THE HIGH COURT

[2024] IEHC 410

[Record No. 2023/6170P]

BETWEEN

FINTAN O'HAGAN

PLAINTIFF

AND

DAMIEN HARPER AND PROMONTORIA SCARIFF DAC

DEFENDANT

JUDGMENT of Mr Justice Kennedy delivered on the 12th day of July 2024.

1. The Plaintiff sought interlocutory relief to prevent the Defendants, a receiver and mortgagee, from marketing or selling a mortgaged property ("the Property") pending trial. Although the affidavits canvassed various issues, most were resolved by constructive engagement. The remaining issues were whether the Plaintiff has established a fair issue to be tried that the proposed sale of the Property would be at an undervalue and thus breach his rights and, depending on that issue, the balance of justice, including the adequacy of damages as a remedy and the Plaintiff's undertaking as to damages.

2. There is no dispute about the facts that: (i) the Plaintiff borrowed from First Active Plc, secured by a mortgage over the Property dated 20 August 2002; (ii) the loan is in substantial arrears and the Plaintiff in long-term default; (iii) the loan and mortgage have been assigned to the Second Defendant which appointed the First Defendant as the receiver on 13 July 2023; (iv) negotiations have been unsuccessful; (v) the receiver took possession of the Property in September 2023 and Hunter Estate Agents started to market it on or about 13 October 2023 with an asking price of €595,000; (vi) the asking price was reduced to €550,000 in early

November 2023 and the Second Defendant informed the Plaintiff at that time that the Property would be auctioned in January 2024; (vii) contrary to the intimation of a January auction, in early December 2023, the First Defendant agreed to sell the property for €560,000, being the best price received and a figure slightly above the reduced asking price but less than the estimated market value; and (ix) in correspondence, the Plaintiff complained that the Property was being sold hastily and at an undervalue, which the receiver denied.

3. The Plaintiff challenges the decision to market the Property for €595,000, its estimated value four years earlier (and there appeared to be no dispute about the rise in property prices since then). He expected that the property would actually sell for more:

> "*Given property price inflation and the shortage of houses, I am surprised that the Property has been sold for so little. The Property is in very good condition, is modern, is located in a prestigious and desirable location and has many design features which elevate it above other properties. Similar properties have sold for higher prices …*".

4. Although neither side tendered expert evidence, the Plaintiff exhibited evidence from Lisney Estate Agents ("Lisney") of sale prices achieved locally. He particularly relied on the sale of a property on the same street ("the Neighbouring Property") for €670,000 on 19 March 2020. He also expressed concerns about the proposed sale's Capital Gains Tax implications and the fact that the proposed transaction would not resolve his indebtedness.

5. A letter dated 15 December 2023 from the receiver's solicitor's rejected the Plaintiff's claim, saying that the property was on the open market since 14 October 2023, the highest offer had been accepted and that the receiver had discharged his obligation to obtain the best possible price. The Defendants' replying affidavits likewise claimed to have met the First Defendant's (undisputed) obligation to secure the best price available, relying on the appointment of Hunters Estate Agents ("Hunters"), experienced estate agents who had sold the Neighbouring Property. The receiver likewise appointed Hunters to advise and conduct the Property's marketing and sale on the open market. It was sold on the basis of the highest bid.

6. Although the Defendants' affidavits were lengthy and supported by numerous exhibits, comprehensively responding to various points raised by the Plaintiff which were ultimately resolved by agreement, they were noticeably less detailed as to the reasoning behind the proposed sale or as to the advice received from Hunters. They did not engage in detail with the points raised by the Plaintiff in relation to the value of the Property, simply confirming that the receiver obtained "*a desktop valuation*" from Hunters on 19 September 2023, along with brochures and details of prices achieved for two comparable properties they had sold locally, one being the Neighbouring Property, but suggested that both were in better condition than the Plaintiff's property. Hunters' "*desktop valuation*" suggested an estimated market value of *circa* €600,000 and a figure of €575,000 by way of both guide price and reserve. Informal estimates were also received from DNG Estate Agents ("DNG") and BidX1. The attached table summarises all these details, including the actual sale details of the Plaintiff's property:

	Hunters Property A	**Hunters Property B (Neighbouring Property)**	**DNG Estimate** (2 comparators)	**Bidx1 Estimate** (3 comparators)	**Plaintiff's Property**
Agents' Recommendations			€585,000 guide price - €550,000 reserve	Reserve €525,000	Hunters - €600,000 estimated market value - €575,000 reserve
Asking Price	€650,000	€685,000			€595,000, reduced to €550,000
Actual Sale Price	**€660,000**	**€670,000**			**€560,000**

7. The Defendants' affidavits emphasised that Hunters were highly experienced. They commenced marketing the property on or about 14 October 2023, engaging a professional photographer and producing a high-quality digital brochure for the Property, which was advertised on myhome.ie and daft.ie. The Defendants argued that the receiver's primary duty was to ensure the repayment of the debt and that the Plaintiff, as a borrower in default, had lost

control of the arrangements for or timing of the sale. They said they had obtained valuations and advice from three estate agents, appointed reputable estate agents and followed their advice as to the valuation of the Property and the methods of marketing and selling it. The Property was advertised for sale on the open market and the highest bid was accepted. The Defendants also queried whether the (heavily indebted) Plaintiff had the means to honour his undertaking as to damages.

8. A further affidavit from the Plaintiff questioned the speed with which the Property was marketed, the price reduced and an offer accepted, comparing the proposed price with that achieved for the Neighbouring Property. He insisted that the price was too low and that, in particular, the Property should have sold for a higher price than the Neighbouring Property:

> "*as they are similar properties and property prices have risen over the passing years, my house was on the market for a short period of time, a longer marketing period extending after the Christmas holidays would have been more appropriate and resulted in a higher sale price. I believe that, the first named Defendant has not done enough to achieve the best price or even the market price*".

The Plaintiff noted that the proposed sale price was less than the Defendant's two main valuations - he discounted the BidX1 estimate on the basis that:

> "*BidX1 specialise in selling distressed properties at auction and they have limited experience in valuing and selling premium properties*".

Accordingly, the Plaintiff argued that the receiver had marketed the property for sale and sold it for less than its estimated value and correctly noted that the First Defendant had not attempted to explain why he agreed the sale for less than was achieved in respect of a similar property and less than the Hunters valuation.

The Law

9. There was no dispute as to the receiver's duty to obtain the true market value on the sale of a mortgaged property, often referred to as the "*Cuckmere* test". In *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 ("*Cuckmere*"), at pp. 968-969, Salmon L.J. held that:

> "*a mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.*"

10. In *Standard Chartered Bank Ltd v Walker* [1982] 1 WLR 1410 ("*Chartered Bank*"), Lord Denning cited *Cuckmere* as establishing the receiver's duty to the mortgagor to use reasonable care to obtain the best possible price when selling a mortgaged property:

> "*He owes a duty to use reasonable care to obtain the best possible price which the circumstances of the case permit.*"

11. The concept of such duties being owed to the mortgagor was recognised in Ireland before *Cuckmere* and *Chartered Bank.* For example, in *Holohan v Friends Provident and Century Life Office* [1966] IR 1 ("*Holohan*"), the mortgagee defendants had disregarded the advice they received and failed to give reasonable consideration to an alternative mode of sale recommended by their surveyors which could have elicited a better price. The defendants were criticised for not considering the option of buying out the tenants to achieve a better price on the disposal of the property. The obligation to have regard to professional advice was clearly signalled in the Supreme Court decision; the Chief Justice observed at p. 25 that:

> "*…if the position turned out to be as the defendants' own advisers anticipated, I would find it difficult to say that it would be reasonable for the defendants to reject out of hand the course proposed to them.*
>
> *What in fact happened, as has been demonstrated, is that the defendants refused to look into the value of the plaintiff's property on a basis which their own surveyors advised would show a considerably higher price than sale at investment value. Their minds (as*

their witnesses admitted) were closed to this course. That was not reasonable: in my opinion it was quite unreasonable. A mortgagee with a power of sale has no power to dispose of the mortgagor's property with the same freedom as if it were his own. The defendants' Head Office appear to have taken an authoritarian line of action in this matter which left their Dublin office with no option but to obey. They [the defendants] declined even to examine into the possibilities of a better price, and this, in my judgment, was such unreasonable conduct on their part and such a disregard of the plaintiff's interest that an injunction should issue to restrain the defendants completing the sale…"

12. However, as McKechnie J. observed in *Ruby Property Company Limited v. Kilty* (Unrep., High Court, 31 January 2003) ("*Ruby*"), every case must be determined on the basis of its own individual circumstances and accordingly the facts of each individual case referred to in argument are of limited assistance in other cases. It should be noted that some of the authorities cited in argument were judgments on substantive undervalue claims, some were claims for summary judgment (where the undervalue issue was raised as a defence) and some were applications for interlocutory injunctions. The proofs and the legal tests are not the same in all these contexts and the decisions must be evaluated accordingly, a distinction which was not always made in the argument before me.

13. In *Lambert Jones Estates Limited v Donnelly* (Unrep., High Court, 5 November 1982) ("*Lambert*") O'Hanlon J. noted the parties' radically different ideas as to the best way to realise the assets. Although the plaintiff was supported by prominent valuation surveyors:

"*the Defendant has also taken expert advice and has acted upon it in deciding how he should proceed with the sale of the property. He is anxious to sell, if at all possible, at an early date to minimise the enormous burden of interest on the bank debt which is accumulating against the Company with each day and month that pass. He does not want to take a course which would involve him in new and costly and protracted planning applications for multiple units of property. He says he has no funds available to finance such transactions and the Plaintiffs have not suggested that any sources of finance are available to him. Finally, he has stated through his Counsel in the course of the hearing,*

that if and when he is allowed to proceed with sale by tender it is his intention to seek the approval of the Court before accepting the highest or any tender.
I fail to see, on the evidence now before the Court, how the Defendant could conceivably be said to be guilty of negligence or breach of duty as Receiver, and in my opinion, any such finding on such evidence as is now available would be perverse." [at pp. 12-13].

14. In *Re Edenfell Holdings Limited* [1999] 1 IR 443 ("*Edenfell*"), a receiver was challenged on various grounds including the limited time afforded to interested parties to better a particular offer received and a decision to sell by tender. The High Court considered that the receiver had failed to consider whether a particular aspect of the proposed transaction (the payment of €100,000 of the €1.6m price to a particular party) was reasonable and that without such consideration the receiver had not exercised reasonable care. The Supreme Court disagreed with the decision because the €100,000 would only be material if there were an unconditional offer for a higher net sum, which was not the case. If the receiver rejected the offer, "*he could have found himself in a position where he had no purchaser*". Accordingly, the Court did not find a breach of duty by the receiver.

15. The outcomes of these cases are fact specific, depending on the specific circumstances, but do demonstrate that an unreasonable failure to have regard to advice or to consider alternative options which would be likely to result in a better price could constitute a breach of duty on the part of the receiver.

16. In *McGowan v Gannon* [1983] 1 ILRM 516 ("*McGowan*"), Carroll J. cited *Chartered Bank* for the above proposition, also noting that:

"*Denning L.J. said it may be that the Receiver can choose the time of the sale within a considerable margin but he should exercise a reasonable degree of care about it.*"

17. In *Ruby*, McKechnie J. noted that Carroll J. in *McGowan* left open the issue:

"*whether a receiver who has tested the market and found that the market is very bad, is entitled to sell at a giveaway or knock down price because he cannot get better. Should*

he be obliged to wait for any given period in the hope that there would be an upswing in the market?"

18. *Moorview Developments Ltd v First Active Plc* [2009] IEHC 214 ("*Moorview*") concerned a Companies Act receivership. Clarke J. (as he was) considered conflicting authorities as to a receiver's potential liability to a debenture holder for negligence (in the management rather than the sale of a business), concluding at para. 12.10 that:

"*... the underlying obligation of a receiver is to the debenture holder who has appointed that receiver…. The purpose of the appointment of the receiver is to arrange for the payment of the debt including any interest on it. The fact that one particular means of managing the business of the company might, from the company's point of view, be perceived to be more advantageous in the long run is, in those circumstances, not a relevant consideration for a receiver who is faced with the overriding entitlement of the debenture holder to be paid.*"

Clarke J. noted the line of authority which suggested that, because the receiver's overriding obligation was to ensure that the discharge of the debt, there could be no obligation on the receiver in respect of the management of the property, since the primary obligation was to the debenture holder and the receiver could not reasonably be expected to serve two masters:

"*12.11…As the position of the debenture holder is superior (because the company has allowed itself to get into default) then the receiver must serve the interests of the debenture holder, and not the company. On that basis it is suggested that to attempt to impose some residual obligation on the receiver would be a recipe for difficulty, with the court being constantly faced with an attempt to strip out from the primary obligation of the receiver towards the debenture holder, some residual obligation in respect of the company.*

12.12 Medforth v. Blake seeks to get round that difficulty by recognising that the primary duty of the receiver is to procure that the debt be paid, but suggests that, subject to that primary duty, there remains a duty on the receiver to manage the property with due diligence in order that the business of the company be carried on profitably."

Clarke J. concluded that there were at least arguable grounds for the proposition that *Medforth v Blake* [2000] Ch 86 does represent the law in this jurisdiction.

19. In *Farrelly & Anor v Kavanagh* [2015] IEHC 114 ("*Farrelly*"), Costello J. dismissed a claim for selling at an undervalue. The Court rejected the proposition that the receiver's obligation to secure the best price obliged him to undertake significant works before selling. He was not obliged to undertake extensive works on the property to maximise its sale price:

> "*37… There was thus no obligation on the defendant to carry out any of the works which the second named plaintiff alleges could have enhanced the purchase price achieved upon the sale of the properties. Furthermore,* [*the defendant*] *did not have the money to carry out the works identified, which he was advised would cost €355,000.00 exclusive of VAT. He simply was not in a position to carry out such extensive works*".

The evidence in that case showed the sale was not at an undervalue. The defendant had unsuccessfully sought to sell for three years. The risk that the plaintiffs would disrupt an auction narrowed the defendant's options. The difficulties led Lisney to recommend the property's withdrawal from the market and its sale on its "*Click to Purchase*" platform. Lisney were experienced and appropriate advisors. The receiver followed their advice. Costello J. noted at para. 38 that, once the decision to sell had been taken, the receiver's duty:

> "*... was to sell at the best price reasonably obtainable. This he endeavoured to do within the constraints outlined above. At each step he took advices from Lisney … In fact the evidence from Mr. Markey of Lisney was that the price achieved … was a very strong one …there was no evidence to contradict that.... Accordingly, I find as a fact the properties were not sold at an under value and that the defendant did not act negligently or breach any duty of care which he may have owed to the second named plaintiff in or about the conduct of the sales of the properties.*"

20. In *ACC Bank Plc v. McEllin* [2013] IEHC 454, Birmingham J. (as he was) concluded that mortgagees were not obliged to enforce rights at any particular time, endorsing the following passage from the decision of Lightman J. in *Silven Properties Ltd v Royal Bank of Scotland Plc* [2004] 1 WLR 997 ("*Silven*"):

> "*A mortgagee is at all times free to consult his own interests alone whether and when to exercise his power of sale…The mortgagee's decision is not constrained by reason of the*

fact that the exercise or non-exercise of the power will occasion loss or damage to the mortgagor: (see China and South Sea Bank Limited v. Tan Soon Gin (alias George Tan) [1990] 1 AC 536). It does not matter that the time may be unpropitious and that by waiting a higher price could be obtained: he is not bound to postpone in the hope of obtaining a better price: see Tse Kwong Lam v. Wong Chit Sen [1983] 1 WLR 1349 at 1355b."

21. Noonan J. rejected a similar claim against a receiver in *Feniton Property Finance DAC v McCool* [2019] IEHC 473 ("*Feniton*") because the undervalue allegation was based on mere assertion, unsupported by objective evidence. A receiver was under no obligation to improve a property with a view to realising a better price. It was settled law that, where the contracts so provided, the receiver was an agent of the mortgagor, rather than the mortgagee which had appointed him. Accordingly, if the borrower wanted to allege that the receiver acted negligently, his claim was against the receiver, not the bank (see para. 26).

22. In *Ryan & Anor v Dengrove & Anor* [2021] IECA 38 ("*Dengrove*"), Murray J. rejected the suggestion that an injunction should be readily granted when property rights are allegedly infringed (without the normal balance of justice analysis):

"*85. In commercial cases involving assets acquired and held solely for commercial purposes there will frequently be two sets of competing property rights in play. Sometimes it is possible to adjudicate as between them and to decide that, on a temporary basis, the exercise of one party's property right should be suspended in protection of the rights of the other…*

103 (iii). The invocation by the appellants of their property rights is on the facts of this case, misconceived. This is a commercial case in which the property rights of both parties are engaged. The appellants have pointed to no credible theory by reference to which the negative contingency of their property rights in enforcing their equity of redemption should temporarily prevail over Dengrove's rights in realising its security and obtaining recovery of the monies owing to it. This case is about ways, means and money – whether and if so how Mr. Ryan gets the property, whether and if so how Dengrove disposes of it, who pays who and who gets what. It is not about the inherent value of the property rights of either party."

"*89. …I can see no reason why the inherent value of Mr. Ryan's property rights should, having regard to these considerations, temporarily prevail over those of Dengrove. The precise dimensions of his rights are far from clear cut, their realisation is contingent on a number of variables, the meaningful exercise of his equity of redemption is constrained by a sequence of contractual obligations...*"

23. In *Hade v Bank of Ireland Mortgage Bank & Anor* [2022] IEHC 645 ("*Hade*"), Barr J. cited McKechnie J.'s summary of the principles in *Ruby*, including that a receiver is:

"*…not required to postpone, defer or cancel a sale in the hope of the market improving. This position was, I think, also accepted by Carroll J. in McGowan and Ors v. Gannon [1983] I.L.R.M. 516, though as the following point was not argued she expressly left open the issue "whether a receiver who has tested the market and found that the market is very bad, is entitled to sell at a giveaway or knock down price because he cannot get better. Should he be obliged to wait for any given period in the hope that there would be an upswing in the market?"*

(c) A similar view was taken by the Court in Bank of Cyprus (London) Ltd. v. Gill [1980] Lloyds Reports 51, but at the same time it was stated that the receiver was of course obliged to take proper steps to secure the best price available at the time of sale."

24. In *McGirr and Anor v Everyday Finance DAC and O'Connor* [2022] IEHC 612 ("*McGirr*"), the debtor sought interlocutory relief, claiming that the way properties had been and were being sold at an undervalue was preventing his debt being extinguished. The case has similarities with the present situation. In *McGirr*:

a. Roberts J. noted that balance of justice considerations may be finely balanced, listing relevant factors including:
    - whether the undertaking as to damages had any substance;
    - the level of indebtedness and the extent to which the proposed sale would clear the debt or affect any remaining equity in the property;

- the nature of the property including whether it was (as in this case) "*a purely commercial property to which the borrower has no particular emotional attachment*" which might tilt the balance away from the borrower;
- the behaviour of the parties, including any delay in seeking injunctive relief.

b. The plaintiffs submitted – as does the Plaintiff in these proceedings – that damages will generally not compensate a loss of property rights, but the defendant countered that that argument could be made with equal force by any borrower.

The plaintiffs argued that all debt enforcement actions affect the debtor's property but that did not mean that every debtor is entitled to injunctions restraining enforcement. Furthermore, just as the refusal of an injunction may interfere with a borrower's property rights, the grant of an injunction may interfere with the creditor's property rights. However, by executing mortgages. the plaintiffs conferred upon the mortgagee the right to sell the properties if the plaintiffs defaulted. Roberts J. agreed (as do I).

c. Rejecting the defendant's submission that damages were an adequate remedy, the plaintiffs argued that a rigid analysis to that issue is no longer the correct approach, citing O'Donnell J. in *Merck Sharp & Dohme Corp v Clonmel Healthcare Ltd* [2020] 2 IR 1 ("*Merck*") (at para 64):

> "*While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance considering how matters are to be held most fairly pending a trial;*
> *…While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be to determined.*"

d. In *McGirr*, the plaintiffs argued that if the remaining two properties (the last of a series of charged assets) were disposed of, then the trial would lack reality as all properties would have already been disposed of. They also complained that other assets had been hurriedly sold at a significant undervalue on the BidX1 website without ending the tenancies, prejudicing the plaintiffs in terms of clearing their indebtedness. Roberts J. accepted that, in the event of a sale at an undervalue, the plaintiffs would be left facing a shortfall after all secured properties had been sold.

e. Roberts J. was unhappy with the information provided, presumably, by the receiver and this appears to have influenced her assessment. She criticised the "*less than satisfactory flow of information*", noting her concern that:

> "*refusing the injunction could perpetuate those issues and that the sale of the properties now may make the trial of the action more difficult to expedite as the defendants would then have sold all the secured properties.*"

f. Balancing those various considerations, Roberts J. concluded at para. 68 that granting the injunction would minimise the overall risk of injustice. Separate enforcement proceedings were underway against the plaintiffs for the deficit on the loan, exposing their family home, and Roberts J. noted that:

> "*Maintaining the status quo will ensure those issues are addressed together and this court will facilitate the parties in relation to making directions to ensure that these proceedings come to trial in the shortest possible time.*"

25. *Harte v Promontoria (Aran) Limited & Ors* [2023] IEHC 593 ("*Harte*") involved a similar (but unsuccessful) attempt to seek interlocutory relief to prevent a sale at an alleged undervalue. There was conflicting evidence about the valuation. The plaintiff relied on a 2019 surveyor's valuation, but the defendants disputed the premises on which it was based, producing alternative valuations. Cregan J. noted the competing valuations, concluding that the receivers had obtained valuations from reputable, independent, experienced and suitably

qualified property experts and had acted appropriately when appointing one of them as agent and in following their advice both in relation to the valuation of the property and the method of marketing and selling it. The plaintiff had not made out a serious issue that the defendants were likely to sell at an undervalue:

"*52. … the receivers are entitled to appoint their own property experts, to obtain suitable valuations of the value of the property at its current market price, to act on that advice, and to market and sell the property at a time of their choosing in order to ensure that the plaintiff's secured debt is repaid.*

…

54. The plaintiff sought to rely on Holohan v. Friends Provident Century Life Office [1966] IR 1 in which the Supreme Court held that a mortgagee with a power of sale does not have power to dispose of the mortgagor's property with the same freedom as if it were his own and that the question to be investigated in such an action is whether or not the mortgagee acted as a reasonable man would have acted in selling the mortgagor's property. In that case, the court held that the conduct of the defendants in refusing to consider an alternative mode of sale to that upon which they had decided, and in refusing to examine the possibilities of obtaining a better purchase price by adopting such a method of sale, was unreasonable conduct on their part and, as a result, the defendants should be restrained from completing the sale.

55. However the facts of that case are quite far removed from the facts of the present case. In the present case, the defendants have obtained opinions and advice from two reputable estate agents, both as to the valuation of the property and also as to the preferred mode of advertising and selling the property. In so doing, in my view, they have acted reasonably. Certainly, there is nothing in their conduct of the proposed sale which would indicate that they are behaving in an unreasonable manner such as to grant the plaintiff an injunction in this case.

56. I also note the case of Edenfell Holdings Ltd [1999] 1 IR 443 in which the Supreme Court held that the receiver had exercised all reasonable care in selling the property as he had and that it was not for the court to view the matter with hindsight but to look at it from the point of view of the receiver who had dealt with the matter at the time and had expert opinion available to him. In the present case it is clear that the receivers have expert opinion available to them and are acting according to that advice".

26. The court's entitlement to consider the substance of an undertaking as to damages has been confirmed in many decisions, including *Hafeez v CPM Consulting Limited* [2020] IEHC 536 ("*Hafeez*"), at paras. 135-137, and *Martin v An Bord Pleanála* [2002] 2 IR 655. In *Hafeez*, the proffered undertaking was deemed no more than "*a pro forma compliance*" with the requirement, because, as Keane J. observed (at para. 135), the plaintiff:

> "*has provided none of the detail concerning his underlying means and income necessary to allow me to assess whether those undertakings have any realistic value".*

27. Where a respondent seeks to dispute the financial ability of an applicant to honour an undertaking as to damages, they should be able to offer specific evidence of the loss which would be suffered if an injunction were to be granted (as held by Hardiman J. in *Dunne v Dún Laoghaire-Rathdown County Council* [2003] 1 IR 567, at p. 580). However, the case law makes clear that a lack of resources will not be fatal to an application for an interlocutory injunction; rather, it will be an important factor for the Court to consider. To this end, see the comments of O'Donnell J. (as he then was) in *Minister for Justice v Devine* [2012] 1 IR 326, at p. 360, and Stewart J. in *McGarry v O'Brien* [2017] IEHC 740, at para. 39 (see also Kirwan's *Injunctions: Law and Practice* (Round Hall, 3rd ed., 2020, paras. 6-169 – 6-171).

First Issue – Serious Question to be Tried

28. The first issue is whether there is a serious question to be tried as to whether the First Defendant would be breaching his duty to the Plaintiff by proceeding with the proposed sale because - according to the Plaintiff - the sale would be at an undervalue. The parties agreed that a receiver owes a mortgagee a duty to take reasonable steps to obtain the best possible price when selling a charged asset (similar to the statutory duty in company receiverships). However, the authorities also show that a receiver is not obliged to postpone a sale indefinitely in the hope of a general improvement in the markets or to undertake expensive or significant

works to the property to increase the price realised. Although the Plaintiff complained of the Capital Gains Tax consequences of the proposed transaction, such tax consequences for the mortgagee would not be a relevant consideration for a receiver (unless, perhaps, an alternative disposal route was reasonably available which would be more favourable for the Plaintiff and which would not involve any detriment to the charge holder - there is no suggestion of any such scenario here).

29. The Defendants submitted that the receiver's duty to the mortgagor was to obtain the market value for the mortgaged property at the time of sale but that he was entitled to sell the Property at a time of his choosing, and, citing *Ruby, Farrelly, Hade and Harte*, that he was not required to postpone or defer a sale. They argued, citing *Farrelly* and *Harte*, that he had sufficiently discharged his duty by instructing experienced and suitably qualified estate agents to conduct the marketing and sale of the property.

30. The receiver says that he discharged his duty to the Plaintiff by obtaining alternative valuations, relying on Hunters to market and sell the Property and by selling at the best price received on the open market. The Defendants appeared to regard these steps as a complete answer to an undervalue claim in any circumstances.

31. However, the receiver's evidence did not engage with all issues raised by the Plaintiff. It seems to me that the evidence supporting the receiver's approach in the cases relied on by the Defendants was rather stronger than the evidence available from the Defendants in this case. Much of the Plaintiff's evidence in this case was unchallenged, including his criticism of the BidX1 estimate on the basis of their limited experience in this sector, suggesting that that route would be unlikely to obtain the best price. More significantly, he raised legitimate questions by reference to the difference between the proposed sale price and: (i) prices recently obtained for other local properties; (ii) the recent Hunters' and DNG estimates; and (iii) Hunters' previous 2019 estimate. The Defendants did not engage with these points.

32. Although the Plaintiff was not happy with the launch price, I consider that it was broadly in line with the Hunters' valuation (and I assume that, psychologically, it was considered preferable to launch at €595,000 rather than €600,000). However, there is no explanation for the reduction in the asking price after the Property had been on the market for only two weeks or so. Nor is there any explanation for the rationale for the early agreement to sell the Property, only a month after the price reduction and for less than Hunters' estimated value.

33. Curiously, the Defendants did not disclose Hunters' advice in regard to the foregoing points. Nor did the Defendants respond to the Plaintiff's suggestion – which, on its face, does not appear entirely unreasonable - that waiting until the new year might have elicited a better offer. It would be concerning if the Defendants had failed to discuss such a possibility with Hunters, but the Defendants are silent in that regard. The concerns expressed by Roberts J. about a "*less than satisfactory flow of information*" from the receiver resonate here.

34. Against that, I consider that the proposed price (€560,000) is relatively close to the reserve recommended by Hunters (€575,000) and greater than the reserves recommended (possibly also on a desktop basis) by Bidx1 and DNG. Furthermore, while the Plaintiff would understandably have hoped to achieve the desktop estimate, by definition estimates do not guarantee the sale price that a particular property actually achieves, which is ultimately a function of the market dynamics. Achieving a lesser price does not necessarily imply a breach of the receiver's duty to the mortgagor.

35. Likewise, without expert evidence, conclusions cannot be drawn - either way - from prices achieved by other properties. To establish an "undervalue" claim at trial, the Plaintiff would need independent expert testimony. The other recent sales would not, in isolation, establish the receiver's alleged breach of duty. The Defendants would also require independent expert testimony to challenge any *prima facie* case advanced by the Plaintiff. I note that no

such expert testimony was forthcoming from either side in this case, unlike many of the authorities relied upon by the Defendants in particular. Certainly, the Hunters desktop valuation could not be regarded as being sufficiently rigorous and forensic to explain, for example, the difference between the proposed sale price and the price achieved for the Neighbouring Property.

36. The Defendants are correct in their submission that the Plaintiff could not succeed at trial without independent expert evidence. However, for present purposes, he need only establish an arguable case. To do so, he queries the decision to sell for less than the Property's estimated value four years earlier (despite the undisputed rise in property prices) and for less than was achieved on other recent local sales, including for the Neighbouring Property, which he regards as similar to his own (although this may be disputed).

37. I consider that the First Defendant's heavy reliance on his retention of Hunters is undermined by his failure to disclose Hunters' actual advice on key issues. These include: (i) when, and for how long, the Property should be on the market; (ii) the speed and extent of the price reduction; (iii) whether €560,000 was the best bid they were likely to receive within a reasonable timeframe; and (iv) whether greater interest and higher bids were likely if they kept the property on the market into the new year.

38. I am surprised that the First Defendant did not explain his decision to reduce the price and sell so quickly. Nor did he explain the apparent *volte face* from the Second Defendant's undisputed indication to the Plaintiff that the Property would be sold at auction in January 2024. Although that statement did not entirely rule out the possibility of an intervening sale, it did seem to imply a more measured sale process. It would have been appropriate for the Defendants to explain to the Plaintiff the reason for their change of tack. In the light of the receiver's duty to the Plaintiff, it would have been helpful for the Defendants to explain the

decision to sell so quickly and why they were not, for instance, keeping the Property on the market until the new year in the hope of eliciting more offers.

39. In my view, the Plaintiff has raised legitimate issues in relation to the speed and circumstances of the sale which the Defendants have not addressed. Greater transparency is called for from a receiver who owes the Plaintiff duties and is acting as his agent. As *McGirr* shows, an unsatisfactory information flow may weigh against the receiver in a balance of justice assessment, and I would add that the Court may draw inferences from a failure to disclose material information which is clearly within a party's power.

40. The authorities cited, including *McEllin*, *Feniton* and *Hade*, do confirm the Defendants' entitlement - within reason - to choose when to sell. As *Farrelly* and *Feniton* demonstrate, they were not required to undertake major or expensive works before doing so. I am not convinced that the authorities rule out an obligation to take the sort of simple and inexpensive steps which any seller would reasonably be expected to undertake to maximise the sale price – indeed, the Supreme Court decision showed that a receiver's decision not to consider buying out the tenants before selling a property could be impugned; however, no issue arises in that regard in this case.

41. *Holohan* clearly supports the position that, where practical steps can reasonably be undertaken which would have an appreciable impact on the purchase price, a receiver would be expected to undertake them. The question of whether the receiver is required to take any particular steps will depend on the circumstances. The greater the time, cost and risk involved the more reluctant the Court will be to impose such an obligation. However, if there are relatively simple, reasonably expeditious and relatively inexpensive steps which could significantly improve the outcome, then a receiver may need to explain a decision not to pursue such an option (and *Holohan* and *Harte* provide useful counterpoints in this regard).

42. I note that, in *Holohan*, the Supreme Court did not go so far as to determine that the defendant was obliged to offer the property for sale with vacant possession. However, it did find that the mortgagee gave no (or no reasonable) consideration to the alternative possibility (selling with vacant possession). He was accordingly deemed to be negligent. It seems to me that if the mortgagee had given reasonable consideration to the possibility, but rejected such advice, then his entitlement to do so would depend on the reasonableness of his decision in the particular circumstances. This inexorably follows from the Supreme Court's logic and language in *Holohan*.

43. I also noted however, that as McKechnie J. observed in *Ruby*:

> "*there are no predetermined, fixed or rigid rules by which such disposal of property must take place. Public auction, exposure by media or billboard, market strategy, expenditure of money, generous time limits, and the hiring of experts are all matters for consideration, as are many others, but not for mandatory engagement. In each situation, an individual assessment must be made, but provided the duty resting upon the receiver or mortgagee is discharged, the actual method of disposal is not determinative.*"

44. *Ruby* is a practical example of the application of these principles in practice. The receiver acknowledged that a higher price might be achieved as a result of adopting the alternative method of sale. However, the Court agreed that he was acting reasonably in discounting that option because it was likely to involve long delays and require additional funds which were not available. Furthermore, the interest on the debt would continue to accrue.

45. *Medforth, McEllin and Silven* and other cases confirm that a receiver is entitled to focus on the charge holder's entitlement to be paid. It is generally irrelevant that an alternative course (such as a medium to long term sale) might be more advantageous from the borrower's perspective. However, the authorities also make clear that the receiver's right to determine the time and manner of sale is not at large. The authorities relied upon by the Defendants (such as *McEllin, Farrelly* and *Feniton*) to support the receiver's right to determine the time of sale

appeared to be situations in which the borrower was seeking to delay the sale on an indefinite or long-term basis in the hope of a market upswing or other unpredictable developments. The courts have, unsurprisingly, rejected the proposition that the receiver was required to entertain extensive or long delays.

46. However, the authorities do not give the receiver unfettered control over timing or suggest that the receiver would be entitled to proceed with an immediate sale if the evidence showed that an alternative route was likely to result in a significantly better realisation within a reasonably short timeframe. It would be surprising (and inconsistent with the *Cuckmere* test) if that were the position. To the contrary, while acknowledging the receiver's entitlement to choose the time of sale within a considerable margin, *McGowan* and *Chartered Bank* also emphasise that he was still duty-bound to use reasonable care to obtain the best price. Likewise, McKechnie J. in *Ruby* and Barr J. in *Hade* both noted that Carroll J. in *McGowan* had left open the question as to:

> "*whether a receiver who has tested the market and found that the market is very bad, is entitled to sell at a giveaway or knock down price because he cannot get better. Should he be obliged to wait for any given period in the hope that there would be an upswing in the market?*"

Indeed, while Carroll J. noted that that point had not been argued, she noted the conflict of evidence as to whether the receiver would be selling at an undervalue and did grant an injunction for three weeks to enable the company (the debtor) to consider evidence adduced in that regard.

47. While the circumstances of any particular case will need to be considered to determine whether the duty has been breached, it seems to me that it would be difficult to contend that a receiver should wait for long or indefinite periods or pursue options presenting significant greater risk or uncertainty. Conversely, however, where a short delay might lead to an

appreciably better result, then it might well be incumbent upon a receiver to allow such a delay unless there were sound reasons not to do so.

48. Accordingly, whether a receiver has acted reasonably will necessarily depend on the particular circumstances– for example, a court may not accept that a receiver had discharged his duty of care to the borrower if he offered the property for sale for an extremely short period and in a manner unlikely to elicit competitive offers – a poorly advertised sale over a bank holiday for an example – when alternative, only marginally longer options were available which would have been likely to secure a better result.

49. While affording the receiver some latitude, the authorities consistently affirm his duty to take reasonable steps to secure the best price available at the time of sale. The circumstances will determine what those required steps might be in a particular case. It is not my function to determine whether the First Defendant actually discharged his duty on this occasion, nor would the evidence suffice to enable me to reach such a conclusion. However, I am satisfied that, primarily due to the limitations on the Defendants' evidence, the Plaintiff has raised an arguable case. I am not satisfied that the First Defendant has discharged his duty to take reasonable care to obtain the true market value just by instructing Hunters and by accepting the highest bid available on the open market.

50. My concern is that, although the Defendants emphasised their reliance on Hunters' undoubted expertise, they failed to adduce any evidence from Hunters whatsoever other than the initial "desktop" valuation and associated documents. They have not revealed Hunters' input into the decision to reduce the price or, ultimately, to sell for less than the reserve, or as to the wisdom of selling before Christmas. It could be more difficult for the First Defendant to contend that he had honoured his professional and legal duty to the Plaintiff if, for example, Hunters advised him that he was selling at the wrong time of the year, or that he was rushing the process or that he had a reasonable expectation of a better price if he waited until the new

year. I have no idea as to whether or not Hunters provided any such advice. Although the Defendants tendered two lengthy, virtually identical, affidavits and exhibits, they did not address these issues.

51. In circumstances in which the Property was placed on the market for a short period, its price reduced quickly and an offer accepted rapidly in the pre-Christmas period, a more detailed explanation of the First Defendant's rationale and the associated advice would have been helpful. The lack of such evidence, and, particularly, the nondisclosure of Hunters' advice, tends to reinforce the Plaintiff's concern as to whether the First Defendant discharged his duty of care.

52. I have noted that the First Defendant's primary duty was to ensure repayment of the debt as much as possible and the Plaintiff, as a borrower in default, was not entitled to control the time and the circumstances of sale. However, the limited evidence does not establish that the First Defendant had sufficient regard to his duty of care to the Plaintiff. I cannot exclude the possibility that, to paraphrase *Cuckmere,* the First Defendant was "*on the wrong side of the line*". As the Supreme Court observed in *Holohan,* a receiver is not entitled to dispose of the property with the same freedom as if it were his own. I have not seen sufficient evidence to conclude that he behaved as a reasonable person would have done.

53. This case is different from some of the authorities relied upon. In *Edenfell* and in *Harte,* for example, the evidence confirmed that the receiver was following expert advice. The fundamental distinction between this case and, for example, *Harte* was the express conclusion in that case that the receivers not only had expert advice but that they were acting according to that advice. By contrast, the Defendants had expert advice available to them in this case, but they have chosen not to disclose that advice in relation to critical issues concerning the conclusion rather than the commencement of the sale process. If the Court were expected to draw inferences as to the nature of such advice, then such inferences could not properly be

drawn in favour of the party who could have adduced that evidence but chose not to do so. Accordingly, as matters stand, I am not satisfied that the proposed sale would be consistent with the receiver's duty to obtain the best price (but the position may well change at trial when more evidence is available).

54. Accordingly, I am satisfied that there is a serious question to be tried as to whether the sale was at an undervalue. The substantive determination, as to whether the receiver actually breached his duty of care, would require full documentary disclosure and oral evidence from the Defendants and their agents (including Hunters), together with independent expert testimony. While the courts will take a broad view in any such assessment, as matters stand there is an arguable case that the proposed sale would be "*plainly on the wrong side of the line*" and that the First Defendant may not have discharged his undisputed duty to obtain "*the best price which the circumstances of the case allow*".

Second Issue – Balance of Justice/Balance of Convenience

55. In terms of the balance of justice assessment, key questions include whether damages would adequately compensate the Defendants for any loss arising from granting the injunction and the substance underpinning the Plaintiff's undertaking as to damages. The Plaintiff did not demonstrate that he has sufficient resources to honour his undertaking. This is relevant to the balance of justice assessment, but I am not inclined to refuse this application on that ground alone because of the other security available to the Defendants and because the evidence available does not convince me that the Defendants would suffer significant prejudice if the sale were to be suspended to allow the claim to be litigated. Too rigorous a stance could mean that impecunious plaintiffs could never seek injunctive reliefs against banks and receivers. This might result in injustice. I might have given this factor greater weight if the likely economic impact on the defendants was more significant.

56. Turning to other balance of justice factors, it is significant that the proceedings concern an investment property, not a dwelling house, and that the Plaintiff remains in continuing default. While there is a disagreement as to the Property's value, it is common ground that its sale (even at a higher price) will not extinguish the Plaintiff's debt. However, there is another secured asset, so the Second Defendant is reasonably protected.

57. The adequacy of damages is an important issue. The Defendants argued that, even if, for example, the Property should have sold for a higher figure, then the margin between the notional value and the price actually obtained could be determined and compensated by an award of damages. There was no suggestion that the First Defendant would not be able to meet any award of damages that might be made against him in the event that the Plaintiff was successful in establishing a breach of duty on his part. I have noted that absence of expert evidence as to the actual price that the Property should have achieved. If, for argument's sake, the Plaintiff could show that, with just a little more effort, a price of, say, €700,000 might have been achieved, then the notional value of the claim would be €140,000. Accordingly, damages should in principle be an adequate remedy.

58. Against this, there are inherent difficulties in proving counterfactuals - the price that hypothetically should have been achieved. Such issues should not be insurmountable – the courts often deal with such dilemmas. However, it is appropriate to note the practical difficulties and also the practical doubt as to whether the Plaintiff, given his financial position, will be able to pursue the claim in circumstances in which, when the asset is realised, he will remain substantially indebted.

59. Furthermore, while the adequacy of damages is one of the most important elements of a balance of justice assessment, it is not necessarily determinative. As O'Donnell J. observed in *Merck* (at para. 47), "*[t]he fact that it is not completely impossible to assess damages should not preclude the grant of an injunction to the plaintiff in an appropriate case*".

60. A further factor potentially weighing in the Plaintiff's favour in the balance of justice assessment is that his only recourse if the Property were sold at an undervalue would be a breach of duty claim against the First Defendant, which would not protect him in the event of a claim by the Second Defendant for the balance outstanding on the loan. As *Feniton* demonstrates, if the receiver appointed by the Second Defendant sells at an undervalue and the Second Defendant pursues the Plaintiff for the residual balance outstanding on the loan, the Plaintiff will not be able to counterclaim against the Second Defendant on the basis of the sale at an undervalue. The Plaintiff would have to pursue a separate claim against the First Defendant. Such an outcome appears unfair (although it could be mitigated if the Court were to direct that any such claim against the receiver should travel with any such claim against the Plaintiff or exercise its discretion to stay further enforcement action until the undervalue issue had been determined).

61. In my view, the haste accompanying the proposed sale – which the Plaintiff would characterise as indecent, and which has not been explained by the Defendants - may be relevant to the balance of justice assessment (particularly when coupled with the Defendants' reluctance to disclose the advice received from Hunters or to explain why a bid was accepted relatively quickly which was less than the reserve recommended by Hunters). The (limited and incomplete) evidence does give rise to questions at the apparent haste with which the sale would be effected and as to the receiver's commitment to his duty of care to the Plaintiff. It would be unjust if the Plaintiff is deprived of the opportunity of litigating that important issue.

62. I doubt that the Defendants would be prejudiced if injunctive relief were granted for a short time to allow these issues to be litigated. The Defendants raised the possibility of a fall in property values. This is of course always a possibility and would be prejudicial. However, there was no suggestion that such a development is likely in the short term. Conversely, the Defendants (as well as the Plaintiff) would benefit if values rise.

63. It is also relevant to the balance of justice that the Plaintiff confirmed his willingness to progress this case to an early trial, meaning that the Defendants should not be restrained for an unreasonably long period before the substantive issue was resolved. However, tangible proposals were not readily forthcoming from the Plaintiff, a point which reduced the impact of the Plaintiff's submission in that regard (and which also went to the issue identified in *Merck* as to the need to determine whether the claim would actually proceed to trial). In my view, all Plaintiffs seeking interlocutory relief would be well advised to demonstrate their *bona fides* by continuing to progress proceedings while the application is proceeding, delivering Statements of Claim, pressing for Defences and taking other appropriate steps to progress the claim. They should also propose a realistic timetable designed to bring the substantive dispute to trial at the earliest possible opportunity. Although no such timetable was adduced in this case, the Plaintiff did indicate his willingness to comply with any directions the Court might impose (but he would be expected to do this in any event).

64. For completeness I should note that I do not agree that an injunction should be forthcoming independently of a balance of justice assessment purely because property rights are engaged. That may be appropriate in some contexts (such as a blatant trespass) but is not appropriate in commercial contexts such as this, which concern the exercise of rights arising pursuant to a mortgage which the Plaintiff voluntarily entered into. I agree with the cogent analysis of this issue by Murray J. in *Dengrove* as cited above.

65. I have considered whether, adopting the approach of Collins J. in *Betty Martin Financial Services v EBS DAC* [2019] IECA 327, the harm to the Plaintiff from a premature sale at an undervalue could exceed the harm to the Defendants if the sale is restrained (absent any serious suggestion that the macroeconomic factors referenced by the Defendants made a fall in value likely rather than possible).

66. While I have considered all of the foregoing points as relevant to the balance of justice point, the factor which weighs most against the Plaintiff's application is the adequacy of damages coupled with the particular figures involved. In this regard, I appreciate that, although the issue is central to the balance of justice assessment, even if damages would be an adequate remedy, that does not necessarily mean that interlocutory relief should be refused. As Murray J. observed in *Dengrove*:

> "*the mere fact that damages would be both adequate as a remedy and available to be paid did not absolve the Court from placing the adequacy of damages within the balance of justice as a whole and, therefore, in also assessing any other factors relevant to that balance in a particular case*".

67. Accordingly, recent authorities confirm that, while adequacy of damages is the most important component of a balance of justice assessment, other factors may properly be considered to determine how matters might be held most fairly pending trial. As Clarke C.J. observed in *Okunade v Minister for Justice* [2012] 3 IR 152, I should seek to minimise the overall risk of injustice. The fundamental objective is to minimise injustice in circumstances where the legal rights of the parties have yet to be determined.

68. However, while the Plaintiff has demonstrated a serious question to be tried, that the proposed sale may be at an undervalue, I am less convinced that, even if there is such an undervalue, the likely margin is likely to be so great as to justify restraining the sale. The issue is finely balanced for the reasons outlined above and particularly because of the Defendants' failure to be more fulsome in their testimony. However, in this case I consider that the application should be refused, partly because the Plaintiff would not be in a position to honour his undertaking but, more importantly, because damages would be an adequate remedy and I doubt that there would be a sufficiently large "undervalue margin" to justify judicial intervention to restrain the Defendants pending trial from exercising rights arising under the mortgage.

69. In the opening paragraph of his judgment in *Dengrove*, Murray J. noted that such "receiver-injunctions" are often refused when they arise in the context of commercial loans secured by commercial assets, because damages will generally be an adequate remedy in such cases, and the lender and/or receiver will frequently be good for any award against them. Murray J. observed that:

> "*Generally in a purely commercial dispute of this kind where the parties' interests are exclusively financial, the law adopts the position that they are best left to their respective remedies in damages. The cases of this kind in which there is a particular factor tilting the balance in favour of the claimant such as would justify the making of orders restricting the creditor's freedom of action pursuant to agreed security instruments, tend to be the exception*".

70. In the circumstances, I do not consider that interlocutory orders would be appropriate. However, I would be willing to consider directions designed to resolve the substantive undervalue issue without delay.