THE HIGH COURT

Record no. 2024/1386 P

Between:

SEAN O'SHEA and MEAVE O'SHEA

Plaintiffs

- And -

DAVID O'CONNOR and EVERYDAY FINANCE DAC trading as LINK FINANCIAL

Defendants

JUDGMENT of Ms Justice Nessa Cahill delivered on 7 November 2024

INTRODUCTION

1. This is an application by commercial investors for certain injunctive relief concerning three buy-to-let properties in which they invested.

2. One of the properties has been sold and the Second Defendant ("***Everyday***") holds the proceeds of that sale; a receiver appointed by Everyday (the First Defendant, "***the Receiver***") is in control of, and collecting the rent payable in respect of the second property; and no steps have been taken by Everyday regarding the third property.

3. By the terms of the Motion as issued, the Plaintiffs seek to restrain the Defendants from taking possession of, and collecting rents from, the properties. They also seek to restrain the receiver from taking any further steps in the receivership.

4. The parties presented the primary question as being whether there is a serious issue to be tried. This was the focus of the submissions made. Both sides assert the balance of justice weighs in their favour. The Defendants also rely on an allegation of delay, and on the asserted insufficiency of the Plaintiffs' undertaking in damages, to defeat the injunction application.

5. There are some notable features of this Motion.

6. First, scant attention was paid to the balance of justice by either side (other than the delay and undertaking points just mentioned). The Plaintiffs' written submissions exemplify this and contain one reference to a "*risk of injustice*" and a single assertion that "*the balance of justice demands that the current position is maintained pending a full hearing*," without any factual explanation or elaboration of the alleged injustice (save for a suggestion that properties may be sold). The affidavit grounding this Motion contains only two sentences asserting – in bald terms – that damages would not be adequate if the properties were sold and there would be injustice if the receiver took possession of the properties, collected rents and/or sold the properties.

7. Second, there is no suggestion that either side has a connection or interest that it is other than purely financial in the properties. There are bare assertions of reputation and property rights by the Plaintiffs but there is no elaboration or explanation of these.

8. Third, there is no evidence before me that any person has any specific or imminent plans or intentions with regard to any particular property. This is not a case in which a mode of sale, selling price or indeed any specific pending development is being asserted to present a risk of imminent prejudice.

9. Another feature of this Motion that warrants mention is that it concerns three separate properties and different factual and legal considerations arise in respect of each. As adverted to above: one property has been sold, one is in the possession of the Receiver, and no steps have been taken to date in respect of the third. While the parties dealt with the Motion as a unitary application that pertains to the three properties, it will become necessary– particularly when it comes to the balance of justice - to address each property individually and independently of the others (without losing sight of the fact that there is cross-collateralization in favour of Everyday as between them).

BACKGROUND

10. The Plaintiffs are a husband and wife who have made commercial, buy-to-let investments in three properties ("***the Properties***").

11. In 2002 the Plaintiffs acquired Apartment 14, Inver Gael, County Roscommon ("***Inver Gael***").

12. On 28 March 2006, the Plaintiffs acquired 111 Celtic Park Ave, Dublin 9 ("Celtic Park"), part-funded by borrowings from AIB Mortgage Bank ("***AIBMB***") in the amount of €530,000, and also secured by cross-collateralization of Inver Gael.

13. On 28 March 2006, the Plaintiffs acquired 16 Lennox Street, Dublin 8 ("***Lennox Street***"), part-funded by borrowings from AIBMB in the amount of €500,000 and also cross-collateralized by Inver Gael;

14. On 5 September 2006, the Plaintiffs borrowed a further sum of €32,000 in respect of Inver Gael, bringing the total indebtedness in respect of that property to €172,500.

15. As of 2006, the total sum owed by the Plaintiffs to AIBMB was €1,202,500.

16. Each of the three mortgages were entered into between the Plaintiffs, on the one hand, and AIBMB and AIB plc (together, "***AIB***") and conferred a power to appoint a receiver and each of the mortgages operated as security for all liabilities of the Plaintiffs to AIBMB.

17. On 2 August 2018 AIB purported to sell the Plaintiffs' mortgages and loans to Everyday, by a global deed of transfer ("***the Transfer Deed***"). The Plaintiffs were notified of the transfer by letters dated 8 August 2018 (from AIBMB) and 15 October 2018 (from Everyday). An issue is raised in the Proceedings regarding this Transfer Deed.

18. Letters demanding payment of monies owing were sent to the Plaintiffs, including on 20 December 2020 and 7 June 2023.

19. Everyday appointed the Receiver in respect of two of the Properties, Lennox Street and Inver Gael, on 6 October 2023.

20. Since 6 October 2023 the Receiver has been in possession of Lennox Street and has collected the rent payable in respect of that property, amounting to €26,000. The Receiver also collected the rents on Inver Gael from that date.

21. Prior to 28 March 2024, the Receiver collected rent in the approximate amount of €3,500 (the figures set out in these paragraphs are as pleaded by the Plaintiffs in the Statement of Claim).

22. On 28 of March 2024, Inver Gael was sold. While it was asserted on behalf of the Plaintiffs at the hearing of this Motion that the Receiver sold Inver Gael, it appears to be common case that it was in fact Everyday which sold that property.

23. Everyday retains net proceeds from that sale of €173,078.52.

24. As of the date of this Motion, no receiver has been appointed, or steps taken, by Everyday in respect of Celtic Park.

25. According to the Defendants, as of 15 April 2024, the total amount due and owing on foot of the facilities is €1,440,297.16 and interest continues to accrue at a rate of 6.35%.

THE PROCEEDINGS

26. By Plenary Summons dated the 15 March 2024 the Plaintiffs seek sixteen orders against the Defendants. These include an interlocutory injunction to restrain the defendants from taking possession of Lennox Street., Celtic Park or Inver Gael, and to restrain the collecting of rents from the tenants of those properties. The Plaintiffs also seek an injunction to restrain the First Defendant from taking any further steps in the receivership of any of the properties in question. A declaration is sought that the appointment of the First Defendant as receiver is null and void and of no effect. The Plaintiffs seek an order directing the removal of the First Defendant as receiver and damages are sought under various headings.

27. As of the date of issue of the proceedings and as of the date of the hearing of this Motion, the Receiver was appointed as a receiver in respect of Inver Gael and Lennox Street. only. The Defendants gave a commitment on 20 March 2024 in the context of these Proceedings to take no steps with regard to Celtic Park pending the date to which that matter was adjourned on that date (which commitment is assumed to remain in place).

28. An appearance was entered on behalf of the Defendants on 20 March 2024. The Statement of Claim was delivered by the Plaintiffs on 9 October 2024, a week before the hearing of this motion.

29. The Plaintiffs' claims in the proceedings may be divided into five categories.

30. First, the Plaintiffs claim that the sale of Inver Gael was unlawful. The basis of this claim is the Plaintiffs' assertion that the mortgage owing on Inver Gael was fully repaid in 2019. The Plaintiffs claim that the First Defendant therefore took possession unlawfully

and that the sale of Inver Gael was also unlawful. This will be referred to as "***the Inver Gael Claim***".

31. Second, the Plaintiffs claim that it was a condition of the mortgage of Celtic Park that the mortgage payments were to be charged on an interest only basis for the first five years of the mortgage and that there would then be a review of the interest payable. The Plaintiffs claim that no review took place within five years of 2006 or at all. The Plaintiffs assert that during the negotiation of the loan and mortgages of Celtic Park and Lennox Street. they primarily engaged with Mr. David O'Mahoney, a manager in AIB mortgage bank. The Plaintiffs rely on a memorandum dated 7 March 2006 sent by Mr. O'Mahoney to the Plaintiffs in which it is stated that the payments would be "*interest only for five years and 'review' after interest only period*".

32. The Plaintiffs assert that no review ever took place in respect of Celtic Park and that this is a fundamental breach of contract by the Defendants. The plaintiffs further assert that AIB in 2011 unilaterally and without any review changed the permanent payment terms from interest only to capital and interest payments. This is referred to in this Judgment as "***the Review Claim***".

33. Third, the Plaintiffs claim that, at the meeting with Mr. O'Mahoney on 7 March 2006 and at all other material times, Mr. O'Mahoney made representations to them that the mortgages and loans in respect of Lennox Street and Celtic Park would be subject to an European Central Bank ("***ECB***") tracker mortgage interest rate. The Plaintiffs rely on the memorandum of 7 March 2006 which discussed the interest rate being charged in respect of the mortgages and loans. The memorandum states "*note interest rate quoted is the current rate which may be subject to change following the recent rate increase announced by the ECB.*"

34. The Plaintiffs claim that Mr O'Mahoney at all times advised them and represented to them that the rate to be charged in respect of the Lennox Street. and Celtic Park mortgages would be an ECB tracker interest rate. It is said that the Plaintiffs learned in 2019 that those mortgages were in fact never subject to an ECB tracker interest rate. This is referred to in this Judgment as "***the Tracker Rate Claim***".

35. The Plaintiffs presented a document prepared by City Wide Financial Solutions which they say shows the calculation of the difference between the interest rate the Plaintiffs were charged and the interest rate which they say they should have been charged on the mortgages for Lennox Street. and Celtic Park based on an ECB tracker rate for the 17 years between June 2006 and December 2023. The Plaintiffs claim that this calculation shows that they should have been charged €553,688.08 less in interest charges and, on that basis, the mortgages would not have been in arrears.

36. Fourth, the Plaintiffs claim that AIB and Everyday failed to effect a valid transfer of the Plaintiffs' mortgages and loans. This claim is pleaded as follows in the Statement of Claim:

> "*The Plaintiffs claim that the heavily redacted pages evidencing a purported sale of the plaintiffs facility to the first named defendant only contained entries which failed to explain the legal effect of the said schedule of transfer*."

This is described here as "***the Loan Transfer Claim***".

37. The fifth claim made by the Plaintiffs is that the First Defendant was invalidly appointed as a receiver. This is premised on the assertion that the instrument of appointment was signed by the First Defendant on 6 October 2023 but was dated the 5 October 2023 and refers to the First Defendant having signed it on 5 October 2023 ("***the Invalid Appointment Claim***").

38. There is an issue between the parties about the removal of furniture from Inver Gael, but this did not feature during this Motion and is not addressed further.

39. The harm pleaded by the Plaintiffs in the Statement of Claim is (a) damage to reputation as landlords (b) the removal of furniture from Inver Gael (c) slander on the Plaintiffs' title (d) economic and property losses and (e) interference with property rights.

40. Given the proximity in time between the delivery of the Statement of Claim and the hearing of this Motion, the Defendants have not yet delivered a defence. However, it is plain from the affidavits and submissions prepared for the purpose of this Motion that the Defendants will join issue with each of the claims made by the Plaintiffs. The

Defendants have also advanced the specific defence that the Tracker Rate Claim and the Review Claim are barred by the operation of the Statute of Limitations 1957 (as amended). These matters were addressed by the Defendants in written and oral submissions.

THE MOTION

41. On 15 March 2024 (the day on which the summons was issued), the Plaintiffs issued a notice of motion grounded on an affidavit sworn by the First Plaintiff ("***the Motion***") seeking two interlocutory reliefs, viz

    (a) An interlocutory injunction to restrain each or any of the Defendants from (a) taking possession of the plaintiffs' properties situated at (i)16 Lennox Street. Dublin 8 (ii) 111 Celtic Park Ave. Whitehall Dublin 9 and (iii) apt 14 Inver Gael, County Roscommon or (b) collecting rents from the tenants of the said properties until further order.

    (b) An injunction to restrain the First Named Defendant from taking any further steps in the purported receivership of any of the Plaintiffs' properties listed in paragraph one above including an order to restrain the First Named Defendant from taking any steps to market or sell any of the said properties, an order to restrain the First Named Defendant from collecting rents from the tenants of the said properties, and an order restraining the First Named Defendant from entering into or trespassing on the said properties or otherwise interfering with the said properties until further order.

42. By that notice of motion two interim injunctions were also sought:
    (a) an interim injunction to restrain the Second Named Defendant from providing any further instructions to the First Named Defendant as purported receiver pursuant to three purported instruments of appointment dated 6th October 2023 purportedly appointing the First Named Defendant as receiver over the properties listed at paragraph one above until further order.

    (b) An interim injunction to direct the Second Named Defendant to deposit the rents collected by the First Named Defendant or his agents in respect of the properties listed at paragraph 1 above since October 2023 into a joint bank account in the

names of the Plaintiffs' solicitors and the Second Named Defendant until further order.

43. On foot of an *ex parte* docket dated 15 March 2024, the Plaintiffs sought an order for short service of this Motion. This was granted by the High Court (Mulcahy J) and the Motion was made returnable for 20 March 2024. On 20 March 2024, the Motion was listed before the High Court (Nolan J).

44. On that date, the Defendants sought an adjournment and confirmed that no receiver was appointed to Celtic Park and that no receiver would be appointed to Celtic Park pending the adjourned date.

45. The Defendants also confirmed that Inver Gael was the subject of a binding contract and was due to be sold in the coming days.

46. The Plaintiffs' position on affidavit (second affidavit of the First Plaintiff) is that the Plaintiffs consented to the sale of Inver Gael, although he states they had "*no option but to consent*".

47. The Defendants gave undertakings to preserve the sale proceeds of Inver Gael pending the adjourned date and not to take steps with regard to any sale of Lennox Street. pending that date.

48. On 16 April 2024, the Receiver swore a replying affidavit and an affidavit was sworn by Margaret Hartigan on behalf of Everyday on 18 April 2024.

49. A second affidavit was sworn by the First Plaintiff on 15 May 2024.

50. The Motion was heard on 16 October 2024.

APPLICABLE LEGAL PRINCIPLES

51. In any application for an injunction, the applicable legal principles are not and cannot be in dispute.

52. The first, threshold step is that the applicant for injunctive relief must demonstrate that there is a serious issue to be tried. This is a low hurdle and requires only that the claim not be frivolous or vexatious (*Merck Sharp & Dohme v. Clonmel Healthcare* [2019] IESC 65 [30], [2020] 2 IR 1, ***"MSD"***).

53. Beyond that, the key question is firmly established by the judgment of the Supreme Court in *MSD* to be whether the balance of justice as between the parties requires the grant of the injunction sought pending the trial of the proceedings.

54. There is no checklist or "*mechanical rules*" (*MSD* [34]) to apply. Rather, in recognition of "*the essential flexibility of the remedy*" (*MSD* [28], [36]), and the objective of finding "*a just solution pending the hearing*" (*MSD* [34]), the overarching imperative is to have regard to the specific facts and matters that arise in each specific application with a view to doing justice between the parties pending trial.

55. The following general principles were set out by O'Donnell J (as he then was) in that case:

> *"(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted;*
>
> *(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the American Cyanimid and Campus Oil approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with*

an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;

(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;

(4) The most important element in that balance is, in most cases, the question of adequacy of damages;

(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;

(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it may be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial.

(7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;

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

56. In *Ryan v. Dengrove DAC* [2021] IECA 38 at [49], the Court of Appeal (Murray J, Haughton and Faherty JJ concurring) explained the role of adequacy of damages in the balance of justice as follows:

"*.. the mere fact that damages would be both adequate as a remedy and available to be paid did not absolve the Court from placing the adequacy of damages within the balance of justice as a whole and, therefore, in also assessing any other factors relevant to that balance in a particular case."*

57. In that judgement, Murray J also addressed the category of so-called "*receiver injunctions*", a category into which this Motion (at least in part) falls and of which there have been many before the Irish courts. The words of Murray J at [1] must be heeded:

"*Applications for such injunctions – in this instance restraining the appointment by a creditor of a receiver and/or the undertaking by the receiver of one or more actions vis a vis secured assets – are not uncommon. Where arising in the context of commercial loans secured by commercial assets, they are often refused. In such disputes, damages will generally be an adequate remedy, and the appointing institution and/or receiver will frequently be good for any award made against them. Generally in a purely commercial dispute of this kind where the parties' interests are exclusively financial, the law adopts the position that they are best left to their respective remedies in damages. The cases of this kind in which there is a particular factor tilting the balance in favour of the claimant such as would justify the making of orders restricting the creditor's freedom of action pursuant to agreed security instruments, tend to be the exception".*

58. That the appropriate remedy in such cases is usually damages was underlined again later in that judgment ([62]):

"As I observed in the introduction to this judgment, the authorities show that in ' receiver-injunction' cases involving commercial properties (and I stress the latter part of that description) the position is often adopted that in a dispute between an undertaking that has borrowed monies for wholly commercial purposes, and a secured lender who has obtained as a condition of that borrowing security over wholly commercial assets, the dispute is a commercial one, and the remedy for breach by either party of their obligations under those

arrangements sounds in damages (see Camden Street Investments Ltd & ors v. Vanguard Property Finance Ltd. [2013] IEHC 478, Kinsella & ors v. Wallace & ors [2013] IEHC 112, O'Gara & anor. v. Ulster Bank Ireland DAC & anor [2019] IEHC 213, Murphy v. McKeown [2020] IECA 75).”

59. This analysis is undoubtedly relevant here and chimes with the guidance in *MSD* that there should be scepticism regarding claims of inadequacy of damages in commercial disputes such as this one.

Serious Issue

60. The threshold requirement of a “*serious issue to be tried*” is a low one, and has been likened to the threshold for the dismissal of a claim pursuant to the inherent jurisdiction of the Court (*Betty Martin Financial Services Limited v. ESB DAC* [2019] IECA 327 (“***Betty Martin Financial Services***”), [42]). It means *“no more than the case not being frivolous or vexatious*” (*MSD* [30]).

61. It is also important in the context of the present Motion to note the caution expressed in *MSD* at [30] (in confirming the redundance of any higher, *prima facie* standard):

> *“the logic of an interlocutory application is that it is heard and determined in advance of the trial. It would make little sense for valuable and expensive court time to be used in an attempt to predict, on the balance of probabilities, the outcome of a case which is yet to be heard, where the evidence had not been ascertained and, more relevantly, had only been adduced on affidavit, and where the arguments were not fully developed.”*

62. The Plaintiffs assert that there is a serious issue to be tried on each of the five claims made. The Defendants refute this with respect to each of them.

SERIOUS ISSUE TO BE TRIED

The Loan Transfer Claim

The Plaintiffs' Case

63. This is pleaded as follows in the Statement of Claim:

> "*The Plaintiffs claim that the heavily redacted pages evidencing a purported sale of the plaintiffs facility to the first named defendant only contained entries which failed to explain the legal effect of the said schedule of transfer*."

64. The Plaintiffs assert that there was an invalid sale of the loans from AIB to Everyday and challenge the adequacy of the proofs relied on. It is contended that there are strict proofs required, and the case of *Permanent TSB plc v. Doheny* [2019] IEHC 414 is relied on in that respect.

65. The Plaintiffs also specifically challenge several aspects of the Transfer Deed. During the hearing, the Transfer Deed was opened at some length and counsel for the Plaintiffs highlighted certain alleged discrepancies and drafting issues with the document, including:

(a) the absence of a correlation between the schedules referenced in the Deed and the schedules that are attached thereto;

(b) the fact that AIBMB is not listed as the lender;

(c) the absence of any explanation of the legal effect of the schedules;

(d) The complaint that the Deed does not make sense, in that it refers to defined terms but there are no definitions in the Deed;

(e) The schedule states underlying loan agreements were with AIB plc, rather than the correct entity, AIBMB;

(f) It is impossible to see how the facilities were transferred when the Transfer Deed refers to AIB plc as the holder of the facility letter.

60. With regard to the registration of the mortgage, the Plaintiffs accept the registration shows ownership of the charge but submit that this does not disclose anything about the title to the unregistered land. It is emphasised that there was no deed of conveyance or assignment as between AIB plc and AIBMB.

61. The Plaintiffs' challenge to the validity of the Transfer Deed hinges heavily on *Mars Capital Finance Ireland DAC v Temple* [2023] IEHC 94 ("***Temple***"). It is claimed that the transfer deed in both cases is the same.

62. The Plaintiffs also rely on *EBS Mortgage Finance v. Bedford* [2024] IEHC 407 ("***Bedford***") as authority that it is necessary to be precise as to which entity in a group is the lender (at [1.8]), as borrowers must know the identity of the lender or assignee. It was contended that *Bedford* also shows that the "hello" and "goodbye" letters themselves are not sufficient to show valid assignment of debts ([5.2]) and that it must be shown that each specific loan was validly transferred including through intra group transfers.

The Defendants' Position

63. The Defendants contend that the Plaintiffs have manufactured the complaints about the alleged invalidity of the loan transfers and submit that they are not properly grounded on affidavit. There is complaint about the fairness of the matter being raised when it was not grounded on affidavit.

64. Insofar as the Plaintiffs relied on *Permanent TSB v. Doheny* [2019] IEHC 414 (***"Doheny")*** regarding the necessity for proofs of a valid transfer, the Defendants' position was that *Doheny* was decided in the very different context of an *ex parte* application to substitute a plaintiff under Order 17 Rule 4. In any event, the heavily redacted transfer deed was accepted as sufficient, when read together with the "*hello*" and "*goodbye*" letters (*per* Meenan J at [11]). The Defendants submit that the same applies here.

65. It was fairly acknowledged on behalf of the Defendants at trial that there are some drafting issues with the Transfer Deed on its face. However, it was also asserted that the Transfer Deed in this case is different to that analysed in *Temple* and that the schedule to the Transfer Deed here is clearly described and is sufficient.

66. The Defendants seek to distinguish *Temple* on several grounds including the following:

    (a) That was action by the lender for possession and the lender bore the burden of showing the necessary proofs to ground an application for possession ([3]);

    (b) The description of the transfer deed is notably different to this case ([7]);

    (c) It was inferred that the document in *Temple* was a much more heavily redacted loan document from the facts summarised at para 21 of that judgment.

67. The Defendants' counsel opened the Transfer Deed and the deeds of mortgages, and facility letters, which were asserted to show that at both AIB plc and AIBMB were mortgagees and both were referenced in the loan documentation.

68. The Defendants' counsel also highlighted that there are account numbers in the schedule to the Transfer Deed that match hand-written account numbers on the loan facility letters and numbers appearing on other documentation.

69. It was submitted that there was no authority to show that, even if there is an infirmity in the description of the institution in a deed, but the accounts and dates were correct, that it could invalidate an assignment.

70. The Defendants' position was that there was sufficient evidence of the chain of title and the loan transfer, and of both AIB plc and AIBMB being parties to the loan and the mortgage, to satisfy the Court for the purposes of this Motion.

Discussion and Decision

71. The first question that falls for determination is whether it was unfair for the Plaintiffs to raise this issue late in the day and, if so, what impact this should now have.

72. It is undeniable that this issue was raised late and it was regrettable that more attention was not paid to this aspect of the Plaintiffs' claim sooner (the written submissions having

been delivered just the week before the hearing of this Motion. This would have allowed the Defendants a better opportunity to meet the case made.

73. However, the Defendants did not seek to adjourn the matter to allow further time to consider this issue or otherwise indicate that the claim could not be addressed in submissions at the hearing. It is also relevant to note that the Loan Transfer Claim is heavily premised on the interpretation of a deed to which Everyday itself was party, and which Everyday is therefore best-placed to understand and explain.

74. The Defendants rely on *Nihill v. Everyday Finance DAC* [2022] IEHC 484 ("***Nihill***") in which a complaint of a breach of duty by the defendant arising from the plan to sell the disputed property without vacant possession was raised for the first time at the hearing of the application for an injunction. There were no written submissions so the defendant had no prior notice of this issue. This point was emphasised by Dignam J and is an immediate point of distinction with this case: the Loan Transfer Claim here was addressed in both parties' written submissions. The Defendants were on notice (albeit short notice) of this issue.

75. Dignam J also observed that the defendant there could have given a good and reasonable explanation for selling the lands in the manner complained of ([79]) but did not have the opportunity to do so. The heavily factual nature of the issue in *Nihill* is one which could conceivably have been addressed on affidavit, more appropriately than the complaints about the defects which the Plaintiffs allege in the Transfer Deed and other documentation relied upon by the Defendants. Allied to this is the fact that the Defendants must at all times have been cognisant of the need to show a good chain of title and valid transfer of the loans.

76. Further, while the Defendants object that this matter was not addressed on affidavit, Simons J pointed out in *Temple* that points of this nature are not in truth matters for affidavit evidence, but rather matters of submission:

> *"25 For completeness, it is necessary to address two procedural objections raised on behalf of Mars Capital as follows. First, objection was taken to the fact that the defendant sought to raise the issue of the substitution of Mars*

Capital as plaintiff without having first signalled an intention to do so by way of a replying affidavit. With respect, this objection is not well founded. Mars Capital, as the moving party in the proceedings, bears the onus of proof in relation to establishing that the principal money has become due and owing. As part of this, it is necessary to demonstrate the chain of transfers. A defendant is entitled to hold a plaintiff to its proofs and is not normally required to flag this in advance on affidavit. Indeed, parties are not to be encouraged to file affidavits consisting of legal submission rather than factual matters.

26 In some instances, a replying affidavit may be required for other reasons: for example, a defendant may be challenging some factual averments set out in the plaintiff's affidavits. No such considerations arise in the present case. Here, the point being made by the defendant is that the affidavit evidence does not establish that the debt has been transferred to Mars Capital. It is the deficiencies in the plaintiff's own evidence which are being relied upon."

77. The same analysis is directly applicable here. The Loan Transfer Claim is grounded on alleged defects in the Transfer Deed that was exhibited to the affidavit of Margaret Hartigan. The Plaintiffs are pointing to defects in Everyday's own documents, being documents exhibited to an affidavit sworn on behalf of Everyday and with which Everyday is fully familiar. It is also a matter of interpretation of documentation, rather than factual dispute. This is important in the context of this Motion.

78. In light of the foregoing – and given this a hearing to assess whether there is a "serious issue" only- it is appropriate to consider the Loan Transfer Issue as presented by the Plaintiffs, despite it having been raised late.

79. However, the late deployment of this claim may impact on how it is weighed. This approach was also suggested by Dignam J in *Rogers v Allied Irish Banks Plc* [2024] IEHC 50

"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."

80. Turning then to the substance of the issue, a primary plank of the Plaintiffs' complaint is the decision of Simons J in *Temple*. That case concerned whether Mars Capital's summary application for a possession order under section 62(7) of the Registration of Title Act 1964 should be referred to plenary hearing. In *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26 ("***Cody***"), Baker J explained the range of possible outcomes in such an application as follows:

> *"70 . On one end of the range are cases where a plaintiff establishes its claim on the affidavit evidence, as the defendant is not able to persuade the judge either that the evidence is incomplete or that there is a basis on which a credible defence exists….*
>
> *74. At the other end of the range of possible results are cases where a defendant either positively establishes a defence either at law or on the merits, or persuades the judge that the plaintiff has not established its proofs…".*

81. Baker J noted that many applications fall between these two ends of the spectrum:

> *"76. Many applications for summary judgment would fall between these two extremes and will involve the proffering of evidence or argument by a defendant by way of defence which is not sufficient to rebut the evidence of the plaintiff to enable the judge to make a positive finding against the plaintiff, but which offers enough doubt as to the truth or completeness of the plaintiff's evidence, or credibly presents reasonable arguments or evidence that a defendant has a basis of defence which merits further scrutiny, evidence or argument. In that instance the trial judge is constrained by the inability to decide between contested affidavit evidence of fact, or resolve complex questions of law, the action cannot therefore be disposed of summarily and will be adjourned to plenary hearing."*

82. The language of "*credibly*" presenting "*reasonable arguments or evidence*" which warrant further scrutiny is closer to a requirement to show a "*prima facie*" defence (such as in the context of a security for costs' application) than the low bar of a "*serious issue*" for an injunction. The fact that the borrower is the defendant in one, and the moving party in the other, and that it is a very different application that is made for a possession order, with the onus on the lender to adduce the correct proofs, does not appear to me to alter this equation. This being so, if a specific set of circumstances constitutes sufficient, reasonable grounds, a *prima facie* defence, to create enough doubt about a lender's claim for possession of a property to warrant plenary trial, it may be expected as a general proposition that the same grounds would meet the lower test of a "*serious issue*" in an injunction application pending a final determination of the right of a lender to take possession.

83. This becomes significant here, when the findings that were made by Simons J in *Temple*, adopting the approach mandated in *Cody*, are considered.

84. The first set of findings in *Temple* are the following:

> *"7. ...A deed of transfer dated 30 April 2021 has been exhibited. This deed is between a number of companies within the AIB Group and EBS DAC (who are identified as the sellers) and Mars Capital Finance Ireland DAC (who is identified as the buyer). The exhibit consists of three pages containing what might be described as operative clauses. Thereafter, there are two additional pages which appear to be extracts from a schedule to the deed. These pages are heavily redacted and all that is legible is a series of headings and a single entry which references, inter alia, the name of the defendant and the address of the property the subject of the charge. There is then a column which identifies the "legal entity" as EBS Mortgage Finance Ltd. There is nothing in the first three pages of the exhibit, i.e. the operative part of the deed, which makes any reference to, still less explains the legal effect of, the schedule It may be, but this is only speculation, that certain crucial pages have been omitted from the redacted form of the document which Mars Capital has deigned to put before the court. The limited material before the court does not establish, even on*

a prima facie basis, that the defendant's debt has been transferred to Mars Capital Finance Ireland DAC."

85. The crux of the factual issue with the deed addressed in [7] was that the operative part of the deed did not refer to or explain the legal effect of, the schedule.

86. In this case, a very similar complaint is made by the Plaintiffs. It is not quite the same, as there are operative provisions in the Transfer Deed which refer to schedules, but the issue highlighted by the Plaintiffs is that there are references in the operative parts of the Deed to "*schedule 1*" and "*schedule 2"* but there is nothing numbered "*schedule 1*" or "*schedule 2*" appended to the Deed. Indeed, it appears that "*schedule 2"* is intended to list the properties in which an interest is ostensibly being conveyed to Everyday, but there is no reference to any specific properties in the documents appended to the Deed.

87. It could be regarded as a minor matter of drafting but the fact is that the properties in which interests are conveyed *via* the Transfer Deed are not anywhere identified in the Deed or any schedule to it. This does make the Transfer Deed on its face difficult to understand.

88. A second deficiency flagged in *Temple* ([19]) that also has an echo here concerns the internal transfer of the loans and securities as between related entities:

"*Matters are further complicated by the fact that there may possibly be a difficulty in relation to the transfer from EBS Building Society to EBS Mortgage Finance. The grounding affidavit does not adequately explain how this step in the chain of transfer occurred."*

89. The Plaintiffs make a similar assertion about the failure to show whether and how the loans here were transferred between AIB and AIBMB. This is based on allegations about errors or deficiencies in the Deed and its schedules, including that the loans were entered into with AIBMB but one of the schedules to the Transfer Deed refers to loan agreements with AIB plc. alone listed as a lender for three of the facilities. Another schedule which is headed "*Loans Datatape*" (a term not defined in the Deed), lists AIBMB alone in the column headed "*legal entity*".

90. It may be noted that the loan facility documentation for Celtic Park and Inver Gael which is exhibited to Ms Hartigan's affidavit does not reference AIBMB. She exhibits only "*particulars of offers of mortgage loan*" for Celtic Park and Inver Gael, which include no cover letter, name no lender and on which an account number is hand-written (that addition not being explained or contextualised by Ms Hartigan).

91. However, Ms Hartigan's affidavit exhibits different documents in relation to the Lennox Street loan, including a cover letter from AIBMB and a "*European Standardised Information Sheet*" which names AIBMB as lender, before the document headed "*particulars of offers of mortgage loan*" is included. Like the other properties, the Lennox Street documents also include a hand-written annotation with an account number.

92. As against this, there are two letters dated 27 June 2006 issued by AIBMB in respect of the draw down of the monies loaned on Lennox Street and Celtic Park (exhibited to the Plaintiffs' grounding affidavit) which do properly include the account numbers and confirm that the mortgage is being given by AIBMB. The Plaintiffs also exhibit a "*letter of offer of mortgage loan*" in respect of Celtic Park which is "*from*" AIBMB.

93. So there is some ambiguity as regards the loan documentation (a matter which can only be properly assessed with full evidence at trial). If the loan documentation for all three properties is the same, it seems that AIBMB is the lender. However, a schedule to the Transfer Deed cites AIB plc as a lender under four of the facility letters, with AIBMB being listed as an additional lender in respect of one of them. There is then a potential question about whether there was a transfer of the loans from AIBMB to AIB plc.

94. As regards the mortgages, Ms Hartigan in her affidavit states that the mortgage for each property conferred rights on AIBMB and are subject to AIBMB's mortgage terms, whereas a schedule to the Transfer Deed states that a 2003 mortgage was with AIB plc and two 2006 mortgages were with AIB plc and AIBMB.

95. Ms Hartigan also avers that, by the Transfer Deed, AIBMB assigned its rights under the loans and the mortgages to Everyday. This is not wholly consistent with the language

of, or schedules to, the Transfer Deed, which do include several references to AIB plc as a party to the loans and facility letters.

96. In short, there is some lack of clarity as regards whether both of AIB plc and AIBMB were lenders and mortgagees or, if only one was, which one and this is also apparent in the Transfer Deed.

97. A third defect that was addressed in *Temple* concerned the failure of the loan transfer document to identify the loans and securities that were asserted to be transferred.

> *"20… Counsel draws attention, in particular, to the coversheet of the deed of charge which expressly references the account number of the loan account and the amount of the principal sum. It is said that the court can proceed on the basis that Mars Capital, as charge holder, is entitled to enforce the debt.*
>
> *21 With respect, the court should not have to speculate as to whether a particular debt is secured by a charge. The " loan" as defined under the deed of charge simply refers to a figure in euros. It does not refer to any account number. It is correct to say that there is an annotation on the front of the deed of charge which does refer to an account number, and that if one cross-references that to the statement of account one might deduct that the charge refers to a particular debt. The difficulty for Mars Capital, however, is that this annotation does not have any particular legal status in the deed. It does not form part of the definition of the loan and, for all the court knows, may simply be something that was added for administrative purposes long after the deed had been executed."*

98. In this case, a schedule to the Transfer Deed does list certain identifying numbers which, within them, contain a shorter sequence of numbers, which numbers are in turn handwritten on the facility letters for the loans as exhibited to Ms Hartigan's affidavit. This resembles the issue identified in *Temple.* However, the same numbers are properly included in print on the letters dated 27 June 2006 issued by AIBMB in respect of Lennox Street and Celtic Park (and exhibited to the Plaintiffs' grounding affidavit). If these figures were compared, the individual mortgage loans could be related to the schedule. While the shorter "*account numbers*" are only handwritten on the loan offers, the numbers are properly included in the letters confirming drawdown (in respect of two of the properties). The difficulties identified by Simons J at [21] are not the same here.

99. In *Temple,* based on the findings just summarised, the application for an order for possession was remitted to plenary hearing so the application could be determined on the basis of complete evidence, it being impossible to draw any final conclusions on the basis of the limited evidence presented by Mars Capital. ([24]).

100. The findings by Simons J are significant:

> "*it is not possible, on the basis of the limited affidavit evidence currently before the court, to determine whether the moving party, Mars Capital, is the owner of the debt upon which the application for an order for possession is predicated. The evidence is, at best, ambiguous*" ([13]

101. The Court further concluded in *Temple* that, "*the redacted version of the deed of transfer which Mars Capital has chosen to put before the court does not establish that ownership of the debt has passed to it*" ([18]), and that there was "*an evidential deficit in respect of the onward transfer to Mars Capital*" ([19]).

102. In *Bedford*, Gearty J similarly identified shortcomings in the loan transfer documentation on which the plaintiffs relied to establish a right to possession in a summary proceeding under section 62(7) of the Registration of Title Act 1964. Gearty J noted the approach set out in *Cody* and the findings made in *Temple* and concluded ([4.10]):

> *"I have examined the exhibits to test whether I may be satisfied that the transfer of loans with the same apparent reference numbers from EBS DAC to this Plaintiff is sufficient proof that they are the same loans as those agreed between the EBS Building Society and the Defendants but, given my reservations about proofs in respect of EBS MF, I cannot be so satisfied. The gaps may be small and capable of easy proof, but this must be done by the Plaintiff. While it may also appear to be a rigorous standard to set, the process is one of summary justice and if this fast and paper-based remedy is used, the proofs on paper must be satisfactory. They have been challenged in several respects and there are a number of areas of uncertainty which make this Court reluctant to proceed to making an order for possession on a summary hearing alone."*

103. Among the findings made in that judgment were:

(a) There was an insufficient explanation of how EBS Mortgage Finance obtained ownership of the loans;
(b) There was no document linking EBS Mortgage Finance to ESB DAC, so ESB DAC could make transfers to Mars Capital;
(c) The loans were set out in a schedule, but this did not complete the chain of title;
(d) The lender must show a proper assignment of the debts, that the specific loans have been properly transferred. This is a requirement which is separate to and independent of the obligatory "*hello*" and "*goodbye*" letters to the borrower on the transfer of the loans ([5.2]).
(e) The transfer deed relied on there did identify the parties, the loans, and defined the key terms in the document.
(f) It was possible to connect the definitions of terms such as "*data tape*" and "*connection ID*" and other defined terms to determine what the schedules were and what they contained ([6.19]).

104. Gearty J observed that there was more extensive documentation relied on in *Bedford*, and that the redactions made were explained in some detail ([6.9]). She observed that this approach may be as a result of decisions such as *Temple*. Indeed, it was the same transfer deed in both cases.

105. Ultimately, the issue that did result in the matter being sent to plenary hearing in *Bedford* was not the redactions to, or inadequacies of, the transfer deed, but the failure to show a proper chain of title linking the loans with the mortgages.

106. The question of redactions to loan title documentation was addressed in *Farrell v Everyday Finance* [2024] IECA 16 (and returned to in *Bedford*) and also in *Start Mortgages DAC v. Ramseyer* [2024] IEHC 329 ("***Ramseyer***"). In the latter judgment, Simons J found that it could not be concluded on a *prima facie* basis that the loan had been transferred owing to the redactions made:

> *"23 It should be emphasised that this is not a case where minor redactions have been made on the grounds that same are necessary to protect the privacy of*

third parties whose debts are said to have been encompassed as part of a global transfer of assets. Nor is it a case where it has been asserted, on a reasoned basis, that certain information has been redacted on the grounds of commercial sensitivity (cf. Farrell v. Everyday Finance DAC [2024] IECA 16). Rather, whole swathes of the operative part of the deeds have been blanked out, without any meaningful explanation or justification having been offered. The redactions are so extensive that this court cannot safely interpret the legal effect of the deeds with a view to determining whether or not they had the consequence of transferring to Start Mortgages the debt outstanding in respect of the loan originally advanced by the Governor and Company of the Bank of Scotland. The limited material before the court does not establish, even on a prima facie basis, that the defendants' debt has been transferred to Start Mortgages."

107. It is not possible to compare the level of redaction between the deeds addressed in different case, but it is notable that there are unexplained redactions to the Transfer Deed here, including to the operative parts of the Transfer Deed. There is nothing in Ms Hartigan's affidavit to explain the redactions or why they were made.

108. There are clear similarities between the issues flagged by the Plaintiffs in this case and the deficiencies found by Simons J in *Ramseyer* to be sufficient to refer the possession proceedings to plenary hearing.

109. There are additional defects here, particularly the absence of any definitions to allow the Transfer Deed to be properly understood and the want of a correlation between the schedules referred to in the Deed and the schedules in fact attached to it. The want of documentation to show a transfer from AIBMB to AIB plc may also be an issue (based on the mismatch between the documents and the schedule to the Transfer Deed).

110. While the applications in *Temple*, *Bedford* and *Ramsayer* are different in terms of the moving party, the statutory context and the burdens imposed, it does seem logically sound that grounds of defence that suffice for a summary possession action to be remitted to plenary hearing should also be sufficient to constitute a "*fair issue*" for an application for an injunction such as that at issue here.

111. Accordingly, depending on the evidence and further submissions at trial, these apparent defects could undermine the chain of title and confer a valid cause of action on the Plaintiffs. On this basis, the Loan Transfer Claim is – narrowly – sufficient to suggest there is a serious issue to be tried on this point.

112. With some reluctance, given the technicality of the points, how they were raised and the insufficient notice given to the Defendant or opportunity to deal with the point, I conclude that the low bar of a "*serious issue*" has been met with regard to the Loan Transfer Claim.

Tracker and the Review Claims

113. These two claims are dealt with together here as the same, substantial issue arises with regard to both, namely the operation of the Statute of Limitations 1957.

114. The Plaintiffs' claims under these headings is based heavily on representations it is said were made by Mr O'Mahoney on behalf of AIB. The Plaintiffs rely on *AIB v. Hayes* [2018] IECA 152 and assert that case demonstrates reliance on extensive oral evidence of assurances and representations made (as found by the Learned Trial Judge, Baker J) that there would be a review of the mortgage rates.

115. The Plaintiffs also rely on *Allied Irish Banks plc v. Galvin Developments (Killarney) Limited* [2011] IEHC 314 which refers to the possibility of preliminary/ collateral contracts being entered.

116. The Plaintiffs point out that there is evidence on affidavit that certain conversations occurred with Mr O'Mahony and there is no reply on affidavit by a person with knowledge of the relevant facts, such as Mr O'Mahony.

117. In reply, the Defendants' primary position is that these claims are barred by the operation of the Statute of Limitations 1957, the relevant conduct having occurred either eighteen years before the issue of the Proceedings or thirteen years previously (if time began to run with the expiry of the five-year '*interest only*' period).

118. The Defendants emphasise that, on 29 March 2019, the Financial Services and Pensions Ombudsman ("***the FSPO***") rejected a complaint about the tracker rate not being applied to the loans, on the ground it was out of time ("***the FSPO Decision***").

119. The Defendants also contend that these claims are not in any event supported by the mortgage and loan documentation and that there cannot be a verbal representation that contradicts the written agreements. The Defendants rely heavily on *Byrne v. Mars* [2023] IEHC 334.

120. As regards the Plaintiffs' contention that there is some ambiguity in the loan offer which refers to an interest rate and a margin and the ECB rate, the Defendants assert that this is typical language for a variable rate and does not support the Plaintiffs' case.

Discussion

121. For the purposes of this Motion, I consider that the key question on the Review and Tracker Claims is whether these claims are barred by the operation of the Statute of Limitations 1957. The relevant limitation periods are six years from when the cause of action accrued, if the matter is based on contract (section 11(1)(a)) or on tort (section 11(2)(a)).

122. The undisputed facts are that the mortgages in question were entered in 2006 and the review period expired in 2011. If the Plaintiffs had a claim based on a failure to carry out that review, it appears from the material before me that this accrued when that failure occurred. On the basis of the material and submissions that were made to me, there is no good reason to form the view that this claim could be maintained beyond 2016.

123. With regard to the Tracker Mortgage Claim, the evidence presented by the Plaintiffs shows that tracker rates were never applied, and the Plaintiffs at all times had access to the relevant information to be aware of this (to the extent that is asserted to be relevant).

124. The extent of this obstacle is compounded by the issue of the FSPO Decision on 29 March 2019. That decision does not address the Statute of Limitations and is not directly applicable here but it does constitute a clear finding that the Plaintiffs were aware of the

relevant matters in June 2011, when the five-year review period expired, a finding which the Plaintiffs did not challenge.

125. Notably, these proceedings then did not issue until almost 5 years after the FSPO Decision.

126. At the hearing, the Plaintiffs' counsel made a bald reference to section 11(9)(a) of the Statute of Limitations which states that provision "*shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief*". No relevant authority on this provision was opened to me and no persuasive argument was advanced as to its possible application here (by reference to the reliefs actually sought in the proceedings or otherwise).

127. It was also suggested for the first time at the hearing of this Motion that time started to run every day that interest is charged and that there was not a single crystallising event. No authority or detail was advanced to support these propositions or to explain their application to the specific claims made here.

128. In the context of this Motion, the Plaintiffs also failed to advance a credible position on affidavit in response to the application of the Statute of Limitations. The First Plaintiff avers only in general terms that *"I was not aware of the position until a few years ago"*.

129. It may well be that more detailed evidence and legal submission will be made at trial to advance and support these points. However, for the purpose of determining the existence of a serious issue in the context of this Motion, it cannot be said that the Tracker Rate Claim or the Review Claim raise a fair issue to be tried, given the strength of the proposition that they are barred by the application of the Statute of Limitations. The Plaintiffs have not salvaged the arguability of the claims that are *prima facie* defeated by the Statute of Limitations. That being so, I do not need to, and do not, address these claims further for the purpose of this Motion.

The Invalid Appointment Claim

130. The Plaintiffs' claim under this heading was summarised earlier in the Judgment. It hinges on one date appearing on the front of the Receiver's instrument of appointment and another date appearing below the signature by which he accepts appointment.

131. This matter may be addressed in evidence at trial and it may be that the Defendants could persuade the court at that stage there is merit to this claim, but from the material presented to me in this Motion, I regard this as an insufficient point to reach the requisite threshold of seriousness. The Plaintiffs have pointed to no authority to suggest that affixing one date on the front of a deed or contract that pre-dates the date of signing by one party invalidates that deed or contract. This is not shown by the Plaintiffs to be a serious issue.

The Inver Gael Claim

132. This claim was advanced briefly by the Plaintiffs and is dealt with similarly here. The proposition is that there was no mortgage on Inver Gael at the date of the sale of that property by the receiver and the sale was invalid.

133. This was answered by the Defendants by reference to the undisputed fact (a fact set out in the Plaintiffs' own grounding affidavit) that there was cross-collateralization between the loans, such that Inver Gael was security for the loans on Lennox Street and Celtic Park. The Plaintiffs also confirmed on affidavit that they consented to the sale of that property (albeit asserting they had no choice but to do so).

134. This claim does not reach the threshold of a serious issue.

BALANCE OF JUSTICE

135. Before addressing whether the balance of justice favours the grant of relief, it is necessary to consider the specific reliefs that are sought by this Motion and the precise impact they would have. This must inform the approach to the various factors that can be weighed in that balance.

Reliefs Sought

136. The first order sought by the Notice of Motion is an order to restrain the Defendants from taking possession of, or collecting rents in respect of, Lennox Street, Celtic Park and Inver Gael.

137. The second order sought is an "*injunction"* (not framed as an interlocutory injunction, but assumed to be intended as such) restraining the Receiver (and – significantly – only the Receiver) from taking any further steps in the receivership, including any steps to market or sell any of the three properties, to collect rents or otherwise entering or interfering with the properties.

138. The third and fourth orders sought are interim orders and were sought pending further order only.

139. The reliefs sought need to be separately analysed by reference to each individual property (the facts pertaining to each being markedly different).

140. Inver Gael was sold in March 2024 and, at the end of the hearing of the Motion, it was accepted on behalf of the Defendants that no interlocutory relief is being pursued in respect of Inver Gael. On the notice of motion grounding the motion before me, there is no basis to make any interlocutory order in respect of Inver Gael.

141. Lennox Street was taken into the possession of the Receiver five months before the Proceedings were issued. The Receiver continues to collect the rent payable by its tenants. By the Notice of Motion, the Plaintiffs appear to seek to restrain those steps and also to restrain the Receiver from taking further steps in the receivership of that property. The effect of the orders sought is to reverse the situation that has already occurred.

142. With regard to Celtic Park, there was a letter sent on behalf of Everyday on 1 December 2020 and another on 7 June 2023 notifying the Plaintiffs of the arrears owing on the three properties and indicating that a receiver may be appointed if the arrears were not

cleared. I have seen no further correspondence or evidence addressing any specific plans or intentions with regard to Celtic Park. However, the Defendants did agree to give a commitment not to take steps with regard to Celtic Park on 20 March 2024 in the context of this Motion and it must be common case that there is a risk of enforcement action.

143. The only possible injunctive relief sought by the Notice of Motion that concerns Celtic Park is an order to restrain the Defendants from taking possession of, or collecting rents in respect of, that property. Notably, there is no relief sought in this Motion to prevent the sale of Celtic Park by Everyday (the Receiver not being appointed to that property).

144. In light of the foregoing, the reliefs sought are as follows:

(a) An order that Lennox Street be restored to the possession of the Plaintiffs;

(b) An order restraining Everyday from taking possession of, or collecting rents from, Lennox Street pending trial;

(c) An order restraining any further steps (such as marketing or sale) being taken by the Receiver in respect of Lennox Street;

(d) An order to restrain the Defendants from taking possession of, or collecting rents in respect of, Celtic Park.

Availability of a Permanent Injunction

145. It must be queried whether permanent injunctive relief might be granted in those terms at trial (as suggested by *MSD*). Otherwise, no interlocutory inunction should be granted:

> "*It is a basic test for the grant of an interlocutory injunction that the case is one which if the plaintiff were to succeed at trial a permanent injunction would be granted*." (*H. A. O'Neil Limited v Unite the Union* [2024] IESC 8, [39] O'Donnell J).

146. The Plaintiffs contend that the claims made could result in a finding that Everyday has no right to the loans or mortgages and a permanent injunction should then be ordered.

It cannot be discounted that this is a possible outcome on the single serious issue made out. If the loans were not validly transferred to Everyday, a Court may make a permanent order restraining any involvement by Everyday (or a receiver appointed by Everyday) with the properties (at least in reliance on the Transfer Deed as currently presented).

147. This basic test would seem to be met here in principle.

148. However, this does not suffice, or even assist, to tip the balance in favour of the Plaintiffs. Rather the question of whether a permanent injunction would be granted is in the nature of the threshold condition absent which an injunction should not be granted on an interlocutory basis.

149. There is also a difficult question for the Plaintiffs which is that they either do not seek any permanent injunctive relief (if I am correct in assuming the "*injunction*" sought by paragraph 2 of the plenary summons and the Notice of Motion is intended to be an interlocutory injunction against the Receiver) or they seek such relief in respect of Lennox Street only (paragraph 2 being directed to the currently-appointed Receiver alone). There are some additional reliefs added in the Statement of Claim, but these are directed to the Receiver, who has no role in respect of Celtic Park.

150. This question was not raised by the Defendants directly, but it may be doubted whether a permanent injunction can be regarded as likely, if none is sought.

151. Noonan J addressed a similar question in *Plus Development LLC v. Lens Media Limited* [2023] IECA 10, and the obstacle of no permanent injunction being sought there was overcome by the fact that an order for specific performance of a particular contract (which was sought) would be to the same effect as a permanent injunction in the circumstances of that case.

152. It may well be that the Plaintiffs would argue that some of the reliefs sought in the Proceedings have the same or equivalent effects as a permanent injunction. I do not believe this point was sufficiently addressed at the hearing for it to be fair to ground the decision on it, but I consider it important to record that the only primary reliefs sought

in the Proceedings that appear to be referable to Celtic Park are claims for damages. Even if this is not a ground of itself to refuse injunctive relief in respect of that property (a question on which I do not express a concluded view on this application), it does indicate that the primary relief actually sought is damages (at least insofar as Celtic Park is concerned).

153. This leads into the question of adequacy of damages (as part of the overall balance of justice).

Adequacy of Damages

154. It is important to record two points: first, the proceedings and injunction before me are solely about money. At its essence, this is a dispute about which side should have control over two investment properties until the parties' rights are determined at trial.

155. No party has asserted any interest in the disputed Properties other than an interest in controlling them and recovering monies from the possession or sale of them. In particular (and by contrast with many other cases), neither side here has attempted to assert any attachment or sentimental interest in the properties, any concrete plans for the development or sale of any property, any agreements with third partes, or any other form of specific prejudice.

156. In fact, neither party has sought to assert – much less prove – that any non-financial prejudice would arise from the grant or refusal of the injunction sought.

157. O'Donnell J in *MSD* advises that an attitude of robust scepticism may be taken to an assertion that damages will not be adequate in a case such as this. This is precisely the attitude that must and can only be taken in this case.

158. Second, this case falls – largely although not entirely – within the general category of "*receiver injunctions*", as addressed in the judgment of Murray J in *Ryan v. Dengrove DAC* [2022] IECA 155. It is a case in which – by its nature – damages are typically adequate.

159. Neither side has expended any real effort in trying to show that damages would not in principle be an adequate remedy, save for bare assertions by the Plaintiffs of reputational harm and impact on property rights.

160. The assertion of such rights can be answered as it was by the judgment of Murray J in *Ryan v. Dengrove DAC* ([96]):

> *" This case is thus now about ways, means and money – whether and if so how Mr. Ryan gets the property, whether and if so how Dengrove disposes of it, who pays who and who gets what. It is not about the inherent value of the property rights of either party and I do not believe that in the particular circumstances of this case the invocation of those rights affects the analysis."*

161. I approach the generalised, unsubstantiated assertion of property rights and reputational concerns with scepticism and will afford them little weight in the balance of justice.

162. There is similarly no evidence that there would be any harm suffered by the Defendants if the injunction is granted and they prevail at trial, that is other than purely financial. It is solely and exclusively about recovering monies.

163. There is no specific evidence before me as to whether or how the situation may alter or deteriorate for the Defendants – or the Plaintiffs - if no steps are taken with regard to Lennox Street or Celtic Park between now and the trial. There is no suggestion of property prices declining (such as was before Barniville J in *O'Gara v Ulster Bank Ireland DAC* [2019] IEHC 213 ("***O'Gara***")) or that the Plaintiffs are mismanaging or would mismanage any of the Properties. There is no evidence from either side to indicate;

(a) any present plans to sell or market any property;
(b) that there is a pending sale at an alleged undervalue (as alleged in *Ryan v Dengrove DAC*);
(c) that the timing of the sale of any of the properties would or could have any material impact on price, or any impact at all;

(d) any detriment being suffered to date by any party as a result of the sale of Inver Gael; the control of Lennox Street by Everyday; or the control of Celtic Park by the Plaintiffs;

(e) any tangible, non-financial harm from the grant or refusal of the reliefs sought (such as in *Betty Martin Financial Services)*.

164. It is inescapable that there will always be some element of harm that will not sound in damages when parties are locked in dispute, as here. This was adverted to in *MSD* ([36]). The question is the relative degrees of harm apprehended by both. On the basis of the affidavits and submissions relied upon, I conclude that the harm apprehended by both sides is overwhelmingly financial in nature and damages are equally adequate for both.

165. Indeed, it is a noteworthy aspect of this Motion that every act that is sought to be enjoined, has already taken place with regard to one or other of the properties (ie one has already been taken into possession by the receiver and another has been sold) and the Plaintiffs have not demonstrated any prejudice arising from this. Conversely, from the Defendants' perspective, Celtic Park continues to be in the possession of the Plaintiffs and no damage to the Defendants has been alleged or shown to arise from this (other than a generalised reference to a right to enforce security).

166. In truth, instead of seeking to point to inadequacy of damages as a matter of principle, the Defendants point to (a) delay and (b) the alleged inadequacy of the Plaintiffs' undertaking. These points will next be addressed.

Delay

167. The Defendants assert that the Plaintiffs have delayed in seeking equitable, injunctive relief and that they should not be granted the orders sought for that reason.

168. The Defendants' position on affidavit is that correspondence was issued requiring payment of arrears on the three Properties as early as 1 December 2020. On that date, Everyday stated that a receiver may be appointed if the arrears were not paid. It is pointed out that the Plaintiffs were warned for over three years before issuing these Proceedings that enforcement action may be taken by Everyday.

169. Formal letters of demand were sent on 7 June 2023, nine months before the issue of the Proceedings.

170. The Receiver was appointed on 6 October 2023 and the Plaintiffs delayed a further five months before issuing proceedings and bringing this Motion.

171. Insofar as the Plaintiffs rely on without prejudice engagement, the Defendants point out that such engagement ceased in March 2022.

172. The Defendants assert that the appointment of the Receiver was notified to the Plaintiffs on 11 October 2023 and they waited more than five months before bringing this Motion.

173. The only prejudice that is alleged on affidavit by the Defendants as a result of delay is an averment by the Receiver about the incurring of legal costs and expenses during the tenure of the receiver. No other prejudice is addressed on affidavit by the Defendants.

174. Indeed, it is relevant to observe that the Defendants issued payment demands and threats to appoint receivers over the three Properties since December 2020 (and, apparently, earlier) but, by the date of the issue of this Motion, had taken no steps regarding Celtic Park. While a temporary commitment not to do so was given in Court on 20 March 2024, the fact remains that Everyday, for undisclosed reasons, took no action in respect of Celtic Park before the issue of these Proceedings.

175. There is no averment made in reply to the allegations of delay by the Plaintiffs, save for a reference to both Plaintiffs suffering stress and trauma and an inability to deal with matters. This is not explained and it is not said what period this relates to. Notably, there is no real attempt to deny that there was delay in the bringing of this Motion.

Legal principles on Delay

176. There is no doubt about the potential relevance of delay as a ground to refuse equitable relief.

177. Delay will not however automatically deprive a party of the right to an injunction. Rather, each allegation of delay must be weighed in light of the specific facts at hand. Butler J expressed this as follows:

> *"Delay is not an absolute concept and what is "reasonable" will vary from case to case. The impact of any given period of delay in the particular circumstances will be relevant to the extent which that delay makes it inequitable for the court to grant the relief sought."* (*Aviareto Ltd v. Global Closing Room Limited* [2021] IECH 377 ("***Aviareto***"), [71]).

178. Even when there is unjustified delay, the Court retains the discretion to decide its impact. In *Betty Martin Financial Services*, for example, Collins J held ([107]):

> *"Having regard to all of these considerations and allowing that there was delay on the part of the Agent and also allowing that the Agent has not convincingly explained that delay, I agree with the Judge that it would not be just or equitable to refuse the injunctive relief sought on grounds of delay."*

179. In *Aviareto*, Butler J also highlighted the relevance of prejudice when assessing delay ([83]):

> *"Delay is relevant to equitable relief largely because it may be inequitable in the sense of being unfair to the other party to grant such relief after an extended delay. The refusal of relief on the grounds of delay is not intended to punish the party which has been guilty of that delay but rather to protect the innocent party. At its height, an extended delay may indicate acquiescence on the part of a plaintiff with the action being taken by a defendant. In other cases, delay on the part of a plaintiff may have caused the defendant to incur expense on the assumption that its actions were not being challenged which would not have been incurred had the plaintiff moved more quickly. Rights may have accrued by virtue of delay which would not be a factor in the litigation of the delaying party had moved quickly."*

180. The Court concluded in that case that there was not prejudice such as justify delay defeating the equitable relief applied for ([94]):

> "*I do not think that the delay has been of such a length of itself to warrant refusal of relief nor, more importantly, has it caused the defendant to alter its position or incur expense that would not have occurred had the plaintiff acted more quickly*."

181. The Defendants here advanced the argument that delay could be weighed as a relevant factor, even in the absence of proof of resulting prejudice. *Farrell v. Everyday Finance DAC* [2024] IECA 16 (Faherty J, Whelan and Allen JJ concurring) was relied upon in support of this contention.

182. In that judgment, Faherty J addressed this point at [106]:

> "*the plaintiff's assertion that his delay was immaterial because no prejudice was suffered by the third and fourth defendants cannot suffice to swing the balance of justice in his favour (even if that be the case that the third and fourth defendants were not prejudiced (and on this I express no opinion))*".

183. The Defendants rely on this passage to suggest that prejudice does not need to be shown.

184. I do not accept that it is a correct or sustainable interpretation of the judgment of the Court of Appeal in Farrell to say that it displaces the relevance of prejudice when delay is alleged. In the above-quoted paragraph, the Court of Appeal did not make a finding about whether or not the defendants suffered prejudice. Rather, the Court found that this question did not need to be decided, as a finding that the delay was immaterial (not having caused prejudice) would not have been sufficient to swing the balance in the plaintiffs' favour. Far from rejecting the relevance of prejudice when assessing delay, the Court implicitly acknowledged that a want of prejudice may render delay immaterial. This was not something that needed to be decided in the particular circumstances of that case.

185. Any assessment of delay in the context of an application for equitable relief is a matter of discretion and a Court must be free to weigh the existence or want of prejudice in the exercise of that discretion. There is no authority to the contrary.

186. It is important to emphasise in the context of this particular Motion that, even if delay is not sufficient in all of the circumstances to disentitle the applicant to the relief sought (whether because of the scale of the delay or want of prejudice or for another reason), this does not mean it is irrelevant in the balance of justice. On the contrary, the existence of delay can be a highly relevant factor in the balance of convenience (*Aviareto,* [26]). This will come into sharper focus when the *status quo* is assessed.

Decision on Delay

187. There has undoubtedly been significant delay by the Plaintiffs, particularly with regard to the Tracker Rate and Review Claims. The Plaintiffs had all of the information they needed to make these Claims since 2011 and did complain to the FSPO on an undisclosed date in 2018. Nonetheless, the Plaintiffs waited until March 2024 to issue proceedings and seek injunctive remedies. There is no meaningful explanation for this delay. This is certainly delay of a magnitude that could in principle suffice to disentitle the plaintiffs to any equitable relief.

188. As against this, in the intervening period, Inver Gael was sold, the Defendants took possession of Lennox Street, but took no steps in relation to Celtic Park. There is no evidence or averments to suggest prejudice to the Defendants during this time or that steps were or were not taken which may have been otherwise, if it was known these proceedings were to issue.

189. It is also relevant that, with regard to the single issue which has been found to be a "serious issue", the Plaintiffs only came into possession of the relevant document, the Transfer Deed, on 18 April 2024, so the delay is less apparent with regard to that issue.

190. If delay was the only ground which was relied on to defeat this application, I would not be minded to refuse the relief sought on that basis alone. However, that is not the end of the matter.

191. While delay may not be sufficient of itself to defeat this Motion in all of the circumstances of this case, it is highly relevant in the balance of justice in several ways.

192. First, the very fact of delay is relevant to determining the *status quo*. With delay having intervened, the *status quo* will be taken to be the situation that actually now pertains, not the situation that would have pertained if these proceedings had been initiated in a timely manner. This is addressed further below.

193. Second, a point that was made by the Defendants is that certain of the orders sought are in the nature of mandatory rather than prohibitory relief. This is not an absolute bar to the grant of an injunction, but it does require a higher standard to be met by the Plaintiffs and would require a strong case to be shown, as has been established since *Maha Lingham v. Health Service Executive* [2005] IESC 89 and more recently re-stated in *Ryanair DAC v Skyscanner Limited & Ors*. [2022] IECA 64. In *Hoey v Waterways Ireland* [2021] IESC 34, Charleton J described this as follows ([26]):

> "*What is thus required for a mandatory injunction prior to trial is a level of proof from a plaintiff that at the ultimate trial that relief is likely to be granted. This engages the probability standard where an interlocutory mandatory injunction is sought by a plaintiff*."

194. It is also firmly established that the labelling of a relief is not decisive: even if presented a prohibitory order, if the substance of an order is to require positive steps to be taken, that is what must be weighed, and which elevates the requirements to a "*strong case*". Murray J addressed this point in *Ryanair DAC v Skyscanner Limited & Ors*. [2022] IECA 64 at 33(ii):

> *"In determining whether an order is 'mandatory' for this purpose, the court is concerned to identify the substance of the relief sought, the matter therefore not being judged on the basis of the phraseology of the order.* Any positive assertion can be expressed as a negative. The converse is also true, so that a technically mandatory order which involves little intrusion on the affairs of a defendant may not fall to be determined by reference to the 'strong case' test (*Charlton v. Scriven* [2019] IESC 28 *at para. 4.6*)."

195. While it cannot be said that all of the reliefs sought are mandatory in nature, certain of the orders (such as those regarding Lennox Street) certainly are. The delay by the Plaintiffs has had the consequence that what could have been prohibitory injunctions regarding Lennox Street are now in substance mandatory injunctions, imposing a consequent higher burden on the Plaintiffs.

196. In summary, while the delay by the Plaintiffs is not sufficient in all of the circumstances to constitute a stand-alone reason to refuse the relief sought, it does give rise to relevant considerations in the balance of justice.

Alleged Inadequacy of the Undertaking

197. The First Plaintiff in his grounding affidavit confirmed that the Plaintiffs give an undertaking in damages.

198. The Defendants challenge the adequacy of this undertaking, and this is one of the grounds on which the Defendants oppose this Motion. All that is said on affidavit by the deponent on behalf of Everyday is that the "*pro forma undertaking… is wholly inadequate*".

199. The Defendants rely on *Farrell v. Everyday Finance DAC* [2024] IECA 16 and the finding that "*an undertaking as to damages cannot just be regarded as an empty formula*" (Faherty J, [99]). It is asserted that the Plaintiffs needed to demonstrate sufficient means before weight can be attached to the undertaking that is offered.

200. As against this, it is common case that Everyday holds the proceeds of sale of Inver Gael and is in receipt of the rents from Lennox Street.

201. If the Defendants want the Court to refuse to accept the adequacy of the undertaking in damages being proffered, it was incumbent on the Defendants to explain whether and to what extent the ultimate sale of the disputed Properties would leave the Defendants with an irrecoverable loss.

202. However, the factual picture is very sparse. There is no valuation of Celtic Park or Lennox Street before me and, in particular, no evidence from the Defendants as to whether the proceeds of sale of the three properties will suffice to discharge the debt owed by the Plaintiffs and any damages that may be awarded. The Defendants have not set out whether and why they believed the Plaintiffs not to have the means to honour an undertaking or how the value of the Properties may relate to that issue. I have not been told what if any shortfall there would be if the proceeds of sale of the three properties were available to meet an award of damages. The Plaintiffs in turn are silent as to their means to discharge any damages that may be ordered.

203. A similar situation was faced in *O'Gara v. Ulster Bank Ireland DAC* (which is another receiver injunction application). Barniville J (as he then was) noted the deficiency in available financial information:

> "*74. In those circumstances, and in the absence of further evidence, I would be faced with an evidential deficit. That deficit cuts both ways. The plaintiffs would not have provided me with sufficient information to demonstrate that, leaving aside their overcharging claim, they would be in a position to meet any liability which they may be found to have on foot of their undertaking as to damages. Presumably as part of demonstrating their ability to meet any such liability, the plaintiffs would wish to refer to the value of the UK properties and, in particular, the value of their equities (if any) in the properties. Neither side provided me with evidence of this. From the perspective of the defendants, if the defendants were required to demonstrate that damages would not be an adequate remedy for them by reason of the various matters outlined by Mr. Smith at para. 86 of his first affidavit and paras. 28 and 33 of his second affidavit (including the performance of the UK commercial property market and the potential effects of Brexit), the defendants would also be required to provide some evidence as to the current values of the UK properties to the extent of which those values exceed (or otherwise) the amounts secured on the properties. None of that information was provided by either side. Had it been necessary to decide this issue, I may have required more evidence from the defendants also. In those circumstances and in the absence of that evidence, I would have had a difficulty in reaching a conclusion on the issue as to whether damages would*

not be an adequate remedy for the defendants. I may, therefore, have proceeded to consider the next stage of the test, namely, the balance of convenience."

204. This is the same issue faced here: Everyday asserts the inadequacy of the undertaking proffered but does not explain the value of the Properties or how they relate to that assertion. If, for example, the property values of the two unsold properties have increased substantially, the total proceeds exceed the total arrears, it may be that any damages to Everyday could be recovered from that surplus. On the state of the evidence before me, it is simply not possible to form a concluded view as to whether an undertaking in damages from the Plaintiffs is adequate or meaningful.

205. By contrast, in *Farrell* (on which the Defendants rely) it appears that evidence was adduced about previous failures to pay rates and services charges, shortfalls in rent and about the financial means of the plaintiffs. In the High Court (*Farrell v. Everyday Finance DAC* [2022] IEHC 698 at [102]), Stack J reasoned as follows:

> *"I find it difficult to see how the plaintiff can give a meaningful undertaking in damages. He gave a very limited account of his borrowings, indebtedness and income. His complaint is actually limited to what appears to be the acceptance of a restructuring of existing debt and he does not assert that he can repay the monies owing. There is direct evidence of his failure to pay service charges and rates."*

206. The Court attached weight both to a want of evidence of means by the Plaintiff and evidence of previous instances of the Plaintiff not discharging monies that were owed.

207. On appeal, the Court of Appeal (Faherty J at [100]) found:

> "*I perceive no error of principle, or afront to the interests of justice, in the Judge's determination that the third and fourth defendants were more likely to be able meet the various financial obligations that attach to the Property. There was ample evidence for the Judge's conclusion in this regard*."

208. There was evidence there to support the findings that the respondents were more likely to meet the obligations attaching to the property.

209. In this case, there is no adequate evidential basis to distinguish between the ability of the Defendants and the Plaintiffs to recover damages, if they are left to a remedy in damages and ultimately prevail at trial. It is therefore difficult to regard the alleged inadequacy of the undertaking by the Plaintiffs as a weighty factor such as could justify refusal of the injunction.

Plaintiffs' Reliance on *Nihill*

210. A specific submission was made by the Plaintiffs that, given the nature of the claims made, an injunction ought be granted. It was contended that *Nihill v. Everyday Finance DAC* [2022] IEHC 484 establishes that a contract of sale is either properly made or not and the appropriate remedy is an injunction (citing *Nihill* [87]).

211. However, the facts of *Nihill* are different to the facts here in a highly significant respect. As Dignam J recorded in his judgment in that case, the properties at issue had been advertised for sale and were due to be auctioned on 13 October 2021. The proceedings were issued on 12 October 2021 and an interim injunction was granted. Among the plaintiff's complaints was an allegation that the lands would be sold at a depressed price.

212. The key finding in *Nihill* on the balance of justice was the following:

> *"83… It can not be said that the Plaintiff could secure a permanent injunction to restrain the sale of the lands at all. However, it does seem to me, given that I am satisfied that the Plaintiff has established an arguable case as to the receiver's power of sale on the basis of the evidence as to his appointment, that he might secure a permanent injunction restraining its sale on the basis of the current sales process, ie. the current marketing and draft contract. It seems to me that this is sufficient to satisfy the first point in Merck Sharpe & Dohme*."

213. Dignam J continued,

> *"86… I think I can properly consider that the lands/farm is not a purely commercial enterprise and therefore while I must continue to have regard to the fact that there is a significant commercial element to the enterprise, the*

scepticism with which I must approach the claim that damage would not be an adequate remedy should be slightly lessened."

214. The Plaintiffs extracted a passage from the judgment in *Nihill* and sought to deploy it as an unanswerable factor in their favour in the balance of justice. In the passage in question, Dignam J quoted an observation of Ó Dálaigh CJ in *Holohan v. Friends Provident and Century Life Office* [1996] IR 1. That case bore some similarity to the facts of *Nihill* itself in that it was an attempt to challenge and prevent a specific pending property conveyance. O'Dalaigh CJ (Lavery and Walsh JJ concurring) held,

> "*the defendants refused to look into the value of the plaintiff's property on a basis which their own surveyors advised would show a considerably higher price than sale at investment value. Their minds (as their witness admitted) were closed to this course. This was not reasonable; in my opinion it was quite unreasonable. 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*."

215. Applying that dicta (as adopted in turn by Allen J in *Hennessy v Tyrrell* [2022] IEHC 109), Dignam J concluded,

> "*it seems to me that, having held that there is an arguable case that the purported sale is invalid, I must give considerable weight to the observation of Ó Dálaigh CJ*."

216. In *Nihill*, it was because of the finding that the specific intended contract of sale was invalid, that an injunction to specifically restrain the Defendants from selling the lands on the basis of that particular draft contract and the marketing process was found to be warranted.

217. This is not comparable to the case before me and does not advance the Plaintiffs' case of prejudice here.

Conclusion on the Balance of Justice

218. The parties did not address the balance of justice in any detail on affidavit.

219. The Plaintiffs have shown no injustice or harm to have arisen from the sale of Inver Gael or the taking possession of Lennox Street. They have shown no identifiable risk of irreparable harm or injustice from the same steps being undertaken with regard to Celtic Park, or from the sale of Lennox Street.

220. There is also no demonstrated risk of harm to the Defendants that is not purely financial in nature, if there a postponement of its rights to take further enforcement action pending trial. Further, Everyday's own decision to take no steps regarding Celtic Park since the threat to appoint a receiver in 2020 undermines any real suggestion of harm being caused by enforcement delay. There is also no allegation by Everyday that the property currently in the possession of the Plaintiffs (Celtic Park) is being mismanaged or that anything less than full rent is being obtained for its occupation. Finally, there is no evidence or even suggestion of a current or imminent plan to sell either Lennox Street or Celtic Park, such that specific prejudice would be caused if not permitted to proceed.

221. The two points raised by the Defendants, namely delay and the insufficiency of the undertaking in damages, have been found not to be sufficient to refuse the orders sought or to tilt the balance in the Defendants' favour.

222. In short, the justices seem relatively evenly balanced, in the sense that neither side has shown any real risk of cognisable prejudice from the grant or refusal of the reliefs sought.

TENTATIVE VIEW ON THE MERITS

223. Given the evenly balanced justices of the matter, it may be questioned whether it is possible to have regard, on a preliminary basis, to the strength of the parties' respective positions. The task is to decide whether there is a credible basis to decide that one side is stronger than the other. O'Donnell J explained this in *MSD* at **[63]**:

> *"In cases where the balance of convenience may be finely balanced, it may be appropriate to have regard, even on a preliminary basis, to the strength of the rival arguments as they may appear to the court. Certainly, if it was apparent that Clonmel's case for invalidity was strong, and/or if there had been successive determinations in Clonmel's favour of a similar challenge in other jurisdictions, then that might weigh against the grant of an injunction."*

224. This also arises more appropriately when the issue in dispute is a legal one. This was underlined in *Ryan v. Dengrove*:

> *"52 As I read O'Donnell J.'s judgment, the approach he was thus suggesting was limited in scope. In particular, it seems to me to be evident from the context that he envisaged a view on the merits (other than in determining whether there was a fair issue to be tried) being taken only in circumstances in which there was a legal issue on which the Court could confidently express such a position and that, it seems to me, necessarily depends on any facts relevant to the disposition of that issue being supported by credible evidence."*

225. Here, there is only claim that has been found to reach the requisite threshold to be regarded as a "*serious issue*", namely the Loan Transfer Issue. On the basis of the case as presented at the hearing of the motion, it is a very technical case, premised heavily on drafting issues with the Transfer Deed. It was raised late in the day, shortly before the Motion was heard, and the Defendants did not therefore have a meaningful opportunity to address it on affidavit. However, it is undeniably a legal issue concerning the interpretation of a deed and the assessment of the adequacy and validity of same, and one which a court is well equipped to address. It is also not apparent that there will be a substantial factual dispute, or what that dispute would be, although there may be relevant witness evidence at trial. Given that this Claim hinges on the Transfer Deed, the following points may be noted from the analysis already carried out.

226. First, by contrast with *Temple*, it is possible to identify each of the facilities and mortgages within the Transfer Deed. The dates are correctly recorded and the facility numbers are included in the schedule and in relevant documentation issued to the Plaintiffs and exhibited to the grounding affidavit. While the loan drawdown letter containing the account number has not been exhibited by the Plaintiffs for one of the

properties (Inver Gael) that is the property in respect of which no injunction is sought and, in any event, it seems reasonable to infer that the same situation pertains to all three.

227. Second, it is possible from the general language of the operative part of the Deed to understand what the purpose of the Deed, and hence the schedules, is (albeit the referencing is unclear), unlike in *Temple*.

228. Third, while there are errors and ambiguities in the schedule with regard to the relevant lender and mortgagee, both AIBMB and AIB plc are party to the Deed, so it appears that the relevant counter-party to each mortgage and facility letter did in fact transfer its interest under the Deed. This can be contrasted with *Bedford*, in which Gearty J noted there was "*little evidence*" of the transfers of the loan book from the lender to the plaintiff.

229. Fourth, the absence of defined terms is a deficiency, but there is no term in the Deed which cannot be fairly understood from the Deed read as a whole.

230. Finally, while there are redactions to the Deed, and it is difficult to compare these to the redactions in other cases (not having access to the underlying documents), there is no good basis to believe that the redactions to the Transfer Deed here do relate to material provisions. This appears to distinguish the case from *Remseyer*.

231. It is not without relevance that in the cases on which the Plaintiffs rely for this claim, such as *Bedford* and *Temple*, the Courts decided that the case was not sufficiently strong to warrant a decision that there was a good defence, rather that there were good grounds to refer the matter to plenary hearing.

232. In light of the specific nature of the case made by the Plaintiffs and the provisions of the Transfer Deed, there is an issue to be tried, but I believe the conclusion can be formed on a preliminary basis, that it is not a strong one.

233. That is not to say that a good case may or may not be made out at trial, rather that on the basis of the documentation before me, including the Transfer Deed, and a comparison with the authorities on which the Plaintiffs rely, the Plaintiffs' case on this

point just barely raises a "*serious issue*", and not one which appears for the purposes of this application to have a good prospect of success. . More detailed evidence and submissions can be made at trial and the parties will be able to adduce different and additional documentation, including, if deemed appropriate, unredacted copies of the Transfer Deed. The merits of the matter can then be more appropriately be addressed.

234. Having weighed "*the relative strengths and merits of each party's case as it may appear at the interlocutory stage*" (*MSD* [63]), I have formed a tentative view of the merits, and this weighs against the grant of the relief sought by the Plaintiffs.

ADDITIONAL FACTORS

235. Turning then to some additional factors that also inform the most just approach in this matter.

Mandatory orders sought

236. The orders sought regarding the possession and rent of Lennox Street are, as has been addressed, in the nature of mandatory relief. This imposes a heavier onus on the Plaintiffs to show a likelihood of success, "*a level of proof … that at the ultimate trial that relief is likely to be granted*" (*Hoey*). It must be reiterated that, on the case as presented, it is possible to decide the strength or weakness of the parties' positions, in order to tip the balance of justice. If the burden is imposed on the Plaintiff to adduce a level of proof to demonstrate likely success at trial, I am not satisfied the Plaintiffs have done so. Having regard to the nature of the Loan Transfer Issue, the technicality of the point, and the fact that it is founded on redactions and drafting issues which may well be explained and/or addressed when the Defendant has an opportunity to do so I am not satisfied that the Plaintiffs have discharged such a burden. The threshold for the grant of mandatory relief that is sought (in substance if not in terminology) with regard to Lennox Street is not met.

Status Quo

237. When the balance of justice is a fine one, the counsel of prudence has long been to preserve the *status quo*. This is important in this case. In *MSD*, O'Donnell J referred

to the "*simple and logical steps*" that emerged from the judgment in *American Cyanamid v. Ethicon Limited* [1975] AC 396,) ([32]) and continued ([33]):

> "*If there is doubt as to the outcome of the analysis of the respective decision to the parties, then other factors may come into play. For example, where other matters appeared balanced, it was a counsel of prudence to take such measures as were calculated to preserve the status quo. If the defendant was restrained from doing something which he or she had previously not done, the only effect of the interlocutory injunction would be to postpone the date on which he or she was able to embark on that course*."

238. This echoes the decision McCracken J in *B&S Limited v. Irish Auto Trader Limited* [1995] 2 IR 142, which was in turn adopted the judgment of Clarke J in *Okunade v. Minister for Justice* [2012] IESC 49 that, "*If all other matters are equally balanced the court should attempt to preserve the status quo*."

239. The same approach was referenced by Barniville J in *O'Gara* at [77]:

> *"It is also the case that, while not a fixed rule, in the event that all matters are equally balanced in the consideration of where the balance of convenience lies, the court should attempt to preserve the status quo (see: B&S, as summarised by Clark J. in Okunade at 180 – 181)."*

240. It is then necessary to decide what the "*status quo*" means.

241. In *Hoey* ([31]), Charleton J quoted an extract from Keane, Eq*uity and the Law of Trusts in Ireland* (15.74–15.78) including the following:

> "… *Where there is a doubt as to the adequacy of the respective remedies in damages available to either party, the court will take other factors into account in assessing where the balance of convenience lies. In the first place, where other factors appear to be evenly balanced it will in general 'as a counsel of prudence' seek to preserve the status quo pending the trial. The status quo normally means the situation which existed at the time the proceedings were commenced; if, however, there has been unusual delay by the plaintiff in applying for the*

interlocutory injunction, it will be the status quo at the time of the application which will be relevant…"

242. In terms of identifying the relevant "*status quo*", Murray J in *Ryanair DAC v Skyscanner Ltd*. [2022] IECA 64 explained as follows:

> "*39… Generally, the status quo ante is the state of affairs prevailing at the point immediately before the commencement of the action or, in the event that the application is unreasonably delayed between the issue of the summons and the hearing of the motion, the position as at the point of application (Bean 'Injunctions' (13th Ed. 2018) at para. 3.23).*"

243. This topic was addressed in more detail by Whelan J in the Court of Appeal in *MSD* [2018] IECA 177

> **"***121 There is a dispute in the instant case as to what constitutes the status quo. An essential aim of an interlocutory injunction is to preserve the status quo existing between the parties until the trial of the issues in dispute can take place. The rationale behind the grant of an interlocutory injunction is primarily the need to protect the rights of a plaintiff by preserving the circumstances which exist at the time he institutes proceedings to prevent him suffering irreparable prejudice by reason of the delay which must necessarily occur between the institution of the within proceedings and the trial of the action. The more time that has passed since the status quo was changed, the more likely it is that the result of the change will be considered the new status quo.*
>
> *122 O'Higgins C.J. in Campus Oil stated at p. 105:*
> *'Such relief is given because a period must necessarily elapse before the action could come to trial and for the purpose of keeping matters in status quo until the hearing.'*
>
> *…*
> *124 In Garden Cottage Foods Ltd v. Milk Marketing Board [1984] A.C. 130 at p. 140, Lord Diplock discussed the meaning of "status quo":*

'The status quo is the existing state of affairs; but since states of affairs do not remain static this raises the query: existing when? In my opinion, the relevant status quo to which reference was made in American Cyanamid is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before the last change would be the relevant status quo.'

125 However, it is for the trial judge to determine what constitutes the status quo in any given case rather than adhering slavishly to pre determined formulae lacking the legal resilience that is a pre-requisite for a strict legal principle."

244. Finlay Geoghegan J in *Contach Building Products v. Walsh* [2006] IEHC 45 considered the effect of delay on the *status quo*:

> "*where a plaintiff moves speedily after learning of the commencement of selling of a product on a market, it appears to me that the status quo which the court must primarily have regard to is the position which prevailed before the commencement of the alleged wrongful acts, or the acts alleged to constitute the passing-off. I am satisfied, in this instance, that the plaintiff did so move. There was no suggestion made on behalf of the defendants that there was any delay in the plaintiff moving to seek to restrain the defendant in this market*."

245. This is discussed in Kirwan, *Injunctions: Law and Practice* (3rd Ed 2020) at [6-255 to 6-256] (footnotes omitted):

"More broadly, it could be argued that the point at which the status quo should be determined is something of a moveable feast, depending on the circumstances of the case. In Alfred Dunhill Ltd v Sunoptic S.A. Megaw L.J. stated, in trying to identify the point of determination of the status quo, that such a point 'may well vary in different cases.' There is much to commend this approach. For example, in Contech v Walsh Finlay Geoghegan J. suggested in the context of an action for passing off that 'where a plaintiff moves speedily after learning of the commencement of selling of a product on a market, it appears to me that the status quo which the court must primarily have regard to is the position which prevailed before the commencement of the alleged wrongful acts, or the acts alleged to constitute the passing-off.'

However, it has been accepted that if there is a lengthy delay in seeking an interlocutory injunction, it may be the status quo at the time immediately preceding the motion seeking the interlocutory injunction which is of relevance. This would appear to make sense having regard to Finlay Geoghegan J.'s reference to moving 'speedily'."

246. Based on these authorities, there is an established general rule that, if there is no delay by the moving party, the *status quo* to be assessed is that which pertained before the commencement of any allegedly wrongful conduct. If, however, there has been delay in seeking to enjoin that conduct, the *status quo* may be taken to be the altered situation. In effect, the conduct complained of becomes part of the *status quo*. The applicant for injunctive relief is fixed with the consequences of their delay. Significantly, the Court has a broad discretion in deciding what *status quo* is to be preserved and how that is to be interpreted.

247. In *O'Gara* the Court placed emphasis on the fact that the *status quo* was that the receivers had been appointed and had already embarked on selling the properties (although none had yet been sold). This was a factor that weighed against the injunctions sought.

248. The facts in *Charlton v Scriven* [2019] IESC 28, Clarke CJ (as he then was) (O'Donnell and O'Malley JJ concurring), were different as the stage of selling properties had

apparently not been reached. There, Clarke CJ drew an important distinction between an order which related to the collection of rent and one which would permit the sale of a property ([6.10] – [6.11]):

> *"I would, therefore, distinguish between the reliefs sought which simply seek to retain the position that the Receivers are entitled to collect the rent, on the one hand, from any relief which might be designed to allow the Receivers to move on to selling the property on the other."*

249. Against the foregoing backdrop, it is appropriate to consider the *status quo* in this case.

250. In my view, the undoubted delay by the Plaintiffs makes it necessary to look at the *status quo* as of the date of the issue of the Proceedings.

251. As of that date, the Receiver was in occupation of two of the properties and in the process of selling one of these. Everyday was actively exercising its powers of enforcement, such as to justify the Plaintiffs applying urgently for injunctions preventing Everyday taking steps with regard to any of them. The risk of enforcement action was regarded by the Plaintiffs as sufficiently urgent and necessary to warrant seeking interlocutory relief (including an *ex parte* order for short service) with regard to the three properties.

252. The *status quo* must be taken to be that Everyday was actively taking steps to enforce its security (which is similar to the *status quo* identified in *O'Gara*).

253. It is true that there is no receiver appointed in respect of Celtic Park, but there is also no injunction sought to prevent the sale of that property. It is important that a Court can make orders to ensure the maintenance of the status quo, but cannot thereby enjoin something a party from doing something which the motion does not seek to enjoin.

254. In the particular circumstances of this case, the *status quo* as of the date of the issue of the proceedings was that there was no impediment to Everyday taking such steps as it deemed necessary and appropriate with regard to the three properties.

255. On the basis of the facts here, and given the findings made regarding delay, the merits of the case and the balance of justice, the appropriate *status quo* is one in which Everyday is the holder of certain security interests and is not enjoined from taking action on foot of them.

256. In directing the maintenance of this *status quo* there are two additional ancillary matters to be noted.

257. First, towards the conclusion of the hearing of this Motion, an offer was made on behalf of the Plaintiffs to keep any rents received in escrow. The Defendants had made a similar undertaking with regard to Lennox Street on 20 March 2024. The Defendants did not have an opportunity to consider the Plaintiffs' offer, but it is an offer to which I am entitled to have regard.

258. Accordingly, for so long as Celtic Park and Lennox Street are not sold, I direct that the Defendants maintain the rents from Lennox Street in escrow and the Plaintiffs (or the Defendants if they do take possession of that property) maintain the rents from Celtic Park in escrow, pending the determination of these proceedings or other order. The Defendants are also directed to continue to preserve the proceeds of sale of Inver Gael. If either Lennox Street or Celtic Park are sold, I direct that the Defendants similarly maintain the proceeds of those sales and preserve them pending the determination of these Proceedings or further order.

259. Second, I note the leisurely pace of these proceedings to date, with the Plaintiffs having taken from March to October 2024 to deliver a statement of claim. The order made here to maintain the *status quo* as it now stands is not a final order but a strictly temporary one only. The parties should take every step to expedite the hearing of this matter, particularly given the fact that there are several relatively narrow, net and technical grounds which should be capable of early resolution. I would echo Clarke CJ's observations in *Charlton v. Scriven* at [7.1]:

> *"Interlocutory injunctions should not be treated as a means of attempting, in practice, to obtain a summary judgment. They are designed to do what they say,*

that is, to hold the situation until there can be a full trial. While there will inevitably be some cases where the result of an interlocutory injunction may, in practical terms, bring the proceedings to an end, it remains the case that there is an obligation on any party which has obtained an interlocutory injunction not to rest on their laurels, but to bring the matter on for full hearing.."

CONCLUSIONS

260. This is a clear example of a case in which the loss being apprehended by both parties is solely and exclusively financial in nature, and there is no evidence of a risk of irremediable prejudice to either party. I am, to borrow the language of *MSD*, "*robustly sceptical*" of the parties' assertions to the contrary (and there are in fact no serious attempts to make such a case).

261. Furthermore, the current situation, in which one property is controlled by Everyday, one property is controlled by the Plaintiffs, and Everyday holds the proceeds of sale of the third, has subsisted since March 2024 and neither side has made an effort to demonstrate any prejudice resulting from this scenario.

262. Given the balance of justice is evenly weighed between the two sides, I have had some preliminary regard to the relative merits of the parties' substantive positions. There was only one claim which meets the undemanding threshold of a "*serious issue*". On a preliminary assessment of its merit, however, I form the tentative view that the Plaintiffs' case is weaker than that of the Defendants on this issue. This weighs against the grant of the relief sought.

263. It is also an important fact that there has been delay by the Plaintiffs, which results in the relevant *status quo* being that which existed at the date of issue of the Proceedings. Consequently, no order is granted for the restoration of the *status quo* prior to March 2024. The *status quo* at that time is that Everyday was taking steps and was entitled to take steps to enforce its security, and this is the *status quo* that should be maintained.

264. In all of the circumstances, the justice of this case lies in favour of the refusal of the relief sought by the Plaintiffs.

265. My provisional view on the question of the costs, subject to hearing any submissions to the contrary, is that the Plaintiffs should be liable for the costs of this Motion, having failed to obtain the reliefs applied for.

266. Should either party wish to contend for a different costs order, written submissions of no more than 1,000 words in length can be delivered by 28 November 2024 and I can hear submissions at 10.30am on 5 December 2024. The parties have liberty to notify the Registrar in the event that this is not necessary.