

THE HIGH COURT

[2017 No. 3432 P.]

BETWEEN

EMO OIL LIMITED

PLAINTIFF

AND

OIL RIG SUPPLIES LIMITED

DEFENDANT

JUDGMENT of Mr. Justice McDermott delivered on the 18th day of August, 2017

1. This is an application for an interlocutory injunction prohibiting the defendant, its servants or agents from trespassing on lands comprising a retail service station at Lock Quay, Clare Street, Limerick.

2. Under a lease dated the 26th July, 2011, John Lyons and Patrick Murray (the landlords) granted a five year tenancy to the plaintiff commencing on 1st August, 2011 at an annual rent of €46,224.00 per annum. Under Clause 3.20 of the lease the plaintiff agreed that on its expiration it would peacefully surrender and yield up the premises to the landlord. Clause 5.3 provided that should the tenancy continue beyond that term it would be deemed to be a tenancy determinable by one month's notice in writing to be given to the other party in the absence of any new agreement.

3. The plaintiff granted a temporary sublease to Gavin Fernando (the sub-tenant) on the 26th July, 2011 for a term of four years and nine months also commencing on 1st August, 2011 for an annual rent of €46,224.00. The sub-tenant executed a Deed of Renunciation in respect of this sub-letting renouncing all rights of entitlement which he may have under the Landlord and Tenant Acts to a new tenancy in the premises at the termination of the tenancy.

4. The original lease between the landlord and the plaintiff, the sub-lease between the plaintiff and Gavin Fernando and the Deed of Renunciation by Mr. Fernando were all executed on the 26th July, 2011.

5. By Deed of Assignment dated 12th August, 2014, the sub-tenant assigned his interest to the defendant Oil Rig Supplies Ltd. subject to the covenants and conditions contained in the original lease dated the 26th July, 2011.

6. It is clear from the affidavits that there was a longer and more extensive business relationship between the plaintiff and the defendant than the connection evidenced by the sub-lease taken by the defendant from Mr. Fernando in August 2014 who was the sub-tenant of the plaintiff. By agreement made 18th December, 2012 between Great Gas Petroleum (Ireland) Ltd. (now trading as EMO Oil) and the defendant, Great Gas Petroleum Ltd. agreed to supply the defendant with motor fuels and the defendant agreed to exclusively purchase motor fuel from it. The plaintiff effectively ceased to supply fuel to the defendant on 17th October, 2015 in circumstances where it is said the defendant fell into arrears and also commenced to source his fuel from an alternative source.

7. The plaintiff claims that its lease on the premises terminated by effluxion of time on 31st July, 2016. On the expiration of the lease the plaintiff continued in possession of the premises pursuant to the terms of Clause 5.3 which states:-

"That if the tenancy hereby created should continue beyond the Term it shall in the absence of a new Agreement be deemed to be a tenancy determinable by 1 Month notice in writing to be given by either party to the other and expiring on any day not necessarily being a gale day."

8. The plaintiff claims that the sub-lease terminated by effluxion of time on 30th April, 2016. Clause 5.4 states that if the tenancy should continue beyond the term of the sub-lease it would be deemed to be a tenancy determinable by one month's notice in writing to be given by either party to the other and expiring on any day not necessarily being a gale day. The sub-lease between the plaintiff and Mr. Fernando also provided that the subtenant would not assign sublet or part with or share the possession of the premises or any part thereof or permit any other person or company to occupy the same as a licensee or otherwise.

9. The history of the business relationship between the plaintiff, Mr. Fernando and the defendant is somewhat unclear. Mr. Sikka in affidavits sworn on behalf of the defendant states that Mr. Fernando was a tenant of the premises which were demised by lease made in or around 2008. He states that Mr. Fernando was in continuous occupation of the premises since that time without any break in the tenancy until he assigned his interests in the premises to the defendant in April 2011. Furthermore, Mr. Sikka claims that the plaintiff began to supply the defendant with fuel for sale in or around April 2011 pursuant to an agency agreement. He states that to the best of his knowledge the plaintiff was aware at all times that the defendant was in possession of the premises since April 2011. He also states that the defendant paid rent to the plaintiff and purchased fuel from it throughout this period. However, he also states that the rent was initially paid to the plaintiff through Mr. Fernando. It is then claimed that the terms of this 'tenancy' were reduced to writing in 2014 under the Deed of Assignment dated the 12th August. Though it was initially claimed that bank statements exhibited indicated rent paid by the defendant to the plaintiff from the 30th March, 2011, it is clear that no such payments of rent appear in the bank statements exhibited at Exhibit "NS 3" in Mr. Sikka's affidavit.

10. Mr. Hurley on behalf of the plaintiff states that there is no evidence that the defendant was assigned any interest in the premises in April 2011 and that whatever informal arrangement the defendant had with Mr. Fernando prior to 12th August, 2014 and/or under a Deed of Assignment did not bind the plaintiff in any way. He comments that since Mr. Sikka states that rent was paid through Mr. Fernando, Mr. Sikka held the premises on the basis of some informal letting agreement with Mr. Fernando and not as a purported assignee. He denies that this tenancy was reduced to writing in 2014. Mr. Hurley states that the sub-lease created on 26th July, 2011 was thereafter assigned to the defendant "without seeking the consent of the plaintiff as legally required in 2014". While the plaintiff had extensive business dealings with the defendant since April 2011 as evidenced in accounts produced and exhibited in the affidavits and while the defendant may have been 'sub-letting' the premises from Mr. Fernando, the plaintiff claims to be a stranger to this arrangement and to have been unaware of its existence. Thus the plaintiff claimed that firstly, the Deed of Assignment was made

without its knowledge; secondly, the term of the sub-lease has now expired by the effluxion of time and thirdly, any claim made by the defendant that it is entitled to a new tenancy by reason of the length of time for which it and its predecessors in title had been in possession of the premises as tenants is unsustainable because of the Deed of Renunciation entered into by Mr. Fernando at the time of taking the sub-lease. It is further submitted that Mr. Fernando has given up any possible right to a new tenancy (if it existed) by virtue of the provisions of s. 17(1)(a) of the Landlord and Tenant Act as amended by the substitution made pursuant to s. 47 of the Civil Law (Miscellaneous Provisions) Act 2008, whereby that right may be renounced and was renounced by him.

11. The plaintiff also states that upon the determination of the sub-lease the defendant paid "a fee for its [the premises] further occupation until July 2016". Mr. Hurley states that by agreement with the plaintiff the defendant has not paid any sum for its occupation of the premises since July 2016. It is said that discussions took place between the plaintiff and the defendant relating to a new agency agreement between the parties. An interim agreement was proposed subject to renewal of the plaintiff's lease with its landlord. The interim agreement proposed was withdrawn because no response was received from the defendant. The defendant was invited to indicate whether he wished to proceed with the arrangement but did not respond.

12. The Plaintiff claims that on Friday 29th July, 2016 it reached an agreement with Mr. Sikka on behalf of the defendant whereby a "tenancy at will" under which the premises was occupied by the defendant would cease and no rent would accrue from the 29th July. A new agreement would be put in place to trade at the site which would be an agency agreement. Fuel would be sold by the defendant and commission paid to the plaintiff. The agreement was said to be subject to renewal of the lease which the plaintiff held from its landlord. Outstanding rent for July which was said to be due would be deducted over the following three months. Thus it was proposed that Mr. Sikka's company would have a licence to remain in possession if the fresh agency agreement was entered with the plaintiff. No rent would be payable in respect of the licence.

13. Mr. Sikka denies occupation as a licensee and contends that the defendant paid rent on the premises until March 2017. This is said to be evidenced by Exhibit NS 5. This is a statement of account which purports to show payments of rent up to that date. However, the last demand for rent was on the 31st August, 2016 and a sum of €4,737.96 was debited to the defendant's rent account with the plaintiff. The plaintiff claims that this was an error by the plaintiff's accounts office. Mr. Hurley says that he met with Mr. Sikka who demanded that the debit be reversed because following the agreement of 29th July the defendant was remaining in occupation as a bare licensee paying no rent until the situation of the head landlord could be sorted out, namely until the plaintiff could ascertain if it could obtain a renewal of the plaintiff's head lease. The sum was therefore credited to the defendant's account which is clear from Exhibit NS 5. In accordance with the agreement of the 29th July, Mr. Hurley states that no further rent was demanded or sought or indeed paid by the defendant. Thus the plaintiff's position is that since August 2016 the defendant has been a bare licensee operating his business on the premises.

14. The plaintiff claims that it was unable to reach an agreement with the landlord in relation to a new lease. Consequently, by letter dated 9th March, 2017 the plaintiff gave one month's notice to his landlord to expire on 12th April. By letter of the same date the plaintiff wrote to the defendant and informed it that the plaintiff's tenancy would expire on 12th April and that the defendant was required to give up possession of the premises on or before that date. Mr. Hurley states that he met with Mr. Sikka on behalf of the defendant on 28th March who indicated that he would take legal advice as to whether he would vacate the premises. The defendant then wrote to the plaintiff by letter dated 31st March and asserted that it had established "tenancy rights under the Landlord and Tenant Acts". The plaintiff claims that the time for delivering possession to the landlord has now expired and that the defendant is trespassing on the premises. The landlord agreed to allow the plaintiff to withdraw its notice of surrender and granted the plaintiff a short extension of its tenancy on the premises in order to allow the plaintiff an opportunity to secure and surrender vacant possession thereof. That facility has been extended due to the difficulties encountered by the plaintiff in securing vacant possession from the defendant.

15. Mr. Sikka states that he was informed that a new lease would be forthcoming to the defendant and that an agency agreement was proposed to be put in place in respect of the management of the pumps. He rejects an allegation that he refused to sign the agency agreement. He contends that the defendant awaited details of the new lease on the basis that all agreements would be concluded together. He believed that rent for the premises would be backdated to August 2016 when the new rent was set by the head landlord. He disputes Mr. Hurley's account of reimbursing the rent for August 2016 on Mr. Sikka's request. He states that the plaintiff did not expect to be in occupation rent free for any period. Nevertheless, it is clear that the defendant has not paid a single monthly amount since August 2016 but the plaintiff is liable for and paid the monthly rent to the landlord in the amount of €4,737.96 per month. The defendant has indicated that he continues to trade from the premises in these circumstances with an annual turnover of €1 million in respect of fuel sales and €1 million in respect of other sales. It continues to employ ten persons.

16. As is clear from the volume of exhibits and the detailed affidavits submitted in respect of the business relationship between the plaintiff and the defendant and the various differences arising on the affidavits, much of the conflict that arises in this case will be the subject of oral evidence at the trial of the action. This summary of the parties respected positions is not comprehensive but gives a flavour of the issues which will arise at the trial of the action.

17. A further issue raised by the defendant arises from his initiation of proceedings for a new tenancy under the Landlord and Tenant Acts in the Circuit Court in Limerick. While at the time of the initiation of these proceedings no such application had been made, it would appear that steps have now been taken to commence those proceedings and to bring them on for hearing in the Circuit Court in Limerick.

18. In order to establish the basis for the granting of an interlocutory injunction the plaintiff must establish that there is a fair *bona fide* question to be tried. As stated by O'Higgins C.J. in *Campus Oil Ltd. v. Minister for Industry and Energy* (No. 2) [1983] I.R. 88:-

"In my view, the test to be applied is whether a fair bona fide question has been raised by the person seeking the relief. If such a question has been raised, it is not for the court to determine that question on an interlocutory application: that remains to be decided at the trial. Once a fair question has been raised ... then the court should consider the other matters which are appropriate to the exercise of its discretion to grant interlocutory relief. ..."

19. The court is satisfied that the plaintiff has raised a fair, *bona fide* or serious question to be tried in these proceedings. The plaintiff claims that the sub-lease under which the defendant had possession of the premises (if valid, which is denied) has expired by the effluxion of time. It is therefore submitted that the defendant is a trespasser and has no right to remain on the premises and operate its business. The plaintiff submits that the defendant's case is unarguable and unsupported by any evidence of a lawful entitlement to remain in possession of the premises in the circumstances outlined in the affidavits. It is submitted that no stateable defence is demonstrated by the defendant.

20. The limits of the court's determination in an application for an interlocutory injunction were considered by Kelly J. (as he then

was) in *ESSO Ireland Ltd. v. 911 Retail Ltd.* [2013] IEHC 389 in which he stated:-

"9. It is important to point out that this is my judgment on an interlocutory application only. Whilst the plaintiffs were prepared to treat the interlocutory hearing as the trial of the action, no such concession was made by the defendant. Accordingly, the court is constrained to remain strictly within the limits of what is permitted on an interlocutory application. Those limits are identified in the speech of Lord Diplock in *American Cyanamid v. Ethicon* [1975] 1 All E.R. 504 at 510, where he says:-

"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial".

10. Notwithstanding that constraint the plaintiffs say that the defendant is so devoid of any arguable case supportive of an entitlement to remain in occupation of the premises that the relief sought should be granted.

11. In examining the question of what defence is demonstrated by the defendant it is accepted that a low threshold of proof needs to be discharged. It is only necessary that the defendant should demonstrate an argument which would survive an application to have it struck out under the inherent jurisdiction of the court as having no reasonable prospect of success. ..."

21. In demonstrating the existence of a serious issue for trial the defendant points to a course of negotiation following the termination of the sub-lease in which it was represented to the defendant that it ought to continue in possession and occupation of the premises pending the conclusion of a new lease between the plaintiff and the landlord. Its sub-lease would then be renewed and that renewal would date from the date of termination of the previous sub-lease pursuant to the terms of a new rent which would be retrospectively payable by it.

22. An additional point of defence raised is that notwithstanding the existence of a Deed of Renunciation said to have been executed by Mr. Fernando (of which the defendant disavows any knowledge) the defendant claims to be entitled to relief by way of renewal of tenancy under the Landlord and Tenant legislation. Though there are very significant difficulties for the defendant in making that case on the evidence I am not satisfied to conclude that the proposed points of defence are unstateable having considered the affidavits submitted.

23. A number of cases such as *Gatien Motor Co. Ltd. v. Continental Oil Co.* [1979] I.R. 406 and *Kenny Homes and Co. Ltd. v. Leonard and Other* (Unreported Supreme Court 18th June, 1998) were relied upon. However, these cases concerned proceedings in which the hearing of the interlocutory injunction were treated as a trial of the action and oral evidence heard. I do not have that advantage in this interlocutory application. I find therefore that I am left somewhat in a similar position to that in which Kelly J. was placed in *ESSO Ireland Ltd.* I am satisfied that I should be very slow to entertain a submission at this stage that the points of defence proposed are totally unstateable though they may give rise to significant difficulties at trial. The court is not satisfied to conclude that the defences outlined in the replying affidavits are frivolous, vexatious and have no prospect of success in the sense considered by Kelly J. at paras. 48 to 53 of his judgment. If an injunction issues it should not be on the basis that the Plaintiff will undoubtedly succeed. It has however raised a fair, bona fide or serious issue to be tried.

24. The question must also be considered whether the plaintiff, if it succeeds in the substantive action, would be adequately compensated by an award of damages for any loss suffered between the hearing of the interlocutory injunction and the trial of the action. If the plaintiff would be adequately compensated by damages the interlocutory injunction should be refused subject to the proviso that it appears likely that the relevant defendant would be able to discharge any damages likely to arise.

25. The plaintiff submits that it is at a continuing loss in that it is obliged to pay the monthly rental to the landlord until it is in a position to give up vacant possession in accordance with the terms of the original lease. The defendant has paid nothing to the plaintiff since August 2016. The plaintiff has lost substantial rent while the defendant has paid nothing and continued to trade. It claims that it is still unable to pay any sum owing but is willing as evidenced by letter dated 12th July, 2017 to pay the sum of €4,730.96 per month to be deducted from the fuel account operated with the plaintiff in the course of business. An intention was expressed in that letter to discharge the monthly amount "in accordance with the lease between the parties" until all matters between the parties have been determined by the court. No such monies have been paid notwithstanding the fact that the matters were before this Court towards the end of July. The defendant maintains that it cannot pay arrears of "rent" and still maintain the payment into the future until the determination of the proceedings. The defendant accepts therefore that even if it had a tenancy during this period it has not paid and has no means to pay the rent. On the other hand, it claims to have a turnover of approximately €2 million from its business and employs ten people. I am not satisfied that the evidence indicates that the defendants would be in a position to meet a claim for damages of a continuing nature until the hearing of the action. I am not satisfied that the plaintiff could recover damages having regard to the stance adopted by the defendant on non-payment of any amount since August 2016. Furthermore, the plaintiff has been in default of its obligation to surrender possession of the premises to the landlord and has only been permitted to remain on the premises on the basis of a short term extension of its tenancy in recognition that it has been thwarted in its efforts to obtain vacant possession from the defendant so that it can fulfil its obligation to surrender possession to the landlord. It is clear that this gives rise to not only a continuing liability but also damage to its business name and its relationship with the landlord.

26. I am therefore not satisfied that damages would be an adequate remedy for the plaintiff in this case and I am not satisfied that the defendant will be in a position to discharge any damages likely to arise.

27. I am satisfied that the plaintiff's undertaking as to damages will adequately compensate the defendant should the defendant be successful at the trial of the action in respect of any loss suffered. Furthermore, if the defendant is correct in respect of its entitlement to renew a business tenancy (which it is intended to pursue in the Circuit Court and in respect of which the court anticipates the defendant will have something of a difficult task to establish) it will have to discharge or have discharged the arrears of rent in those circumstances. It is difficult to conclude that the defendant would be at any particular let alone substantive loss from the granting of the injunction. However, even leaving that aside, I am satisfied that the undertaking as to damages will adequately compensate the defendant should he be successful in the trial of the action or indeed in his Circuit Court proceedings in respect of a business tenancy.

28. The remaining issue is whether the balance of convenience justifies the granting of the injunction. The court must consider the consequences for the plaintiff in the event that the interlocutory injunction is refused but the plaintiff succeeds at trial and the consequences for the defendant in the event that the interlocutory injunction is granted and the plaintiff fails to establish its case.

Furthermore, in the background the court must also have regard to the fact that the defendant now seeks relief under the Landlord and Tenant Acts in respect of a business tenancy in the Circuit Court.

29. The court is obliged to minimise the risk of injustice and the risk of injustice from not acting must be greater than that from acting in order for the court to depart from the status quo which now applies in this case.

30. If the status quo is not maintained in this case the defendant contends that ten employees will be out of work, his business upon which he and his family have been engaged for a number of years will be lost and his family income will be immediately affected because it is generated by the company's business. Furthermore, the plaintiff's claim will effectively have been determined without a full hearing in which oral evidence and other documentary evidence will be fully considered by the court in determining the issues.

31. I feel that there is considerable strength in these arguments even if having regard to the substantive defence I am of the view that on the papers before the court (which perhaps do not reflect the entire documentation or evidence that may be available to a court of trial) the defendant may have something of an uphill struggle to maintain aspects of that defence.

32. I am satisfied having considered all of the evidence and exhibits in the case and the submissions of counsel that this is a somewhat finely balanced case. The court must have regard to the strengths of the plaintiff's case as set out above and in the affidavits of Mr. Hurley and the significant difficulties with the defendant's case, the fact that the undertaking for damages will be an adequate remedy for the defendant should he succeed and the court's view that the defendant would be adequately compensated by an award of damages for any loss suffered in the granting of an injunction. I must also give considerable weight to the fact that damages in my view would not adequately compensate the plaintiff in this case for the reasons already given. Considerable weight must also be given to the consequences of the granting of the injunction for the defendant. However, I am satisfied that the court should grant an injunction in this case in the terms sought but taking account of the finely balanced nature of the case and the serious consequences for the defendant will do so on terms intended to minimise any risk of injustice to the defendant.

33. The court will grant an injunction but will place a stay on the order on condition that:-

(a) The defendant pays a monthly amount equivalent to the amount of rent payable by the plaintiff to the landlord every month that is the sum of €4,737.96 to commence on the 1st September 2017.

(b) The defendant to pay a sum of €61,593.48 to the plaintiff within two months of the date hereof; it appears to me that the payment of this sum will in any event be necessary if the defendant is to establish its claim for a new tenancy in the Circuit Court under s. 28 of the Landlord and Tenant (Amendment) Act 1980 (though it may well be regarded as in default of its obligation in that respect, but that is not a matter for this Court).

If the defendant defaults in respect of either of these conditions an application may be made to lift the stay and it is the intention of the court that the injunction should in those circumstances take immediate effect.