LAMBERT JONES

THE HIGH COURT

1982 No. 10479P

BETWEEN/

Lambert Jones Estates Limited
Charles Street Limited
Blevin Limited
Artur Limited
Berriman Limited
Ascon Limited
Base Investments Limited
Atlantic Limited
Caribe Limited
National Petrol Company Limited
Ansty Holdings Limited
Powerscourt Estates
Nevis Investments Limited
Chain Libraries Limited
Ralph Slazenger
Gwendoline Slazenger
James Kelly
James Murphy
Peter Ashcroft

PLAINTIFFS

-and-

John Donnelly

DEFENDANT

Judgment delivered by Mr. Justice O'Hanlon on the 5th day of November, 1982.

In this case the Plaintiffs seek an interlocutory injunction to restrain the Defendant, in his capacity as Receiver, from proceeding with a sale by tender of an extensive and valuable development site abutting onto St. Stephen's Green and South King Street in the City of Dublin.

The Plaintiffs in the case are very numerous. They include the limited company which owns the property; a minority shareholder in the

company; a number of parties who claim to be the owners of a charge over the majority shareholding in the company; a number of unsecured creditors of the company and the directors of the company.

The Defendant, John Donnelly, is the receiver and manager of the assets and undertakings of the first and second-named Plaintiffs (the first-named Plaintiff being the owner of the development site in question which extends over some 3.5 acres at St. Stephen's Green West). At a Board meeting of the first-named Plaintiff held on the 11th May, 1982, the Directors took the unusual course of resolving "that to protect the interests of the creditors that they should request the Company's Bankers, Northern Bank Finance Corporation Limited, to appoint a Receiver/Receiver and Manager over the assets of the Company mortgaged and/or charged to such bankers without the necessity of any formal notice or demand which are hereby waived and that such request be made immediately."

It was pursuant to this Resolution that the Defendant was appointed as Receiver on the 11th May, 1982, of the first-named Plaintiff and of its subsidiary, the second-named Plaintiff in these proceedings.

The Defendant in the course of carrying out his duties as such Receiver has set about negotiating a sale of what is described as the

major asset of the first-named Plaintiff, being the parcel of land already referred to, situate at St. Stephen's Green West in the City of Dublin. The indebtedness of the first-named Plaintiff to their bankers as of the 15th October, 1982, was in the region of £6,461,613.00 and further interest is accruing thereon at the rate of £3,206 per day, - close on £100,000 per month, and more than £1m. per annum.

The Defendant claims that since his appointment as Receiver he has been engaged in negotiations and transactions which will make the property more attractive to a potential purchaser - securing a clear site and getting rid of burdensome claims against the property which existed in favour of Green Group Limited under the terms of an agreement of the 28th November, 1973, and made between that company of the one part and the first-named Plaintiff of the other part. He now says that the property is ripe for sale and has proceeded to put it on the market for sale as a single unit, the sale being by public tender, and the closing date and time for receipt of tenders being Friday the 5th November, 1982, at 3 p.m.

The Plaintiffs bring these proceedings for the purpose of preventing the Defendant from carrying through his avowed purpose of selling the entire site as a single unit by public tender in the manner adopted by

him. They claim that they have expert advice to the effect that it would be much more profitable to divide up the property into smaller units; to apply for and obtain planning permission for schemes of development of such smaller units, and then proceed to sell off such parcels - individually in a series of transactions. In support of this contention they have put before the Court an affidavit by James Kelly, himself a Plaintiff and a director of the first-named Plaintiff, and a further affidavit by Patrick Joseph Bannon, a partner in the firm of Harrington Bannon, Chartered Valuation Surveyors of 40 Fitzwilliam Place in the City of Dublin. They claim that the Receiver is only concerned with getting in sufficient funds to discharge the claims of the bank creditors, and is unconcerned about the fate of the Company which owns the property, or of its shareholders, directors or unsecured creditors. Their present application is for the purpose of obtaining interlocutory relief so that the status quo may be preserved pending the hearing of the action and they have indicated that they do not wish to have the hearing of the motion treated as the hearing of the action, although this course would have been acceptable to the Defendant. It appears to me that when such an application is made the Court should look closely at the cause of action upon which the Plaintiff relies, and

subject to the conclusion it reaches after conducting such examination it may then be necessary to examine the question of the balance of convenience as between granting and refusing the relief sought.

What the object of the exercise should be in looking closely at the Plaintiff's cause of action is not very easy to determine by reference to the decided cases on the topic. One of the leading authorities on the principles applicable in granting or refusing relief by way of interlocutory injunction in this jurisdiction is the case of Educational Company of Ireland Ltd. -v- Fitzpatrick and Others, (1961) IR 323.

Lavery J. cited with apparent approval a number of passages from what he described as "the authoritative text-book, Kerr on Injunctions", some of the relevant extracts being as follows:-

> "In interfering by interlocutory injunction, the Court does not in general profess to anticipate the determination of the right, but merely gives it as its opinion that there is a substantial question to be tried and that till the question is ripe for trial, a case has been made out for the preservation of the property in the meantime in statu quo. A man who comes to the Court for an interlocutory injunction is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition, until such question can be disposed of.
>
> "The office of the Court to interfere being founded on the existence of the legal right, a man who seeks the aid of the Court must be able to show a fair prima facie case in support

> of the title which he asserts. He is not required to make out a clear legal title, but he must satisfy the Court that he has a fair question to raise as to the existence of the legal right which he sets up, and that there are substantial grounds for doubting the existence of the alleged legal right, the exercise of which he seeks to prevent". (p. 336).

Lavery J. summarised these passages (at p. 337) by saying: "The plaintiffs have to establish that there is a fair question raised to be decided at the trial."

Earlier English decisions which suggested that there was an onus on a Plaintiff seeking an interlocutory injunction to establish a 'probability' of ultimate success, or 'a prima facie case', or 'a strong prima facie case', were discarded by the House of Lords in American Cyanamid Co. -v- Ethicon Ltd., (1975) 1 AER 504, where Lord Diplock re-stated the principle applicable in the following terms:

> "The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried ...
>
> Unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

It appears to me that Lord Diplock, while professing to discard the old test of the 'prima facie' case, went very close to reinstating it in the last sentence of this citation.

These two decisions were referred to by Finlay P. in a judgment

delivered on the 26th August, 1982, Rex Pet Foods Ltd. -v- Lamb Brothers (Dublin) Ltd. & Ors. The learned President concluded that the two decisions were not inconsistent, but complemented each other. He continued:

> "The first enquiry must be as to whether the claim in aid of which the Plaintiffs seek this injunction on the affidavits raises a fair or serious question to be tried. If it does not, or to put the matter in the negative form in which it is contained in the decision of Lord Diplock in the Cyanamid case, it if is vexatious or frivolous or an implausible claim then no question of an injunction arises. If, however, it does raise a fair or serious question to be tried in the action then I must necessarily enquire - the onus of proof being on the Plaintiff - as to whether the balance of convenience is in favour of the granting of an injunction."

The recent decisions are again summarised in a useful manner in the judgment of Murphy J. in the case of Campus Oil Ltd. & Ors. -v- The Minister for Industry and Energy & Ors., delivered the 22nd September, 1982.

In many of the cases where the courts have had to consider the principles applicable in granting or refusing relief by way of interlocutory injunction a good deal of stress has been laid on the difficulties facing the court when the facts are in dispute between the parties and it is not possible to resolve such conflict by a perusal of the affidavits. In such circumstances it is clearly inadvisable for the court to express a view as to the probable outcome of the proceedings when they go to plenary hearing, or to base a decision as

to interlocutory relief on a forecast of such probable outcome.

The affidavits which have been filed on both sides in the present case disclose some areas of disagreement on the facts but the disputed facts are few in number and appear to me to be relatively unimportant. I believe the essential facts which I have to consider in dealing with the present claim for an interlocutory injunction are not in dispute and can, I think, be summarised as follows:-

1. The Defendant was appointed as Receiver over the property of the first-named Plaintiff, including the St. Stephen's Green site, on the initiative of the Board of Directors of the first-named Plaintiff, in or about the month of May, 1982, at a time when the indebtedness of the Company to its bankers was in the region of £6m. That figure had risen to close on £6½m. by the 15th October, 1982, with further interest accruing thereafter at a rate not far short of £100,000 per month.

2. For the purpose of discharging this indebtedness the Defendant is proceeding to sell off the major asset of the Company, consisting of the 3.5 acre site at St. Stephen's Green. This he proposes to do by offering the property for sale by public tender as a single unit, and with the benefit of such planning permissions as have already been

obtained in respect of the site and which are still in force.

3. The Defendant is a Chartered Accountant, and sought and obtained the advice of a prominent firm of Estate Agents, Surveyors and Valuers, Messrs. Jones Lang Wootton of 10/11 Molesworth Street, Dublin. He claims to have acted on their advice at all stages, and that he is still acting on their advice with regard to the proposed method of sale of the property.

4. The Plaintiffs have consulted other experts in the property field and have been advised that a considerably enhanced purchase price could, in all probability, be obtained for the site if it were sold off in several smaller lots over a period, with planning permission having first been obtained for the development of such smaller units.

5. The Defendant does not set out to dispute the claim that by adopting the method suggested by the Plaintiffs a higher sale price might ultimately be obtained for the property taken as a whole. He says, however, that he is advised that the apparent gain to the vendors would in all probability be illusory. They would be likely to be involved in long delays while new development schemes were prepared for the different units and planning permission was sought for same. In the meantime interest at over £1m. per annum would continue to accumulate

against the Company as long as there was no return from the property. The costs involved in the Plaintiffs' alternative plan of campaign would be very heavy and there are no funds available to meet such costs. Indeed, the banks have already had to contribute some £200,000 to enable the Defendant to clear the site and the title for the purposes of the sale now proposed. Taking all these circumstances into account, he says he has been advised to proceed to sell in the manner which has been adopted by him, and at the present time.

6. There is another divergence of views between the experts in relation to one of the grants of planning permission which exists in relation to the property and which is the subject of an appeal to An Bord Pleanala. The Defendant says he has been advised to let that appeal lie dormant for the time being until the sale goes through, for reasons which are explained in the affidavits. The Plaintiffs say, with the support of their experts, that the sale should be deferred until An Bord Pleanala has given its decision.

7. The appointment of the Defendant as Receiver was made by Northern Bank Finance Corporation Limited and The First National Bank of Chicago in exercise of powers conferred on them by a number of Mortgages and Debentures which had been entered into by the first-named Plaintiffs and

their said Bankers. The Debentures in each case are in the conventional form and provide that in the event of a Receiver being appointed he shall have power, (inter alia) -

> "to sell or concur in selling let or concur in letting and to terminate or to accept surrenders of leases or tenancies of any of the property hereby charged in such manner and generally on such terms and conditions as he shall think fit and to carry any such transactions into effect in the name of and on behalf of the Company".

That concludes my summary of what I consider to be the central and undisputed facts of the case.

It is important to bear in mind what is the cause of action upon which the Plaintiffs rely in these proceedings. The action is not brought for the purpose of determining which of the two methods of disposal of the property would, in the long run, be more favourable to all the parties who have a material interest in the outcome of the sale. It is brought to restrain the Defendant from acting in breach of his duties as a Receiver and Manager, and seeking damages against him for negligence and breach of duty and other ancillary relief.

I am prepared to accept that a Receiver owes a duty of care to the owner of property, and possibly also to the creditors of the owner, when he proceeds to realise property for the primary purpose of discharging the claims of a secured creditor by whom he has been appointed. That

duty of care would render it incumbent upon him to take all reasonable steps to obtain the best possible price for the property. (See Latchford -v- Beirne, (1981) 3 AER 705, and Standard Chartered Bank Ltd. -v- Johnny Walker & Anor. (unrep.) a decision of the English Court of Appeal delivered the 17th June, 1982). Accordingly, in applying the principles governing the grant or refusal of an interlocutory injunction, it appears to me that the first question which must be asked in the present case is the following:-

On the material available to the court on the hearing of this application for an interlocutory injunction, have the Plaintiffs any real prospect of succeeding in their claim for a permanent injunction at the trial? If the answer to that question is No, then the Plaintiffs have failed to satisfy the test suggested by Lord Diplock in the Cyanamid case and would, in my opinion, fall at the first hurdle in their application for an interlocutory injunction.

I can see very clearly on the affidavits that the Plaintiffs have radically different ideas from the Defendant as to the best way of realising the assets of the Company, and that they have the support of a prominent firm of Chartered Valuation Surveyors for the opinion they have formed. It is equally clear, however, that the Defendant has also

taken expert advice and has acted upon it in deciding how he should proceed with the sale of the property. He is anxious to sell, if at all possible, at an early date, to minimise the enormous burden of interest on the bank debt which is accumulating against the Company with each day and month that pass. He does not want to take a course which will involve him in new and costly and protracted planning applications for multiple units of property. He says he has no funds available to finance such transactions and the Plaintiffs have not suggested that any source of finance is available to him. Finally, he has stated through his Counsel in the course of the hearing, that if and when he is allowed to proceed with sale by tender it is his intention to seek the approval of the Court before accepting the highest or any tender.

I fail to see, on the evidence now before the Court, how the Defendant could conceivably be said to be guilty of negligence or breach of duty as Receiver, and in my opinion, any such finding on such evidence as is now available would be perverse. I hesitate to describe the Plaintiffs' claim as "frivolous" or "vexatious" since I can appreciate their anxiety to take any step which they feel will guarantee them the best return for the property, but to borrow the expression used by Finlay P., I regard it as an implausible claim, and to borrow the

words of Lord Diplock, I consider that the material available to the court at the hearing of this application for an interlocutory injunction fails to disclose that the Plaintiffs have any real prospect of succeeding in their claim for a permanent injunction at the trial.

For this reason I propose to refuse the application.

As the matter may go further, it may be of assistance if I express briefly the views I have formed on some other aspects of the case.

It also appears to me that the claim for an interlocutory injunction may not lie in the present case by reason of the Plaintiffs' inability to establish that, if their cause of action is well-founded, damages would not afford them an adequate remedy. If the Plaintiffs are correct in their argument, and the Receiver is proceeding to sell in a manner involving negligence and breach of duty on his part, then the only damage that can thereby be caused to the Plaintiffs is financial loss - the difference between what will be realised on a sale by this method and what could be realised by some other method. The Plaintiffs contend that such loss is not quantifiable, - that it would be too difficult to determine how much had been lost in the process. Where a claim for damages arises, however, the Court is not deterred from assessing damages by the difficulty of the task. It is noteworthy that

the Plaintiffs offer the usual undertaking as to damages in the event of their claim for an interlocutory injunction succeeding and presumably regard the loss which could be incurred by the Receiver as being quantifiable, although the difficulty of assessment would appear to be as great in one case as in the other.

By reason of the conclusion already reached as to the unsustainable nature of the cause of action if considered in the light of the evidence now before the Court, it is unnecessary for me to consider the balance of convenience as between the parties in granting or refusing the application for an interlocutory injunction. It appears to me, however, that the scales may be tilted in favour of the Plaintiffs on this aspect of the case by reason of the rather curious circumstance that if the Plaintiffs wrongfully impede the Receiver in realising the assets, and money is lost in the process, the main losers will be the Plaintiffs themselves. The less the property in St.Stephen's Green realises, the more will have to be paid out of whatever other resources are available to the Company. The Bank, as a secured creditor, could also be put in jeopardy, but as between the parties to the action it would not seem to be a matter of great moment to the Receiver if the method favoured by him for the realisation of the property is obstructed, and he is compelled

to resort instead to some less profitable means of disposing of the asset. However, this is a matter which I do not have to determine positively, by reason of the conclusions already reached in relation to the first branch of the case, and which form the basis upon which the present application is refused.

R. J. O'Hanlon

R. J. O'HANLON

5th November, 1982

Note

Counsel: For the Plaintiffs - Eoghan Fitzsimons, SC., and Peter Kelly BL (instructed by A. & L. Goodbody, Solicitors).

For the Defendant - T. K. Liston, SC., Peter Shanley, SC. and Kevin Feeney, BL, (instructed by Matheson, Ormsby and Prentice, Solicitors).

Cases cited:

Educational Co. of Ireland Ltd. -v- Fitzpatrick & Ors. (1961) IR 323

American Cyanamid Co. -v- Ethicon Ltd., (1975) 1 AER 504.

Rex Pet Foods Ltd. -v- Lamb Bros. (Dublin) Ltd. Finlay P., 26th Aug. 1982 (unrepd.)

Campus Oil Ltd. & Ors. -v- Min. for Industry & Energy & Ors., Murphy J. (unrepd.) 22 Sept. 1982.

Latchford -v- Beirne (1981) 3 AER 705.

Standard Chartered Bank Ltd. -v- Johnny Walker & Anor. C.A. 17th June 1982 (unrepd).