THE HIGH COURT

[2023] IEHC 747

RECORD NO 2023/4429 P

BETWEEN

CAVERNBELL LIMITED

PLAINITFF

AND

PADRAIG WALSH

DEFENDANT

Judgment of Mr. Justice Mícheál O'Higgins delivered on the 10th October 2023

Introduction

1. This is a slightly unusual application for an interlocutory injunction. The matter came before me when I was sitting as a Duty Judge on Thursday, 21st of September 2023. Due to pressures on the list, the case was part heard and resumed on 27th of September 2023. I indicated that I would give my judgment as soon as possible. On 3rd of October 2023, the plaintiff sought to mention the matter and place before the court an affidavit exhibiting certain updated correspondence which it was felt was relevant and would assist the court in its deliberations. The defendant objected to the affidavit and correspondence being handed in

on the basis that the hearing was over. Having heard brief submissions, I declined to receive the additional affidavit. This is now my judgment on the plaintiff's application for a mandatory interlocutory injunction.

Background

2. The plaintiff is a development company which entered into a development agreement in December of 2020 with the approved housing body and registered charity known as "Respond". In that agreement, the plaintiff agreed to construct a housing development comprising some 48 apartment units at Golf Lane, Glenamuck Road, Carrickmines, Dublin 18. The housing development is for the purpose of social and affordable housing. The development includes a four/five storey apartment block. The plaintiff engaged a company known as Blacklough Developments Limited as building contractors to construct the development. The apartment block was constructed some 4.9 meters away from the location identified in the drawings for which it had been granted planning permission. This was drawn to the attention of Dun Laoghaire Rathdown Council and by letter of the 28th of October 2022 the Council wrote to the plaintiff and threatened planning enforcement proceedings. The plaintiff directed its building contractor, Blacklough Construction Limited, to cease all works onsite until the planning discrepancy was remedied. All building works onsite ceased on or about the 28th of October 2022.

3. In order to sort the matter out, the plaintiff lodged an application for retention permission to Dun Laoghaire Rathdown Council. On the 10th of March 2023, the Council issued a notification of decision to grant retention permission.

4. This is the point at which the defendant, Padraig Walsh, comes into the picture. He is a joint owner of a property at 29 Blackberry Hill in Carrickmines, Dublin 18. It appears to be common case between the parties that, due to the apartment block in question being

constructed 4.9 metres away from the location identified in the planning drawings, and due to the orientation of the apartment block, the balconies of some of the apartments will overlook the plaintiff's garden, giving rise to legitimate concerns for the plaintiff's privacy. The defendant says that the apartment block, which should have faced the gable wall of a property close to the defendant's home, will instead have three apartments (of what he says is a five-storey not four-storey block) looking directly into the defendant's rear garden. In his affidavit the defendant has indicated that he expended substantial funds in creating a rear garden which he considers to be an extension of his home, as evidenced by the photographs exhibited to his replying affidavit.

5. I have to say that I have some sympathy for the defendant's position in relation to the background planning/privacy issue because it appears to be accepted that, through no fault of the defendant, the apartment block was constructed otherwise than in accordance with the planning drawings and indeed I note that the plaintiff is in litigation with the architect regarding this issue, which everybody agrees is not the fault of the defendant.

6. The second reason why I have sympathy for the defendant's position, certainly insofar as the background to the proceedings is concerned, is that he appears to have acted reasonably in addressing the issue and, instead of seeking to extract his pound of flesh in damages, reached agreement with the plaintiff that the privacy issues would be addressed by the plaintiff installing opaque glazed screens on the apartment units concerned in order to mitigate the impact upon the defendant's privacy.

7. As I have mentioned, Dun Laoighaire Rathdown Council issued a notification of a decision to grant retention permission on the 10th of March 2023. In order to protect his interests, the defendant submitted an appeal to An Bord Pleanála from the notification decision and this appeal was noted as received by An Bord Pleanála on the 4th of April 2023.

8. Thereafter, the plaintiff and the defendant engaged in negotiations in an attempt to achieve a satisfactory resolution of the dispute between them. As I have mentioned, they reached agreement on the necessary mitigation measures, and this involved the plaintiff agreeing to install the glazed screens that I have described.

9. It is important to note that the parties were represented by solicitors during the negotiations at all relevant stages. After the matter had been teased out in correspondence, the plaintiff and the defendant reached agreement on what was to be done, and by way of a 3-way arrangement, the plaintiff, the defendant and *Respond* executed a settlement agreement dated the 18th of August 2023. The gist of this agreement provided that the plaintiff on or before the completion of the construction of the development would install the opaque glazed screens on the apartment units concerned and would do so to a good workmanlike standard, as per the detail on drawings that were exchanged between the parties. It was agreed that the development would not be considered complete unless and until the privacy screens were in place. For its part, *Respond* as owner agreed to keep and maintain the screens on the apartment balconies concerned and acknowledged that the purpose of the screens was to afford the overlooked gardens of Blackberry Hill privacy from being overlooked from the balconies indicated in the drawings.

10. For his part, the defendant in para. 2 on the second page of the agreement agreed as follows:

> "*The Neighbour confirms and agrees that he will withdraw the appeal <u>with immediate effect</u> and take all necessary steps as directed by the Board in relation to implementation of the withdrawal of the Appeal by the Neighbour"* (my emphasis).

11. The plaintiff's case is that, in breach of this clear contractual obligation, the defendant has failed and/or refused to withdraw his appeal to An Bord Pleanála. According to the plaintiff, this means in practical terms that it cannot resume the building works until the

planning appeal is determined. This could take many months or possibly longer and meanwhile, says the plaintiff, it is likely it will suffer considerable prejudice and monetary loss, including the possibility that *Respond* could terminate the Development Agreement.

12. The defendant has a different view of matters, and he says that when he executed the terms of settlement, it was at all times understood by him that the agreement with the plaintiff and *Respond* was subject to a burden being registered on the Land Registry Folio. In other words, the defendant contends that the agreement between the parties, when construed in accordance with the pre and post contract correspondence, was conditional upon the Land Registry registering the burden relating to the owner's commitment to install and maintain the screens. The defendant contends that, when read in the light of the correspondence, including and in particular the cover letter dated 9 August 2023 wherein the defendant returned the signed contract, the contract was, as a matter of law, conditional upon the burden being registered. If this contention is correct, that would mean that the defendant's obligation to withdraw the planning appeal would not be triggered until such time as the burden was registered, and therefore the defendant denies that he is in breach of contract.

13. The practical difficulty that has now arisen is that, by letter dated the 20th of September 2023, the Land Registry has declined to register the burden, stating that "terms of settlement" are not a burden capable of registration under s. 69 of the Registration of Title Act 1964.

14. The plaintiff's position in this injunction application is that the defendant is wrongfully refusing to withdraw the appeal until the Property Registration Authority has concluded the process of registering a Form 48. It is contended that this is in clear breach of the settlement agreement which states very clearly that the defendant agrees to withdraw the appeal "with immediate effect". The plaintiff contends that the registration of the Form 48 on the Folio is neither a precondition to, nor condition of, the appeal being withdrawn. The

plaintiff confirms that it will assist the registration of the Form 48 but insists that it is not a precondition to the appeal being withdrawn and is simply not part of the agreement. On that basis, the plaintiff contends that the defendant has no valid legal or factual basis to warrant him refusing to notify An Bord Pleanála that he is withdrawing the appeal.

15. The plaintiff has brought this application for an interlocutory injunction because it says that it will suffer and continues to suffer very significant losses during the period moving forward when it won't be able to complete the development. Clause 17.1 of the development agreement provides that *Respond* is entitled to liquidated damages for late completion of €100 per unit for each of the 48 units. This aggregates to a figure of €4,800 per week. The plaintiff is desirous of recommencing the building works immediately and a period of six weeks has already passed since the settlement agreement was signed on the 18th of August 2023. The plaintiff says that, in addition, Clause 18.1.3 gives *Respond* the right to terminate the agreement, which would cause the plaintiff to suffer enormous and potentially catastrophic losses as the development is partially complete and significant disruption to the completion of the development would thereby arise.

16. A further possibility of losses arises from the fact that construction inflation is running at a high level and, according to the plaintiff, each month of delays will add to the cost of completing the development. All of this should be seen against the backdrop that the allegedly wrongful acts of the defendant will inevitably cause significant delays to the completion of much need housing units in the Dublin area.

Submissions of the plaintiff

17. One of the main arguments pressed by counsel for the plaintiff in both written and oral submissions is that the plaintiff has a strong case and that, in point of fact, the defendant simply has no defence. The plaintiff sues for specific performance of the agreement and seeks

a mandatory injunction directing the defendant to advise An Bord Pleanála that he is withdrawing his appeal and to take all steps to withdraw the appeal. It is submitted that the executed agreement of the 18th of August 2023 is extremely clear in its terms – the defendant *"confirms and agrees that he will withdraw the Appeal with immediate effect and take all necessary steps as directed by the Board in relation to the implementation of the withdrawal of the Appeal".*

18. Under the terms of the agreement, there is no conditionality or permitted delay. There are no conditions precedent that have to be satisfied. The obligation to withdraw the appeal arises "with immediate effect". The plaintiff says the defendant is disregarding his obligations and is seeking effectively to renegotiate what was agreed.

19. The plaintiff points out that the defendant had legal advice at all material times and indeed sought for the fees of his solicitor to be discharged by the plaintiff. This was one of the matters which was agreed in correspondence as part of the negotiation process and the plaintiff duly discharged the fee of the defendant's solicitor, Mr. McParland.

20. The plaintiff says that insofar as the inter-partes correspondence is relevant at all, it shows that the defendant, through his solicitor, raised the issue of *Respond* possibly providing further documentation so as to protect the defendant's position vis–a–vis the possibility of future buyers purchasing the apartments and not honouring the commitment to construct and/or maintain the privacy screens. The plaintiff says that the correspondence makes clear that this request was openly and straightforwardly declined by *Respond.* The correspondence shows that the defendant was notified that *Respond* was not agreeable to providing any further documentation and that the only agreement "on offer" was the agreement that was eventually signed by all three parties. In other words, that the defendant with his eyes wide open knowingly signed up to withdrawing the planning appeal, without tying that commitment to the registration process.

21. The plaintiff points out that it has already sued the architect it alleges was responsible for the planning issue that has been encountered, namely the rotation of the apartment block. Those proceedings are in the Commercial List of the High Court. In addition to the late delivery charges and risk of termination of the Building Agreement, the plaintiff estimates that construction inflation (estimated at 10 – 15% per annum) might add €1 million to the cost to complete the development, which is in excess of €80,000 per month.

22. It is submitted that the court does not need to form a view about the level of losses that will arise on a month–by–month basis as part of its consideration of this interlocutory application. The plaintiff maintains that it has demonstrated that losses may arise and could build up into a substantial sum within a very short period.

23. Citing Kirwan, *Injunctions Law and Practice*, 3rd Ed., (Roundhall, 2020) at paras. 10-465, the plaintiff maintains that it is an important overarching general proposition that rights relating to property generally, and land more specifically, are in broad terms treated by the courts as rights which are normally protected by injunction. It is submitted that the planning objection prevents the use of the land as the plaintiff's finance is dependent on the development being in compliance with the planning permission. It is submitted that the plaintiff's case falls within this general principle and secondly that it enjoys a clear contractual obligation, justifying protection from the court by way of injunctive relief.

24. The plaintiff contends that the defendant's position is wholly unsustainable and fails to take into account long–settled law on the interpretation of written contracts. The plaintiff relies on the decision of McDonald J. in *Brushfield Limited (T/A The Clarence Hotel) v. Arachas Corporate Brokers Limited & Ors* [2021] IEHC 263 (Unreported, High Court 19th April 2021). In that case, McDonald J. carried out an extensive review of caselaw relating to the interpretation of policies of insurance. The plaintiff submits that this has general

application. The plaintiff relies in particular on para. 110 of the judgment of McDonald J. as follows:

> "*110. The following principles emerge from those authorities:*
>
> *(a) The process of interpretation of a written contract is entirely objective. For that reason, the law excludes from consideration the previous negotiations of the parties and their subjective intention or understanding of the terms agreed;*
>
> *(b) Instead, the court is required to interpret the written contract by reference to the meaning which the contract would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties at the time of conclusion of the contract;*
>
> (c) *The court, therefore, looks not solely at the words used in the contract but also the relevant context (both factual and legal) at the time the contract was put in place;*
>
> *(d) For this purpose, the context includes anything which was reasonably available to the parties at the time the contract was concluded. While the negotiations between the parties and their evidence as to their subjective intention are not admissible, the context includes any objective background facts or provisions of law which would affect the way in which the language of the document would have been understood by a reasonable person".*

25. The plaintiff contends that the law is clear and the defendant's position is entirely misconceived in that it fails to take into account the fundamental principle that the process of interpretation of a written contract is objective, not subjective, and that the law excludes from consideration the previous negotiations of the parties and their subjective understandings as to the terms that have been agreed.

26. Even if the Court is minded to consider the *inter partes* correspondence, indicating that the defendant raised the issue concerning registration of the Form 48, it was made clear

in the correspondence – in an open and upfront way – that *Respond* would not be signing any further documents. The plaintiff relies upon the fact that Grainne Loughnane, Solicitor answered Mr. McParland's letter of the 26th of July 2023, and in her letter of the 1st of August 2023 made it clear that *Respond* would provide the Form 48 (which consents to the settlement being registered on the Folio), but that they would not be signing any further documents. By a later letter of the 2nd of August 2023, she wrote again to Mr. McParland enclosing the Housing Finance Agency consent to the settlement being registered as a burden and she sought confirmation that the defendant would now sign the terms of settlement.

27. The plaintiff says that at that point in time, the defendant/ his solicitor had a number of choices: he could have refused to sign the settlement and insisted on the Deed of Covenant that he had prepared being signed by the plaintiff and by *Respond*, or, he could have insisted on a redrafting of the Form 48, or, he could have accepted the position and procured his client's signature on the settlement. The plaintiff says that Mr McParland took his client's instructions, and the defendant signed the settlement and returned it under cover of his letter of the 9th of August 2023. It is submitted that the letter added a request (indicating that it was not already agreed) asking that the plaintiff *"furnish… a letter undertaking to deal with all Land Registry queries"*. The plaintiff relies upon the fact that Ms. Loughnane, Solicitor, wrote back on the 18th of August 2023 enclosing a fully signed and now dated agreement.

28. In short, the plaintiff says that is not tenable for the defendant to propound additional terms not contained in the settlement of the 18th of August 2023 as conditions precedent to what it says is the "crystal-clear" obligation to immediately withdraw the appeal. The defendant is not entitled to renegotiate the settlement that was reached between the parties on the 18th of August 2023. By way of analogy, the plaintiff submits that contracts for the sale of registered land complete every day of the week, without registration having been concluded to register the transfer. The sale of the land is never conditional on registration unless

specifically and expressly agreed between the parties, and this would normally never be the case.

29. The plaintiff points out that it believes the issue of registration will be resolved but it is not willing to have all works on site remain suspended whilst the planning appeal remains live, as this would run the risk of enormous losses building up on a weekly basis.

30. Moreover, the plaintiff contends that the defendant's position can be protected in a number of ways. His solicitor can write to *Respond* and if he does not receive an appropriate response he can join *Respond* as an additional party to a counterclaim to the plaintiff's action, claiming relief from the court. Whilst it is submitted that this would be premature, it is an option open to the defendant.

31. Moreover, the defendant can sue *Respond* if he believes they are disregarding his entitlements and, in that regard, the plaintiff contends that *Respond* would have no defence to any such claim.

32. The plaintiff submits that, by contrast to the position of the defendant, it would be guaranteed to suffer inevitable damage if an interlocutory injunction is refused. The plaintiff will be delayed in the resumption of works at the development. *Respond* has the right to terminate the development agreement and the chances of that occurring could increase. Enormous financial losses will arise on a weekly and monthly basis which the plaintiff will, it is suggested, ultimately have to claim from the defendant. It is submitted there must be a real risk, and indeed likelihood, that the defendant will be unable to pay damages of several hundred thousand euro. The plaintiff has no desire to pursue the defendant for any claim of damages and wishes to avoid that occurring, however, a further delay of weeks or months on the construction works would cause very significant losses to arise.

33. The plaintiff submits that the balance of justice lies strongly in favour of granting interlocutory relief. Given the "immediate" obligation, the plaintiff's strong case and in

reality the absence of any defence, the inevitable enormous losses to the plaintiff, the apprehended likelihood the defendant will be unable to honour a significant award of damages, and the importance of parties being held to their agreements coupled with the hypothetical and tenuous nature of the potential damage to the defendant if an injunction is granted, it is submitted that in all these circumstances the balance of justice lies heavily in favour of the court granting an injunction.

Submissions on behalf of the defendant

34. In his affidavit, the defendant avers that having lodged the planning appeal he received a letter from the plaintiff's deponent, Mr. O'Connor, asking him to meet a Mr. Sean McCallion who he was advised had authority from the plaintiff to agree alterations to address the issues that had arisen. Mr. Walsh agreed to meet with Mr. McCallion at his home to discuss a resolution of the planning appeal. He brought Mr. McCallion to the rear door of the house and showed him how the balconies in the apartments which the plaintiff was constructing should not be able to be seen from his garden nor should the owners and occupiers of such apartments have a clear and unobstructed view of his garden. He says that his sole objective in lodging his appeal was to protect his privacy and that of his family. He avers he expended considerable monies on making his rear garden an extension of his home, as evidenced by the photographs exhibited to his affidavit.

35. Mr. Walsh avers – and I don't think this is contradicted – that the structure as planned, if built in accordance with the original planning permission, would not have encroached his privacy, but the structure as it is being built will result in the balconies to the south of the structure having a clear and unobstructed view of his back garden.

36. He avers that, following discussions with Mr. McCallion, his concerns were to be addressed by the installation of opaque glazed screens to the balconies of the offending

apartments. On consulting his solicitor regarding the matter, he emphasised the need for any agreement that might be reached to be binding not just on the plaintiff but also on the owner of the development and its successors in title.

37. At para. 8 of his affidavit he says that the plaintiff's solicitors produced a document entitled "Terms of Settlement" and submitted same to his solicitors for consideration. He says his solicitors reverted to the plaintiff's solicitors specifically seeking a Deed of Covenant on the part of the registered owner of the Glen Development to install, keep and maintain the proposed screens on the relevant apartments and the agreement needed to refer to the relevant Land Registry Folio and include an assent to the registration of the proposed Deed of Covenant as a burden on the Folio referable to the development.

38. He avers that the plaintiff's solicitor's response was to confirm that a letter of consent addressed to the Property Registration Authority confirming the registered owner's agreement to the registration of the settlement deed as a burden on the Folio would be forthcoming. He says the plaintiff's solicitors went on to say that they would be reluctant to make any amendments to the original draft terms of agreement as it had taken a number of weeks to get it agreed with *Respond* and they believed the proposed letter would suffice.

39. On the 20th of July 2023, his solicitors wrote to the plaintiff's solicitors indicating that it was necessary to establish who precisely owned the Glen Development and requesting a copy of the relevant Folio and Filed Plan and the corporate documents referable to the relevant entities. He says his solicitor stated that a specific Deed of Covenant and assent of the registered owner of the development to the registration of the covenant as a burden on the relevant Folio was required and also raised the issue of the consent of the Housing Finance Agency. On the 21st of July 2023 his solicitors received by email a copy of the relevant Folio and corporate documents. Having received same, his solicitors submitted a draft Deed of Covenant to the plaintiff's solicitors on the 26th of July 2023 for review and approval.

40. On the 1st of August 2023 the plaintiff's solicitors reverted suggesting the matter be dealt with by way of a Land Registry Form 48 and specifically stating that *Respond* were not prepared to sign any further documents. The plaintiff's solicitors also stated that no Land Registry compliant maps would be made available.

41. The defendant avers that on the 2nd of August 2023 the plaintiff's solicitors furnished a letter of consent from the Housing Finance Agency.

42. At para. 13 he avers that his solicitor informed him that in 46 years of practice he had not previously dealt with the registration of "Terms of Settlement" of a dispute as a burden on a third party Folio and expressed his concern as to what the defendant's position would be if his application to register the Form 48 in the Land Registry as a burden on the relevant Folio was rejected.

43. At para. 14 he states that on the 9th of August 2023 his solicitors wrote to the plaintiff's solicitors enclosing the signed terms of settlement and set out the documentation required to implement the entirety of the agreement reached, specifically querying the execution of the Form 48 by *Respond*. The letter indicated that it was only being signed by the company secretary and that this was not enough and also seeking a letter of undertaking in relation to the Land Registry queries and payment of nominal legal fees.

44. In the balance of his affidavit Mr. Walsh refers to the correspondence going back and forth between the parties, and he reiterates his position that it was at all times understood between the parties that the defendant was concerned about the registration issue and that this was acknowledged by the plaintiff and by *Respond* who were agreeable to the burden being registered.

45. As to the potential losses being contended for by the plaintiff, the defendant contends that it is wholly inappropriate for the plaintiff to say that these are the responsibility or even potentially the responsibility of the defendant. He says that no work has taken place since the

28th of October 2022 solely as a result of the plaintiff's wrongful actions in building the apartments in non-compliance with the planning drawings. He says that in the absence of the defendant's cooperation, no works could recommence until the appeal to An Bord Pleanála has been determined and any such losses which the plaintiff might suffer could not and should not be placed at his door.

46. In written and oral arguments, it was urged that the difficulties faced by the plaintiff in the within proceedings are entirely of the plaintiff's own making. He asserts that the plaintiff made a deliberate and conscious decision not to construct the offending apartment in accordance with the planning permission granted. The net effect of such unlawful and wrongful action was to cause a building, which should have faced the gable wall of a property close to the defendant's home, to have three apartments of a five-storey block look directly into his rear garden. The defendant submits that in the belief that his requirements had been acknowledged and agreed, but against a backdrop of the landowner and *Respond* refusing to sign any further documentation, the defendant accepted the plaintiff's proposal to secure his position by registering the agreed burden on foot of the Land Registry Form 48 that had been provided. The sole reason for not altering the terms of settlement to provide for the registration of the burden was due to the plaintiff's solicitors stating that *Respond*, the landowner, were prepared to provide a Land Registry Form 48 consenting to the registration of the burden but were not prepared to sign any further documentation at that point (see the plaintiff's solicitor's email of the 1st of August 2023).

47. The defendant contends that it has now come to light that *Respond* and the plaintiff are in dispute and that legal action is intended between the parties. It is contended that the plaintiff did not disclose such fact in its dealings with the defendant and that this was not appropriate in an injunction application. It is urged that at all material times the defendant believed that the plaintiff and *Respond* were acting in tandem in their dealings with the

defendant. The plaintiff's solicitors specifically referred to having taken instructions from *Respond* in their email of the 1st of August 2023. In that email it is stated that *Respond* were prepared to provide a Land Registry Form 48 which consents to the Deed of Settlement being registered as a burden against its Folio.

48. The Land Registry has now rejected the defendant's application to have the Form 48 registered. It is contended that this leaves the defendant with no way of securing his position with particular reference to third parties who may acquire an interest in the development.

49. As to the claim of likely ongoing losses, the defendant contends that it simply isn't realistic or fair to suggest that responsibility for this lies at the defendant's door. The losses being incurred by the plaintiff as referenced in the grounding affidavit of Phelim O'Connor arose solely by reason of the plaintiff's wrongdoing. Such losses have been accruing since October 2022 prior to the defendant having any involvement with the plaintiff.

50. As to the "*Campus Oil* criteria", laid down in *Campus Oil Ltd v. Minister for Industry and Energy (no. 2) [1983] I.R. 88*, the defendant disagrees with the plaintiff's contention that the defendant's concerns are fanciful and theoretical in the extreme. The plaintiff is not in a position to speak on behalf of *Respond* which is not a party to the proceedings. Neither party to the current proceedings has any knowledge as to the future intentions of *Respond* in relation to the development once completed. It is entirely conceivable that the development could be sold by way of a shared ownership scheme whereby a tenant would own part of the particular apartment and rent the other part. It is urged that the housing market is extremely fluid with new schemes and methods of bringing this type of accommodation into use being considered on a daily basis.

51. In terms of the practicalities, it is submitted that in the absence of the opaque glazed screens measuring 1.7 metres in height, the occupiers of the apartments involved would have a balcony that they could sit out on and enjoy a southwestern orientation providing maximum

sunlight. The erection of the opaque glazed screens of such height will detract from the relevant properties and therefore will have no appeal to the occupiers thereof. In these circumstances, it would only be natural that such occupiers would wish to see the opaque glazed screens removed or at the very least reduced in height. Without an enforcement burden registered on the *Respond* Folio, the defendant and his family will have no enforceable agreement against any third party who would purchase or acquire the apartments without notice of the binding obligation which both the plaintiff and *Respond* entered into for the benefit of the defendant and his successors in title.

Analysis

52. It is well settled that a court being asked to grant an interlocutory injunction does not make findings of fact or resolve issues which fall to be dealt with at the final hearing. The essential function of an interlocutory injunction is to find a just solution pending an action coming on for hearing.

53. In *Merck Sharpe and Dohme v. Clonmel Healthcare* [2020] 2 I.R. 1, the Supreme Court emphasised that the decision in *American Cyanamid v. Ethicon Limited* [1975] AC 396 was not to be approached as though it laid down strict mechanical rules for control of future cases. Rather, the test for an interlocutory application had to be applied with a degree of flexibility.

54. Secondly, the Supreme Court held that it was preferable to consider the adequacy of damages as part of, and not antecedent to, the balance of convenience as this approach tended to reinforce the essential flexibility of the remedy of an interlocutory injunction. Moreover, the possibility of awarding damages to compensate a plaintiff for its loss did not preclude the granting of an injunction in an appropriate case. An injunction was not to be granted merely because an applicant could tick the relevant boxes of an arguable case, inadequacy of

damages, and ability to provide an undertaking as to damages, and was not to be refused merely because damages might be awarded at trial.

55. The Supreme Court also held that whilst the adequacy of damages was the most important component of any assessment of the balance of convenience, and would be decisive in most cases, other factors could also be weighed in the balance in considering how matters were to be held most fairly pending a trial, and recognising the possibility that there might be no trial.

56. In addressing the issues in this case, I should start by indicating that no argument has been made to me that the settlement agreement signed by the parties and dated 18 August 2023 is invalid, contrary to public policy or is otherwise unenforceable. Accordingly, I will proceed on the basis that the signed agreement is valid and enforceable.

57. One of the main issues between the parties concerns the question whether it is permissible for the defendant to go outside the terms of the written settlement agreement and rely upon the *inter partes* correspondence for the purpose of ascertaining the intentions and understandings of the parties. The plaintiff contends that the defendant's entire case is misconceived and is based upon a fundamental misunderstanding of contract law. The plaintiff contends that the defendant's case requires acceptance of the idea that the process of interpretation of a written contract is subjective and that it is permissible for a court to consider the previous negotiations of the parties as evidenced by the *inter partes* correspondence. The plaintiff says that this contention breaches established principle and runs counter to the review of caselaw carried out by McDonald J. in the *Clarence Hotel* case.

58. Secondly, the plaintiff makes an alternative argument and says that, even if – contrary to the plaintiff's first submission – it is permissible for the defendant to go outside the four corners of the written contract and rely on the inter-partes correspondence, that too is of no assistance to the defendant because the correspondence shows that he voluntarily, and with

the benefit of legal advice, agreed unconditionally to the immediate withdrawal of the appeal. The plaintiff says that the correspondence shows: a) the defendant was aware the draft agreement did not mention the registration of the burden issue; b) raised the issue with the plaintiff and requested that it be addressed in a separate document; c) neither the plaintiff or *Respond* agreed to this and made it clear no further documentation would be forthcoming; d) the defendant had the choice then of accepting or rejecting what was then on offer, and chose to press ahead and sign the agreement; and e) did so in the full knowledge and understanding that the executed agreement required immediate withdrawal of the planning appeal and did not *caveat* this or link it any way with the issue of registration of the burden.

59. The plaintiff acknowledges that the test for a mandatory injunction is, in shorthand, a strong case. The decision of the Supreme Court in *Maha Lingham v. HSE* [2006] 17 E.L.R. 137 at para. 140 makes clear that the requirement is to show that the applicant has a strong case that he is likely to succeed at the hearing of the action.

60. In my view, having reviewed all the papers, the plaintiff's case meets that high threshold. I am satisfied that the affidavit evidence demonstrates that the plaintiff has a strong case that it is likely to succeed at the final hearing. I think it is difficult for the defendant to argue against the plaintiff's main point that the defendant, with the benefit of legal advice and with his eyes open, signed up to an agreement which makes no reference to the obligation to withdraw the appeal being conditional upon, or in any way tied to, the registration of the burden on the Folio. In the hearing before me, I think both sides accepted that the terms of the written agreement (whatever about the correspondence) are clear and oblige the defendant to withdraw the appeal "with immediate effect".

61. At the hearing, the plaintiff pressed the point that basically its substantive case is *unanswerable* and that therefore it is entitled as of right to an interlocutory injunction. This issue was considered recently by Mulcahy J. in *Cawley v. Munster Insurances and Financial*

Limited and Ors [2023] IEHC 531 delivered on 21 September 2023. Mulcahy J. reviewed some English caselaw on injunctions and stated that they support the proposition that, save in special circumstances, an injunction should be granted where there is no arguable defence. He referred to the colourful words of McGarry J. *in Hampstead & Suburban Properties Ltd v. Diomedous* [1969] 1 Ch. 248 which concerned the breach of a covenant in a lease in a licensed premises not to play music:

> "*Where there is a plain and uncontested breach of a clear covenant not to do a particular thing, and then the covenantor promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is compelled to keep his promise the better …*
>
> *I see no reason for allowing a covenantor who stands in clear breach of an express prohibition to have a holiday from the enforcement of his obligations until the trial. It may be that there is no direct authority on this point; certainly none has been cited. If so, it is high time that there was such authority; and now there is".*

62. It might be noted McGarry J. was talking there about a *negative* covenant, whereas the settlement agreement the present plaintiff relies upon involves a *positive* covenant, requiring the defendant to do something, as opposed to *not* do something.

63. The present case is also different from the *Cawley* case that Mulcahy J. decided because in *Cawley*, it appears to have been accepted by the defendant that, with respect to a certain portion of the disputed shareholding, the plaintiff was entitled to the shares in question. On that basis therefore, the plaintiff in *Cawley* was found to have an unanswerable claim for interlocutory relief with respect to the admitted portion of the shares.

64. On the facts of the present case, it seems to me that I don't have to go so far as finding that the plaintiff's case is *unanswerable.* The defendant here does not concede any portion of the substantive claim and insists that he is not in default. However, for the reasons outlined in

the plaintiff's affidavit, I am satisfied on the facts of the present case that the plaintiff has a strong case that he is likely to succeed at the hearing of the action. In my view, this should feature as a significant factor in the balancing exercise that I have to carry out in this application.

65. Before I consider the various limbs of the *Campus Oil* test, there is a separate *threshold* aspect that I should firstly consider. The caselaw suggests that it will be rare for a court to grant mandatory relief where, as here, the relief being sought at the interlocutory stage is in the nature of final relief. In other words, the plaintiff here is seeking at the interlocutory stage what amounts to an order of specific performance of the settlement agreement. As a matter of general principle, courts will be slow to grant what amounts to final relief at the interlocutory stage because it effectively risks resolving the case in favour of the plaintiff at a point in time prior to the case going to trial.

66. Granting mandatory final relief at the interlocutory stage also involves going much further than preserving the *status quo*, which is usually the extent of the permissible objective of an interlocutory injunction. Indeed, one of the main differences between a prohibitory injunction and a mandatory injunction is that the former preserves the *status quo* whereas the latter disturbs it.

67. As this is an important issue, I think it would have been preferable if the parties had specifically addressed this issue in their submissions.

68. Be that as it may, I have had an opportunity to review Kirwan, *Injunctions Law and Practice*, 3rd Ed., (Roundhall, 2020) chapter 6 from p. 277 onwards which I found helpful. On my review of the caselaw, as summarised in that text, there is a jurisdiction to grant mandatory relief at the interlocutory stage even where the relief being sought is final relief. However, for the reasons mentioned, such relief will rarely be granted at the interlocutory

stage (see *O'Murchú t/a Talknology v. Eircell Ltd* per Geoghegan J. [2001] IESC 15). There are a number of reasons why this is so.

69. In *Herrera v. Commissioner of An Garda Síochána* [2013] IEHC 311, Hogan J. noted that courts will be reluctant to grant mandatory relief at the interlocutory stage given that it is much harder to undo the consequences of a mandatory order than a prohibitory order if at the trial of the action, the courts find in favour of the party against whom the mandatory order was granted.

70. For that reason, an appropriate issue for the court to consider is whether there is a way of protecting the position of both parties to this dispute so that this concern will either not arise at all or the risk of it occurring will be much reduced. I will return to this issue later on when I address the balance of convenience.

71. As I have indicated, I am satisfied that the plaintiff has a strong argument that it will be able to persuade a court that the terms of the agreement are clear and that the agreement requires the defendant to withdraw the planning appeal "with immediate effect". The plaintiff also has a strong case that it will be able to demonstrate that, on a correct construction of the agreement, there are no conditions precedent that would have to be established for the defendant's obligation to withdraw the appeal to be triggered. In the hearing before me it appeared to be accepted that the settlement agreement, on its face, does not connect the defendant's obligation to immediately withdraw the appeal to the registration of *Respond's* commitment to build and maintain the privacy screens. For these reasons, I am satisfied that the first limb of the *Campus Oil* test is met. I am also satisfied that the higher threshold for a mandatory interlocutory order is also met on the facts here.

Are damages an adequate remedy?

72. Moving to the second limb of the test, for the reasons set out in the plaintiff's grounding affidavit, I think there has to be a very real risk as to whether damages would be an adequate remedy in this case. Were an interlocutory injunction to be refused, there is a very real possibility that the plaintiff would suffer considerable loss, possibly running to hundreds of thousands of euro. Were the matter to drag on for some months, the losses could well snowball and become very significant indeed.

73. The defendant points to the fact that he is a private individual and not a corporation who, through no fault of his own, has had this litigation foisted upon him. While I have some sympathy for that position, that point cuts both ways. It seems to me that the plaintiff raises a reasonable point in querying whether the defendant would be in a position to cover the losses that would be likely to build up. I take the defendant's point that he can't be held responsible for the fact that the works have stalled since 28 October 2022, but there is every possibility somebody will have to be held accountable for delays occurring since the date of the settlement agreement on 18 August 2023.

74. Neither party was anxious to join *Respond* to these proceedings, either as a defendant to a counterclaim or as a notice party, and I note that, understandably, both parties were anxious to keep the costs of the proceedings to a minimum.

75. I think there is substance to the plaintiff's concern that the defendant may not be in a position to meet an award of damages in this case, were same to arise. On that basis, I am inclined to the view that, if it is necessary for me to so find, the second limb of the *Campus Oil* test has been met. In any event, I note that in the *Merck Sharpe and Dohme* case the Supreme Court effectively held that the adequacy of damages limb of the test should not be regarded as a "tick box" question, but rather as an issue that should be viewed in the round. The court expressly held that it was preferable to consider the adequacy of damages as part of, and not antecedent to, the balance of convenience, as this approach tended to reinforce the

essential flexibility of the remedy of an interlocutory injunction. That is the approach I propose to take here.

Balance of justice

76. Moving then to the third limb of the test as to where the balance of justice lies, in my view, the balance of justice in this case strongly favours granting the interlocutory relief that is sought. I have come to that conclusion notwithstanding my view that the mandatory relief that is sought here is in the nature of final relief. As I have mentioned already, as a matter of general principle, ordinarily courts should be reluctant to grant mandatory interlocutory relief where the relief sought is in the nature of final relief. However, in the unusual circumstances arising in this case, I feel the balance of justice favours such an order being made. I am strongly of the view that it is in the interest of both parties that the building works should recommence at the earliest opportunity. It is in nobody's interests that significant losses would start building up.

77. In my view, the "*balance of least injustice*" favours granting the plaintiff the relief that it seeks. Given that I am satisfied that the plaintiff has demonstrated that it has a strong case that it is likely to succeed at the hearing of the action and given that I accept the plaintiff has established that very significant losses may accrue if an injunction is refused, these factors, when taken together, tilt the scales in favour of granting mandatory injunctive relief at this stage.

78. I have considered the defendant's argument that once the planning appeal is withdrawn, that process can't be reversed and therefore, he contends, he is entitled to hold on to the "leverage" that he holds and should not be compelled to withdraw the appeal. In the first instance, it should be borne in mind that, if the plaintiff's core argument that I have found to be strong is correct, then the defendant is not lawfully entitled to hold on to his

leverage. Rather, if the plaintiff is correct, that means the defendant is entitled to no such leverage and should immediately discontinue the appeal that he has contracted to withdraw.

79. It seems to me that the risk of damage and prejudice to the defendant is remote and theoretical and not evidentially supported. The concern apprehended by the defendant, taken at its height, is the possibility that a future buyer of the apartments will purchase without knowledge of the burden. I regard that as unlikely and no more than theoretical. But in any event, whether one regards that risk as realistic or remote, it is a risk that, one way or the other, will not crystalise for a long time. The works will have to be completed first and the risk that the defendant is concerned about is a risk that won't arise, if it arises at all, for a number of years. In contrast, the risk of the plaintiff suffering loss is likely to crystalise in the near future and could aggregate into a ruinously large sum in a short period of time.

80. I am not satisfied that, were an injunction to be granted at this stage and were the defendant to succeed at the final hearing, that it would necessarily or inevitably follow that the defendant would sustain the loss that he apprehends. A number of things have to happen for the defendant's apprehended damage to arise. Since the settlement agreement on its face binds *Respond* as well as its successors and assigns (see para. 3 of the agreement), it is at least arguable that future purchasers will be bound by the commitment to erect and maintain the screens, with or without notice of the burden. The height of the defendant's concern appears to be the possibility that *Respond* may sell the apartments and somehow conceal from the purchaser the commitment it has given in writing and which it is agreed should be registered on the folio. I am not satisfied from the evidence that that is a realistic concern. Both the plaintiff and *Respond* have expressly agreed in writing to provide and maintain the screens.

81. The evidence establishes that *Respond* have consented to the settlement being registered on the folio, as has the Housing Finance Agency. No evidence has been put

forward to indicate or suggest that *Respond* would disregard its contractual obligations to the defendant by selling the apartment block and hiding from the purchaser the agreement it has with the defendant.

82. In any event, were *Respond* to act in this surprising or unexpected fashion, there are a number of options open to the defendant to protect his position. The defendant can sue *Respond* if he believes that they are disregarding his entitlements. Alternatively, the defendant could potentially sue the plaintiff if it reneges on the commitments it has given. In my view, there is simply no evidence before the court that suggests that either the plaintiff or *Respond* will renege on their commitments and, in the absence of such evidence, it would be wrong and illogical to assume that they would.

83. In my view, the way through the "knot" in these proceedings is to focus not so much on the party's differences but rather on what they have agreed:

(i) The plaintiff and *Respond* have expressly agreed in writing to provide and maintain the screens.

(ii) The defendant has agreed that the screens will address his privacy concerns about the balconies overlooking his garden.

(iii) The defendant has agreed that in return for the commitment to put up and maintain the privacy screens, the planning appeal should not be taken further.

(iv) The plaintiff and *Respond* have agreed to pay, and have paid, the fees sought for the defendant's solicitor.

(v) All parties are desirous that the building works resume as soon as possible and proceed to a conclusion.

84. The only thing that is said to be "not agreed" is the timing of when the planning appeal should be withdrawn.

85. Some of the caselaw indicates that the court should adopt whatever course would carry the "least risk of injustice" if the decision on the injunction application turns out to have been wrong. This was the approach of Kelly J. in *Shelbourne Hotel Limited* v. *Torriam Hotel Operating Company Limited* [2010] 2 I.R. 52 (see also Clarke J. in *Dowling v. Minister for Finance* [2013] 4 I.R. 576 at 639).

86. In my view, the course which would be likely to cause the least injustice here would be to grant the injunction, leaving the way clear for the building works to resume, and hold over the balance of the proceedings including any ancillary orders. In the meantime, the parties will have an opportunity to honour the commitments that they have made to each other and, as it were, demonstrate their good faith. It seems to me that would encourage the parties to continue to engage with each other and incentivise a resolution of the burden registration issue, thereby eliminating the (theoretical) exposure which the defendant believes he currently faces. This will allow the parties redouble their efforts to achieve the *shared* objective of having the burden in favour of the defendant registered on the folio, by whatever means may be appropriate.

87. The main benefit of granting the interlocutory injunction and proceeding this way is that the financial exposure facing both sides will effectively disappear.

88. For all these reasons, I hold that the balance of justice strongly favours granting the interlocutory relief that is sought. I take the view that it is not in the interests of either party that the resumption of the building works should be further delayed.

89. There is one other argument that I should mention. One of the defendant's complaints is that the plaintiff failed to make material disclosure of relevant matters. These were firstly, the suggestion that the plaintiff's *ex parte* papers did not include all of the relevant correspondence. Secondly, the suggestion that the plaintiff failed to mention that the plaintiff and *Respond* were allegedly "at loggerheads". To my mind, neither of these points warrants

refusing injunctive relief at this stage. Whether *Respond* and the plaintiff are or are not in dispute, and whether this issue should have been canvassed in the papers, are matters that can be addressed at the final hearing. I expressly make no findings on these issues which can be addressed further in affidavits, if needs be. The same goes for the suggestion that the plaintiff's grounding affidavit was incomplete and should have included additional correspondence. As a matter of fact, no substantive orders were sought on an *ex parte* basis. In my view, neither of the defendant's complaints of non-disclosure requires to be resolved at this stage. These matters are best left over to the court of trial. Should they turn out to be valid complaints, this can be reflected in the outcome of the final hearing and on the question of costs.

90. The parties can address me on the final terms of the order and also on the question of the costs of the injunction. My preliminary view is that the costs of both sides should be reserved to the hearing of the action. I propose not to grant the plaintiff summary judgment of its claim that it is entitled to specific performance of the agreement and/or for a declaration that the defendant is obliged with immediate effect to withdraw his appeal to An Bord Pleanála. The issue of summary judgment does not arise at this stage and, in fairness, was not pressed by the plaintiff at the hearing. It seems to me that is a matter that should be held over for the final hearing, if any.

Signed :

Micheál O'Higgins

Appearances : Martin Canny BL instructed by Kane Tuohy LLP Solicitors for the plaintiff. Mark McParland of Mark McParland Solicitors LLP for the defendant.