THE HIGH COURT

[2024] IEHC 50

[Record No.] 2020 1767 P

PHILIP ROGERS & SINÉAD ROGERS

Plaintiff

-V-

ALLIED IRISH BANKS PLC, EVERYDAY FINANCE PLC & LUKE CHARLETON

Defendant

Judgment of Mr. Justice Dignam delivered on the 15th day of January 2024.

Introduction

1. This is my judgment in respect of the plaintiffs' application for an interlocutory injunction restraining, inter alia, the sale by the second or third-named defendant (collectively "the respondents") of four parcels of land.

2. The plaintiffs seek an interlocutory injunction:

> *"…restraining the second and third named Defendants, whether by themselves, their servants or agents or otherwise, from advertising or offering for sale by public auction or otherwise, affixing notices on, taking possession of, trespassing upon, entering any contract or agreement to sell, or selling the lands comprising Folios LD1200, LD444, LD10706 and LD8562, County Longford."*

3. The substantive proceedings concern seven parcels of land. In those proceedings, the plaintiffs challenge the appointment of the third-named defendant ("Mr. Charleton") as receiver to those lands and seek an order, inter alia, directing him and the second-named defendant ("Everyday") to yield up possession of the lands. However, the application for an interlocutory injunction came about due to a proposed sale by Mr. Charleton of four of those parcels and therefore this judgment is concerned with those four parcels.

4. The proceedings were instituted by a Plenary Summons of the 4th March 2020 and a Statement of Claim was delivered on the 9th April 2021. On the 9th July 2021, the plaintiffs applied for short service of this Motion. The application for short service (and the application for the injunction) was grounded on an affidavit of the first-named plaintiff ("Mr. Rogers") of the 7th July 2021. There then followed an exchange of affidavits, with Mr. Charleton swearing an affidavit on the 26th July 2021, Mr. Rogers swearing a further affidavit on the 9th September 2021, Mr. Charleton replying on the 17th December 2021 and Mr. Rogers replying to that affidavit by his own affidavit of the 18th January 2022. An affidavit of the solicitor for the respondents was delivered immediately before the hearing (after the plaintiffs' written submissions were delivered). The plaintiffs objected to the admission of this affidavit on the basis that it was delivered after the exchange of affidavits was closed, after the plaintiffs' submissions were delivered and without the leave of the court. Both parties agreed that it should be furnished to the court and that I would deal with whether or not it could be admitted in the course of this judgment. I am satisfied that this affidavit should be admitted. I deal with this point later on in this judgment.

Background

5. In summary, the background to this application is as follows. It is important to note that there are some disputes of fact between the parties and there are some areas in which it is unclear whether there are such disputes. For example, the plaintiffs deny that they have a personal liability on foot of a facility letter of the 9th March 2010 (which is a key document) but it is not clear whether they deny that they borrowed monies on foot of this facility or simply that there is no remaining liability on foot of it. Thus, this summary of the background is simply what appears to be the case and does not constitute any finding on disputed or possibly disputed issues of fact.

6. The plaintiffs are the owners of seven parcels of land comprised in the following folios: LD1200M LD444, LD10706, LD8562, LD8585F, LD16126F AND LD14491F.

7. It seems that the plaintiffs borrowed monies from the first-named defendant ("AIB") on foot of three facility letters of the 28th August 2007, 17th December 2009 and 9th March 2010. These loans were secured by charges over various parcels of the lands the subject of the main proceedings. The loan on foot of the facility letter of the 9th March 2010 (for €130,000) was secured by a mortgage of the 1st March 2010 over the lands in Folios LD1200, LD8562 and LF5885 and Plan 7 of Folio LD444, i.e. the lands which are subject of this application. This charge was registered on the folios on the 3rd March 2010.

8. A company, Terracotta Construction Limited, also borrowed monies from AIB. This loan was secured by a mortgage over separate lands. These borrowings were guaranteed by the plaintiffs on the 14th December 2011 up to a maximum of €848,000. These guarantees were to be supported by security. I was not brought to any document in the exhibits which identifies the security but it appears to be common case that the four parcels of land were at least part of that security for the guarantees and I am proceeding on that basis.

9. By letters of demand to each of the plaintiffs dated 9th July 2015, AIB demanded payment of €129,660.20, the sum claimed to be due on foot of the facility letter of the 9th March 2010. By other letters (of the 20th August 2015), AIB demanded payment from each of the plaintiffs on foot of their guarantees of the liabilities of Terracotta Construction Limited.

10. AIB and AIB Mortgage Bank issued summary proceedings against the plaintiffs on the 10th February 2016 in respect of their guarantee obligations, the sums due on foot of the facility letter of the 9th March 2010 and a separate alleged facility. Those proceedings were not progressed by AIB.

11. By a global deed of transfer dated the 2nd August 2018, amended and restated on the 2nd October 2018, the plaintiffs' loans, AIB's security over the lands, and the plaintiffs' obligations under the guarantees were transferred to Everyday. Everyday's ownership of the charge over the relevant four folios (i.e. the mortgage of the 1st March 2010) was registered on the folios on the 20th December 2018. The transfer is one of the issues on which the plaintiffs' position is unclear. In paragraph 15 of the first affidavit sworn by Mr. Charleton, he said "*The plaintiffs have not challenged Everyday's interest in*

the said facilities and ancillary security documents" but in paragraph 17 of Mr. Rogers' second affidavit he says "*Mr. Charleton is also completely incorrect to aver that "[t]he Plaintiffs have not challenged Everyday's interest in the said facilities and ancillary security documents*." *From the time of the purported transfer of interest to Everyday I have challenged it, first personally and latterly through my Solicitor and through these proceedings*." However, there is no other evidence of Mr. Rogers or his solicitor having done so and it was not one of the grounds advanced on this application. In any event, Everyday's ownership is registered on the four folios and, subject to a possible issue about Folio LD444, this seems to me to be conclusive.

12. After this transfer, by letter of demand of the 13th September 2019, Everyday demanded repayment by the plaintiffs of the sum of approximately €156,000 which was stated to be due on foot of the facility of the 9th March 2010. They also demanded payment of the sums claimed to be due under the facilities of the 28th August 2007 and the 17th December 2009. By letter of the same day, Everyday also demanded payment by Terracotta Construction on foot of its loan with AIB. There is no evidence of any demand being made by Everyday on foot of the guarantees and, indeed, the plaintiffs do not claim that any such demand was received by them.

13. It seems that the plaintiffs did not reply to these demands.

14. By instruments of the 7th October 2019, Everyday appointed Mr. Charleton as receiver over the four parcels of land which are the subject of this application. They did so expressly by reference to the Deed of Mortgage and charge of the 1st March 2010. Mr. Charleton was also appointed as receiver of the lands in folios LD8585F, LD16126F and LD14491F by reference to mortgages of the 4th February 2000, 5th January 2010 and 9th October 2007 respectively but these are not in issue on this application.

15. The plaintiffs instituted these proceedings by Plenary Summons of the 4th March 2020 and delivered a Statement of Claim on the 9th April 2020.

16. In June 2020, the plaintiffs became aware that Mr. Charleton had placed the four parcels of land for sale by auction with Wilsons Auctions and that the auction was due to take place on the 14th July (subsequently postponed to the 28th July 2020).

17. The plaintiffs made an ex parte short service application on the 9th July 2021 of the motion seeking the interlocutory relief set out above. There then followed the exchange of affidavits referred to above.

Legal Principles

18. The approach to an application for a prohibitory injunction was set down in *Campus Oil v Minister for Industry and Energy (No. 2) [1983] IR 88)* and was restated in *Okunade v Minister for Justice & Ors [2012] 3 IR 152* and then recalibrated by the Supreme Court in *Merck Sharpe & Dohme v Clonmel Healthcare [2019] IESC 65* where O'Donnell J set out an eight step approach.

19. In the circumstances of this case, and in light of the bases upon which it was argued, it is not necessary to consider all of these steps in detail. While the respondents did raise the point that the plaintiffs had not sought a permanent injunction in the substantive proceedings, essentially the case turns on whether the plaintiffs have established that there is a fair, serious or bona fide (these terms being used interchangeably) question to be tried and, if so, how best matters should be arranged pending trial (which involves a consideration of whether the balance of convenience/justice favours the grant or refusal of the injunction, including a consideration of whether damages would be an adequate remedy). The first consideration is often described as a "*threshold*" test in the sense that if the applicant does not reach that threshold, then he is not entitled to an injunction and the Court does not need to consider the balance of justice or how matters should be arranged pending trial. That threshold, in the case of a prohibitory injunction – whether there is a fair or serious or bona fide question to be tried - is a low hurdle. Barniville J in *O'Gara v Ulster Bank Ireland DAC [2019] IEHC 213* described the test in the following terms:

> *"It may be helpful to view the threshold in terms of requiring a plaintiff who seeks an interlocutory injunction to demonstrate that there is a question or issue which would withstand an application to dismiss…as disclosing no reasonable cause of action or as being frivolous or vexatious. The threshold is of that order and so unless the case is un-stateable, it is generally not a difficult threshold to meet."*

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

> *"neither party takes issue with the judge's view that the requirement to show a fair question/serious issue does not mean that the Agent must establish a very strong case and that the threshold to be surmounted is generally recognised as low (paragraph 11 of the judgement under appeal). It may be useful to regard*

this threshold as akin to the threshold that applies where a party seeks to dismiss a claim against it pursuant to the inherent jurisdiction and that was the approach taken by the High Court in a number of decisions cited to us including Wingview Ltd v NS Property Finance DAC (per Haughton J, paragraph 14) and O'Gara v Ulster Bank DAC (per Barniville J paragraph 42)"

21. There is some discussion in the case law of the need to adopt whatever course would carry the least risk of injustice and to avoid the *Campus Oil* principles being applied in a "*purely formalistic fashion*" (*Shelbourne Holdings, Torriam Hotel Operating Co. Ltd [2015] 2 IR52* and *Wallace v Irish Aviation Authority [2012] IEHC 178*). Indeed, O'Donnell CJ referred in *Merck Sharpe and Dohme* to the flexible nature of the injunction remedy. However, I do not understand any of these authorities to suggest that there should not be a threshold test. Nor was this argued by the plaintiffs.

Fair Question

22. The plaintiffs argue that they have established a fair question to be tried on a number of different bases.

23. The only claim that is made in the Statement of Claim is that the appointment of Mr. Charleton as receiver was based on guarantees entered into by the plaintiffs in respect of the liabilities of Terracotta Construction Limited and that those guarantees are void, invalid, of no legal effect and unenforceable. In the Statement of Claim, they are alleged to be void, invalid, of no legal effect and unenforceable because (i) they were not supported by valid consideration, (ii) were obtained by economic duress, or (iii) were released, deleted and no longer relied upon by AIB prior to it transferring its relevant interests to Everyday. However, the plaintiffs' grounding affidavit proceeded solely on the third point, i.e. that the guarantees had been released or deleted and nothing was said about points (i) and (ii). Nor were submissions made on those points.

24. When the plaintiffs' written submissions were delivered, they sought to expand on the case pleaded. In addition to the claim that the guarantees had been released or deleted they also sought to make three new points: (i) the respondents could not appoint a receiver because Everyday had not been registered as owner of the relevant charges on the relevant folios; and (ii) the respondents had failed to adduce any evidence that Everyday enjoyed a contractual power to appoint a receiver in respect of the four folios; and (iii) Everyday and Mr. Charleton are not entitled to sell the lands in

the manner in which they proposed to do because they do not enjoy vacant possession and are not acting reasonably in attempting to sell the lands with a tenant still in occupation. Of these three additional points, the first had been adverted to obliquely in the exchange of affidavits. The other points had not even been raised in the exchange of affidavits and were made for the first time in the written submissions.

25. When the applciation came on for hearing, the plaintiffs sought to make the following points: (i) Everyday did not have a valid charge over Folio 444 because the AIB charge (which Everyday purported to take) had already been cancelled on the date of transfer; (ii) the Deed of Appointment appointing Mr. Charleton relied on a contractual power of appointment but Everyday had not evidenced a contractual power to appoint a receiver because the mortgage document which was exhibited did not contain such a power; and (iii) a mortgagee with a power of sale must proceed reasonably and must market the property in such a way as to obtain the best price reasonably obtainable and that the sale or marketing process engaged in for these properties did not comply with this obligation, i.e. versions of the three additional points. What is striking about this is that the plaintiffs did not place any reliance on the fundamental point in the Statement of Claim and the grounding affidavit, i.e. in relation to the alleged release of the guarantees.

26. There is an issue about whether the plaintiffs are entitled to raise any of these additional points in circumstances where they are not grounded in the case pleaded in the Statement of Claim and were not raised (or, in the case of the claim that Everyday had not been registered as owner of the charge on folio 444, not raised in direct terms) prior to delivery of the written submissions. The respondents objected to them being raised. They submitted that the plaintiffs' in their submissions had sought to reformulate their application by disputing the appointment of the receiver on a "*broad swathe*" of grounds, which had not been pleaded and that this was impermissible. They went on to submit: *"The plaintiffs have chosen, one must assume deliberately, not to challenge the appointment on those grounds in the pleadings. Unpleaded issues, which do not form part of the Plaintiffs' case, cannot provide a legitimate foundation for seeking injunctive relief."* It is undoubtedly the case that the plaintiffs could have pleaded some of the additional points sought to be relied upon but did not. For example, the argument that is made by the plaintiffs in respect Everyday's ownership of the charge on folio 444 could have been pleaded in the Statement of Claim but was not and no explanation is given for this. However, some other grounds, such as the claims about the method of sale, could not have been pleaded because they only arose after the Statement of Claim was

delivered, i.e when the sale process was commenced. An application to amend the Statement of Claim could, of course, have been brought.

27. It seems to me that insofar as issues could have been pleaded but were not the Court would be entitled to simply refuse to consider them. However, in circumstances where the defendants have been able to address the substance of these points in their submissions and in a supplemental affidavit, I think it more appropriate for me to consider the points on their merits. However, the fact that the points were not pleaded, mentioned or raised directly in the exchange of affidavits, has an impact on how they should be addressed.

28. While the release of the guarantees was not pushed as a point at the hearing, in circumstances where it is the fundamental (and only) point in the Statement of Claim and was dealt with in the written submissions, I propose to consider it and then to consider the other points.

Release of the guarantees

29. The plaintiffs are the registered owners of the lands contained in Folios LD1200, Plan 7 of Folio LD444, Folio LD10706 and Folio LD8562. On the 14th December 2011, the plaintiffs guaranteed the payment to AIB of certain liabilities of Terracotta Construction Limited up to the sum of €848,000.000 and interest. It is common case that these guarantees were secured by charges on the folios. The plaintiffs make the case that at some stage between that date and the 23rd May 2014, AIB released, deleted and ceased to rely on the guarantees and that they then wrongfully on the 26th May 2014 purported to reinstate the guarantees. The plaintiffs claim that AIB acted in breach of contract in not informing the plaintiffs of the release or reinstatement of the guarantees. Their case is that Everyday can therefore not rely on the guarantees. The plaintiffs make this case on the basis of contents of documents which Mr. Rogers inspected in a solicitor's office in December 2016. Those documents consist of a set of internal emails of the 23rd and 26th May 2014. The email of the 23rd May is headed "*Re: Terracotta Construction Ltd SIN41233721 G'tee Sinead Rogers SIN 44676176 G'tee Philip Rogers*" and states:

> "*The above SIN numbers have been deleted on the system. Could they please be reinstated and a copy sent to the address below. The customers have not been advised that the g'tees were no longer relied upon. G'tees were approved subsequent to the above SINS but the case did not proceed to full drawdown.*"

By email of the 26th May 2014 that original email seems to have been forwarded on with an email stating "*Please see below request re released guarantees.*" An email was then sent to the author of the original emails saying "*Before we can re-instate the guarantees we require confirmation that the GUARANTORS have NOT been notified of the release.*" That confirmation was given shortly later.

30. The burden of proof is on the plaintiffs to establish that these emails have the meaning which they ascribe to them. It seems to me that there is a strong possibility that these are simply evidence of an administrative error on the part of employees of AIB. The fact that there was no correspondence with the plaintiffs to inform them of the release and no formal documentation strongly suggests that it was simply an administrative error (this is reinforced by the terms of the emails themselves) and that the plaintiffs' reliance on them is opportunistic. However, at this stage all the plaintiffs have to do is establish that there is a fair question that they amount to a release of the guarantees and, particularly in the absence of any evidence from AIB (which could have been adduced by the respondents) the possibility that a court may be satisfied at the trial of the action that the effect of the documents was to release the guarantees can not be excluded. Having regard to the low bar for a prohibitory interlocutory injunction (as set out in *O'Gara*) it seems to me that the plaintiffs have established a fair question that the guarantees were released.

31. However, that in itself is not determinative because the real issue is whether Mr. Charleton was appointed on foot of the guarantees. The plaintiffs must establish a fair question that this was the case. It is the respondents' case that the appointment of Mr. Charleton was grounded on the separate personal indebtedness of the plaintiffs (and not on the guarantees) and the proposed sale of the four parcels of land is based on the security held for that indebtedness (and not on the guarantees). The guarantee point, it is submitted, is a red herring in circumstances where Everyday did not rely upon the guarantee liabilities when appointing the receiver.

32. I am not satisfied that the plaintiffs have established a fair question that Mr. Charleton was appointed on foot of the guarantees. There is simply no evidence to support such a conclusion. While AIB demanded payment on foot of the guarantees in July 2015, there is no evidence of Everyday having demanded payment on foot of the guarantees. The only relevant demand letters from Everyday were the letters of the 13th September 2019 which demanded payment on foot of the loan facility of the 9th March 2010 and a demand letter to Terracotta Construction. There was no demand letter to the plaintiffs on foot of the guarantees. Finally, Mr. Charleton swore that *"[T]he liabilities of*

the plaintiffs under the Guarantees were not, and are not, relied upon to ground Everyday's entitlement to appoint me as receiver." While it appears to be common case that the guarentees are secured by the same mortgage of the 1st March 2010, in the absence of any demand by Everyday for payment on foot of the guarantee, I see no basis upon which I could conclude that the plaintiffs have established a fair question that Mr. Charleton was appointed on foot of an indebtedness under the guarantees. In these circumstances the plaintiffs' claim that Everyday appointed the receiver on foot of the guarantee is a mere assertion. That is insufficient to discharge even the low threshold required.

33. That seems to me to determine this ground as it was advanced. However, that raises the question of whether there is a fair question to be tried about Everyday's entitlement to appoint a receiver on the basis of personal indebtedness on foot of the facility of the 9th March 2010 because if there is a fair issue about this then in circumstances where Everyday were not relying on the indebtedness under the guarantee, I would have to consider that there must be a fair issue about Everyday's entitlement to appoint the receiver. In short, Everyday relies on personal indebtedness secured by the mortgage of the 1st March 2010. If I am satisfied that there is a fair issue about this indebtedness then I must conclude that there is a fair issue about the appointment of Mr. Charleton. This was not pleaded by the plaintiffs. Nonetheless, I have considered it in circumstances where the plaintiffs have made certain averments putting their personal indebtedness in dispute.

34. The manner in which the question of personal liabilities is dealt with in both sides' affidavits is confusing because they deal with overall liabilities on foot of a number of different personal facilities, some of which are irrelevant to this application. The only personal facility which is relevant to this application is that of the 9th March 2010 because that is the one which is secured by the relevant lands.

35. In the grounding affidavit, Mr. Charleton said that the aggregate personal indebtedness on the 23rd July 2021 was in the amount of €513,436.39. This was on the basis of four facilities, one of which was that of the 9th March 2010. He also said that *"[T]he plaintiffs do not in these proceedings dispute their personal liabilities under the plaintiff's facility letters".* He did not give a breakdown between the amounts due on foot of the different facilities in the body of the affidavit though the letters of demand exhibited to his affidavit state how much was due on three of the facilities on the 13th September 2019. The letter of demand in respect of the 9th March facility is exhibited and states that the amount due at that date was €156,665.11. There is no evidence of any replies to this demand.

36. In the plaintiffs' replying affidavit, Mr. Rogers states that Mr. Charleton is wrong to suggest that the personal liabilities are not disputed by the plaintiffs. However, it is entirely unclear what personal indebtedness the plaintiffs say is disputed. It is clear that they are disputing that they have a total personal indebtedness of €513,436.39 but he does not deal in any detail at all with the alleged indebtedness on foot of the facility letter of the 9th March 2010.

37. By contrast, he specifically deals with other alleged personal indebtedness. For example he points out that Mr. Charleton did not exhibit the facility letter of the 17th July 2013 to which he had referred and also accepts that the plaintiffs have a personal liability in respect of one of the other loan facilities referred to by Mr. Charleton, i.e a facility of the 28th August 2007, but that he does not know how much is now claimed to be due and owing on this facility. He also averred that he was certain no monies were loaned to him or the second-named plaintiff in 2013.

38. It is striking that the plaintiffs do not specifically address the alleged indebtedness which is secured on the properties which are the subject of this application. The furthest Mr. Rogers goes is to say that (i) he does not know what monies or even if monies were advanced to him in 2009 or 2010 and that he has not been furnished with documents substantiating the amounts claimed and (ii) he has not been given an opportunity to meet the claim brought by AIB and therefore does not accept that the monies are due and owing. The reference to "*the claim brought by AIB*" is a reference to the Summary Summons proceedings brought by AIB against the plaintiffs and Terracotta Construction (2016/2355). AIB was seeking judgment in the sum of €644,495.65 plus interest on foot of the guarantees and in the sum €129,660.20 on foot of personal indebtedness. I understand Everyday has been substituted as plaintiff. Mr. Rogers did not exhibit these proceedings and does not even say that this claim is on foot of the facility letter of the 9th March 2010. However, it was subsequently accepted by Mr. Charleton that those proceedings involve the plaintiffs' liabilities under that facility letter.

39. I find both of these to be unconvincing even for the purpose of establishing a fair question.

40. In respect of the first point, letters of demand on foot of the facility of 9th March 2010 were sent in 2015 (by AIB) and 2019 (by Link, acting for Everyday) and there is no evidence or even an assertion that the plaintiffs even replied to those letters to question or challenge the claimed indebtedness.

41. In relation to the second, the point that Mr. Rogers makes about the summary proceedings is that he disputes a personal liability (subsequently clarified to be under the 9th March letter) but has not been given an opportunity to set out his defence and the basis for disputing the indebtedness because AIB have not prosecuted those proceedings. There is no reason whatsoever why he could not have set out his defence or the basis upon which he says the plaintiffs do not have a liability under the relevant facility letters (9th March 2010) in these current proceedings. He does say that his solicitor has clearly stated his intention to defend the proceedings in correspondence and that "*the repeated assertion by Mr. Charleton that there is no dispute as to the existence and extent of personal indebtedness is, whether intentionally or not, misleading.*" However, in the solicitor's correspondence referred to, the only "*grounds of Defence and Counterclaim*" referred to relate to the guarantees (the alleged lack of consideration and the alleged release) and it does not address the claimed personal indebtedness at all. The letter does state that the grounds of defence and counterclaim "*will include, inter alia*" those grounds relating to the guarantees, thereby suggesting that there might be others, but one would expect that if there were other grounds, particularly those relating to personal indebtedness, they would be set out.

42. It was open to the plaintiff to specifically deny that there was any personal indebtedness relevant to the lands the subject of this application and to set out the basis on which they say they have no liability and did not do so. There is simply no basis upon which the Court could conclude that there is a fair issue to be tried in respect of such indebtedness.

43. In those circumstances, I am not satisfied that the plaintiffs have established a fair question that the receiver was appointed on foot of the guarantees or, insofar as it is raised at all, a fair issue that the plaintiffs were not indebted to Everyday on foot of the facility of the 9th March 2010 (which was secured by the mortgage of the 1st March 2010). Of course, this does not amount to a finding that the plaintiffs are in fact so indebted.

No evidence of a contractual power to appoint a receiver or to sell the lands

44. Mr. Charleton was appointed as receiver by instruments of appointment which were expressly made in pursuance of powers contained in the mortgage of the 1st March 2010. The mortgage deed was exhibited by Mr. Charleton in his replying affidavit. However, that deed expressly incorporated the AIB Mortgage Conditions (2009 Edition)

but these conditions were not exhibited. The deed itself (which was exhibited) did not contain any provision for the appointment of a receiver.

45. In those circumstances the plaintiffs submitted in their written submissions that there was no evidence of a contractual power to appoint a receiver. It was submitted at paragraphs 13 and 14 of the submissions:

> "13. *In the absence of proof from the defendants that Mr. Charleton was appointed in accordance with the terms of the AIB Mortgage Conditions (2009 Edition) and in the absence of proof of what is encompassed by the definition of "Total Debt" in those Conditions such as might trigger an entitlement to appoint a receiver, the plaintiffs have raised a fair question to be tried, being that Everyday does not have a contractual power to appoint Mr. Charleton as receiver in respect of the farm lands the subject matter of this interlocutory motion…*
>
> *14. It is further submitted that there is a good arguable case that the defendants are not entitled to sell the farm lands, on the basis that the two page copy deed dated 1 March 2010 exhibited by Mr. Charleton is entirely insufficient to prove that any liabilities of the plaintiffs to Everyday are secured over the farm lands."*

46. This was the first time these points were raised in any way by the plaintiffs. They were not raised in the pleadings (they could not have been in circumstances where the issue only came to light during the exchange of affidavits) or in either of the two affidavits which Mr. Rogers swore after Mr. Charleton had delivered his affidavit in which he exhibited the mortgage deed without the 2009 Conditions.

47. It was to address this point that the respondents sought to deliver a further affidavit immediately prior to the hearing. This affidavit (of Mr. Edward Kane, the respondents' solicitor) explained that through an oversight the applicable mortgage conditions were not included when the mortgage was exhibited to Mr. Charleton's affidavit. He exhibited the applicable conditions.

48. This is the affidavit which the plaintiffs objected to being admitted. The parties were agreed that it should be handed in and that I should deal with whether or not it could be admitted in the course of my judgment. I am satisfied that it should be admitted. As noted above, the first time that the complaint or argument that there was no evidence of a contractual power to appoint a receiver or that any liabilities of the plaintiffs to Everyday were secured over these parcels was adverted to was in the

plaintiffs' written submissions. Mr. Charleton swore his affidavit in which he exhibited the incomplete mortgage on the 26th July 2021. Mr. Rogers replied by affidavit on the 9th September 2021 and did not advert to these points or to the absence of the mortgage conditions from the exhibit. He swore a further affidavit (in reply to Mr. Charleton's second affidavit) on the 18th January 2022 and again did not advert to these issues. These were detailed affidavits in which the plaintiffs joined issue with very many points made in Mr. Charleton's affidavits. He could have raised these points and it would have been open to the respondents to deal with them by way of affidavit in the normal exchange of affidavits. However, it was only raised in the written submissions. It is not a matter for the respondents to prove points which have not been raised by the plaintiffs. In those circumstances, it would be entirely unfair for the plaintiffs to be permitted to raise these points in their written submissions for the first time and for the court to consider them but for the respondents not to be permitted to address the points by affidavit. I am fully satisfied that the affidavit should be admitted.

49. Condition 11 of the mortgage conditions is a full answer to the point that there is no evidence of a contractual power to appoint a receiver. It provides at 11.1:

> *"At any time after the Mortgagor so requests or the security hereby constituted becomes enforceable, the Lender may (i) in relation to a Housing Loan Mortgage, in compliance with the Act exercise its statutory power to appoint a receiver under seal or under the hand of a Designated Officer of the Lender or (ii) in relation to any Other Mortgage, appoint under seal or under the hand of a Designated Officer of the Lender, a receiver. Any receiver so appointed is herein called a "**Receiver**" (which expression shall where the context so admits include the plural and any substituted receiver or receivers). The provisions of Section 108(1), (2), (4), (7) of the Act shall not apply to any Other Mortgage."*

50. In relation to the point that in the absence of proof of what constitutes the "*Total Debt*" there is insufficient proof that any liabilities to Everyday are secured over the four folios, the Mortgage Deed identifies the mortgaged property as the property comprised in Folios 8562, 1200, 10706 and Plan 7 of Folio 444 County Longford and the mortgage conditions state that the mortgage (over those properties) shall be security for the plaintiffs' liabilities to AIB (whom Everyday succeeded). "Total debt" is defined as:

> *"(a) all amounts payable by the Mortgagor in respect of any loans or credits of any nature made or granted by that Lender to the Mortgagor now or at any time*

in the future in whatever currency (including, without limitation, principal, interest, costs and expenses and all amounts payable by the Mortgagor under any letter of offer, loan agreement or contract involving an extension of credit of any nature made by that Lender to or with the Mortgagor now or at any time in the future), in each case, under terms which require the Mortgagor to provide or maintain this Mortgage as security therefor; and

(b) all amounts, liabilities, obligations (either actual or contingent) which the Mortgagor may owe to that Lender now or at any time in the future in whatever currency and whether on any current account or otherwise in any manner whatsoever as principal debtor, whether alone or jointly and severally or severally with any other person, in each case, under terms which require the Mortgagor to provide or maintain this Mortgage as security therefore;

(c) all amounts, liabilities, obligations (either actual or contingent) which the Mortgagor may owe to that Lender now or ant any time in the future in whatever currency and in any manner whatsoever under any guarantee, indemnity or other contract of surety, whether alone or jointly and severally or severally with any other person; and

(d) all Expenses incurred by that Lender in accordance with the terms of this Mortgage on the basis of a complete, unlimited and unqualified indemnity to that Lender by the Mortgagor and all other amounts which the Mortgagor is liable for under this Mortgage"

51. Condition 3 provides:

"3.1 The Mortgagor hereby covenants with each of the Lenders to pay the Total Debt owing to each lender in accordance with this mortgage. This mortgage shall be security for the Total Debt owing to each Lender, whether or not the Lender holds other security.

3.2 The mortgage shall secure the Total Debt owing to each Lender severally but not jointly".

52. I am therefore not satisfied that the plaintiffs have established a fair question that there is no evidence of a contractual power to appoint a receiver or that Everyday did not have such a power. Nor am I satisfied that there is a fair question that the mortgage (when read with the conditions) is insufficient to prove that the alleged liabilities under the facility of the 9th March 2010 are secured over the four folios.

No valid charge over Folio 444

53. The plaintiffs claim that Everyday does not have a valid charge over Folio 444 because the AIB charge (which Everyday purported to take) had already been cancelled on the date of the purported transfer to Everyday.

54. The plaintiff's argument is based on the contents of the folio. Entry No. 2a (dated 3rd March 2010) records a charge in favour of AIB Mortgage Bank. It then records that the ownership of the charge was transferred to Entry No. 2b on the folio and that the charge at Entry No.2a was cancelled on the 3rd November 2017. Entry No. 2b is a charge in favour of Allied Irish Banks plc. It is clearly the same charge as the one at Entry No. 2a as it is dated 3rd March 2010. The folio subsequently notes that "*The ownership of the charge has been transferred. See entry No.4*". Entry No. 4 (20th December 2018) states *"Everyday Finance Designated Activity Company is the owner of the charge registered at Entry 2a*." The plaintiffs essentially submit that this reference in Entry No.4 to the charge registered at Entry No. 2a is fatal because that charge had been cancelled before the transfer which is recorded at Entry No. 4. They rely on section 64(2) of the Registration of Title Act and *Harrington v Gulland Property Finance Limited & Ors [2016] IEHC 447*.

55. Section 64 provides, inter alia:

> *"(1) The registered owner of a charge may transfer the charge to another person as owner thereof, and the transferee shall be registered as owner of the charge.*
>
> *(2) There shall be executed on the transfer of a charge an instrument of transfer in the prescribed form, but until the transferee is registered as owner of the charge, that instrument shall not confer on the transferee any interest in the charge*."

56. In *Harrington v Gulland,* Baker J had to consider (in the context of an interlocutory injunction application) whether *Gulland* had a power to appoint a receiver where a transfer of a charge from Irish Bank Resolution Corporation to Gulland had not yet been registered. She distinguished a number of earlier judgments on the basis that in those cases the transmission of the security interest was effected by operation of law and therefore did not require registration and held:

> *"25. The legal issue raised by the plaintiff in the present case is the net question of the effect of s.64(2) of the Act of 1964 in circumstances where no statutory provision such as that contained in the Central Bank Act 1971 obviates the requirement of registration, as Gulland is not a licensed bank, and no transmission by operation of law can be shown.*
>
> *26. Instead, the transfer of the interest of the mortgagee was made by an instrument in the statutory form provided by the Land Registry Rules for the transfer of an interest in a charge. The provisions of s.64(2) are unambiguous and while it is not necessary that the interest of the mortgagee be transferred by means of a transfer in the prescribed form, and a different suitable form may be used, the instrument of assignment does not confer on the transferee any interest in the charge until the transferee is registered as owner of the charge. The statutory provisions are clear and the transferee does not take "any interest" in the charge, be that a security interest or a contractual entitlement.*
>
> *27. Accordingly, it seems to me that the plaintiffs have made out an arguable case that in the absence of registration, or some other means by which the interest in the charge has been transmitted or is deemed by statute not to require registration, that the contractual interest in the charge has not become transferred and therefore Gulland may not, in pursuance of the contractual power contained in that mortgage or charge appoint a receiver. It has not taken in the interest of the mortgagee because of s.64(2)."*

57. The plaintiffs' argument is simple; it is that Entry No. 4, on which Everyday relies to prove its ownership of the charge, refers to Entry No. 2a but the charge at Entry No. 2a had previously been cancelled prior to Entry No.4 and therefore Everyday is not properly registered as the owner of an effective charge. The plaintiffs go on to submit that there is therefore "*a fair question to be tried regarding whether, absent rectification of the Register by means of an appropriate application to the PRA, Everyday is properly*

registered as the owner of the charge dated 3 March 2010." Putting this in *Gulland* terms – the relevant charge is the charge at Entry No. 2b but Everyday is not registered as the owner of that charge and therefore has no powers under it.

58. This may well have been an error and the reference to "*Entry 2a*" in Entry No. 4 should in fact be a reference to "*Entry 2b*" and the gist of the respondents' argument was that I should interpret the folio accordingly. However, I do not believe that it is open to me to do so or to reach such a conclusion on an application of this type having regard to section 31 of the 1964 Act which provides, inter alia, that the "*register shall be conclusive evidence of the title of the owner to the land as appearing on the register…*"

59. The Court does retain a jurisdiction under section 31 to make an order directing the register to be rectified but it seems to me that an application for rectification must be brought as a separate application. In any event, no such application was made to me on behalf of the respondents.

60. In those circumstances, having regard to the low threshold identified in *O' Gara* and *Betty Martin*, I am satisfied that the plaintiffs have established a fair question that Everyday did not have the power to appoint a receiver to the lands in Folio 444 because they had not been registered as owner of the relevant charge.

61. It does, of course, remain open to the respondents to apply for rectification of the register under either section 31 (to the Court) or section 32 (to the Property Registration Authority). It was submitted on behalf of the respondents that if the Court was satisfied that this was the only fair question to be tried, they should be given an opportunity to make such an application subject to them giving appropriate undertakings. I will return to this when considering the balance of convenience/justice.

The defendants are in breach of the obligation to obtain the best price reasonably obtainable

62. The plaintiffs claim that Mr. Charleton is acting in breach of his obligation to obtain the best price reasonably obtainable in the manner in which he is going about the marketing and sale of the properties. They point to a number of alleged shortcomings in the marketing and sales process which they say amount to such a breach: the property is being sold without vacant possession; it is subject to a lease which the receiver seems to be unaware of; there has been no proper marketing and it has simply been advertised on the auctioneer's website; no prior notice of the proposed sale was given to the

plaintiffs; the sale is being attempted while these proceedings are in being. In oral submissions the plaintiffs also raised certain complaints about the contents of the advertisements. It was also submitted that there was a lower Advised Minimum Value ("AMV") for the properties than would be appropriate or expected and that this value was set in order to reflect the shortcomings in the marketing and sales process.

63. None of these points are pleaded in the Statement of Claim but that is not surprising in circumstances where the Statement of Claim was delivered before the plaintiffs became aware of the proposed sale. Nor were these points explicitly raised during the exchange of affidavits, other than the complaint about the plaintiffs not being on notice of the proposed sale. Even that complaint is raised as a simple statement of fact as part of the narrative or as a response either to the respondents' claim that Mr. Charleton had secured possession of the lands or that the plaintiffs had delayed in the proceedings and not as part of a complaint about the sales process.

64. Thus, the first time the plaintiffs actually raised any point about the manner of sale was in their written submissions. They said at paragraph 2(c) "*Everyday is not entitled to sell the lands, the subject matter of this motion, in the manner which it currently proposes, primarily because the defendants do not enjoy vacant possession and are not acting reasonably in rushing to sell the lands with a tenant still in occupation*" and at paragraph 24 and 25 they criticise Mr. Charleton for not putting "*any evidence before the Court concerning exactly what, if any steps, they took to market the farm lands"* and that "*leaves the Court none the wiser regarding what were those preparations [for sale] or actions. There is no evidence whatsoever of any active campaign by Mr. Charleton to effectively advertise, promote and market the lands for sale*". At paragraph 26 it is submitted that "*Mr. Charleton has made the deliberate choice to sell the lands with Mr. Creegan in occupation, which will result in a worse price being achieved at any auction than a sale with vacant possession*." At paragraph 28 it is submitted "*The plaintiffs submit that the defendants should be restrained from selling the farm lands, because they do not enjoy vacant possession and are not acting reasonably in rushing to sell the lands with Mr. Creegan still in occupation."*

65. In those circumstances, where the complaints had not previously been made, the respondents objected to these matters being raised. Nonetheless, counsel for the respondents dealt and was in a position to deal with the substance of the complaints on the basis of the evidence as it stood at the time. There was no suggestion that the respondents would wish to contest any of the factual premises for these submissions. Therefore, I am satisfied that the respondents were able to deal with the arguments. I

am therefore satisfied that I should consider these points but, as noted earlier in this judgment, the fact that the issues were not raised at an earlier stage has an impact on how they must be addressed.

66. The burden of proof of course rests on the plaintiffs. It is necessary to emphasise this in light of the above submissions, including that Mr. Charleton has not placed "*evidence before the Court concerning exactly what, if any steps, they took to market the farm lands*".

67. The plaintiffs rely on section 103 of the Land and Conveyancing Law Reform Act 2009, *Holohan v Friends Provident and Century Life Office [1966] IR 1*, and *Hennessy & Anor v Tyrell & Anor [2022] IEHC 109.*

68. Section 103 of the 2009 Act provides, inter alia:

> *"(1) In the exercise of the power of sale conferred by this Chapter or any express power of sale, the mortgagee, or any receiver or other person appointed by the mortgagee shall, notwithstanding any stipulation to the contrary in the mortgage, ensure as far as is reasonably practicable that the mortgaged property is sold at the best price reasonably obtainable."*

69. In *Holohan v Friends Provident* it was held (per the headnote) by Ó Dalaigh CJ, Lavery and Walsh JJ:

> *"1. that a mortgagee with a power of sale has not power to dispose of the mortgagor's property with the same freedom as if it were his own;*
>
> *2. that the question to be investigated in such an action is whether or not the mortgagee acted as a reasonable man would have acted in selling the mortgagor's property;*
>
> *3. that the conduct of the defendant company in refusing to consider an alternative mode of sale to that upon which they had decided and in refusing to examine the possibilities of obtaining a better purchase price by adopting such a method of sale was unreasonable conduct on their part;*
>
> *4. that the defendants should be restrained from completing the sale."*

70. The plaintiffs' claim is essentially that there is a fair issue that the manner of the proposed sale and the manner in which the lands have been marketed either ensures or could have the effect that they would be sold at a depressed price and is therefore in breach of the respondents' duty.

71. I am not satisfied that the plaintiffs have discharged the burden of establishing a fair question on these points. The plaintiffs have advanced no evidence and, in particular no expert evidence, in relation to these matters.

72. The core point about the alleged shortcoming in the sale and marketing is that the property is being sold without vacant possession. That this is the core point is clear from the excerpts from the plaintiffs' written submissions quoted above. As part of this they also state that the respondents do not even appear to be aware of the lease. This seems to me to be a debating point and is inconsistent with the plaintiffs' own replies to particulars and with the contents of the advertisements which state "*Please note these lands are occupied – further details on request*."

73. As a general rule it is not sufficient for a plaintiff, even at an interlocutory stage, simply to say that because lands are being sold without vacant possession there is a breach of duty on the part of the receiver. There are two aspects to such a claim: the first is whether the sale without vacant possession will lead to a lower price; and the second is whether, even if such a sale may or will lead to a lower price, it amounts to a breach of duty.

74. In relation to the first of these, a Court can accept as a general proposition that a sale without vacant possession is often likely to lead to a lower price than a sale without vacant possession. However, that general proposition can not be stretched too far. Whether a Court can or should accept, without expert evidence, that a particular sale without vacant possession is likely to lead to a lower price than if the lands were sold with vacant possession will depend on the facts of the case. For example, in many cases the Court could readily accept that a sale of land with the debtor still in possession would lead to a depressed price because any purchaser will anticipate, or be concerned, that they will face difficulty in obtaining possession. In other scenarios, such as, for example, where there is a tenant in place who is paying rent, it may not be open to a Court to conclude without evidence that a lower price will be obtained. It may well be, for example, that the existence of a rental stream would be attractive to some purchasers. In this case there is a tenant in place on foot of what Mr. Rogers describes as a long

lease (though no details are given). Furthermore, there is no evidence that any purchaser will experience any particular difficulty in obtaining possession in accordance with whatever agreement is in place. In those circumstances the Court can not simply accept even to the standard of a fair issue the assertion that a sale with that tenant in occupation will lead to a depressed price.

75. In relation to the second point, even if a Court is satisfied (either with or without evidence) that a sale without vacant possession is likely to lead to a lower price, it does not necessarily follow that such a sale amounts to a breach of the receiver's duty and a court could not simply accept that the sale at a lower price is a breach of duty. As Allen J put it in *Hennessy Tyrell & Everyday Finance [2022] IEHC 109* in holding that the purchase of lands with the farmer still in possession will probably, if not inevitably, lead to a depressed price "*it is not necessarily unreasonable for a mortgagee to take into account in deciding what it will do the time, effort and expense of what might turn out to be a protracted campaign of litigation to achieve vacant possession."* Thus, expert evidence will frequently be required to establish that the likelihood of a lower price without vacant possession constitutes a breach of duty. Such evidence will not be required in all cases. If, for example, a defendant does not offer any explanation as to why a property is being sold without vacant possession and, therefore, probably for a lower price than might otherwise be achieved, a Court could, and perhaps would often, safely conclude that the burden of establishing an arguable case was satisfied without expert evidence being adduced, particularly having regard to the low threshold as set out in *O' Gara* and *Betty Martin Financial Services*. However, that can only be the case where the defendant has had an opportunity to address the claim that they are acting in breach of duty by selling the property without vacant possession. A court could not, in general, conclude that a defendant is acting in breach of duty purely on the basis of the defendant not giving an explanation of why they are selling without vacant possession where the plaintiff has not even raised that point. That would amount to a reversal of the burden of proof. It would also be an unfair proceeding. In this case, the point was not raised in the exchange of affidavits either by way or evidence or assertion.

76. In circumstances where the plaintiffs did not raise these complaints in such a way as to provide the respondents with an opportunity to address them on affidavit and the plaintiffs did not adduce any expert evidence, I can not be satisfied that the plaintiffs have discharged the burden of proof in relation to the sale without vacant possession.

77. The plaintiffs also make other points about the marketing process itself, including that there has been no proper marketing, it has only been advertised on the auctioneer's

website and that the marketing period has been too short. At the hearing, specific complaints were made about the contents of the advertisements such as that they stated that the local village had a butchers shop, that "[*T]he lands are being sold as seen and not subject to planning*" and that "*the grass lands are said to be summer grazing lands*"

78. It is in general not sufficient for a plaintiff to simply assert that the sales/marketing process is deficient without some evidence to support it such as evidence as to what a reasonable vendor/auctioneer would do or would have done in the particular circumstances. There is, for example, no evidence of what the appropriate AMV should be (or what it would be if there were no shortcomings in the process) or of what the appropriate marketing period or methodology might be. For example, it may be that a month long advertising period is too short (the only evidence before the Court is that Mr. Rogers learned of the sale on the 16th June and the auction was due to take place on the 14th July) or it may be that there is a legitimate view that a short advertising period is most effective or that there are diminishing returns from a more extended period. Similarly, while it might be said that only advertising on the auctioneer's website limits the pool of possible purchasers, it may also be said that the costs incurred in placing advertisements elsewhere would not achieve a sufficient benefit for the cost involved. The Court can not speculate as to these matters and, in general, it is a matter for a plaintiff who wishes to rely on such factors to adduce the necessary evidence. The plaintiffs have adduced no such evidence and in those circumstances, I could not be satisfied that the plaintiffs have discharged the burden of proof.

79. I should say, that there may be cases which come on for hearing with urgency in which the courts may be satisfied that the burden of proof is satisfied even in the absence of such evidence. For example, Allen J did not require expert evidence in *Hennessy*. However, in that case the motion for an injunction was issued on the 17th February and it was heard on the 23rd February because the defendants were anxious to proceed with the proposed auction. This necessarily meant that the opportunities for the parties to deal with certain matters and to adduce evidence were more confined than in this case where there was a full exchange of affidavits over an extended period of time.

80. The plaintiffs place heavy reliance on *Hennessy v Tyrell* and I have considered whether there are sufficient similarities between the two cases to establish a fair issue on the question of the methodology and marketing process.

81. There are, of course, some similarities between the two cases, including, for example, a relatively short marketing period, the properties were only advertised on the

auctioneer's website and the properties were being sold without vacant possession. It appears from paragraph 23 of his judgment that Allen J was not disposed to grant an injunction merely on the basis that the defendant was proposing to sell without vacant possession and that what tipped "*the balance in this case is the apparent suddenness of the decision to sell; the absence, as far as the evidence goes, of any previous demand for possession; and the absence of any meaningful marketing of the land*".

82. The similarities should not be overstated and there are significant material differences between the two cases.

83. Unlike in this case, the core issue in the application in *Hennessy,* which was identified from the beginning, was whether the plaintiff had established a fair question to be tried as to the defendant's entitlement to sell the land in the way it proposed (see paragraph 14 in *Hennessy*). The defendant in *Hennessy* had himself identified three strands to the application, one of which was the marketing and sale of the property. The plaintiff agreed with this. This meant that unlike in this case the parties were engaged on this particular issue and the defendant had an opportunity to deal with it (the fact that they either pushed the matter on or were agreeable to it being heard within a very short time period must be taken to have been at their own risk).

84. Secondly, the evidence in *Hennessy* was to the auction on the 24th February 2022 appears to have only been first advertised at some point between the 2nd February and the 5th February (see paragraphs 10 and 11 of Allen J's judgment) so for a period of three weeks at the very most. However, a particular feature of *Hennessy* is that under the applicable standard form AIB charge, the first-named defendant receiver's power was limited to the collection of the rents and profits. It was common case that he did not have a power of sale, but that on the 28th January 2022, unbeknownst to the plaintiff, two deeds of appointment were executed by Everyday and Mr. Tyrrell appointing Mr. Tyrrell as agent for Everyday to market and contract to sell the lands. It was acknowledged that the first time the plaintiff could have known of this was on receipt of the replying affidavit of Mr. Tyrrell on the 22nd February, the day before the hearing. The evidence also was that there had been no demand for possession. It was this combination of factors which caused Allen J to refer to the "*apparent suddenness of the decision to sell... [the absence, as far as evidence goes, of any previous demand for possession; and the absence of any meaningful marketing of the land."*

85. The same factors do not apply in this case, or at least do not apply to the same extent. While the marketing period was still relatively short, it was longer than in *Hennessy*. There is no evidence of when it started but the evidence is that the first-named

plaintiff first became aware of the same on the 16th June. In the absence of any evidence as to when the sales were first advertised, I must take this as the start date of the sales process. The auction appears to have been scheduled for the 14th July (and was subsequently postponed to the 28th July). So there was a marketing period of four weeks. While this may still be relatively short it was not accompanied by the unknown appointment or change in status of the third-named defendant. He always had the power of sale, unlike the receiver in *Hennessy*. Furthermore, unlike in *Hennessy* where there appears to have been no previous demands for possession, in this case, according to the plaintiffs' own replies to particulars, the tenant had received correspondence from Mr. Charleton demanding that he vacate the land. There is no evidence of a demand for possession being made on the plaintiffs but there were demands made of the tenant, of which, according to paragraphs 8(b) and 11(a) of the plaintiffs' replies to particulars, which are quoted in Mr. Charleton's affidavit, the plaintiffs appear to have been aware. They said at paragraph 8 (b) of the replies:

> *"…The Receiver, by his servants or agents, sought to take possession of the land, posted notices on the land and communicated with the leaseholder…"*

At paragraph 11(a) they said:

> *"… [the tenant] also received correspondence directly from the third-named Defendant demanding that he vacate the land."*

86. Furthermore, in *Hennessy*, the person in possession was a company controlled by the plaintiff. As Allen J put it "*I do not overlook what might be described as the elephant in the room which is that the impediment to a sale of the lands with vacant possession is the presence on the land of Mr. Hennessy himself, whether in his personal or corporate incarnation. If Everyday were to apply in the prescribed statutory summary manner for an order for possession of the land to allow a sale with vacant possession I cannot think what answer there might be."* Thus, in that case, there was a very high likelihood that if the lands were sold without vacant possession the purchaser would be confronted with the aggrieved previous owner either as a tenant or a litigant seeking to challenge the sale. In this case, the tenant is a third party. It may be that a purchaser and the tenant would continue the commercial arrangement which appears to have been in place or the purchaser will exercise whatever rights they may have under whatever landlord and tenant relationship exists – the plaintiffs refer to it being a lease and I must accept that it is but there is no evidence of the period of the lease or of, for example, any break clauses. It is also important to note that Mr. Rogers says when dealing with the balance

of convenience and the adequacy of damages that he intends to resume possession of the lands in order to farm them himself and it must be taken from this that he does not envisage any difficulty in obtaining possession from the tenant. If that is the case this must apply equally to the purchaser.

87. In those circumstances, the matters that tipped the balance in *Hennessy* do not apply with anything like the same force.

Conclusion on the Fair Question

88. In all of those circumstances, I am not satisfied, notwithstanding the low threshold in *O' Gara* and *Betty Martin Financial Services,* that the burden of establishing a fair issue has been satisfied in relation to the alleged breach of the receiver's duty.

Balance of Justice

89. In those circumstances it is not necessary to consider the balance of convenience/justice including the adequacy of damages, save, perhaps, in relation to the relief sought insofar as it applies to the lands in Folio 444. I have found that the plaintiffs have established a fair question that the lands in Folio 444 can not be sold at least until the register is rectified, if it is rectified. In this regard, it was indicated on behalf of the defendants that they would provide an appropriate undertaking in respect of those lands pending an application in respect of the entries on that Folio. If an appropriate undertaking is forthcoming this will have the same effect as an injunction and I will therefore hold off a determination as to whether the balance of justice favours the grant of an injunction in respect of Folio 444 to provide an opportunity to the defendants to decide whether to grant such an undertaking.

90. I will list the matter on the 1st February for the purpose of ascertaining whether the respondents will provide such an undertaking, and, if not, to determine whether the balance of justice favours the grant of an injunction. I will also deal with the question of costs on that date.