[2020] IEHC 619

THE HIGH COURT

[2020 No. 6083 P]

BETWEEN

JOHN COULSTON AND ROY SCANNELL

PLAINTIFFS

AND

JAMES DOYLE, JOAN DOYLE, JEREMIAH DOYLE AND ROBERT DOYLE

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 1st day of December, 2020

SUMMARY

1. To obtain a temporary (interlocutory) injunction pending a trial, a receiver has to give an undertaking to pay damages to the borrower (to compensate the borrower if a permanent injunction ends up not being granted at the trial). However, under the typical mortgage deed, the receiver is deemed to be the agent of his principal, the borrower. As a principal is liable for his agent's acts and omissions, does this not mean that the borrower is liable for the giving of an undertaking as to damages by the receiver – even where it is given to the borrower? If this is correct, then the borrower is liable to indemnify the receiver for any pay-out made by the receiver to the borrower pursuant to the undertaking as to damages. This would make the undertaking as to damages meaningless to the borrower, since the borrower would effectively end up paying his/her own damages.

2. This is the claim made in this case i.e. that the receiver's undertaking as to damages to the borrower is meaningless. On this basis it is claimed that the interlocutory injunction should not therefore be granted to the receiver since damages could never be an adequate remedy for a borrower (such as to justify the grant of such an injunction), when the borrower ends up effectively paying damages to himself. No caselaw was opened to this Court in which this particular claim was previously made.

3. If this defence is upheld, it would mean that undertakings as to damages, given to borrowers by receivers in the very regular receiver injunctions before the High Court, would be meaningless and would provide no protection for the borrowers – this is because a receiver is invariably the agent of the borrower. However, for the reasons set out below, including the fact that the receiver/borrower agency is not a normal type of agency, this Court rejects this argument.

BACKGROUND

4. The application for the interlocutory injunction is being made by the first named plaintiff (the "Receiver") against the defendants (the "Doyles") seeking possession of five separate sites in Killorglin, Kilgobnet, Ballymacprior and Cappaghaneen in County Kerry (the "Properties") which are owned by the Doyles.

5. The Doyles borrowed significant sums to purchase and develop the Properties. The current level of debt secured on the Properties is €1,924,850. Submissions were made by the Receiver, which were not disputed by the Doyles, that no repayments have been made on the loans since 2018 and that the current value of the Properties is €1,150,000, and so even after their sale, it is expected that there will be a shortfall of €750,000. The

Properties are commercial in nature (a small housing development and agricultural land). It is not claimed by the Doyles that any of the Properties comprise a family home, although some of the lands are used for farming by the Doyles.

6. It is not necessary to go into detail in relation to the initial borrowings, the default on the repayment of those borrowings, the assignment by the original lending bank to Everyday Finance DAC ("Everyday") of the borrowings and related security or the appointment of the Receiver (by Everyday under the security documentation), since none of these matters are disputed by the Doyles. It is to be noted that the second named plaintiff was appointed by Everyday as its agent in respect of the Property for the purposes of the exercise of Everyday's powers under the security documentation.

THE LAW RELATING TO INTERLOCUTORY INJUNCTIONS

7. The law in relation to the grant of interlocutory injunctions is well-settled and was most recently restated in *Charleton v. Scriven* [2019] IESC 28 and *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Limited* [2019] IESC 65. It is clear from these cases that for a plaintiff to get an interlocutory injunction the following must be established:

- *Fair question to be tried*?

  The plaintiff must establish that there is a fair question to be tried regarding her entitlement to that injunction.

- *But a strong case has to be made out if mandatory injunction?*

  However, where the interlocutory injunction is mandatory in nature, before such an order will be granted, the plaintiff must show, not merely that there is a fair question to be tried, but that a strong case has been made out.

- *Does balance of justice favour grant of injunction?*

  Once a fair question/strong case has been made out, then the plaintiff must establish that the balance of justice (balance of convenience) favours the grant of the injunction. In considering where the balance of justice lies, an important, but not necessarily determinative issue (per O'Donnell J. in *Merck Sharp & Dohme* at para. 35) is the adequacy of damages.

- *Are damages an adequate remedy for plaintiff if injunction wrongly refused?*

  The Court must first ask would damages be an adequate remedy for a plaintiff who is *refused* an interlocutory injunction by this Court, if that plaintiff gets a permanent injunction at trial (thus leading to the conclusion that the interlocutory injunction should *not have been refused*)? If damages would be an adequate remedy but also an effective remedy (i.e. the defendant is in a financial position to pay them) for the plaintiff, then this militates against the grant of an injunction. On the other hand, if damages would not be an adequate remedy for the plaintiff, this favours the grant of the injunction.

- *Undertaking by plaintiff to defendant to pay damages if injunction wrongly granted?*

  There must be an undertaking as to damages by the plaintiff to the defendant because:

  > "The Plaintiff cannot get an injunction unless it can give an undertaking as to damages. If an injunction is wrongly granted at this stage and it so transpires at the hearing of the action, the Plaintiff must undertake to adequately indemnify the Defendant against any loss incurred by the Defendant by reason of the injunction being wrongly granted." (per Laffoy J. in *Pasture Properties Limited v. Evans* [1999] IEHC 214).

- *Are damages an adequate remedy for defendant if injunction wrongly granted?*

  Once this undertaking is being given, the Court must then ask if the plaintiff's undertaking to the defendant to pay damages would be an adequate and effective remedy for the defendant if it turns out that the interlocutory injunction was wrongly granted. (See *American Cyanamid Co. v. Ethicon Ltd* [1975] 1 All ER 504 per Lord Diplock at 511).

- *Which court order will run least risk of injustice?*

  Finally, in deciding whether or not to grant an interlocutory injunction, it is important to have regard to the '*underlying principle of attempting to fashion an order which runs the least risk of injustice'* (per Clarke C.J. at para. 6.12 of *Charleton v. Scriven*).

These foregoing principles will be applied to the facts of this case.

ANALYSIS

8. It is common case that the order sought in the present case, an order for possession, is mandatory in nature and so the Receiver must establish that a strong case has been made out for this order. In this respect, the Receiver claims that, as the validity of the appointment of the Receiver and his powers are not disputed by the Doyles, a strong case has in fact been made out. He claims that it falls within the type of case envisaged by Clarke C.J. in *Charleton v. Scriven* at paragraph 6.13 where he states:

   > "Where no real case of any substance is made by a defendant which puts forward a credible basis for suggesting either that receivers were not validly appointed or that receivers, although validly appointed, are seeking to exercise powers which they do not have, then it will not matter whether any interlocutory injunctive relief which the relevant receivers seek can properly be characterised as respectively mandatory or prohibitory, for there will be a more than adequate basis for suggesting that a strong case has been made out."

9. The Doyles, while not disputing the appointment of the Receiver or the powers of the Receiver, nonetheless claim that the interlocutory injunction should not be granted for the following reasons.

Defence 1 - Everyday should be a party to the proceedings?

10. First, the Doyles claim that Everyday should be a party to the proceedings as there is no privity between the Receiver and the Doyles, which this Court takes to mean that there is no privity of contract between them, i.e. that they both are not signatories to the mortgages or other security documentation. This Court rejects this defence since there is no necessity for a defendant and plaintiff to be in a contractual relationship for the plaintiff to issue proceedings or seek an injunction against a defendant. The question of whether litigation, or in this case an application for an injunction, is justified is not determined by whether there is privity of contract between the plaintiff and defendant but is instead determined by whether the plaintiff has a legal right which is capable of enforcement against the defendant. It is clear from the documentation opened to this Court, and which has not been disputed by the Doyles, that the Receiver was duly appointed and has the right to seek possession of the Properties and therefore has a legal right which is enforceable against the Doyles, notwithstanding that the Doyles claim that there is '*no privity'* between themselves and the Receiver.

Defence 2 - Everyday should have negotiated a settlement in good faith with the Doyles?

11. Secondly, the Doyles claim that Everyday and its agent, Link ASI Limited ("Link ASI"), entered into negotiations with the Doyles to settle the outstanding debts. In particular, evidence was provided on behalf of the Doyles that a proposal was made by the Doyles to Link ASI for the settlement of the outstanding debt by the payment of a sum of money to Link ASI from a relative of the Doyles, in conjunction with the sale of some other commercial property over a 24 month period, with the proceeds from that sale to be paid to Link ASI. The Doyles complain that Everyday rejected this proposal. In particular, the Doyles claim that, in rejecting this proposal, Everyday acted unreasonably and not in good faith. However, there is no obligation on a bank or indeed any other creditor to settle a lawfully incurred debt with a debtor for less than the full amount. A similar argument was made in *Ryan v. Danske Bank* [2014] IEHC 236. In that case, it was claimed that the offer by the borrower to discharge his arrears ought to have been positively considered by the bank. This was rejected by Baker J., who stated at para. 37 that:

> "In summary the Bank and the plaintiff entered into formal security documentation which entitled the Bank as a matter of contract to appoint a receiver on the happening of certain expressly identified events. Certain restrictions will be implied as a matter of common law in the exercise by the Bank of this right, but these are no more than the obligation on the part of the Bank to act fairly and honestly. The Bank was entitled to appoint a receiver following the making of a demand and it has not been asserted that proper demand was not made. I reject the assertion that there can be imported into the contractual relationship between the parties an obligation on the part of the Bank to act reasonably, to consult, or still less to fully consult, with the customer, or to act in the interest of the borrower. A duty of care may well arise should the receiver or the Bank sell either or both of the secured properties, but such a duty has not arisen in these circumstances to date. *What the plaintiff asserts is that he had a right to be heard, that the offer made by him to*

discharge the arrears ought to have been positively considered by the Bank, that the Bank failed to afford him natural justice in its process. These are rights and obligations which I cannot accept as a matter of law are arguably terms that may be implied into the security contract and the mortgage deeds."(*Emphasis* added)

12. While this Court would prefer if parties in dispute agreed settlements between themselves, it cannot force one of the parties to settle for less than its legal entitlements. It seems clear on the basis of *Ryan v. Danske Bank* that it does not amount to bad faith for a creditor such as Everyday to fail to settle the unpaid loan with the Doyles, for less than the outstanding debt. Accordingly, this is not a basis upon which to resist the present application for possession.

Defence 3 - Damages are not an adequate remedy for the Doyles?

13. The third point made by the Doyles in their defence is that damages are not an adequate remedy for the Doyles, should the Receiver be granted an interlocutory injunction by this Court but then be refused a permanent injunction at the trial. In relation to the adequacy of damages, it is necessary first to consider whether damages would be an adequate remedy for the party seeking the injunction, such as to obviate the need for the injunction.

Would damages be an adequate remedy for the Receiver?

14. The first question is as follows: if an interlocutory injunction was not granted by this Court, but an injunction was to be granted at the trial, would damages be an adequate remedy for the Receiver to compensate him for not getting possession of the Properties between this hearing date and the trial date?

15. It seems that the damage/loss to the Receiver and the institution appointing him, Everyday, in not getting possession of the Properties for the period between now and the trial, could be easily calculated. However, it is unlikely that the Doyles would be able to meet any damages claim, since they owe almost €2 million to Everyday, and there has been no repayment made on the borrowings since 2018 and there is likely to be a shortfall of some €750,000, after the Properties are sold. No evidence to the contrary was presented by the Doyles. Accordingly, it seems clear that damages would not be an adequate and effective remedy for the Receiver if this Court was to refuse to grant an interlocutory injunction. This aspect of the adequacy of damages therefore favours the grant of the injunction. However, this is only the first part of the adequacy of damages test. The second part will be considered next.

Would damages be an adequate remedy for the Doyles?

16. Having determined that damages would not be an adequate remedy for the Receiver if the interlocutory injunction was refused, this Court must ask the next question: if an interlocutory injunction were to be granted to the Receiver, but an injunction was refused at the trial, would damages be an adequate and effective remedy for the Doyles to compensate them for being deprived of possession of the Properties between this hearing date and the date of the trial?

17. In this instance, one is dealing with commercial property, i.e. land that has a few completed houses built upon it with foundations laid for other houses, as well as land used for farming. For this reason, the dispute is commercial in nature and as noted by O'Donnell J. in *Merck Sharp & Dohme*, at para. 64, the courts should be '*robustly sceptica*l' of a claim in commercial cases that damages are not an adequate remedy. In addition, it seems clear that damages could be easily calculated, so as to compensate the Doyles for the loss they might suffer in not having possession of the Properties. This is because it appears that if rent is lost on the completed houses, this could be easily calculated as could any lost income from farming. The fact that damages would in fact be an effective remedy, as well as an adequate remedy, for the Doyles therefore favours the grant of the interlocutory injunction, since an undertaking has been given by the Receiver to pay any such damages suffered by the Doyles if a permanent injunction is refused at the trial. In this regard, the Doyles have not contended that the Receiver does not have sufficient funds to meet that undertaking.

Is a mortgagor liable for a receiver's undertaking as to damages in favour of mortgagor?

18. However, the Doyles do make one novel point regarding adequacy of damages which must be addressed. They claim that under the terms of the various mortgages appointing the Receiver, it is clear that the Receiver, as is standard in such mortgages, is deemed to be the agent of the Doyles. Clause 8.01 of the Mortgage dated 11th December, 2000 (the "Mortgage") for one of the sites (Folio KY29032F), which is in almost identical terms in the other four mortgages, states:

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

19. On this basis, the Doyles argue that, if they were to ultimately win at trial and be awarded damages from the Receiver, the effect of this principle (that they are responsible for the acts of the Receiver and that they are liable for such expenses incidental to the powers of the Receiver, as Everyday in its absolute discretion shall determine) is that they would have to indemnify the Receiver in respect of the damages that he has to pay them. On this basis, they say that they would, in effect, end up paying their own damages. Accordingly, they argue that damages are not an adequate remedy for them since they

could never effectively receive damages. They therefore claim that the balance of justice favours the refusal of the interlocutory injunction.

Agency between receiver and mortgagor is not an ordinary agency

20. The English Court of Appeal decision in *Gomba Holdings (UK) Ltd v. Minories Finance Ltd [*1989] 1 All ER 261 is particularly relevant, as it highlights clearly that the agency between a receiver and a mortgagor is not an ordinary agency. In that case, the receivers were the agents of the mortgagor and the mortgagor sought possession of documents from the receivers, which the receivers had prepared during the receivership. The mortgagor made this claim for possession on the basis that the documents were prepared by its agents, the receivers. The English Court of Appeal rejected the argument that the mortgagor was entitled to possession of these documents. At p. 263, Fox L.J. states:

> "The basis of the claim to ownership is that the receivers were, during the receivership, the agents of companies and were paid by the companies. It is said that, as between principal and agent, all documents concerning the principal's affairs which have been prepared or received by the agent belong to the principal and have to be delivered up on the termination of the agency.
>
> In general terms that is a correct statement of principle, but it cannot be applied mechanically to the somewhat complex position of receivership. The agency of a receiver is not an ordinary agency. It is primarily a device to protect the mortgagee or debenture holder. Thus, the receiver acts as agent for the mortgage in that he has power to affect the mortgagor's position by acts which, though done for the benefit of the debenture holder are treated as if they were the acts of the mortgagor. The relationship set up by the debenture, and the appointment of the receiver, however, is not simply between the mortgagor the receiver. It is tripartite and involves the mortgagor, the receiver and the debenture holder. The receiver is appointed by the debenture holder on the happening of specified events, and becomes the mortgagor's agent whether the mortgagor likes it or not. And, as a matter contract between the mortgagor and the debenture holder, the mortgagor will have to pay the receiver's fees. Further, the mortgagor cannot dismiss the receiver since that power is reserved to the debenture holder as another of the contractual terms of the loan. It is to be noted also that the mortgagor cannot instruct the receiver how to act in the conduct of the receivership.
>
> All this is far removed from the ordinary principal agent situation so far as the mortgagor and the receiver are concerned. Whilst the receiver is the agent of the mortgagor he is the appointee of the debenture holder and, in practical terms has a close association with him. Moreover, he owes fiduciary duties to the debenture holder who has a right, as against the receiver, to be put in possession of all the information concerning the receivership available to the receiver: see *Re Magadi Soda Co Ltd* (1925) 41 TLR 297.
>
> The result is that the receiver, in the course of the receivership, performs duties on behalf of the debenture holder as well as the mortgage holder. And these duties

may relate closely to the affairs of the entity which is the subject of the receivership. It is, therefore, not satisfactory to approach the problem of the ownership documents which come into existence in the course of the receivership on the basis that ownership depends on whether the documents relate to the affairs of (in this case) the company.

I agree with Hoffman J that the ownership of the documents in the tripartite situation of the receivership depends on whether the documents were brought into being in discharge of the receiver's duties to the mortgagor or to the debenture holder or neither. The fact that the document relates to the mortgagor's affairs cannot be determinative. All sorts of documents may relate to the mortgagor's affairs but to which the mortgagor cannot possibly have any proprietary claim.

On the other hand (and this is the second group), the receivers had to advise and inform the debenture holders regarding the conduct of the receivership. Documents created for that purpose, while they can certainly be said to relate to the affairs of the companies, cannot be the property of the companies. They were not brought into being for the purpose of the company's business affairs and the fact that they were created by or on behalf of persons who are, technically the agents of the companies cannot be sufficient to create ownership in the Companies." (Emphasis added)

21. It is clear that the English Court of Appeal refused to grant the mortgagor possession of the documents it sought, even though the receivers were its agents, on the basis that those documents were created by the receivers for the purpose of informing the debenture holder regarding the conduct of the receivership. It seems clear that it concluded that this action by the receiver was a duty exercised by the receiver on behalf of the debenture holder, rather than the mortgagor, and in discharge of the receiver's duties to the debenture holder, rather than the mortgagor. It is relevant to note that the Supreme Court in *Bula Ltd v. Crowley (No. 3*) [2003] 1 I.R. 396 has recognised that a receiver/mortgagor agency is not an ordinary type of agency. In that case (at p. 423), the second, third and fourth paragraphs extracted above of Fox L.J.'s judgment were adopted by Denham J. (as she then was).

22. In *Ardmore Studios (Ir.) Ltd v. Lynch* [1965] I.R. 1 at pp. 38 and 39, McLoughlin J. noted that the reason for this special type agency was so as to enable the receiver deal effectively with third parties in realising the secured property:

> "It has long been recognised and established that receivers and managers so appointed are, by the effect of the statute law, or the terms of the debenture, or both, treated, while in possession of the company's assets and exercising the various powers conferred upon them, as agents of the company, in order that they may be able to deal effectively with third parties. But, in such a case as the present at any rate, it is quite plain that a person appointed as receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgagee bank, to realise the security; that is the whole purpose of his appointment […]"

> [Quoting with approval from Evershed M.R. in *In re B. Johnson & Co. (Builders)* [1955] 1 Ch. 634 at 644]

23. The decision in the English Court of Appeal in *Silven Properties Ltd v. Royal Bank of Scotland Plc* [2004] 4 All ER 484 is also relevant. In that case, Lightman J. at p. 494 adopted the following statement:

> "[T]he so-called "agency" of the [receivers]' is not a true agency, but merely a formula for making the company, rather than the [mortgagor] liable for his acts..."

At p. 495, he stated:

> "[N]ot merely does the receiver owe a duty of care to the mortgagee as well as the mortgagor, but his primary duty in exercising his powers of management is to try and bring about a situation in which the secured debt is repaid"

24. Applying these principles, it is clear that, while the Receiver is the agent of the Doyles, it is not a normal type of agency, but rather one designed to make the Doyles liable for the Receiver's acts, while at the same time the Receiver has a primary duty to make sure the secured debt is repaid. This is because the relationship is not one simply between the Receiver and the Doyles, it is instead a tripartite relationship between the Receiver, the Doyles and Everyday. The Receiver was appointed by Everyday and he owes significant duties to Everyday. Moreover, only Everyday can terminate that agency. Accordingly, while the Receiver is, to quote Fox L.J., '*technically*' the agent of the Doyles, this is not sufficient for the Doyles to be liable for the act in question (i.e. the giving of an undertaking as part of proceedings in which a receiver is seeking possession of a secured property against the wishes of a mortgagor). Indeed, the interpretation which the Doyles are seeking to put on the special type of agency would defeat the very purpose of the agency in the first place (to realise the security), since they claim that their liability for the Receiver's undertaking means that the Receiver should not be entitled to an injunction granting him possession of the secured property. Accordingly, this interpretation of this special type of agency cannot be correct, in this Court's view.

25. Furthermore, the act of giving an undertaking is clearly being done by the Receiver in discharge of his duty on behalf of the debenture holder/Everyday (to get possession of the Properties). It is not an act done in discharge of a duty to the mortgagor/the Doyles (e.g. such as the collection of rent and giving of receipts to tenants). Accordingly, this Court concludes that, in light of the special type of agency that exists between a receiver and a mortgagor, the giving of a court undertaking by the receiver (agent) (to procure an interlocutory injunction for the possession of the secured property) is not deemed to be the obligation of the mortgagor (principal). The Receiver in challenging in court the right of the Doyles to resist handing over possession of the assets, the subject of the receivership, is doing so, in clear discharge of his duties to Everyday and not in discharge of his duties to the Doyles. Indeed it is in contravention of their wishes. Furthermore, if it was to be deemed the act of the Doyles, as principals, it would defeat the primary purpose of the receiver/mortgagor agency (to recover the secured property). Accordingly,

the Doyles are not liable for this undertaking as to damages by its agent, just as the mortgagor in *Gomba Holdings* was not entitled to documents created by its agent. In *Gomba Holdings*, it was the debenture holder which was entitled to the documents; similarly in this case, it is the debenture holder which is bound by the undertaking as to damages. This means that if that undertaking by the Receiver is relied upon in the future by the Doyles, the Doyles will not be required to indemnify the Receiver for the amount of money he has to pay them to satisfy that undertaking.

26. Thus, notwithstanding that the Receiver is the agent of the Doyles and notwithstanding the power of Everyday (i.e. the 'Bank' in the Mortgage) under Clause 8.01 to use its '*absolute discretion'* (to apply expenses, incidental to the exercise of any powers of the Receiver, towards satisfaction of the secured moneys) and notwithstanding that the Bank is stated not to be liable for '*any default neglect or breach of trust*' by the Receiver, this is not an agency which would entitle the Receiver or Everyday to be reimbursed by the Doyles for the undertaking (or to apply the cost of the undertaking towards satisfaction of the secured moneys).

27. This is because the undertaking of the Receiver (in litigation against the mortgagor to secure possession of the secured asset) is not part of the ordinary course of a receivership which this special type of agency is designed to cover. An example of an act within this agency is if money was paid to the Receiver by a tenant under a lease with the Doyles and a receipt was given by the Receiver to that tenant. Such actions by a receiver would be deemed to be on behalf of the Doyles, and not on behalf of Everyday, even though Everyday had appointed the Receiver. As noted in Breslin & Corcoran, *Banking Law* (4th Ed., Round Hall, 2019) at para. 15-20, the purpose behind this special type of agency (between the receiver and the mortgagor), arising as it does from the tripartite relationship between the mortgagee, the receiver and the mortgagor is to:

> "insulate the mortgagee from liability as mortgagee in possession, including liability to account for receipts, duties in relation to the management of the asset pending sale, and duties in connection with the sale […]"

28. However, an undertaking given by a receiver to a court in favour of a mortgagor in order to obtain possession of secured property from a mortgagor, who is resisting the court order, is not an act carried out by a receiver in the ordinary course of this special type of agency such as to bind the mortgagor. For the same reason, it is not an expense which the bank can apply towards satisfaction of the secured moneys.

29. If the Doyles were correct in their argument that the Doyles were liable for every act of their agent, the Receiver, during the receivership, without qualification, it would render every undertaking, by a receiver to a court in the numerous court disputes between receivers and mortgagors, meaningless. This is because it would mean that although the undertaking was given by a receiver for the benefit of the Doyles, it would effectively be an undertaking paid for by the Doyles (when in fact, the Court is seeking to protect the Doyles by procuring the undertaking). It would defeat the intention of the Court in seeking an undertaking to protect the Doyles. This cannot be correct in this Court's view.

30. Similarly, if the Doyles were correct regarding the effect of the agency clause in a mortgage, it would mean that if legal costs were awarded by a court to a mortgagor against a receiver in such a dispute, the mortgagor would have to indemnify the receiver for the legal costs (which the receiver has to pay the mortgagor). It cannot be the case that if the Doyles win this litigation, with costs awarded to them and paid for by the Receiver, that they would end up being paid for by the Doyles. Since the Receiver is incurring those legal costs in discharge of his duties to the debenture holder, in contravention of the mortgagor's wishes, these are not acts of an 'agent', for which the Doyles, as 'principal', are liable, because it is '*not an ordinary agency'* (per Fox L.J. in *Gomba Holdings*) but a special type of agency arising from the tripartite relationship between a mortgagee, a receiver and a mortgagor.

31. On this basis, this Court does not see merit in the Doyles' claim that they are liable for an undertaking as to damages given in their favour by the Receiver.

32. Accordingly, this Court rejects the Doyles' argument that this Court should, on this basis, pay no heed to the undertaking as to damages given by the Receiver, in deciding whether to grant an interlocutory injunction. Thus, this Court concludes that, as regards the adequacy of damages, this factor also favours the grant of an interlocutory injunction.

CONCLUSION

33. This Court concludes that this case falls four-square within the statement of Clarke C.J. at para. 6.13 of *Charleton v. Scriven*, where

> "no real case of any substance is made by a defendant which puts forward a credible basis for suggesting either that receivers were not validly appointed or that receivers, although validly appointed, are seeking to exercise powers which they do not have"

and so there is

> "a more than adequate basis for suggesting that a strong case has been made out."

Thus, a strong case has been made out for the grant of the interlocutory injunction.

34. The Court concludes also that the balance of justice favours the grant of the injunction since for the reasons set out above, the claims made by the Doyles do not provide any basis for saying that the grant of the injunction runs the risk of causing any injustice to the Doyles. In particular, the Court concludes that damages would be an adequate remedy for the Doyles if the injunction is granted at the interlocutory stage (but is refused at the trial). In reaching this conclusion, this Court rejects the claim that the undertaking as to damages by the Receiver is meaningless. The Court concludes that, even though the Receiver is deemed to be agent of the Doyles, it is a special type of agency which does not oblige the Doyles to indemnify the Receiver for any damages he would have to pay if the Doyles were entitled to rely on this undertaking. In addition, this Court concludes that damages would not be an adequate remedy for the Receiver if an injunction was to be refused now (but is granted at that trial). A further factor which

weighs in the balance of justice is the considerable amount owed on the Properties (approximately €2 million), the fact that no repayment has been made since 2018 and the fact that even after the sale of the Properties, there will be a shortfall of approximately €750,000 to Everyday.

35. On this basis, this Court will grant the interlocutory injunction. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. If it is necessary for this Court to deal with final orders, this case will be put in for mention one week from delivery of this judgment, at 10.45am.