

**THE HIGH COURT**

[2021] IEHC 389  
[2021 No. 629 P]

**BETWEEN**

**DAVID LANGAN**

**PLAINTIFF**

**AND**

**PROMONTORIA (OYSTER) DAC,  
DAMIEN HARPER AND LINK ASSET SERVICES DAC**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Twomey delivered on the 8th day of June, 2021**

**INTRODUCTION**

1. As a result of the recent economic crash, there have been numerous cases where borrowers have sought interlocutory injunctions against purchasers of unpaid loans, in which the borrower seeks to prevent the sale of the property which secured the loans, pending a substantive hearing on the validity of the sale of the loans. This is another such case, although in this case, a contract for the sale of the property has been executed and so the plaintiff ("Mr. Langan") seeks an injunction restraining the defendants from completing the sale of the secured property, which was sold to a third party by way of auction on 27th January, 2021. The property consists of approximately five acres of land in Lusk which Mr. Langan uses for market gardening.
2. This judgment therefore considers, the usual issues in interlocutory injunction cases, of whether Mr. Langan has made out a strong case or a fair question to be tried, whether damages would be an adequate remedy for him (as an alternative to the injunction) and whether the balance of justice favours the grant of the injunction.
3. The basis for the seeking of the injunction is Mr. Langan's claim that he entered a settlement agreement with the first named defendant ("Promontoria") through communications with the third named defendant ("Link Asset Services") whereby he agreed to settle his outstanding debts of circa €870,000 with Promontoria, by his payment to Promontoria of €190,000. Mr. Langan claims a term of that settlement was an agreement that the lands would be taken out of the auction at which they were sold to the third party. The defendants say that, while there was a period of '*without prejudice*' discussions between Mr. Langan and Link Asset Services, no binding agreement was ever reached and so Promontoria was entitled to proceed with the sale of the lands contained in Folio 179957F and located at Baldongan, Lusk, Co. Dublin (the "Property").
4. For the reasons set out herein, including that there is neither a strong case made out, nor even a fair question to be tried, regarding whether a binding settlement agreement came into existence, this Court refuses the reliefs sought by Mr. Langan.

**BACKGROUND**

5. The substantive proceedings were issued by way of plenary summons on 3rd February, 2021. The general indorsement of claim therein sets out a total of 17 reliefs sought by Mr. Langan. A number of these reliefs are declaratory in nature and relate to Mr. Langan's contention that Promontoria is not the valid owner of the underlying loan or security.

Certain orders are sought preventing the second named defendant (the "Receiver") from *inter alia*, taking any steps in relation to the Property. Mr. Langan also seeks an order preventing completion of the sale of the Property.

6. In his Notice of Motion issued on 8th February, 2021, Mr. Langan seeks a number of orders the effect of which are to prevent Promontoria and/or the Receiver from taking any further steps in relation to the sale of the Property.
7. The grounding affidavit of Mr. Langan sets out in some detail the background to the dispute as well as Mr. Langan's version of the negotiations which he claims led to a binding agreement for the settlement of his debts.
8. For present purposes, the background facts can be summarised as follows.

#### **The Loan**

9. By way of loan facility letter dated 23rd January, 2009 Ulster Bank (Ireland) Limited (the "Bank") agreed to extend an overdraft facility to Mr. Langan (on a joint and several basis with two partners). Subsequently, by way of loan facility letter dated 3rd February, 2010 the Bank agreed to advance a loan to Mr. Langan (again on a joint and several basis, with one of his partners, Mr. Gregory Langan) in the sum of €580,000. That loan was for the purpose of continuing existing borrowings and restructuring the overdraft facility. These facilities are collectively referred to herein as the "Loan".
10. The Loan was secured by a pre-existing mortgage dated 22nd May, 2007 whereby the borrowers (being Mr. Langan along with the partner who entered the 2010 facility) agreed to mortgage the Property to the Bank. On 26th June, 2007, ownership of the Property was registered in the Land Registry, with Mr. Langan stated to be the full owner.
11. On 19th December, 2016, by Global Deed of Transfer, the Loan and mortgage were transferred to Promontoria. The mortgage was subsequently registered as a charge in favour of Promontoria on 9th March, 2017.
12. The Loan was not repaid and by letter dated 23rd May, 2019, Promontoria demanded repayment of the Loan. The sum demanded in that letter was some €830,902.
13. Of note is that the Loan is the subject of summary proceedings issued in 2015 (see proceedings bearing Record No. 2015/256 S). Those proceedings have not yet been heard.
14. On 20th June, 2019, by instrument of appointment, a receiver was appointed over the Property. That receiver was discharged on 18th November, 2020. On the same date, the Receiver (Mr. Harper, the second named defendant) was appointed over the Property.

#### **Sale of the Property**

15. On 27th January, 2021, following the sale of the Property by public auction by Promontoria, it entered into a binding contract with a third party (the "Contract") for the sale of the Property at a price of €245,000.

16. Mr. Langan now seeks to prevent Promontoria from following through with the Contract on the basis that, over the course of several emails and telephone conversations with an asset manager from Link Asset Services, he claims he negotiated a binding agreement with Promontoria to the effect that his debts would be settled and the Property removed from the auction. This series of emails and telephone conversations is set out and analysed in detail later in this judgment.
17. Of note is that there is some dispute between the parties regarding the current use and quality of the Property. Mr. Langan avers that he actively grows crops on the Property and that he derives his income from the sale of those crops. He further avers that the water source for the crops comes from a borehole on the Property. The averments made on behalf of Promontoria dispute that the Property is used for such purposes.

### **THE LAW RELATING TO INTERLOCUTORY INJUNCTIONS**

18. The law in relation to the grant of interlocutory injunctions is well-settled and was most recently restated in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Limited* [2019] IESC 65. For present purposes the key issues are:

- **Fair question to be tried?**

The plaintiff must establish that there is a fair question to be tried regarding his 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?**

If 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 factor is the adequacy of damages. In this regard, the courts should be robustly sceptical of a claim by a plaintiff who is seeking an interlocutory injunction that damages are not an adequate remedy in a commercial claim for breach of contract (if she were not to get her interlocutory injunction but was to win the substantive hearing).

### **A fair question to be tried or a strong case to be made out?**

19. The notice of motion seeks, *inter alia*, an order restraining Promontoria from taking any further steps in respect of the Property and from completing any contracts or taking any further steps on foot of the purported sale of the Property.
20. As previously noted, Promontoria has entered into the Contract for the sale of the Property to a third party. It follows that an order from this Court restraining Promontoria from taking any further steps on foot of the purported sale amounts in essence to an order from this Court that Promontoria breach that Contract and/or rescind that Contract.

21. Ordering a party to breach a contract is in substance a mandatory order and therefore this motion seeks in substance a mandatory injunction, albeit that it is framed as a prohibitory injunction. On the authority of *Maha Lingham v. HSE* [2006] 17 E.L.R. 137, this Court concludes that before such an injunction is granted the plaintiff must show that he has made out a strong case for the relief he claims.

**A strong case that there exists a binding agreement to settle the loan?**

22. While reference was made on behalf of Mr. Langan to certain technical arguments about the transfer of the loan by the Bank to Promontoria, the amount of interest charged, the validity of the appointment of the Receiver and the validity of the mortgage charge, it was clear that the key issue at the hearing was Mr. Langan's claim that he had reached a binding agreement with Promontoria to settle his outstanding debts of over €870,000 for the payment by him of €190,000 prior to the completion of the Contract on the day of the auction.
23. It is Promontoria's case that no binding agreement was ever concluded and that therefore it could not amount to a breach of that alleged agreement for Promontoria to complete its Contract for the sale of the Property. On this basis, it claims that there are no grounds for the granting of an interlocutory injunction preventing Promontoria from completing its Contract for the sale of the Property pending the hearing of the substantive case.
24. To consider whether Mr. Langan has a strong case (or even if there is a fair question to be tried) regarding the existence of a binding agreement, it is necessary to consider in detail the evidence leading up to, and on, the day of the auction on 27th January, 2021, when the alleged agreement came into existence between Mr. Langan and Ms. Yvonne Loughran ("Ms. Loughran"), an asset manager with Link Asset Services who was acting on behalf of Promontoria in relation to the servicing of the Loan.

**The emails prior to the day of the auction**

25. The first contact between Mr. Langan and Ms. Loughran was an email from Mr. Langan on 13th January, 2021 at 4.32 pm to Ms. Loughran in which he indicated that he had been given her email address by a Mr. Healy and that she might contact him.
26. Ms. Loughran replied by email dated 13th January, 2021 at 16:38 and she stated that:

"You should be aware that any discussions will be on a without prejudice basis."

Her email also stated in block capitals at the bottom:

"SUBJECT TO CONTRACT/CONTRACT DENIED"

27. It is relevant to note that this statement applies to "*any discussions*" and therefore clearly sets out from the first contact by Ms. Loughran, and even before any figures were discussed, the basis upon which Ms. Loughran was engaging with Mr. Langan and also that everything was subject to contract.
28. Mr. Langan replied to this 'without prejudice and subject to contract' email within minutes (at 16:57) by suggesting that he would call her the following day.

29. Ms. Loughran replied at 5 pm indicating a suitable time and again her email contained at the bottom in capitals the words "SUBJECT TO CONTRACT/CONTRACT DENIED".
30. The next email is on 15th January, 2021 at 1.10 pm from Mr. Langan to Ms. Loughran and it contains an offer from him to settle the outstanding loans for a payment of €80,000 in one tranche or €100,000 in two tranches. This email also contains various terms attaching to his offer, such as the fact that he would '*not pursue any alleged receiver for invalid appointment*' and that he would '*not be seeking a statutory declaration as to who owns an interest in my mortgage*'. It is relevant to note that Mr. Langan, at this stage, was aware of the auction which was due to take place 12 days later on 27th January, 2021 since he makes reference to the auction in one of his proposed terms, namely that:

"I will make an application to strike out the high court Proceedings against the auctioneer currently advertising the Property for sale in a online auction"

31. In reply to this offer on the same day at 2:17 pm, Ms. Loughran sends an email to Mr. Langan with the following wording in capitals:

"WITHOUT PREJUDICE/SUBJECT TO CONTRACT/CONTRACT DENIED"

This time, this wording is at the start of the email. She tells him in that email that she needs him to confirm the source of funding for the transaction and she states in relation to this proposal that '*I will take this forward for consideration*'.

As this is the first offer by Mr. Langan in this negotiation process, it is relevant to note that Ms. Loughran appears to be indicating that this offer will have to be considered by someone other than herself. Thus, as early as 15th January, 2021, Mr. Langan was aware that Ms. Loughran had to convey his offers to others for acceptance/rejection.

32. The next relevant email is dated 19th January, 2021 (5.04 pm) from Ms. Loughran to Mr. Langan in reply to his offer of €100,000. Once again, at the start of the email, it is stated in capitals:

"WITHOUT PREJUDICE/SUBJECT TO CONTRACT/CONTRACT DENIED"

This email states, insofar as relevant, that:

"I refer to your proposal of €100k in full and final settlement of the outstanding obligations to Promontoria (Oyster) DAC ("PODAC") which, as of 18/01/2021, amounts to €870,059.07 excluding charges, costs and daily accruals where applicable.

Unfortunately, the proposal is not at a sufficient level to address your outstanding obligations and has therefore been rejected. However I have stressed to the loan owner that you are actively engaging with me and that your preference is that a consensual resolution is progressed. Therefore, and on an entirely exceptional basis, **I understand consideration may be given** to a minimum amount of

€200k in full and final settlement of the outstanding liabilities of yourself, Brendan and Gregory [the partners]. **Any proposal will be subject to formal approval and subject to contract.**

Whilst I appreciate you may be disappointed that your initial proposal was not successful, you should note that the proposed settlement amount of €200k represents a very significant discount to the outstanding amount due. I have included a summary of the proposed terms:

- Full and final settlement for an amount of €200k payable to PODAC;
- Initial payment of €50k two weeks from acceptance;
- Balance €150k payable 1st May 2021;
- Settlement agreement to be entered into by the parties at a cost of €1.5k – payable by yourselves directly to the appointed solicitor;
- Once the terms have been agreed, all legal action will be held pending the successful completion of the agreement;
- Upon successful completion of all terms of the settlement agreement, the security held (by way of legal charge) over Folio DN179957F and DN191360F will be released at a cost of €150 per Deed of Release (x2), costs are payable directly to the acting solicitor.
- Once the agreement has successfully completion all litigation is to be struck out by consent between the parties and each party will be liable for their own costs

I understand that folio DN179957F is currently listed for sale with Wilson's Auctions. Upon receipt of your confirmation that you wish to progress a settlement in line with the above, **I will request that the property is withdrawn** from the auction." (Emphasis added)

33. It is clear from this email that reaching a settlement of the loan is more than just agreeing a figure, since there are a number of important terms to be agreed, in addition to the figure.
34. This email is also relevant since it confirms that it is the 'loan owner' who has the final say in relation to the acceptance or rejection of any proposal discussed between Mr. Langan and Ms. Loughran. In addition to the wording at the start of the email in capitals (i.e. without prejudice/subject to contract/contract denied), Ms. Loughran reiterates in the body of this email that any proposal is subject to formal approval and subject to contract.
35. It is also important to note that all she states on behalf of the loan owner is that 'consideration may be given' by the loan owner to a figure of €200,000, not that this is a formal offer capable of acceptance there and then by Mr. Langan. This is also to be gleaned from the block capitals in the heading of the email, i.e. subject to contract etc.
36. As previously noted, Mr. Langan is aware that the auction is due to take place on 27th January, 2021 and now he is being told by Ms. Loughran that upon receipt of confirmation

that he wished to *'progress a settlement in line with the above'*, all that she commits to doing is to *'request'* that the property is withdrawn from the auction. At this stage therefore Mr. Langan would have been aware that with just a week to go to the auction, the later he left it to finalise (*albeit* subject to contract and on a without prejudice basis) with Ms. Loughran a settlement figure and to finalise all these other terms, the greater the risk that the Property might be sold at that auction, particularly as Ms. Loughran was not committing to withdrawing the Property from the auction, but rather to requesting that it be withdrawn.

37. Then on the 21st January, 2021 at 9:19 am, Mr. Langan replies to this email by threatening various people with the criminal courts unless his increased offer of €125,000 (which he makes in this email) for the sale of the Property is accepted. Insofar as relevant in this email, he states:

"If we cannot settle this matter amicably, I can see this matter ending up in the criminal courts. [...] if my property is sold a number of people will be brought before the criminal courts, including but not limited to the directors of promontoria Oyster, the alleged receiver solicitor and the auctioneers. I trust this won't be necessary and my offer is €125k for full and final settlements."

38. By email dated 21st January at 5:40pm Ms. Loughran replies to this email and again her email is headed:

"WITHOUT PREJUDICE/SUBJECT TO CONTRACT/CONTRACT DENIED"

Insofar as relevant, she states that:

"I note that you are proposing €125k in full and final settlement of your outstanding obligations to Promontoria (Oyster) DAC which, as of 18/01/2021, amount to €870,059.07 excluding charges, costs and daily accruals where applicable.

Unfortunately the proposed settlement is considerably less than the minimum amount that may be considered in this instance as communicated to you in my email of 19th January 2021 and is therefore rejected. In addition, I await a Statement of Affairs on behalf of yourself, Brendan and Gregory.

[....]

[M]y client **may give consideration** to a settlement proposal at an appropriate level noting that this would be **considered on a without prejudice basis** and would be **subject to formal approval and subject to contract.**" (Emphasis added)

Once again Ms. Loughran is at pains to point out that she is not in a position to agree a final figure as this is subject to formal approval and that a settlement proposal would be considered on a without prejudice basis and subject to contract.

39. Despite Mr. Langan being aware from the contents of Ms. Loughran's email of 19th January of what is involved in reaching a binding legal agreement, he does not reply to this email of 21st January from Ms. Loughran until 27th January, the morning of the auction at 10:47 when he calls Ms. Loughran.

**The day of the auction**

40. Ms. Loughran has contemporaneous notes of her telephone conversations with Mr. Langan on the 27th January 2021 and the first one is at 10.47, when he calls her and this note states:

"27/01/21 @ 10.47 – call from David Langan who advised that he could not meet the €200k counter proposal as set out in my email. DL asked whether a reduced figure would/could be considered. YL stated that this was unlikely but that she would ask the question and revert."

41. The next note is from 12:17:

"27/01/2021 @ 12.17 – telephone call from YL to David Langan. YL advised that she had discussed the matter and the proposed settlement. YL stated that on an entirely exceptional basis, **an amount of €190k may be considered but this was without prejudice and subject to formal approval** etc. DL stated that he couldn't raise funds for a proposal at that level and could this be reduced. YL stated that this was the minimum that could be considered and under the circumstances it represented a significant discount to the overall balance. DL asked what would happen if a settlement could not be reached. YL stated that the loan owner would rely on their security which included the sale of the asset listed with Wilsons and legal debt recovery action against the borrowers/guarantor personally. DL had emailed a proposal of €140k full and final settlement, on the call YL confirmed that this would not be a sufficient level. DL then verbally advised €150k full and final. YL stated that she would take this forward for consideration." (Emphasis added)

42. It is important to note that this contemporaneous note of Ms. Loughran's telephone conversation is consistent with the contents of her emails leading up to that conversation, namely that she states to Mr. Langan that the figure of €190,000 "*may be considered*" and also her reference to the communication being without prejudice and subject to formal approval and that she had to take any proposals forward for consideration (by the loan owner).

43. Two hours after this telephone conversation Ms. Loughran replies, by email at 14:16, to the verbal offer made during that telephone call by Mr. Langan of €150,000, by indicating that it was not acceptable. Once again the email is headed in capital letters:

"WITHOUT PREJUDICE/SUBJECT TO CONTRACT/CONTRACT DENIED"

and it states:

"Further to our discussion I note that you proposed a full and final settlement amount of €150k to address your outstanding obligations which, as at 18/01/2021, amount to €870,059.07 excluding charges, costs and daily accruals where applicable.

Unfortunately the proposed settlement is considerably less than the minimum amount that may be considered in this instance as communicated to you in our telephone call of 27/01/2021.

Should you wish to submit a revised and improved proposal you are welcome to do so noting **that any proposal would be considered on a without prejudice basis**. As discussed there is **no obligation for the loan owner to accept any proposal for less than the total outstanding amounts due**. All rights are reserved in respect of same." (Emphasis added)

44. It is again important to note that once again Ms. Loughran is at pains to emphasise, on the very day when Mr. Langan claims that he reached a binding agreement with her on behalf of Promontoria, that her discussions are on a without prejudice and subject to contract basis.

45. Approximately half an hour after this email was sent, Ms. Loughran receives a call from Mr. Langan and her contemporaneous note of the conversation reads as follows:

"27/01/2021 @ 14.46 – call from DL following receipt of email from YL 14.16 rejecting the proposal for €150k. DL stated that he was struggling to raise the finance required and again asked what the next steps would be. YL stated that the asset would be sold, that there was a charge over a further asset that would likely be enforced and the judgement proceedings against the borrowers/guarantor would be progressed. DL stated that he would do everything he could to obstruct the sale and he would not let this go through. DL stated that he wasn't trying to "threaten" YL but this was his intention. YL noted that DL was entitled to act as he saw fit but that the sale would be progressing in the absence of a settlement being in place. DL then stated that he would agree to €190k full and final with an extension to the final payment. **YL stated that she couldn't give any guarantees at the as auction was in process and she wasn't sure what time the subject asset was listed. YL confirmed that she would take the offer forward for considered and again noted that this was WP/subject to formal approval** etc." (Emphasis added)

46. The next relevant event is a note of a telephone conversation from Ms. Loughran to Hayden Kearney, an asset manager with Link Asset Services and this reads:

"27/01 2021 @ 15.00 – telephone call from YL to Hayden to advise of the offer. HK advised that Wilsons had just confirmed that the asset has been sold for €245k and is now contracted for sale."

47. It is also relevant to note that Ms. Loughran has provided sworn evidence which is consistent not only with her emails, but also the contemporaneous notes of her telephone calls in which she avers, *inter alia*, that:

“I advised the plaintiff that I could not give him any guarantee that his proposal would be considered as the auction was underway at that stage and I was not sure what time the Property was listed for auction. I said to him that, notwithstanding this, I would put the proposal forward to [Promontoria] for consideration, noting again to him that the proposal was at that time being considered on a without prejudice basis and subject to contract.”

48. In contradiction to the foregoing emails, the contemporaneous notes and sworn affidavit of Ms. Loughran (regarding the without prejudice nature of the discussions etc.), Mr. Langan avers as follows:

“I say that I made an offer of €125,000 in or about 15th January 2021 to settle the matter. I say that this was refused by way of email dated 21st January 2021. I say that I made, by way of telephone call, an offer of €150,000 which was refused. [...]

I say that [Link Asset Services] on a subsequent call on the 27th of January 2021 expressly sought and offered the settlement sum of €190,000 in full and final settlement of the debt and for the lands. It was expressly outlined that if I accepted the said sum that the lands would be taken out of the auction. Whilst aware of the underlying issue of the debt and security, but also noting the involvement of my other family members, I say that I accepted the offer and relied on the representation. I say that I expressly agreed to the figure and to the taking out of the lands of the auction and the Defendant agreed to do same.”

49. Thus, it is relevant to note that Mr. Langan claims that Link Asset Services on a telephone call at some stage on the 27th January offered the settlement sum of €190,000 and that the Property would be withdrawn from the auction. He is not specific about who made this offer on behalf of Link Asset Services, nor does he say at what time this offer was made (which is clearly of crucial importance, in view of the fact the auction was taking place that day). Equally, he provides no details of whether or not the detailed terms set out in Ms. Loughran’s email regarding tranches, payment dates etc were agreed. Apart from his assertion to that effect, he does not provide any evidence which is consistent with his claim that a binding agreement was concluded and his claim that there was an agreement to pull the Property from the auction.

50. On the contrary, Ms. Loughran provides a significant amount of correspondence and contemporaneous notes which support her sworn evidence that no binding agreement came into existence, i.e.

- From the very first email of 13th January, 2021, it is made clear that ‘any discussions’ will be on a without prejudice basis – thus consistent with there being no binding agreement.

- Practically every single email from Ms. Loughran had in block capitals wording that the negotiations were without prejudice, subject to contract and that a contract was denied - also consistent with there being no binding agreement.
- The emails from Ms. Loughran made it clear that her negotiations with Mr. Langan were on the basis that she did not have authority to conclude an agreement with Mr. Langan, but that her role was to provide figures which '*may be considered*' by the loan owner and which figures were said to be subject to '*formal approval*' – also consistent with a non-binding agreement.
- Her contemporaneous notes are completely consistent with the terms of the numerous emails prior to and after the relevant telephone conversations and again in these it is emphasised once again that she could not give any guarantees as the auction had started and that everything was without prejudice and subject to formal approval – again consistent with a non-binding agreement.
- Even if there were a binding agreement to settle the Loan for €190,000, the documentary evidence is that at most that Ms. Loughran would make a 'request' to have the Property withdrawn from auction - again consistent with a non-binding agreement in relation to the withdrawal of the Property from auction.

51. When one considers on the one hand the detailed averments of Ms. Loughran in her affidavit and the documentary evidence (both emails and contemporaneous notes), which back up those averments regarding the non-binding nature of the discussions, and on the other hand one considers the claim by Mr. Langan that, notwithstanding all this evidence, Ms. Loughran (or some other agent of Link Asset Services, since he does not even specify who was acting on behalf of that company) made a binding offer to settle the Loan for €190,000 and a binding offer to withdraw the Property from auction, for which there is no documentary evidence, it is difficult to avoid concluding that Mr. Langan's claim amounts to a bare assertion.
52. For this reason, this Court concludes not only has Mr. Langan not made out a strong case that he has a binding agreement for the settlement of his Loan and the withdrawal of the Property from the auction, but there is not even a fair question to be tried in relation to these issues.
53. Although it was clear that the alleged binding settlement agreement was the core of Mr. Langan's case, he also briefly made a number of technical points in support of the reliefs sought. However, like Finlay Geoghegan J. in *Flynn v. Breccia* [2017] 1 I.L.R.M. 369 at para. 32, this Court does not propose to consider each and every one of these technical grounds or indeed set them out, but it should be noted that it has fully taken them into account and has carefully considered the written legal submissions in this regard. In brief terms, a number of points will be made.
54. Although not determinative (since parties can settle claims even where they believe them to be baseless), it is nonetheless relevant to note that that these technical arguments

(effectively that he Mr. Mangan does not owe Promontoria the Loan) are made in circumstances where Mr. Langan sought to negotiate a settlement of that Loan with Promontoria, and indeed these proceedings were issued by him on the basis of his belief that he had entered a binding settlement agreement to that effect. The fact that Mr. Langan now makes certain claims that the transfer of the Loan was defective, that the mortgage charge is defective, and that the appointment of the Receiver is defective is clearly at odds with his alleged 'binding agreement' to settle his debts.

55. Mr. Langan claims that the Loan was not properly transferred to Promontoria. Under General Condition 11.32 of the Terms and Conditions for Business Lending to Partnerships, to which the Loan was subject, the Bank had the right to transfer the Loan to another entity without the prior consent of Mr. Langan. The Bank exercised this right when it transferred the Loan to Promontoria by way of Global Deed of Transfer executed on 19th December, 2016. There is nothing put forward by way of evidence from Mr. Langan to suggest that the transfer is defective.
56. Mr. Langan further claims that the mortgage charge is defective on the basis that the mortgage was not signed and executed. However, by way of evidence for this claim, Mr. Langan has exhibited a redacted copy of the mortgage, not an unredacted version, which if it were not redacted might, at least, have provided evidence that it does not bear his signature. Instead, what is clear from the mortgage is that under Clause 17 consent is given for the transfer of the mortgage from the Bank to Promontoria which was duly done when the Global Deed of Transfer was executed between the Bank and Promontoria on 19th December, 2016.
57. Mr. Langan also claims that the appointment of the Receiver was defective, and that the Receiver had no power of sale in relation to the Property. However, the argument that the Receiver had no power of sale is not relevant in circumstances where the Property was sold by Promontoria as mortgagee when it exercised its power of sale under the mortgage (see Clause 8 of the mortgage which states that sections 17 and 20 of the Conveyancing Act 1881 shall not apply to the mortgage and that the statutory power of sale '*shall be exercisable at any time after demand*').)
58. Mr. Langan claims that the calculation of the interest on the Loan was incorrect (this is an issue that goes to his defence in the summary proceedings referenced earlier) and he also made certain claims in relation to his signing of the loan facility letter in 2009. While it was accepted on behalf of Promontoria that Mr. Langan did not sign the 2009 loan facility letter, it was submitted that the fact that he did sign the 2010 loan facility letter (together both letters form the Loan) meant that he could not resile from his indebtedness. This is because the 2010 loan facility letter references the same account number as the 2009 loan facility letter. Furthermore, Mr. Langan has not sought in these proceedings to dispute the fact that the Loan was not repaid and that he remains in debt. Indeed, it was submitted on behalf of Mr. Langan during the course of this application that the purpose of the injunction would be to essentially allow for Mr. Langan to follow-through with the settlement of the Loan by in effect paying €245,000 to Promontoria for

the Property (rather than €190,000, which he had allegedly agreed, as €245,000 was the amount secured at auction).

59. Accordingly, in relation to each of these technical points, this Court also concludes that not only has Mr. Langan not made out a strong case in relation to them, but there is not even a fair question to be tried in relation to those issues. It is important to note that if Mr. Langan believes that there is merit in these technical points, he will of course have the opportunity to argue them at the substantive hearing. The only issue being decided now is whether he should have an interlocutory injunction, pending that substantive hearing.

**Balance of justice**

60. If this court is wrong in its conclusion that Mr. Langan failed to satisfy the first step in the test for obtaining an interlocutory injunction, then this Court would have to consider whether the balance of justice favours the grant of the injunction.
61. In this regard, it is important first to note that Mr. Langan does not dispute that he borrowed the sums of money in question, rather he disputes that up to €50,000 in interest of the €870,000 was wrongly charged, that the loan was not properly transferred to Promontoria, that the receiver was not validly appointed etc.
62. In considering where the balance of justice lies this is obviously not a factor in favour of Mr. Langan since he is not asserting that he did not get the benefit of the monies borrowed or indeed that he has already repaid them. Rather, having borrowed the monies and having failed to repay them he is seeking to prevent the sale of the Property which Promontoria says is the security for the Loan. That is important background against which this Court must consider whether the balance of justice favours Mr. Langan or Promontoria.
63. Next, as noted by O'Donnell J. in *Merck*:
- “the most important element in that balance [of justice] is, in most cases, the question of adequacy of damages”,
- and,
- “In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy.”
64. It seems to this Court that these principles have particular resonance in the current case. First, Mr. Langan is claiming that there is a binding agreement dated 27th January, 2021 for the settlement of his Loan and for the withdrawal of the Property from the auction and secondly that this binding agreement was breached when Promontoria sold the Property by auction on 27th January, 2021.

65. Since the Property in question amounts to a field of approximately five acres which was used by Mr. Langan as part of his market garden business, there can be little doubt that this is a commercial case in which a breach of contract is claimed.
66. As such, not only has no evidence been provided to this court of why the adequacy of damages should not be the most important element of the balance of justice in this case, but also, as noted by O'Donnell J., this Court must be robustly sceptical of Mr. Langan's claim that damages are not an adequate remedy for him (if he was not granted the interlocutory injunction but was to win at the substantive hearing).
67. It seems clear that if the Property has been used for the planting of crops as claimed by Mr. Langan then it should be an easy matter to calculate the financial loss caused to Mr. Langan by his being deprived of the use of that Property.
68. It is for this reason that this Court concludes that Mr. Langan, even if he had established a strong case/fair question to be tried, has not discharged the onus of proving that damages would not be an adequate remedy for him (in the event that the interlocutory injunction was wrongly refused by this Court).
69. In this regard, it is also relevant to note that there is no suggestion that Promontoria would not be a mark for any such damages.
70. On the other hand, Mr. Langan has not made any repayments on the Loan for a period of over four years and accordingly he would not appear to be a good mark for damages if the injunction was found by the trial judge to have been wrongly granted by this Court.
71. In this regard, Mr. Langan has produced a one-page unsigned letter of confirmation that an acquaintance is in a position to provide funds of €250,000 to Mr. Langan to facilitate his purchase of the Property from Promontoria, in support of his injunction application. This was obtained in order to provide evidence that Mr. Langan was prepared to purchase the property, not at the price of €190,000 that he said was allegedly agreed, but at the price of €245,000 at which price the Property was sold at auction. However, it is clear that these funds are only available for the purpose of purchasing the Property and so are not available to meet an award of damages obtained by Promontoria against Mr. Langan.
72. For these reasons, this Court also concludes that damages are not only an adequate remedy for Mr. Langan, but they are not an adequate remedy for Promontoria, which therefore supports the view that the balance of justice favours the refusal of the injunction

### **CONCLUSION**

73. This Court concludes the injunction sought is in substance a mandatory injunction and that Mr. Langan has failed to establish the first step in obtaining such an injunction, namely that he has a strong case in relation to his claim of a binding agreement for the settlement of his Loan and for the withdrawal of the Property from auction.

74. Even if Mr. Langan only had to establish a fair question to be tried (rather than a strong case), he has failed to establish that there is a fair question to be tried in relation to those issues or indeed in relation to the various technical issues he raised regarding the transfer of the loan, the validity of the appointment of the receiver, overcharging of interest etc.
75. Furthermore, even if Mr. Langan had satisfied the first step in the test for interlocutory injunctions, the second step (namely whether the balance of justice favours the granting of the injunction) is not satisfied since Mr. Langan is alleging the breach of a commercial contract and damages are an adequate remedy for Mr. Langan, thereby obviating the need for an injunction.
76. In addition, while there is no evidence to suggest that Promontoria is not a mark for damages if the trial judge were to find that the injunction should have been granted by this Court, Mr. Langan is unlikely to be a mark for damages if the trial judge found that the injunction was wrongfully granted by this Court.
77. For all these reasons, the injunction is refused.
78. 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. In case it is necessary for this Court to deal with final orders, this case will be put in for mention one week from the date of delivery of judgment, at 10.30 am.