

**THE HIGH COURT
COMMERCIAL**

[2022] IEHC 289

[2022/1195P]

BETWEEN

PLUS DEVELOPMENT LLC AND COOPER PLUS HOLDINGS LIMITED

PLAINTIFFS

AND

LENS MEDIA LIMITED

DEFENDANTS

JUDGMENT OF Mr. Justice Twomey delivered on the 17th day of May, 2022

INTRODUCTION

1. This is a case in which the plaintiffs ("Plus Development" and "Cooper Plus") seek to enforce an agreement, which is termed a Memorandum of Understanding, dated 3rd June, 2020 ("MOU 2") that they say they have with the defendant ("Lens Media") to acquire and develop a media park on 48 acres of land at Grange Castle Business Park in Clondalkin, Dublin (the "Venture"). The proposed division of labour between the parties involved in the Venture was as follows: Plus Development was to be involved in building the media park, Cooper Plus was to be involved in obtaining finance for it and Lens Media was to be involved in the management and operation of the studios.
2. The lands, the subject of the media park, are to be purchased from South Dublin County Council ("SDCC") at a cost of €26.5 million.
3. The plaintiffs seek an injunction, pending the hearing of the trial of the action, which seeks to restrain Lens Media from taking any steps to pursue the acquisition and development of the media park without the plaintiffs and they seek an injunction prohibiting Lens Media from excluding the plaintiffs from the Venture.
4. The plaintiffs say that MOU 2 (and in particular a clause therein obliging each of the three parties to MOU 2 not to pursue the Venture without any of the other parties) constitutes a binding obligation on Lens Media. Lens Media claims that its obligations under MOU 2 have been discharged and so this negative pledge covenant is not binding upon it.
5. The question of whether an injunction will be granted pending the trial will be determined on the basis of the law relating to the granting of interlocutory injunctions, as clearly outlined in *Merck Sharpe and Dohme v. Clonmel Healthcare* [2019] IESC 65. The plaintiffs must therefore establish:
 - if they were to succeed at the trial, a permanent injunction, in the same form sought pending the trial, might be granted by the trial judge;
 - that there is a fair issue to be tried (in this case, regarding the applicability of the negative pledge covenant to Lens Media);
 - if so, that the balance of justice favours the grant of an injunction pending the trial and, in this regard, the most important element is usually the question of the adequacy of damages.

ANALYSIS

6. In determining whether there is a fair issue to be tried in this case, it is clear that the primary focus is on the enforceability of the terms of MOU 2. In this regard, it is to be noted that the injunction which the plaintiffs seek is one which seeks to enforce the terms of MOU 2 against Lens Media. This is clear because the third paragraph of Clause 7 of MOU 2 states:

“The parties specifically agree that *none of them will seek to pursue the project without the others* (unless the others voluntarily agree to withdraw), and that no party will take any actions to exclude or circumvent the participation by the other parties, or to *bring in other persons or entities in place of the parties hereto*, without the written consent of the remaining parties.” (Emphasis added)

7. In essence therefore, the injunction which the plaintiffs seek is one which seeks to enforce the negative pledge covenant contained in Clause 7, by preventing Lens Media from pursuing the Venture with anyone other than the plaintiffs, without their consent.
8. If there is a fair issue to be tried, (or to put it another way, if it is arguable), that this negative pledge covenant is binding on Lens Media, and if the balance of justice favours the grant of an injunction, then an injunction will be granted by this Court (assuming that such an injunction might be granted at the trial if the plaintiffs were successful). However, Lens Media claims that it is not arguable that they are bound by this negative pledge covenant or any of the other terms of the MOU 2.
9. To understand Lens Media’s argument, it is necessary to refer to the recitals of MOU 2, where it is stated that:

“[Plus Development, Cooper Investment Group Entities and Lens Media] intend to engage in a ‘joint venture’ to acquire or lease certain real estate in South Dublin, Ireland consisting initially of approximately 47.6 acres of land located at Grange Castle Business Park (the “Property”), and to develop and operate the Property with a media park, including sound stages, post production offices, common areas & support facilities in accordance with the Phase 1 Development outlined by the Foley Design Concept (the “Venture”). *Phase 2 and Phase 3 are addressed in the original MOU (“MOU1”) signed on April 30, 2020 and will be detailed in the Operating Agreement* (defined below). The intention of this MOU2 is to further refine and memorialize the agreement among [Plus Development, Cooper Investment Group Entities and Lens Media] with respect to the Property and the Venture. The parties intend this MOU2 to be binding and enforceable. To the extent that the provisions of this MOU2 are inconsistent or conflict with the provisions of MOU1, the provisions of this MOU2 shall control.” (Emphasis Added)

10. This recital also makes clear that the parties intended to form a joint venture company, which company would then be the owner of the lease over the media park lands:

"The parties intend to form the Venture and execute a 999 Year Land Lease from South Dublin County Council "SDCC" (the "Lease"). Subject to SDCC giving its consent, *the Lease will be assigned to a limited liability company to be formed by the parties* (the "LLC"). *The parties are currently negotiating the terms and conditions of an operating agreement for the LLC* (the "Operating Agreement"). It is anticipated that the LLC will be incorporated in Ireland: currently work is being carried out to assess the optimum structure for all parties from a taxation aspect.

The membership interest in the LLC will be detailed in the Operating Agreement and will follow the previously agreed understanding in MOU1." (Emphasis added)

11. In the operative part of MOU 2, further reference is made to the Operating Agreement (which is also referred to by the parties as a Shareholders' Agreement). It is provided in the second paragraph of Clause 7 that:

"The parties *agree to negotiate the terms of the Operating Agreement in good faith.*" (Emphasis added).

12. The fourth paragraph of Clause 7 states:

"This MOU2 is *intended to be temporary* in nature to cover the period between the date hereof and the entry into the Operating Agreement and therefore *will expire on the entry into the Operating Agreement.*" (Emphasis added)

13. The essence of Lens Media's defence to the claims made in these proceedings, and its defence to the application for this interlocutory injunction, is set out in its solicitors' letter of 29th March, 2022 to the plaintiffs' solicitors. It states that:

"The basic documents concerning the parties' relationship are the Memorandum of Understanding of April 30 2020 ("MOU 1"), The Non-Disclosure Agreement of December 13th 2019 ("the NDA") and the Memorandum of Understanding of 3rd of June 2020 ("MOU 2").

In accordance with MOU 1 and 2, the parties intended to engage in a "joint-venture" to acquire certain lands and to develop and operate the property for a certain purpose(s).

Such lands were to be assigned to a limited liability company (LLC) which LLC would be governed by an operating agreement. *The parties agreed to negotiate the terms of the operating agreement in good faith.*

The operating agreement is the central and foundational document governing the agreement between the parties; *if, despite the party's good faith efforts to agree an operating agreement, such agreement cannot be reached, the agreement to negotiate in good faith is at an end.*

[.....]

In any event, given the fact that the *parties' relationship is at an end*, the Court's equitable jurisdiction to order specific performance of any asserted option (which is denied) cannot be invoked as the making of such Order would be pointless/futile." (Emphasis added)

14. A similar point is made by Mr. James Morris ("Mr. Morris") of Enniskerry, Co. Wicklow, a director of Lens Media, who gave sworn evidence on behalf of the defendant. In his first affidavit, he provides:

"[A]n overview of the negotiations that the parties have engaged in since the execution of the memorandum of understanding and with a view to reaching agreement on the terms of an Operating Agreement and/or shareholders' agreement. This is of relevance to *the Defendant's contention that by engaging faithfully, diligently and over a reasonable period in good faith negotiations, as envisaged in the memorandum of understanding of 3 June 2020 (the "MOU"), the Defendant has satisfied and discharged its obligations under the MOU.*" (Emphasis Added)

15. In order for this Court to determine if, in these proceedings, there is a fair issue to be tried, it must consider whether it is arguable that MOU 2, and in particular the negative pledge covenant in Clause 7 thereof, is binding on Lens Media. Lens Media claims that it is not binding on it as it has discharged all of its obligations under MOU 2 by engaging in negotiations, which it says were in good faith, but which failed to reach agreement regarding the terms of the Operating Agreement/Shareholders' Agreement.
16. It is relevant to note that uncontroverted submissions were made on behalf of Cooper Plus that €968,000 was invested in the Venture by the plaintiffs and that while some of that sum was paid to a related entity of Cooper Plus and to Cooper Plus' solicitors, circa €600,000 was invested in the Venture. Mr. Matthew Cooper ("Mr. Cooper") of North Cahuenga Boulevard, Los Angeles, a director of Cooper Plus, provided sworn evidence on behalf of that company in these proceedings and it was Mr. Cooper who provided to SDCC evidence of funds in the sum of \$35 million to enable SDCC to agree in principle to sell the lands to the proposed joint venture company.
17. However, as noted, the parties have failed to reach agreement on the terms of the Operating Agreement/Shareholders' Agreement and it is on this basis that Lens Media says that its obligations to the plaintiffs (and thus its obligations under the negative pledge covenant in Clause 7) are at an end.
18. It is also relevant to note that Mr. Morris has averred that, although Lens Media has not secured alternative financing in place of the plaintiffs' financing for the Venture, it has nonetheless engaged in discussions with several other parties. For example, he avers at para. 73 of his first affidavit dated 21st April, 2022 that:

"[I]n early 2022, we were introduced to another potential investor who we have met and set out a very general plans for the studios – we have not supplied

financial information and no terms of investment were discussed and we explained that we were in an existing arrangement.”

19. Since this contact was pursued by Lens Media despite the fact that Clause 7 says that no party, including Lens Media, will ‘take any actions’ to bring in other persons or entities in place of the parties to the Venture, it seems that this and other contact with other ‘potential parties’ was pursued because Lens Media believes that its obligations under MOU 2 (including the negative pledge) have been ‘discharged’, to use the expression used by Mr. Morris in his affidavit regarding the status of MOU 2.

IS THERE A FAIR ISSUE TO TRIED?

20. The question for this Court is not whether Lens Media is correct in this view, but simply whether the contrary position taken by Cooper Plus is arguable, i.e. that there is a fair issue to be tried that the negative pledge covenant (in Clause 7 of MOU 2) is still binding on Lens Media.
21. This Court is of the view that there is, at the very least, a fair issue to be tried regarding this issue for the following reasons.
22. First, while the terms of MOU 2 state that the agreement contained therein is intended to be temporary and that it will expire on the entry of the parties into the Operating Agreement, it specifically does not address what is to occur if the parties fail to reach agreement on the terms of the Operating Agreement and in particular it does not state what Lens Media claims it means, namely that MOU 2 is discharged if the parties fail to sign an Operating Agreement.
23. It appears to this Court that Lens Media’s case depends on this Court implying a term into MOU 2 which states that after some period of time (which, it is relevant to note, has not been specified by Lens Media in MOU 2 or elsewhere), MOU 2 will come to an end if the parties fail to reach agreement on the Operating Agreement.
24. The failure of parties to reach agreement on the terms of important legal documents is always a possibility and such an express term could easily have been inserted in MOU 2 to deal with such a failure, but it was not. Its absence therefore, in this Court’s view, militates against a court implying such a term into MOU 2.
25. Furthermore, if there had been such a term expressed in MOU 2 regarding its termination by the effluxion of time, it is likely that there would also be terms to address the critical question of which party was to have the benefit of the right to purchase the media park land from SDCC or how that was to be dealt with on the termination of MOU 2. Thus, implying a term regarding the termination of MOU 2 might also necessitate, at a minimum, implying a term regarding what is to happen with the right to purchase the property.
26. In addition, it might be necessary to imply a term regarding the parties’ respective rights regarding the unwinding of their respective investments in the Venture. Mr. Morris has averred that ‘considerable resources’ were invested by Lens Media in the Venture. As

regards the investment by Cooper Plus of €600,000 in the Venture, Lens Media made submissions to this Court regarding the following sentence in Clause 4 of MOU 2, which states:

“To the extent that any costs with third parties are incurred on behalf of the Joint Venture during the period that the MOU2 is in force then, subject to the pre-approval in writing of these costs by Plus [Development] and Cooper [Plus], Plus [Development] and Cooper [Plus] will be responsible for payment of these costs.”

27. However, this sentence in MOU 2 deals only with the payment of the costs of the Venture, while MOU 2 is in force, while envisaging (in Clause 7) its replacement at some future date by an Operating Agreement. It is likely that, if there was an express term providing for MOU 2 to come to an end by the effluxion of time, there would be a term clarifying whether Cooper Plus would be entitled to be reimbursed any, some, or all of this investment by the other parties to the MOU 2.
28. All of this militates against a finding that there is an implied term in MOU 2 that it comes to an end by the effluxion of time and/or that Lens Media’s obligations have been discharged by the failure to negotiate the Operating Agreement/Shareholders’ Agreement.
29. Secondly, there is an entire agreement clause in MOU 2, which indicates that the parties’ agreement is as set out in that document and not elsewhere. In the ninth paragraph of Clause 7, it is stated:

“This MOU2 and MOU1 constitute the entire agreement of the parties relative to the subject matter hereof.”

30. On this basis, one can conclude that both parties are bound by the terms of the negative pledge covenant as it is expressed in Clause 7 and not by matters extraneous to those terms. As already noted, this negative pledge covenant is not stated to expire on a certain date or to expire if there is a failure to reach agreement on the terms of the Operating Agreement. The confirmation in this entire agreement clause that there is nothing, outside MOU 1 and MOU 2, which can modify the parties’ negative pledge covenant further militates against the suggestion that this Court should now imply into MOU 2 a term that the negative pledge covenant can come to an end through the effluxion of time or otherwise conclude that it is very clear, and so not arguable, that MOU 2 has been discharged.
31. Thirdly, although the document is entitled a Memorandum of Understanding, the parties expressly state (in the second paragraph of the Recitals) that:

“The parties intend this MOU2 to be binding and enforceable.”

32. This term is of additional significance regarding the claim by Lens Media that the negative pledge covenant is not in fact legally binding upon it, when one considers that the parties adopted a very different position regarding MOU 1. This is because in MOU 1, the parties expressly agreed that only one sentence of MOU 1 was to be legally binding (i.e. a

sentence regarding the confidentiality of the discussions between the parties). This serves to highlight the significance to both parties of agreeing in MOU 2 to a legally binding negative pledge covenant (and one which is open-ended in the absence of agreement on the terms of an Operating Agreement). Accordingly, this militates further against Lens Media's claim that it is not even arguable that the negative pledge covenant is legally binding upon it.

33. Fourthly, the importance to the parties of each and every provision in MOU 2 being legally binding upon the parties is also clear from the fact that the parties expressly provide (in the tenth paragraph of Clause 7) that:

"If any provision of this MOU2 is declared by a court of competent jurisdiction to be invalid or unenforceable, the remaining provisions hereof shall nevertheless be given full force and effect."

34. Thus, even if a provision of MOU 2 is declared by a court to be invalid, and which invalidity may affect the bargain reached by the parties, it is expressly stated that the remaining provisions will continue in full force and effect. Again this clause, by emphasising the importance to the parties of all the terms of MOU 2 being legally binding on the parties, militates against a finding by a court that a clause that is specifically agreed between the parties (the negative pledge covenant) would (without any express statement to that effect) nonetheless cease to have effect after a certain unspecified period of time if the parties failed to reach agreement on the terms of the Operating Agreement.

35. Fifthly, it is common case that *circa* €600,000 was spent by the plaintiffs on the Venture and it is at least arguable that they would only do so on the basis of terms which were legally binding and in particular on the basis of the protection of the negative pledge covenant that Lens Media would not seek to exclude them from the Venture without their prior written consent. Indeed, this appears to be the understanding of Lens Media. This is because in the letter dated 26th May, 2021 to Cooper Plus it is stated on behalf of Lens Media that:

"It was expressly agreed at the outset that you would fund the Planning process on a speculative basis while simultaneously raising the balance of the equity and debt funding, and *you have the binding provisions of MOU2 as the protections you asked for at the time.*" (Emphasis added)

36. It is at least arguable that the protections to which Mr. Morris is referring includes the negative pledge covenant and there is no suggestion by Mr. Morris that this protection is time limited or that this protection would expire if the parties failed to reach agreement on the terms of the Operating Agreement.
37. Sixthly and finally, while not determinative, it is also relevant to note that, despite its claim to the contrary before this Court, Lens Media itself appears to have recognised that the alleged binding nature of Clause 7 on Lens Media is not clear cut (and so is a fair

question to be tried). This is because in his affidavit of 21st April, 2022, at para. 6e, Mr. Morris states that Lens Media has 'discharged' its obligations under MOU 2. Yet, if this is the case, Lens Media should, it seems, be free to negotiate with third parties. However, at para. 73 of this same affidavit, Mr. Morris avers that in speaking to three other potential investors, in apparent reference to the negative pledge covenant in Clause 7, he notified those investors that Lens Media was in 'an exclusive arrangement with US colleagues'. Then he avers that '[t]his is still the status', which suggests that it is his view that the negative pledge covenant with the plaintiffs was still being binding on Lens Media as of 21st April, 2022. This averment appears therefore to run contrary to Lens Media's claim, before this Court, that it is not even arguable that the negative pledge clause is binding upon it.

38. All of the foregoing reasons therefore support the view that there is a fair issue to be tried regarding whether Lens Media is bound by the negative pledge covenant. Before concluding whether there is a fair issue to be tried, there are two further issues to be considered.

No privity of contract between Cooper Plus and Lens Media?

39. Lens Media has also argued that there is not a fair issue to be tried because while one of the plaintiffs, Plus Development is party to MOU 2 and Lens Media is a party to MOU 2, the second plaintiff, Cooper Plus, is not a party to MOU 2. This is because Lens Media points out that in the 'parties' section of MOU 2, the relevant party is stated to be "COOPER INVESTMENT GROUP Entities" and not Copper Plus. In addition, on the execution page of MOU 2, the document is signed on behalf of "COOPER INVESTMENT GROUP".
40. However, it seems to this Court that this point is not sufficient for this Court to conclude that there is not an arguable case that the negative pledge covenant in MOU 2 is enforceable against Lens Media.
41. This is because, first, in these proceedings, it is not just Cooper Plus, but also Plus Development, which is seeking to enforce MOU 2 against Lens Media. Significantly, there is no suggestion that Plus Development is not a signatory to MOU 2, nor is there any claim that it cannot enforce MOU 2 on the basis that it is not privity to the terms of that agreement.
42. Secondly, Cooper Plus has averred that 'Cooper Investment Group entities' is a descriptive term for a group of companies in which Mr. Cooper and his brother (David Cooper) have an interest and that it was always the intention, of which Lens Media was aware, to substitute an appropriate corporate vehicle into the final structure for the Venture.
43. Consistent with this averment is the fact that in the unsuccessful negotiation of the Shareholders' Agreement, the proposed party to that agreement, with Lens Media and Plus Development, was Cooper Plus, the Irish incorporated company duly formed by Mr. Cooper for the Venture, and not "Cooper Investment Group Entities" or "Cooper

Investment Group". Furthermore, Lens Media did not raise any issue regarding the substitution of Cooper Plus for Cooper Investment Group Entities/Cooper Investment Group into the draft Shareholders' Agreement at that stage. The substitution of Cooper Plus for Cooper Investment Group Entities/Cooper Investment Group in the draft Shareholders' Agreement is therefore consistent with this averment of Mr. Cooper that it was at all times the intention to insert a company from Cooper Investment Group entities into the Venture and that this was understood by Lens Media.

44. On this basis, the alleged lack of privity is not such as to lead this Court to conclude that there is not a fair issue to be tried regarding the binding nature on Lens Media of the negative pledge covenant.

The injunction sought is mandatory in nature?

45. Lens Media also claims that the injunction which is being sought by the plaintiffs is mandatory in nature. The precise terms of the notice of motion are as follows:

- "3. An Order by way of interlocutory injunction restraining the Defendant, its servants or agents, from taking any steps to pursue the project, the subject matter of these proceedings, without the Plaintiffs, their servants or agents.
4. An Order by way of interlocutory injunction restraining the Defendant, its servants or agents, from taking any action to exclude or circumvent the participation by the Plaintiffs, or either of them, and/or from bringing in other persons or entities in place of the Plaintiffs."

46. As regards paragraph 3, it seems clear to this Court that this injunction is prohibitory in nature, since it prevents Lens Media from taking any steps to pursue the Venture, without the plaintiffs. Furthermore, the proposed injunction simply reflects the terms of the negative pledge covenant to which Lens Media have allegedly agreed under the terms of the MOU 2. Lens Media is not required by the terms of the injunction sought to pursue the Venture with the plaintiffs. Rather, if Lens Media proposes to pursue the Venture, it is prohibited from pursuing the Venture without the plaintiffs. Accordingly, in substance this injunction could not be described as mandatory.
47. The terms of paragraph 4 are perhaps not as clear as they might be. However, the injunction being sought also seems to be prohibitory in nature, since it appears to be one seeking to restrain Lens Media from bringing in parties to the Venture, other than the plaintiffs. Therefore, this Court cannot see how this proposed injunction could be described as mandatory.
48. On this basis, this Court concludes that both injunctions are prohibitory in nature and therefore the test to be applied is whether there is a fair issue to be tried in relation to the enforceability of the negative pledge covenant against Lens Media (per *Merck Sharpe and Dohme*) and not the test of there having to be a strong case likely to succeed, which would be the case if it were a mandatory injunction (per *Maha Lingham v. HSE* [2006] 17 E.L.R 137).

MIGHT A PERMANENT INJUNCTION BE GRANTED AT THE TRIAL?

49. This Court has concluded that the injunction being sought is prohibitory and not mandatory in nature, since it does not oblige Lens Media to proceed with the Venture with the plaintiffs. For this reason, this Court also concludes that if the plaintiffs succeed at the trial, a permanent injunction in the form of the interlocutory injunctions being sought, might be granted by the trial judge. To put the matter another way, this is not a case in which an injunction is being sought to oblige Lens Media to enter into, or continue, a business venture or partnership with the plaintiffs against its will. Lens Media may decide to continue the Venture with the plaintiffs, but it also may decide not to pursue the Venture at all. If it decides not to pursue the Venture, then, in the absence of agreement between the parties, it may be necessary to obtain court orders requiring the sale or realisation of the assets, if any, of the alleged partnership between the three parties or to otherwise unwind the alleged partnership between them. Indeed, it is relevant to note that the fact that there may have to be an unwinding of the parties' positions was recognised by Mr. Morris in his email of 10th September, 2021 to Mr. Cooper when the parties were trying unsuccessfully to negotiate the terms of the Shareholders' Agreement. He observed that if the parties failed to reach agreement on the terms of the Shareholders' Agreement (which remains the position), it would be necessary to agree an exit route for all the parties. He states:

"If, however, we all fail to achieve the agreement between us within this timeline then we shall all have to face up to the fact that the project will not be achieved and *we will need to agree that we will all be released from the obligations of the MOUs* which would be deemed as all terminated. On this final point, we feel we do all need to be sure that the potential exit route for all is agreed among us now, but our preference is to try to work with [Cooper Plus] to have the necessary funds to pay the deposit and sign the Contract within the time frame set out by the SDCC."
(Emphasis added)

50. Mr. Cooper replied as follows:

"[Cooper Plus] concur with the focus on resolving the deal points for the [Heads of Terms], however in the *event that [Cooper Plus/Lens Media] cannot agree on terms, we can outline a backup Termination/Break-up Agreement.*" (Emphasis added)

51. It is relevant to note that this exchange also reflects the current reality, namely that all the injunction achieves is preserving the status quo and it is in the parties' interests that they agree how they will unwind the breakdown in relations. Ideally, they will agree that between themselves without incurring any further court time and expense. However, if they fail to do so, and if the plaintiffs succeed at the trial, then the plaintiffs might be granted a permanent injunction enforcing the negative pledge covenant. Of course, if this were to be the case, at that stage the parties would still have to achieve what both parties recognised in this email of exchange of 10th September, 2021, i.e. an agreement on how to unwind their affairs.

Conclusion regarding fair issue to be tried?

52. For all the foregoing reasons, this Court concludes first, that if the plaintiffs succeed, the trial judge might grant a permanent injunction and secondly that there is a fair issue to be tried regarding the enforceability of the negative pledge covenant against Lens Media.
53. In line with *Merck Sharpe and Dohme*, it seems clear that an injunction, pending the trial, should be granted retaining the *status quo* between the parties, unless the balance of justice does not favour the granting of the injunction. Accordingly, this issue will be considered next.

BALANCE OF JUSTICE

54. The next question is whether the balance of justice favours the granting of the injunction. The key issue regarding the balance of justice in this case is whether damages would be an adequate remedy for the plaintiffs in the event of the injunction being refused by this Court pending the trial but the trial judge finding that the injunction should have been granted.
55. In this regard, Mr. Cooper has averred that Lens Media is balance sheet insolvent with net liabilities of €228,871. On this basis, Cooper Plus submits that if the injunction were not granted and at the trial of the action the trial judge finds that it should have been granted, Lens Media will not be a mark for damages. On this basis, Cooper Plus argues that damages are not an adequate remedy in the event of this Court refusing to grant the interlocutory injunction, since it is very unlikely to receive any damages from Lens Media.
56. It is striking that Lens Media has not chosen to answer this averment regarding its financial affairs. On this basis, the only evidence this Court has before it is sworn evidence that Lens Media is balance sheet insolvent. In these circumstances, it seems clear to this Court that damages would not be an adequate remedy for the plaintiffs if they were denied the interlocutory injunction.
57. The other situation to consider is, if the interlocutory injunction were granted by this Court but the trial judge determined that it should not have been granted, whether damages would be an adequate remedy for Lens Media. In contrast to the approach taken by Lens Media, Mr. Cooper has provided this Court with sworn evidence regarding the financial status of Plus Development. He has averred that Plus Development is a financially robust company with annual profits in excess of USD\$1 million.
58. On this basis, and bearing in mind the significant difference regarding the evidence of the financial status of Plus Development on the one hand and Lens Media on the other hand, when considering the adequacy of damages in the context of the balance of justice, it seems clear that the balance of justice favours Plus Development and Cooper Plus and so the grant of the injunction.
59. Accordingly this Court will grant the injunction sought by the plaintiffs.
60. This Court orders 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, with

the terms of any draft agreed court order to be provided to the Registrar. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention one week from the date of delivery of this judgment, at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).