judge. They may consider any of the reasons erroneous in point of law or may uphold any of them as being correct in point of law. They may also adopt reasons of their own for arriving at the same conclusion or a different conclusion. Whatever course they may adopt, the reasons for the judgment or order actually made by the High Court judge will remain as he or she expressed them."

103. He went on to note that, *"even where a party who is obliged to serve a notice to vary omits to do so, this does not preclude the court from varying the judgment or order of the High Court where justice so requires, although, it may in such circumstances adjourn the hearing in order to enable the appellant to deal with a case of which he had no notice and has a discretion to make a special order as to costs."*

104. Patently, on the authority of *AA*, the defendants here cannot (nor do they) seek to "vary" the reasons given by the Judge for the Order made in the High Court. Nor do the defendants seek to vary the Order itself. Rather, for the reasons set out in their "Grounds of Opposition" they oppose the appeal, and they ask this Court to affirm the decision of the

Judge dismissing the application for injunctive relief on the basis that the plaintiffs had failed to establish a fair issue to be tried. Thus, they are not contending for a different order. Rather, as I have said, they contend that there are additional grounds upon which the High Court Order should be upheld. The *dicta* of Clarke J. (as he then was) in *McEnery v. Commissioner of An Garda Síochána* [2016] IESC aptly illustrates the obligations on a respondent who is served with a notice seeking leave to appeal to the Supreme Court but who, while otherwise happy with the order made in the court below, nevertheless wishes to argue that there are grounds other than those given by the trial judge upon which the order in issue should be upheld.

105. In the context of discussing the new rules of the superior courts adopted to reflect the new constitutional regime following the 33rd amendment to the Constitution, Clarke J. noted that a respondent who wishes to argue that there are grounds other than those given by the trial judge upon which the order in issue should be upheld must lodge, pursuant to Order 58, r.18(1)(d) RSC, a concise statement of any additional grounds which the respondent intends to convey would justify the affirmation of the judgment appealed from, which grounds are "other than those set out in the judgment or order of the court below". As I have referred to earlier, Order 86A, r.15(1)(b) RSC imposes a similar obligation a respondent to an appeal to this Court. Clarke J. also went on to note that if a respondent however wants to suggest that the order in the court below should be changed, then the respondent is obliged to lodge a cross-appeal. Such is required *"even if it is a cross-appeal which might or might not have been raised by the respondent concerned other than as a reaction to the appeal itself"*. At para. 3.7 of *McEnery,* Clarke J. gave the following example to illustrate when it would be incumbent on a respondent to lodge a cross-appeal:

> *"3.7 A simple example may explain the distinction. In one case, a plaintiff succeeds and is awarded its costs. In a second case, the plaintiff succeeds but, on some basis*

specified in the ruling of the court below on costs, does not secure the full costs of the case. In both cases, the defendant appeals. In the first case, the plaintiff is entirely happy with the order of the court below. The plaintiff won and got its costs, and if the appeal is successfully seen off, the plaintiff will be happy to retain its victory and its order for costs. However, in the second case, the plaintiff has a question to ask. Does it wish, in the event that it successfully resists the defendant's appeal, to urge this Court that there should be a change in the order for costs made in the court below by virtue of which only partial costs were found payable? If the plaintiff considers that such is the desired course of action, then the plaintiff will also be an appellant (or, more technically, a cross-appellant) because the plaintiff will wish to persuade this Court to change the order made in the court below (presumably, in those circumstances, from one in which only partial costs were awarded to one in which full costs were awarded). A plaintiff in such circumstances cannot adopt that course of action without itself, separately, seeking leave of this Court to raise that point on appeal."

106. Unlike the respondent in the example given by Clarke J., here, the defendants *qua* respondents to the plaintiffs' appeal have no *"question to ask".* They are happy with the Order of High Court. However, what the defendants say, effectively, in their respondent's notice and their written submissions, is that there are reasons other than those given by the Judge for refusing injunctive relief. They contend that even if the plaintiffs had established a fair issue to be tried, the balance of justice did not in any event favour their obtaining interlocutory relief. The defendants assert that in deciding otherwise, the Judge erred. In effect, the defendants are asking this Court to find that a proper assessment of the balance of justice favoured the refusal of injunctive relief. The defendants' written submissions (at

para. 31) set out what they contend are the factors that establish that the balance of justice favoured the refusal on interlocutory relief.

107. By reason of the foregoing, I am satisfied that there is no merit in the plaintiffs' argument that the defendants have failed to comply with Order 86A, r. 15 RSC or that they were otherwise required to include a notice of cross-appeal. In my view, the defendants' respondent's notice conforms with the requirement of Order 86A, r.15. Specifically, rule 15(1)(a) has been complied with in that the defendants have clearly and concisely set out their opposition to the appeal. Furthermore, what is set out in the section entitled "Preliminary" conforms with rule 15(1)(b) in that the defendants have pointed, effectively, to additional grounds (namely that the balance of justice favoured the refusal of relief) on which the Order of the High Court should be affirmed. Moreover, insofar as counsel for the plaintiffs asserts a breach of rule 15(1)(c), that assertion is entirely misconceived given that the defendants are not contending that the Order of the High Court should be varied. I should add that even if the defendants were contending that the High Court Order should be varied (which they are not), their failure to include a cross-appeal at section 3 of the respondent's notice would not (based on the *dicta* of Keane C.J. in *AA*) necessarily preclude the Court from varying the Order of the High Court once it was satisfied that no procedural injustice was visited on the plaintiffs in so doing. As I have said that consideration does not arise here as the defendants are not seeking a variation of the High Court Order.

108. In any event, it also bears emphasising that, as appears from the High Court judgment, the parties' respective arguments on the question of the balance of justice were fully aired in the court below and indeed decided on (hypothetically of course given the Judge's finding on the fair issue to be tried). As can be seen, the defendants again raised the balance of justice issue in their respondent's notice and in their written submissions

which were delivered to the plaintiffs in October 2022 prior to the appeal hearing. Thus, there can be no suggestion (and in fairness counsel for the plaintiff did not so contend) that there has been any procedural unfairness to the plaintiffs in the matter being argued before this Court.

Assessment of the balance of justice

109. I turn now to the merits of the parties' respective arguments as to where the balance of justice lay for the purposes of the application for interlocutory relief.

110. As said by O'Donnell J. in *Merck*, the question of whether damages would be an adequate remedy for a plaintiff forms part of the assessment of the balance of justice and thus must necessarily be addressed. It will, in most cases, be *"the most important element in the balance".* Furthermore, as O'Donnell J. says, the mere fact that damages would be both adequate as a remedy and available to be paid does not absolve the Court from placing the adequacy of damages within the balance of justice as a whole and, therefore, it is necessary to assess all other factors relevant to the balance of justice in a particular case.

111. At para. 41 of his grounding affidavit, the second plaintiff avers that damages would not be an adequate remedy for the plaintiffs in circumstances where the potential for the receivers taking possession of the Properties, and a prospective sale thereof, "would represent a clear and flagrant breach of the Plaintiffs' proprietary rights, which would not be compensated by an award of damages or a purely monetary award." The second plaintiff repeats this averment in his supplemental affidavit "particularly in circumstances where the properties are family investments". He avers that the plaintiffs "have a particular sentimental and emotional attachment" to the properties (in particular to the First Property which is located in County Meath where the plaintiffs reside and are from). He further states:

> "Therefore, I say and believe that it is not simply a question of two commercial properties, but that damages would not be an adequate remedy were the relief sought herein refused and, say, for instance, the properties sold pending a full trial which ended up vindicating our position: this would be a most gross and flagrant breach of our property rights, particularly after the prolonged and chequered factual matrix to this case."

112. On the other hand, the defendants say that damages are an adequate remedy for the plaintiffs in light of the commercial nature of the properties in issue here. They further submit that it is not sufficient for the plaintiffs to simply assert a breach of property rights.

113. In this regard, they rely on *Ryan v. Dengrove* [2021] IECA 38. There, Murray J. addressed the relevance of asserted property rights in the following terms:

> *"84. In principle, the case law is clear in positing both the appropriateness of the Court taking account of the inherent value of a property right in determining whether to grant an interlocutory injunction (see Allied Irish Banks plc. and ors. v. Diamond and ors at para. 96) and in recognising that the equity of redemption is itself a valuable asset which precludes the mortgagee from simply selling the property for what it can obtain in the short term (Dellway Investments Ltd. and ors v. National Asset Management Agency and ors [2011] IESC 4, [2011] 4 IR 1 at para. 174). However, it is easy to lapse into enthusiastic rhetoric around the vindication of property rights, while overlooking the complexity sometimes attending their application. Reliance upon the right requires clear identification of what, exactly, is involved, potentially a qualitative legal judgment as to whether some such entitlements should in particular situations enjoy stronger protection than others (on a temporary basis or otherwise) and, where this is the case, a legal justification for that outcome. This has the capacity to be less than straightforward*

in proceedings involving competing property rights, which comprise bundles of different legal entitlements, and which may range from outright ownership of real property, to contractual and in some cases inchoate rights, and which may involve assets that are held for differing purposes. A home, or property otherwise held to a particular and personal end, or for that assets in which a person has an emotional investment (as was the case in Betty Martin) may not fall to be treated in the same way as secured assets that are used only for business purposes (see O'Gara v. Ulster Bank at para. 59).

85. In commercial cases involving assets acquired and held solely for commercial purposes there will frequently be two sets of competing property rights in play. Sometimes it is possible to adjudicate as between them and to decide that, on a temporary basis, the exercise of one party's property right should be suspended in protection of the rights of the other. Merck is a good example of this. There the Supreme Court clearly felt that account should be taken of these interests, but in that case it was in a position to resolve the tension between Merck's SPC and Clonmel's right to enter, and obtain an income stream from, the relevant market by reference to the fact that Merck had a certificate which was prima facie valid, while Clonmel had a challenge to validity which was not conspicuously strong. In some particular circumstances, the fact that one party's rights will be terminated permanently if an injunction is not granted while the other's can be simply kept in abeyance until trial, resolves the issue. However, in other cases it is not possible to decide that one party's rights outweigh its opponents': in that situation the invocation of competing property or property based rights sometimes becomes a zero sum game, adding little to the common law rules. That, indeed, is what happened in Allied Irish Banks plc and ors. v. Diamond."

114. Counsel for the plaintiffs says that the present case cannot be equated with the factual matrix that arose in *Ryan v. Dengrove.* He asserts that the properties here, albeit being buy-to let properties and thus not constituting a family home, are not of the type in *Ryan v. Dengrove* where what were in issue were significant commercial enterprises and thus lay at the outer end of the spectrum referred to by O'Donnell J. at para. 53 in *Merck.* Moreover, it is contended that the present case is overlaid by the emotional and sentimental attachment the plaintiffs have to the properties.

115. The contention that the properties are overlaid with the plaintiffs' sentimental attachment does not hold weight and, in my view, has all the hallmarks of a mere assertion devoid of any factual evidence such as might underscore the plaintiffs' claimed emotional attachment. The plaintiffs themselves acknowledge that the properties were purchased as investments of a commercial nature. The fact that these commercial investments may not be on the scale of the investment properties in issue in *Ryan v. Dengrove* does not, in my view, detract from their commercial nature. To my mind, the plaintiffs' properties are not being held *"to a particular or personal end"* in the sense contemplated in *Ryan v. Dengrove* (at para. 84). Nor are they assets in respect of which it can be said the plaintiffs have an emotional investment in the sense considered in *Betty Martin Financial Services Ltd. v. EBS DAC* [2019] IECA 327. There, Collins J. was satisfied that there was such emotional attachment as he articulated at paras. 92-93:

> *"[T]here is, in my opinion, prima facie plausible evidence before the Court that the Agent's business is, in substance, a family business in which Mr Martin and his sister have a particular emotional/familial investment given the circumstances in which the business was first developed by their mother and her apparent pioneering role as the first woman to be appointed as a branch agent by the EBS in Ireland. The position disclosed by the evidence here is, it seems to me, materially*

different to the position in O' Gara v Ulster Bank Ireland DAC where, on the evidence before him, Barniville J concluded that the assets at issue were effectively purely commercial assets without any special feature or emotional attachment for the plaintiffs. I do not think the evidence before this Court leads to that conclusion here. The Judge attached considerable weight to this factor and in my opinion he was entitled to do so.

93. In these circumstances, I am not satisfied that it can confidently be said the remedy in damages would, for the Agent, "be necessarily commensurate with any possible injury as to preclude the possibility of the grant of an injunction." That is not to say that damages would not be an available remedy at trial – clearly they would – but rather that the interests that the Agent is seeking to vindicate in these proceedings extend beyond the purely financial and, in my view, there is a very real risk that, if the injunctions granted by the High Court were to be discharged, and if the Agent is successful at trial, an award of damages at trial in respect of the intervening period will not adequately vindicate those interests."

116. The plaintiffs' circumstances are at a considerable remove from what was at issue in *Betty Martin Financial Services.* To my mind, (and indeed as the Judge observed) the present case is one where principle 5 of the principles set out by O'Donnell J. at the conclusion of his judgment in *Merck* is apt:

"(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."

117. Mindful of course of O'Donnell J.'s injunction in *Merck* that the adequacy of damages as a remedy must be assessed within the balance of justice as a whole, it is thus necessary to look at the other factors in this case which I consider have a bearing on the balance of justice.

118. The plaintiffs' total borrowings in 2006 amounted to in excess of €600,000. As of June 2022, their indebtedness was in the region of €700,000. Even if the plaintiffs are correct in asserting that no interest was due after October 2008, their debt is still substantial. All of this is against a backdrop of 10 years of no repayments by the plaintiffs on the loans and where they had access to the rental income on the properties without accounting for same to the receivers.

119. It was only in June 2020, some eight years after they stopped paying the mortgages, that the plaintiffs raised the interest rate issue for the first time**.** Whilst I accept that the Judge erred in stating, at para. 25 of the judgment, that there was no evidence that the plaintiffs had queried or challenged the interest rate at any stage prior to the issue of the proceedings in September 2020 (the issue having been raised in correspondence on 9 June 2020 and 20 July 2020), the fact of the matter is that there is simply no evidence that the plaintiffs queried or challenged the interest rate at any stage between October 2008 and June 2020.

120. Furthermore, the plaintiffs have not tendered any explanation for the non-payment of the loans. There is also clear evidence that as a result of the plaintiffs' actions the receivers were not in a position to act or collect rent up to 2022. It is noteworthy that the plaintiffs' undertaking in relation to the rental income was given only at the last minute.

To my mind, the Judge failed to give sufficient weight to the overall indebtedness of the plaintiffs, their long history of non-payment of their loan accounts, and their failure to account to the defendants for any rent received by them historically until the offer at the hearing in the court below to hold the rental income in escrow pending the determination of the proceedings.

121. I also consider it of relevance that the plaintiffs have failed to address the balance of convenience issue in any meaningful way, either in the High Court or on appeal.

122. It is also noteworthy that the Judge's assessment that balance of justice favoured the plaintiffs was predicated on a very narrow premise, namely the absence of any undertaking from the defendants that if the receivers obtained possession of the Properties they would not, in advance of the trial of the action, attempt to exercise their power of sale. The Judge considered therefore that if a power of sale was sought to be exercised, it would not be an efficient use of the parties' resources if the plaintiffs had to come to court again and re-apply for injunctive relief.

123. The Judge's determination in that regard was made at a time when the proceedings were at an early stage (where no statement of claim had been delivered) and, thus, the prospect of a trial was remote. However, as I have earlier remarked, the proceedings are now far more advanced with the statement of claim having been delivered in October 2022 and a request for voluntary discovery in train (and presumably by now also the defendants' defence filed and any requisite reply filed). Moreover, the parties have their expert reports on the "ECB rate", as their respective affidavits demonstrate. All of this means that the likelihood of an early trial is a real prospect. This constitutes a further factor in tipping the balance of justice in favour of refusing the plaintiffs' injunctive relief.

124. When viewed in the round, and in the context of my finding that damages would be an adequate remedy for the plaintiffs, all of the foregoing factors weigh heavily in favour of refusing the plaintiffs injunctive relief. It follows from what I have said that this therefore is not a case that the balance of justice is so finely balanced (to paraphrase O'Donnell J. in *Merck*) such that it is necessary or appropriate, before deciding on the balance of justice, to have regard to the strengths of the parties' arguments on what is meant by the term "ECB rate". As I have said, this will be decided by the trial judge at the hearing of the action having regard to the pleadings and the evidence.

125. Accordingly, for the reasons set out above, I would dismiss the plaintiffs' appeal and affirm the Order of the High Court.

Costs

126. The plaintiffs have not succeeded in their appeal. It would seem to follow that the defendants should be awarded their costs. If, however, any party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within 28 days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the 28-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

127. As this judgment is being delivered electronically, Donnelly J. and Pilkington J. have indicated their agreement therewith and with the orders I have proposed.