THE HIGH COURT

Record No. 2018 No. 1384 P.

BETWEEN:

THE BOARD OF MANAGEMENT OF ST. PATRICK'S SCHOOL

PLAINTIFF

AND

EOGHAN O'NEACHTAIN LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Hunt delivered on the 5th day of March, 2018

1. The plaintiff is a body corporate established pursuant to the provisions of the Education Act 1998, and is responsible for the management of St. Patrick's School, Lombard Street, Galway. The defendant is a limited liability company, having a registered office at Dublin Road, Oranmore, Galway.

2. For more than the last twenty years, the defendant or its predecessors have entered a series of written agreements with the plaintiff, permitting the defendant to carry on a car park business from the yard of the said school. There may have been some variations as between different agreements as to the precise hours at which this business might be carried on, but I am satisfied that these variations are not material. In essence, the defendant was entitled to run a commercial car parking operation from the school yard outside school hours during the week, at weekends and during the school holidays.

3. The plaintiff issued a plenary summons on 14th February, 2018, pleading that the defendant occupied the school yard for the aforesaid purposes pursuant to a licence agreement, which expired by efflux of time on 31st January, 2018. It is then pleaded, in effect, that the defendant has been a trespasser on the school premises since that date, and has not yielded up possession, despite lawful demand. The claim is for declarations that the previous agreements between the parties were in the nature of a licence, and for an injunction directing the defendant to vacate the yard in question. There are other reliefs claimed which are not material to the present application.

4. The plaintiff applied for an interim injunction on an *ex parte* basis on 15th February, 2018. Costello J. granted liberty to issue and serve a notice of motion seeking interlocutory relief on a short service basis. This notice of motion was issued and returnable to 21st February, 2018, and the matter was heard on that date. The plaintiff was represented by Mr. Micheál O'Connor, and the defendant by Mr. Conor Fahy.

5. Brother Niall Coll provided affidavit evidence on behalf of the plaintiff. Eoghan O'Neachtain, director, did likewise in respect of the defendant. It will be necessary to refer to certain aspects of those affidavits and exhibits. Mr. O'Connor very fairly conceded that, although the nature of the relief sought could be expressed in both positive and negative terms, he was essentially seeking injunctive relief of a mandatory nature against the defendant.

Interlocutory Injunctions

6. The principles which apply to the grant or refusal of an interlocutory injunction are well settled. The decision in *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88 outlines a number of relevant criteria. Firstly, the applicant must demonstrate a *bona fide* question to be tried. Secondly, damages must be demonstrated to be an adequate remedy in the event that the court ultimately finds against the party for whose benefit the injunction was granted. Thirdly, the granting of the injunction must lie within the balance of convenience. Finally, the court must consider the value of maintaining the *status quo*. In *Allied Irish Banks v. Diamond* [2012] 3 I.R. 549, Clarke J. noted that the *Campus Oil* test must be further informed by the underlying need to avoid the path that leads to the "*greatest risk of injustice*" (see pp. 570 – 571).

7. Where a mandatory interlocutory injunction is sought, the underlying principles require an applicant to achieve a higher standard than demonstrating a *bona fide* question to be tried. In such a case, the applicant must demonstrate that it has a "*very strong case*". As Clarke J. noted in the Diamond case:-

> *"in order to minimise the overall risk of injustice the court requires a higher level of likelihood about the strength of the plaintiff's case before being prepared to make such an order."*

8. It has been held that property rights, in particular, are subject to this higher standard. In *Dublin Corporation v. Burke* [2001] IESC 81, which concerned a landlord and tenant dispute, the Supreme Court rejected an approach that would have allowed Dublin Corporation to remove the defendant from premises by way of interlocutory injunction. Geoghegan J. noted, *inter alia*:-

> *"If the facts as set out in that letter prove correct it would seem likely that Mr. Burke would be held to have been a tenant from month to month of the unit which he occupied. If so, it is not suggested that that tenancy has ever been terminated. As long as it has not been terminated and assuming that the tenancy exists, Mr. Burke is entitled to occupy the unit in whatever form he wishes and irrespective of whether Landlord and Tenant Act rights would arise or not upon termination by notice to quit. But given the possibility of rights under the Landlord and Tenant Act, there can be no doubt, in my view, that if the position is to be viewed on the basis of balance of convenience, the balance of convenience can only be in favour of refusing an injunction in so far at least as it relates to the unit the subject matter of the alleged tenancy. It would be extremely speculative and difficult to assess damages and given that a solid property right might effectively be lost on foot of an interlocutory injunction I would not consider that damages could be an adequate remedy. But even before one comes to consider the balance of convenience, I am extremely doubtful that there would even be a prima facie case for an injunction where a defendant with some back-up evidence (if ultimately accepted) is alleging an actual tenancy in the premises and the plaintiff is for all practical purposes merely sceptical of the truth of the allegation."*

9. I believe that this passage is of particular assistance in the determination of the present issue. If the evidence suggests the possibility of a tenancy and/or consequent rights under the Landlord and Tenant legislation, then the plaintiff will not be entitled to any form of mandatory relief.

Factual background
10. I am satisfied that the affidavit evidence establishes the following facts in relation to this matter:-

> (i) The arrangement whereby the school yard was used as a car park dates back to 1997. Mr. O'Neachtain's late father, Martin O'Neachtain, operated the business until 2002, when Eoghan O'Neachtain took over. He incorporated the defendant company in 2009 for the purpose of running and operating the car park, and Mr. O'Neachtain had assisted his late father to that end for a number of years previously.
>
> (ii) This arrangement was governed by written agreements from 2002 up to the 31st January, 2018. The plaintiff characterises the arrangement contemplated by these agreements as a licence, and the defendant is equally adamant that it is a tenancy.
>
> (iii) The most recent written agreement, made between the parties on 23rd December, 2016, does not purport to nominate the nature of the relationship thereby created, and I assume that this is the position applicable to previous such agreements. I was not informed that there was any material difference in this respect.

11. As the expiry date of the agreement of 23rd December, 2016, approached, it appears that there was some informal contact between the parties culminating in a course of correspondence that commenced with a letter from Mr. O'Neachtain to Br. Coll dated 21st January, 2018. The operative part of that letter is as follows:-

> *"As you are aware I have leased St. Pat's car park on an ongoing basis for upwards of fifteen years and previously the car park was leased by my father, Martin O'Neachtain between 1997 and 2002 when I took over the lease of the school car park. Based on the successive leases Eoghan O'Neachtain Limited has acquired a business equity in the premises.*
>
> *The rolling successive leases run from February 1st every year to the 31st of January. Since early December I have tried to make contact on several occasions with the Principal of St. Pat's, Ms. Marian Barrett, and today with your good self as Chairman of the Board of Management with a view to settling the terms of a continued lease which will commence on 1st February, 2018.*
>
> *As you will appreciate the Car Park is a business and I as the proprietor and director of Eoghan O'Neachtain Ltd have a duty to my staff to have matters settled in relation to the lease prior to 1st February.*
>
> *If I do not hear from you in advance of that date, Eoghan O'Neachtain Limited will continue to operate the car park on the same terms as that of the lease currently in place."*

12. On 31st January, 2018, the solicitors representing the plaintiff replied to this letter in the following terms:-

> *"It should be noted that your company enjoys a Licence and not a Lease as wrongfully stated and in the circumstances your wrongful assertion that your company has a business equity has no legal basis or foundation.*
>
> *You are fully aware that your occupation and use of the school property as a car park on terms has always been on the basis of a Licence which can be terminated at will.*
>
> *We note that the licence agreement ends on the 31st January, 2018.*
>
> *Our client is prepared to issue your company a new licence agreement commencing on the 2nd February, 2018 on the following terms:-*
>
> ***Term**: 2nd February, 2018 to 1st February, 2019*
>
> ***Licence Fee**: €82,000 plus VAT*
>
> *Please return this letter duly signed to this office no later than Thursday, 1st February, 2018."*

13. At the foot of that letter, there is a space provided for Mr. O'Neachtain to signify acceptance of that offer by signature and return of the letter. This offer was not accepted by him on behalf of the defendant, and solicitors on behalf of the defendant replied by reiterating the substance of Mr. O'Neachtain's earlier letter and threatening injunctive proceedings in the event that the plaintiff intended to close the car park from that date and thereby prevent the defendant from operating the business as usual. Under cover of a separate letter on the same date, the solicitors on behalf of the defendant served a notice of intention to claim relief under s. 20 of the Landlord and Tenant Act 1980. This is in the standard prescribed form, and includes an intention to claim, in the alterative, €750,000 compensation for disturbance. The correspondence thereafter is not material to the present application.

Strength of the plaintiff's case
14. Therefore, in line with the authorities referred to above, the first matter that the plaintiff must establish is that it has a vey strong case, sufficient to justify the grant of mandatory interlocutory relief. In this case, that involves establishing a very high probability that the relationship created by the contractual documents is that of licensor and licensee, as opposed to that of landlord and tenant. If this is established, the plaintiff must then proceed to demonstrate a further strong probability that such a tenancy could not continue by virtue of the defendant obtaining a new tenancy from the Galway Circuit Court on foot of the notice of intention to claim relief pursuant to the provisions of the 1980 Act.

15. As previously noted, the written agreements between the parties did not purport to nominate or characterise the legal nature of the relationship between the parties. The recent correspondence indicates a stark difference of opinion on this point. It is well established that the question of whether a tenancy exists in a given set of circumstances is essentially a matter of construction of the agreement of the parties. Where the agreement is in writing, the court can scrutinise its terms, but any label attached by the parties to the relationship, either in the agreement itself or in correspondence pertaining thereto, is not necessarily determinative of the matter. In construing such an agreement, a task of the court is to ascertain the true intention of the parties. In *Gatien Motor Company Limited v. Continental Oil Company of Ireland Limited* [1979] I.R. 406, Griffin J. held that:-

> *"To find whether it was intended to create a relationship of landlord and tenant, one must look at the transaction as a whole and at any indications that are to be found in the terms of the contract between the two parties…"*

16. In the *Gatien* case, Kenny J. held that:-

> *"The existence of the relationship of landlord and tenant or some other relationship is determined by the law on a consideration of many factors and not by the label which the parties put on it."*

17. Therefore, in such cases, the courts will look beyond the express wording of agreements to determine the intention of the parties and, in so doing, look for objective indications consistent with a tenancy agreement including, for example, the existence of exclusive possession. In *Irish Shell & BP Limited v. Costello Limited (No. 2)* [1984] I.R. 511 at 517, Henchy J. held that:-

> *"In all cases it is a question of what the parties intended, and it is not permissible to apply an objective test which would impute to the parties an intention which they never had."*

18. Consequently it is necessary to determine what objective circumstances the parties intended to bring into existence in this case, regardless of how they elect to describe that relationship. In *Street v. Mountford* [1985] A.C. 809, Lord Templeman put the matter as follows:-

> *"The manufacture of a five pronged instrument for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."*

Exclusive Possession

19. An important factor in this regard is the existence of exclusive possession as evidence of the existence of a tenancy, although this is not necessarily conclusive in itself. In the *Gatien* case, Kenny J. held that:-

> *"When determining whether a person in possession of land is to be regarded as a tenant or as being in some other category, exclusive possession by the person in possession is undoubtedly a most important consideration but it is not decisive. A person may be in exclusive possession of land but not be a tenant. The existence of the relationship of landlord and tenant or some other relationship is determined by the law on a consideration of many factors and not by the label which the parties put on it. Even if the documents disclose an intention to confer exclusive possession on the person in possession, it does not necessarily follow that he is a tenant. All the terms of the document and the circumstances in which it was entered into have to be considered."*

20. In this respect, it is necessary to distinguish between the occupation of land by way of possession, as opposed to occupation by way of some alternative capacity. Some forms of occupation of the latter type are also exclusive, without conferring a right to possession of the premises, such as the occupation of a hotel room by a paying guest. The essential distinction between the two categories of occupant lies in the degree of control that permits the occupier to "*call the place his own*", and in the extent to which the occupier would be entitled to restrain or terminate a trespass on the lands or premises in question. Broadly speaking, a tenant is a person or entity who has the ability to exclude the landlord from possession of the premises for the duration of the arrangement between the parties.

21. In this case, I believe that the nature of the arrangement between the parties strongly favours the view that the occupation of the school yard by the defendant fell well short of constituting possession of the premises to the total exclusion of the plaintiff. The right of the defendant to occupy the school yard was firmly limited to times when it is not required for use in connection with the primary educational purposes of the school property as a whole. Furthermore, the agreement specifically provided at Clause 4 that the days of opening were subject to alteration from time to time to accommodate the wishes of the plaintiff Board for school purposes. Clause 12 also provided that should the plaintiff Board have required the car park for development or some other purpose, it was at liberty to terminate the agreement by the giving one month's written notice to the defendant, without obligation to pay compensation in that event. Therefore, I do not consider that defendant ever acquired the right to call the yard its own, or to enjoy possession thereof to the total exclusion of the plaintiff.

22. I am satisfied that these clauses strongly support the view that even though the defendant was permitted to use the school yard in a specified and particular manner at certain limited times, the reality was that the plaintiff Board continued to operate and exercise dominion over the school yard, and that it had not parted with its overall estate, possession or occupation of that yard. The terms of the agreement when read as a whole strongly signal an intention on the part of the plaintiff to retain overall possession and control of the yard, and are inconsistent with the provisions found in a true tenancy agreement. In determining the nature of the arrangement effected by the agreement between the parties, I believe that I am also entitled to take account of the nature of the entire premises of which the school yard forms an integral part, and the general legal position of the plaintiff as the grantor of the right of occupation in question.

23. It is clear to me that the primary purpose of this agreement was to enable the Board of Management of the school to maximise the revenue generating potential of the school premises for which it bore a wider statutory responsibility, but always without prejudice to the proper discharge of the proper discharge by the plaintiff of the primary purpose of the school buildings, to which this yard is subsidiary and ancillary, and to retain the defendant to this end, to the mutual advantage of the parties. I can find nothing in this document, or in the circumstances in which it came into being, to suggest that it was ever the intention of the plaintiff to tie its hands for the future by ceding possession and control of the school yard to the defendant on a permanent or long-term basis.

24. Such an arrangement would be entirely inconsistent with the statutory legal obligations of the plaintiff in relation to the proper management of the school property, or with the primary educational purpose and use of the school buildings and ancillary property. In my opinion, the terms of the document and the surrounding circumstances strongly suggest that the opposite is the case, and in the absence of clear facts or words evincing a contrary intention, the limited right to occupation of the yard conferred by the agreement fell significantly short of a grant of exclusive possession. I am also satisfied that if there was a trespass by a third party on the school yard, given the limited temporal rights of the defendant's occupation, it would have fallen to the plaintiff as owner to restrict any such incursion.

25. Consequently, I am satisfied that the plaintiff has established a very strong case to the effect that the defendant has occupied the car park as an licensee at all material times. In essence, the intent of the agreement was to provide a stream of revenue to the plaintiff from use of the school buildings during fallow periods, and this intent was achieved by permitting the defendant to access the yard at times when it was not required for school purposes to operate an intermittent car parking business. To that end, the defendant paid a fee to the plaintiff. I am satisfied that the most accurate characterisation of this fee was that it was in consideration of limited access to the premises, rather than a rent for occupation of the yard to the exclusion of the plaintiff Board. In return for this access payment, the defendant obtained the right to retain as profit all parking charges collected in excess of the

access fee. I do not believe that it is at all likely that the plaintiff intended to part with possession of the school yard, or to create a tenancy in favour of the defendant, in order to facilitate this mutually beneficial commercial arrangement.

26. Even if I am incorrect in this conclusion, that would not be the end of the matter. If there was a tenancy between the parties up to the 31st of January of this year, the right of the defendant to continue in occupation of the premises thereafter depends on the that tenancy qualifying for the relief claimed in the notice served by the defendant on the plaintiff seeking a new tenancy pursuant to the provisions of the 1980 Act. Clearly, the defendant has the benefit of more than the period of three years business user required for such a new tenancy. However, entitlement to such relief also requires that the applicant be a tenant in occupation of premises constituting a "*tenement*", as that concept is defined by the Act of 1980.

Tenement

27. In the first instance, the premises in respect of which a new tenancy is claimed must consist either of land covered wholly or partly by buildings, or of a defined portion of a building. In this case, the only structure on the property in question that might constitute a "*building*" is the wheeled hut depicted in the photographs exhibited in the affidavit evidence. The hut is fixed to the property by means of power cables. Buildings do not need to be permanent in order to come within the definition of "*tenement*". Buildings of a ramshackle nature may suffice for this purpose: see the description by O'Hanlon J. in *Terry v. Stokes* [1993] 1 I.R. 204 at 208. Consequently, I am satisfied that the defendant has established an arguable case that there is a "*building*" partly covering the land in question.

28. However, where premises claimed to be a "*tenement*" are land covered only partly by buildings, the unbuilt portion of the land must be "*subsidiary and ancillary*" to the buildings. On this part of the definition, I am satisfied on the basis of the affidavit evidence that the plaintiff has a very strong case that even if there is a tenancy, these premises cannot constitute a "*tenement*" for the purposes of obtaining the relief claimed by the defendant pursuant to the provisions of Part 2 of the 1980 Act. It is clear that there is a very strong argument that the relationship between the land and the building in this case is the wrong way round for the purposes of the defendant's application for relief under the 1980 Act. In effect, to obtain relief in this case, the defendant will need to demonstrate to the Circuit Court that the whole of the unbuilt land (the yard) is subsidiary and ancillary to the building (the hut). In my view, this argument is very tenuous and weak on the facts disclosed by the affidavit evidence.

29. On that evidence, it appears far more likely that even if the wheeled hut is regarded as a building, it is clearly subsidiary and ancillary to the use of the unbuilt land as a car park. Previous High Court authority supports this proposition. If the buildings are simply a convenience to the business conducted on the premises, and the relevant activity can be carried on without them on the unbuilt land, the business activity is unlikely to be subsidiary and ancillary to the buildings: see the judgment of Morris J. in *Dursley v. Watters* [1993] 1 I.R. 224 at 229 – 230. Significantly, in *Kenny Homes & Company Limited v. Leonard* (unreported, 11th December, 1997), a car park hut and kiosk were held by the High Court to be subsidiary and ancillary to the surrounding unbuilt land. In the same vein, it has been held by this Court that a clubhouse is far more likely to be regarded as ancillary to tennis courts and a car park than the reverse: see *Fitzgerald v. Corcoran* [1991] ILRM 545 at 546. In *Terry v. Stokes*, a tenement was found to exist because use of the land was held to be subsidiary and ancillary to use of the building on the land. In that case, a business of repairing car parts was carried on in the building, while the adjacent unbuilt yard was used for parking the cars from which parts had been removed prior to the carrying out of repair work on those parts in the building.

30. In this case, I am satisfied that the most likely conclusion will be that the business user of parking cars was carried out on the unbuilt yard area, and that the wheeled hut was used as a convenience to the business of parking cars. Tickets could be issued and payment received for parking on the yard without the necessity of having the convenience of this hut. The situation would be quite different if a building had been erected to house the parked cars, as is the case with purpose-built multi-storey car parks. It is also different to the case of *Terry v. Stokes*, in that the business in question in that case was carried on inside the building, with the use of the yard for parking being ancillary to that business. In this case, parking was the sole business carried on under the contractual arrangement, not an activity carried on as an adjunct to some other activity involving motor vehicles.

31. Therefore, I am satisfied that the plaintiff has established that the defendant has extremely limited prospects of establishing any statutory right to remain on in occupation of the premises after the expiry of the previous agreement between the parties on 31st January, 2018. The facts of this case are also very different to those of *Dublin Corporation v. Burke*, where the documentary evidence expressly favoured an interpretation that a tenancy existed between the parties, and where a statutory right to renewal would have attached to that tenancy on termination thereof. In this case, neither of these ingredients is likely to be found. The plaintiff has therefore established the requisite very strong case for the purposes of deciding whether it is entitled to mandatory interlocutory relief.

Adequacy of damages

32. I will now consider the question of the adequacy of damages, in the event that a mandatory interlocutory injunction is granted to the plaintiff, should it ultimately transpire that the defendant is entitled to the relief that it claims pursuant to the provisions of Part 2 of the 1980 Act on the basis of a business equity in a "*tenement*" held under a contract of tenancy. In my view, in the particular circumstances of this case, damages would be an adequate remedy in the unlikely event that the defendant is able to establish such rights. It would not be the position that any such rights could not be made effective because the defendant could never be restored to possession of the premises should a new tenancy be granted by the Circuit Court.

33. I infer from the plaintiff's affidavits that it has no intention of granting a tenancy such as that claimed by the defendant in the future. Consequently, if the defendant is excluded from the premises by an injunction, and even if the plaintiff then admits a third party to the premises to replace the defendant, the plaintiff will almost certainly do so by the offer of the same type of licence as that refused by the defendant earlier this month. Such a licence arrangement would be likely to be capable of termination for any purpose and by the giving of a short period of reasonable notice.

34. Consequently, in the unlikely event that the defendant establishes a case for relief in the proposed Circuit Court landlord and tenant application, I do not envisage that there would be any difficulty in the plaintiff returning the defendant to limited occupation of the school yard. Thereafter, any loss of profits, goodwill or salary to the defendant's employees would be readily calculable and recoverable on foot of the plaintiff's undertaking as to damages. Therefore, the inadequacy of damages in the event that interlocutory relief is wrongly granted is not a basis for refusal of relief in this case. To resolve any doubt on this point, if an injunction is granted in this case, I will require in addition to the undertaking as to damages from the plaintiff a further undertaking not to create a tenancy in favour of any future occupant of the car park until all proceedings between the plaintiff and the defendant arising out of their previous relationship have been concluded.

Balance of convenience

35. Finally, I must consider the balance of convenience and the value to be attached to maintenance of the *status quo*. As Clarke J.

noted in *Allied Irish Banks v. Diamond* at p.571, this is the test factor most closely related to the issue of risk of injustice. I consider that on the evidence available on this application, and with due regard to the considerable disparity in the strength of the respective cases of the parties, injustice is far more likely to result from the refusal of the injunction sought by the plaintiff than from the grant thereof.

36. On the other hand, with the benefit of the additional undertaking from the plaintiff identified above, I am also satisfied that damages would be an adequate remedy for either party in the event that the injunction issue is wrongly decided either way. Consequently, I am satisfied that the balance of convenience lies in favour of the grant of an injunction, in the sense that greater inconvenience and injustice is likely to flow from refusal than from the grant of an injunction.

37. This view is not affected by pleas made on the basis that the defendant has eight employees engaged in this business. Unfortunately, the harsh fact is that their future employment prospects are always contingent on the underlying viability of the business of the defendant, which in turn depends on the ability of their employer to continue in occupation of the school yard during permitted periods, whether by agreement or pursuant to statutory right as declared by the local Circuit Court. Their employer has made the judgment that occupation of the yard for the purposes of the business must proceed on the basis of a tenancy and not a licence, and has therefore refused the offer of a licence that would have permitted both business and employment to continue. That is the judgment call made by the employer, for better or for worse. I regret that the employees have become enmeshed in the dispute between the plaintiff and the defendant, but I cannot deny an injunction to the plaintiff solely on the basis of their interests, where the plaintiff's case for an injunction appears to be particularly strong. Of course, I will consider their position and interests in terms of any stay that may be requested if an injunction issues.

Preservation of the *status quo*

38. In this case, I am satisfied that the *status quo* is not the position that pertained prior to 31st of January 2018, but rather the position that has obtained from then to the date of this judgment. This position is that the defendant's right to occupy the premises by agreement has expired, and any continuing or future right to operate on the plaintiff's property is contingent on the establishment by the defendant that the previous agreement with the plaintiff created a tenancy, which said tenancy will in turn fulfil the criteria for renewal pursuant to the provisions of Part 2 of the 1980 Act. Given my view as to limited prospects of the defendant establishing either of these propositions on the basis of the available evidence, I am clearly of the opinion that a high value attaches to the preservation of the *status quo* arising on the expiry of the previous agreement by efflux of time on 31st January, 2018.

39. Therefore, I am satisfied that the plaintiff has established entitlement to an order in terms of paragraph 1 of the notice of motion, and I will hear counsel further as to any further or additional order that may be required, the provision of undertakings, and as to the question of costs.

Approved

14 March 2018