

**THE HIGH COURT  
COMMERCIAL**

**2005 No. 1624 P 2006 28COM  
2005 No. 2096 P 2006 19 COM  
2005 No. 3212 P 2005 89 COM**

**BETWEEN**

**CROFTER PROPERTIES LIMITED**

**PLAINTIFF**

**AND  
GENPORT LIMITED**

**DEFENDANT**

**Judgment of Ms. Justice Finlay Geoghegan delivered on 22nd March, 2007.**

1. The plaintiff ("Crofter") is the owner of Sachs Hotel on Morehampton Road in Dublin. The defendant ("Genport") is in occupation of the premises, which it held on a lease dated 12th May, 1981, for a term of twenty-one years from 1st August, 1980 ("the Lease"). The lease expired on 31st July, 2001. On the same day Genport served a notice of intention to claim relief pursuant to the Landlord and Tenant (Amendment) Act, 1980.
2. On 18th January, 2002, Genport issued a Landlord and Tenant Civil Bill claiming new tenancy in the premises. Since that date it is in occupation pursuant to s. 28 of the Act of 1980.
3. There is a long history of litigation between Crofter and Genport in relation to Sachs Hotel and other matters. In proceedings Record No. 1996 No. 25 P., between Crofter and Genport, McCracken J. made an order on 8th November, 2002, in which he, inter alia, granted Genport relief against forfeiture, conditional on payment of all monies then due (€829,189.22) in respect of historic arrears of rent and current arrears of rent less certain set offs, within 28 days from the date of perfection of that order. The final order of McCracken J. in that case appears to have been perfected on 27th January, 2004. According to a letter of 23rd February, 2004, from Eugene F. Collins, Solicitors, then acting for Genport, to Lavelle Coleman, Solicitors, acting for Crofter, a sum of €1,915,501.67 was paid by Genport to Crofter, being all monies then due and owing by Genport to Crofter.
4. It is common case that in 2004 the rent payable by Genport to Crofter under the terms of the Lease and in accordance with the orders of McCracken J. was €141,634.06 per quarter. The last rent paid by Genport to Crofter, prior to the date of hearing herein, was a portion of the rent due on 1st May, 2004, leaving outstanding a sum of €45,421.06 due on that date. No subsequent rent has been paid.
5. On 10th May, 2005, Crofter issued proceedings 2005 No. 1624 P (Rent Proceedings) claiming possession of the premises. The amount then alleged to be due and owing for rent was €611,957.30, and the sum of €102,000 for insurance.
6. In June, 2005, Sachs Hotel was closed down and boarded up. On 17th June, 2005, Crofter issued a further set of proceedings 2005 No. 2096 P, claiming an injunction restraining Genport from carrying out building works in the premises and other reliefs. Interim and interlocutory relief was sought and an undertaking given on behalf of Genport to refrain from carrying out any building works on the premises known as Sachs Hotel, pending the trial of the action.
7. On 27th September, 2005, Crofter issued a third set of plenary proceedings No. 2005 No. 3212 P (Covenant Proceedings) claiming possession of the premises. In those proceedings multiple breaches of the terms of the expired lease are alleged.
8. Three proceedings were admitted to the Commercial List. By order of the 27th day of February, 2006, the parties were given an opportunity to resolve their differences by mediation. When this failed by the Autumn of 2006, the High Court proceedings were brought on for hearing.
9. Since 18th January, 2002, the Circuit Court Landlord and Tenant proceedings have progressed slowly. A defence was delivered in July, 2004. Crofter sought discovery and Genport made this in June, 2005. A notice of trial was filed by Genport in January, 2006. This appears to have been mislaid in the Circuit Court Office. A date for trial was not subsequently sought by the either party. Only in the course of this hearing, was a trial date obtained for 26th March, 2007.
10. At the hearing, it was agreed that Crofter's claim in the Injunction proceedings would be left over until after the determination of the primary claim for possession in the Rent and Covenant proceedings.

**Arrears of rent**

11. I find on the evidence adduced that on 10th May, 2005, at the date of commencement of the Rent proceedings there was unpaid rent and a sum in respect of insurance paid on 2nd December, 2004, totalling €713,957.30, due by Genport to Crofter. This amount is not disputed. However, Genport initially contended that it was entitled to set off a sum of approximately €850,000 in respect of costs and interests, pursuant to orders of the High Court and Supreme Court in proceedings 1996 No. 25 P.
12. Crofter do not dispute this amount nor the right of Genport to seek to set off this amount against all sums due by Genport to Crofter. However, it contends that Genport did not seek to set off this amount against the claim for arrears of rent until after the commencement of proceedings and the delivery of a defence in the Rent proceedings. It is further contended that on the contrary, by letter of 17th June, 2005, Eugene F. Collins, Solicitors, then acting for Genport, had expressly acknowledged the entitlement of Mr. Philip Smyth to use the benefit of the relevant costs orders for the purposes of bankruptcy proceedings then brought by Crofter against Mr. Smyth.
13. I also find that on 10th May, 2005, there were three further amounts due by Genport to Crofter in respect of sums outstanding on orders made in proceedings 1996 No. 25 P by the High Court and the Supreme Court and in proceedings 1988 No. 10501 P between Genport & Ors. and Crofter & Ors. Crofter was entitled to bring those into account in any set off in respect of the costs in the 1996 proceedings as claimed.
14. Crofter produced in the proceedings a schedule of rent and costs owing by the parties on 10th May, 2005, demonstrating that, even if Genport were entitled to set off the taxed costs in respect of the 1996 proceedings, there remained due and owing a net sum to Crofter of €435,844.36. It was agreed in the course of proceedings that there had to be deducted from that, a sum of €39,127.94 in respect of costs allegedly due to Crofter on proceedings 1988 No. 10501 P, as such costs were not taxed until November, 2006.

The balance of €426,716.42 was due and owing and therefore, Genport was in default of its obligation to pay rent in accordance with the terms of the expired lease at the date of commencement of the proceedings.

15. At the date of the hearing, on 16th January, 2007, Crofter claimed that the amount then due in respect of rent and costs by Genport to Crofter was €813,010.39. In the schedule produced supporting that amount, the only dispute related to the insurance payment claimed pursuant to clause 2(x) of the expired lease. It is contended that the amount paid was excessive. I am satisfied on the evidence given by Mr. Tunney and Mr. Woods for the plaintiff and the exchanges which took place in November, 2005, that this contention is not made out. The insurance then obtained, having regard to the fact that the hotel was closed up, and steps taken by Mr. Tunney appear to have been reasonable. I find in accordance with the schedule produced in evidence, that at the date of the hearing, there was outstanding in respect of rent from May, 2004 to November, 2006, and insurance in respect of 2004, 2005 and 2006, a sum of €1,678,325.26. Further, that after set off in respect of orders for costs in prior proceedings, the net sum due to Crofter by Genport was €813,010.39. The next instalment of rent was stated to be due on 1st February, 2007, in the sum of €141,634.06.

#### **Other breaches of terms of the Lease**

16. Crofter makes multiple allegations of breaches of the terms of the Lease in the Covenant proceedings. It is not in dispute that at the date of commencement of the proceedings, Genport was in breach of the covenants at clause 2(b), to pay and discharge all rates and at 2(aa) "not to do or suffer to be done anything whereby the Intoxicating Liquor Licence attaching to the demised premises ... may become forfeited or liable to be taken away ..." The Intoxicating Liquor Licence had lapsed in September, 2004.

17. There is significant dispute about the alleged breaches of clause 2(d) "to maintain and keep the interior of the demised premises ... in good and substantial order and repair" and clause 2(f) "to maintain and keep the roof and exterior of the demised premises including all exterior water and drain pipes and sewers in good and substantial order and repair" and clause 2(j) "not to alter the demised premises or to cut, maim or injure any part thereof or to make or suffer to be made thereto any structural alteration or any addition or any change in the internal layout thereof without prior consent in writing of the lessor (such consent not to be unreasonably withheld) and then only in accordance with plans and specifications previously approved by the lessor in writing".

18. I find on the evidence of Mr. Peter Hanna of the inspection carried out by him in the hotel on 29th June, 2005, that the condition of the Hotel was such that Genport must be considered at that stage to have been in breach of its obligation under clause 2(d) to maintain and keep the interior of the premises in good and substantial order and repair. Genport contends that it was intending at that date to carry out repair work but was prevented from doing so by the injunction obtained by Crofter. Even if certain of the works intended to be carried out at that time came properly within the definition of maintenance and repair work, Mr. Hanna's evidence of the state of the building is such that Genport had for some time been in breach of its obligation to repair.

19. There is significant dispute between the parties on the alleged breach of clause 2(j) of the lease. It is unnecessary for me to consider these in detail having regard to the conclusions which I have reached on s. 28 of the Act of 1990. My conclusions on this allegation may be shortly stated as follows.

20. In June, 2005, Genport closed the Hotel, erected a hoarding and, without notification to Crofter, appeared intent on carrying out significant building works. No plan and specifications had previously been approved by Crofter in writing, as required by clause 2(j) of the Lease. Prima facie, Genport appeared intent on a course of action which would have been in breach of clause 2(j).

21. On 19th July, 2005, Genport purported to serve an improvement notice pursuant to s. 48(1) of the Act of 1980. Crofter, through its solicitors, objected to the entitlement of Genport to serve an improvement notice. For the reasons set out below that objection appears correct.

22. In December, 2005, Genport carried out work on the premises. Having considered carefully the evidence of Mr. Hanna and Mr. Bradley, I am satisfied that certain of the works carried out at that time were within the works described in clause 2(j) of the Lease. No prior approval had been obtained, and hence, Genport were in breach of clause 2(j) in carrying out such works.

23. Accordingly, I have concluded on the facts herein in the Rent and Covenant Proceedings that:

i. Prior to the date of commencement of the Rent proceedings, Genport was in breach of its obligation to pay rent and reimburse insurance paid in accordance with the terms of the lease.

ii. Prior to the commencement of the Covenant proceedings, Genport was in breach of the following terms of the lease:

(1) to pay rates;

(2) not to permit the Intoxicating Liquor Licence to lapse; and

(3) to repair and maintain the premises.

iii. At the date of commencement of the proceedings, whilst Genport appears to have threatened a breach of clause 2(j), it had not carried out such building works. It did carry out certain building works in breach of clause 2(j) subsequent to commencement of the proceedings.

#### **Section 28 of the Act of the Landlord and Tenant (Amendment) Act, 1980**

24. Genport is in occupation of the premises since 18th January, 2002, pursuant to s. 28 of the Act of 1980. This provides:

"28.—Where an application is pending under this Part for a new tenancy or to fix the terms of a new tenancy and the pre-existing tenancy was terminated otherwise than by ejectment or surrender the tenant may, if he so desires, continue in occupation of the tenement from the termination of the tenancy until the application is determined by the Court or, in the event of an appeal, by the final appellate court, and the tenant shall while so continuing be subject to the terms (including the payment of rent) of such tenancy, but without prejudice to such recoupments and readjustments as may be necessary in the event of a new tenancy being granted to commence from such termination."

25. As appears, whilst in such occupation, Genport is subject to the terms (including the payment of rent) of the Lease. On the

findings above, Genport was in breach of the terms of the Lease prior to the commencement of the Rent and Covenant proceedings. The principal legal dispute between the parties is the consequence which flows from such breach. Crofter primarily contends that such breach automatically brings to an end Genport's entitlement to remain in occupation pursuant to s. 28 and as the freehold owner it is entitled to possession. Genport primarily contends that it has an absolute right pursuant to s. 28 to remain in occupation pending the final determination of the application to the Circuit Court (or on appeal to the High Court) and the Court has no jurisdiction in these proceedings to make any order for possession in favour of Crofter, notwithstanding the breaches of the terms of the Lease. Each party in the alternative maintains intermediate positions. In particular, each contends that if the court has a discretion to grant an order for possession, then such discretion should be exercised in accordance with the principles applicable to relief against forfeiture. Crofter contends that the facts are such that the discretion should be exercised in favour of an order for possession. Genport contends to the contrary.

26. Counsel agreed that there is no decision of the Supreme Court or High Court on the consequences for a person in occupation under s.28, of a failure to pay rent or other breach of the terms of the expired lease or tenancy. Section 28 was considered by the Supreme Court in *Kenny Homes & Company Limited v. Leonard & Anor.* (Unreported, the Supreme Court, 10th June 1998, Lynch J. [nem diss]). That was an appeal from the High Court, in which Costello P. had granted an injunction restraining the defendant/appellant from trespassing on the plaintiff's/respondent's lands in Cork. The defendant had been carrying on a petrol filling station and car park business in the premises. It had served a notice of intention to claim a new tenancy and issued and served an application to Cork Circuit Court for a new tenancy or, in the alternative, compensation.

27. In the High Court, a preliminary issue arose as to the jurisdiction of the High Court to hear the case before the Circuit Court had determined the defendant's claim for a new tenancy under the 1980 Act. Costello P. had dealt with the preliminary issue in his judgment as follows:-

"It was submitted that the Court had no jurisdiction to grant an injunction because of the proceedings pending in the Cork Circuit Court under the 1980 Act. It was urged that

- (a) exclusive jurisdiction was given to the Circuit Court under the 1980 Act to determine Lecorn's right to a new tenancy,
- (b) that this Court had no jurisdiction to determine the issues arising on that application,
- (c) that by virtue of Section 28 of the 1980 Act Lecorn were entitled to retain possession of the premises pending their application for a new tenancy,
- (d) that accordingly the injunction claimed could not be granted.

I disagreed with these submissions. I concluded that

- (a) the Circuit Court had exclusive jurisdiction under the 1980 Act to hear and determine claims for a new tenancy,
- (b) that the present proceedings were for injunctive relief based on a claim that the Defendants were trespassers,
- (c) that the 1980 Act did not deprive the Court of jurisdiction to hear such a claim,
- (d) that ordinarily, where a right to a new tenancy under the 1980 Act was contested on the ground that a "tenancy" did not exist or that the premises were not a "tenement" these issues should be determined in the Circuit Court and this Court should stay proceedings in which these issues were raised,
- (e) That because of the particular urgency in this case the Court should not decline jurisdiction,
- (f) That should the Court decide that (i) the agreement of the 1st October 1994 constituted a "tenancy" and (ii) the site constituted a "tenement" within the meaning of the Act then Section 28 of the Act applied and Lecorn would be entitled to retain possession pending the determination in the Circuit Court of the application for a new tenancy, and I would accordingly dismiss these proceedings.

I therefore decided to hear oral evidence and determine these two issues. Should I decide them in Lecorn's favour, the Circuit Court would then be required to determine whether or not a new tenancy should be granted in the light of the plaintiff's intended use of the site and for the issue of compensation."

28. In the Supreme Court, Lynch J. expressed agreement with the above conclusions.

29. Counsel for Crofter rely upon the above as determining that the High Court has jurisdiction in an appropriate case to consider and determine a claim for an injunction, or it is contended, a claim for possession notwithstanding pending proceedings before the Circuit Court in relation to the claim for a new tenancy.

30. The facts and issues in *Kenny Homes Limited* were quite different to the present case. In that case the plaintiff in the High Court was contesting the claim for a new tenancy in the Circuit Court on the basis that a tenancy did not exist and that the premises were not a tenement. No similar objection is made by Crofter herein. Crofter is disputing Genport's entitlement to a new tenancy in the Circuit Court but that is quite different to the objection made in *Kenny Homes*. It is undisputed that Genport was entitled to serve a notice of intention to claim a new tenancy under s. 20 and to apply to the Circuit Court under s. 21 of the Act of 1980.

31. Costello P. indicated in his above conclusions that should he decide that there existed a tenancy and tenement then s. 28 applied and "Lecorn would be entitled to retain possession pending the determination in the Circuit Court of the application for a new tenancy, and I would accordingly dismiss these proceedings". However, such a statement must be considered in a context where there was no allegation as in this case, that the defendant was in breach of the terms of the expired tenancy.

32. A similar approach was taken by O'Byrne J. (whose decision was affirmed by the Supreme Court) in *Walpole (Ireland) Limited v. Dickson* [1935] 69 ILTR 232, to s. 38 of the Landlord and Tenant Act, 1931, which in its essential terms was the same as s. 28. In

that case, a landlord sought ejectment of a tenant from a premises in Suffolk Street, Dublin. A tenant had served a notice of intention to claim relief under the Act and Deed application? to the Circuit Court. Counsel for the tenant had submitted that pending the hearing of the Circuit Court action, the High Court proceedings should be adjourned. O'Byrne J. at p. 233 stated in relation to such submission:-

"I would certainly take that course of action if I thought there was any substantial ground on which such application might be granted, but in my opinion, having regard to the facts of the case, and to the documents, and to the provisions of the Act of 1931, such an application could not possibly succeed. Mr. Campbell relied on Section 38 of the Act, which provides that where an application under the Act is made to the Court for a new tenancy, the tenant may, if he so desires, continue in occupation of the tenement to which such application relates from the expiration of such tenancy until such application is heard by the Court, or in the event of an appeal, by the final Appellate Court. The difficulty which arises on the threshold of this case, from the point of view of Mr. Campbell's client, is that the premises with which we are concerned do not seem to me to come within the definition of a tenement in Section 2 of the Act."

33. On the facts of that case, O'Byrne J. held that the tenancy at issue was excluded from the terms of the 1931 Act and accordingly refused to allow the action for ejectment stand over pending the decision of the Circuit Court and gave judgment for possession of the premises.

34. Each of the above cases indicate that the relevant High Court judge (who were affirmed by the Supreme Court) appears to have taken the view that he would not have proceeded with the action for possession if there was a claim for a new tenancy before the Circuit Court which prima facie came within the terms of the relevant Landlord and Tenant Act. I do not consider that those judgments alone support a contention that this court should not now entertain a claim for possession which is based upon a distinct and different allegation, namely that Genport is in breach of a term of the Lease.

35. Section 28 was also considered in some detail by McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1. In that case the defendant's tenancy had expired by efflux of time. The plaintiff issued ejectment proceedings in the Circuit Court. The defendant claimed a new tenancy in his defence and counterclaimed. The Circuit Court, and High Court on appeal, granted possession to the plaintiff and dismissed the defendant's counterclaim for a new tenancy.

36. The plaintiff then separately issued summary proceedings in the High Court claiming mesne rates at market value, together with interest in respect of the period from the expiration of the lease to the final determination of the ejectment proceedings on appeal in the High Court. That claim was resisted having regard to the terms of s. 28 of the Act of 1990. It was submitted that where a tenant was in occupation under s. 28 and a new lease was not granted, that the landlord was only entitled to rent at the rate set under the expired lease.

37. McKechnie J. at p. 10 having set out s. 28 of the Act of 1980 then stated:-

"As appears from its wording, this section applied only as and from the date of the tenant's application to the court and not from any earlier date... In such circumstances, the tenant may, if he so decides, continue in occupation until the application is finally determined. But whilst so continuing, he is subject to the terms of the expired lease, including the obligation to pay the rent reserved thereunder."

38. McKechnie J. at p. 12 considered the nature right conferred by s. 28 of the Act of 1980 and a similar right in s. 12 of the Landlord and Tenant (Amendment) Act 1978 as amended:

"In my opinion, the right conferred by these sections does not create or establish any new statutory tenancy. It most certainly does not create any new contractual tenancy as where, for example, a tenant remains in possession after the expiry of his term and rent is paid and accepted, then without more the parties by operation of law are presumed to have agreed to a yearly tenancy on the same terms and conditions as are applicable: see *Phoenix Picture Palace Ltd. v. Capital & Allied Theatres Ltd.* [1951] Ir. Jur. Rep. 55. The right is simply one to continue in occupation and no more. Such continuation is of course on the terms as decreed by the various sections but though such terms and conditions may differ, this does not change the nature of the right so conferred. Such a right is, I think, personal, that is personal to the pre-existing tenant and, quite unlike a contractual tenancy, does not create any estate or interest capable of being transferred or transmitted either *inter vivos* or on death. It is also quite unlike any traditional statutory tenancies which existed previously, such as those under s. 32 of the Rent Restrictions Act 1960, as amended ... As I have said, in my view the right in this and similar situations is a bare one, and, by itself, does not confer on the tenant any estate or interest in the land."

39. The parties did not dispute the analysis of McKechnie J. as to the nature of the right of occupation conferred on Genport by s. 28 of the Act of 1980 and I respectfully also agree with that analysis. I would also draw attention to the temporary nature of the right. It is a personal right to continue in occupation whilst an application for a new tenancy is pending in the Circuit Court or on appeal and no more. It does not confer on Genport any estate or interest or other proprietary right in the land. The proprietary rights of Genport appear to be rights in the nature of a chose in action arising under ss. 20 and 21 of the Act of 1980 by reason of the service of the notice of intention to claim relief and commencement of proceedings claiming a new tenancy and the statutory provisions in accordance with which that claim will be determined.

40. The first submission which must be considered is the claim of Crofter that the breaches of the terms of the Lease by Genport automatically bring to an end its right to continue in occupation pursuant to s. 28 of the Act of 1980.

41. Section 28 must be construed in accordance with the well known principles of statutory construction. In *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 at p. 151, Blayney J. quoted with approval Lord Blackburn in *Direct United States Cable Company v. Anglo American Telegraph Company* (1877) 2 A.C. 394 who stated that:-

"The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver."

42. Section 28 gives to a tenant an express right to continue in occupation "until the application is determined by the court...". It then provides "...the tenant shall while so continuing be subject to the terms (including the payment of rent) of such tenancy". It fails to set out any consequence for a breach of the terms of the tenancy by the tenant.

43. The words used by the Oireachtas in relation to the period during which the tenant may continue in occupation under s. 28 are clear and unambiguous. It does not appear to me that the section can be construed as automatically bringing to an end a tenant's right to continue in occupation in the event that a tenant is found to be in breach of the terms of the tenancy. The words used in s. 28 simply do not permit of such a construction. Further there is no other provision in Part II of the Act of 1980 which supports such a construction.

44. Counsel for Genport submits, on the contrary, that s. 28 gives an express right to remain in occupation until the claim for a new tenancy is determined by the Circuit Court, or on appeal, the High Court, which right cannot be terminated even if Genport is in breach of the terms of the relevant tenancy i.e. the Lease. I have concluded that to so construe s. 28, having regard to the right of re-entry in clause 4 of the Lease, would lead to an absurd result and one which cannot have been contemplated by the Oireachtas. Clause 4 of the Lease provides:

"PROVIDED ALWAYS and it is hereby agreed that if the rent hereby reserved or any part thereof shall at any time be in arrear and unpaid for twenty-one days after it becoming due (whether legally demanded or not)...if any covenant condition or agreement on the part of the Lessee herein contained shall not be preformed or observed then and in any such case it shall be lawful for the Lessor or any person or persons duly authorised in that behalf into or upon the demised premises or any part thereof in the name of the whole re-enter and the demised premises to hold and enjoy thenceforth as if these presents had not been made but without prejudice to any right of action or remedy of the Lessor in respect of any antecedent breach by the Lessee of any of the stipulations herein contained."

45. This clause gives to Crofter a right of re-entry and then provides upon re-entry that the Lease is forfeited. This is sometimes referred to as forfeiture by re-entry. The purpose of such a clause is to secure compliance with the terms of the Lease and ultimately the sanction of re-entry and forfeiture if this cannot be achieved.

46. The present occupation of Genport under s. 28 is not based upon any present interest in the premises. It is a simple right of occupation conferred by statute. Nevertheless, if the court were now to construe s. 28 as contended for by Genport, it would mean that Genport would not be subject to the re-entry in clause 4 of the Lease in relation to its failure to pay rent or other breaches of terms of the Lease. This would appear contrary to the intention of the section in so far as it makes the tenant, whilst in occupation under s. 28, subject to the terms of the tenancy. Not all terms of the Lease will be relevant to occupation under s.28 by reason of the absence of any proprietary interest in the property. By so providing, the Oireachtas must have intended that the tenant would remain subject to such terms including payment of rents as are appropriate and relevant to the bare right of occupation conferred by s. 28. The right of re-entry under clause 4 still appears relevant. However, the consequential forfeiture is no longer relevant by reason of the absence of any present proprietary interest in the property as distinct from the right to claim a new tenancy under s. 21 of the Act of 1980.

47. Further, if the section was to be construed as contended for by counsel for Genport, it would mean that a tenant could deliberately decide not to make any payment of rent whilst in occupation under s. 28 and in the event that a new tenancy is not granted the landlord would have no right of redress other than a potential judgment against the tenant. This is particularly relevant to the facts of these cases. The evidence is that the only asset of Genport is the right to claim a new tenancy and it is otherwise an insolvent company. Hence such a judgment would be of no value to Crofter. In the meantime if Genport's contentions were correct it would be entitled to remain in occupation effectively without payment of rent until the final determination of its claim for a new tenancy on appeal.

48. Accordingly, I have concluded that whilst s. 28 of the Act of 1980 *prima facie* gives a tenant a right to remain in occupation pending the determination of the application to the Circuit Court (including on appeal), it also makes a tenant subject to the terms of the tenancy, that where the relevant tenancy includes a right of re-entry, the right to remain in occupation may be terminated by the court. The court must retain a discretion to determine whether or not to so terminate. The right of re-entry under the Lease is subject to the discretion of the court to grant relief against forfeiture. This construction of s.28 confirms the view already formed that it cannot be construed as automatically bringing to an end a tenant's right of occupation by reason of a breach of the terms of the tenancy.

49. The next question is what circumstances would warrant the court exercising its discretion to terminate a tenant's right to remain in occupation under s. 28. This must be determined in the context of the scheme in Part II of the Act of 1980. There is no provision in Part II of the Act of 1980 which expressly envisages that a tenant who has an application for a new tenancy pending before the Circuit Court, might at the time of such determination not be in occupation of the tenement. On the contrary, the statutory scheme appears premised on an assumption that a tenant remains in occupation after the termination of the old tenancy, and where a new tenancy is granted, there is a seamless transfer from holding under the old tenancy to holding under the new tenancy in such a way as to avoid disruption to a tenant while ensuring the rights of the landlord are respected. The new tenancy commences on the termination of the old tenancy (s. 16) and is a graft on the previous tenancy (s. 27). The court may under s. 23(7) require a tenant to expend a specified sum in the execution of specified repairs and postpone the grant of the new tenancy until that requirement has been complied with.

50. Accordingly, it appears to me that in the context of the above statutory scheme a right of occupation under s.28 should only be terminated in exceptional circumstances where there appears a risk of a serious injustice to the landlord if the tenant is permitted to remain in occupation whilst continuing to act in breach of the terms of the tenancy. This approach is also confirmed by the temporary nature of the bare right of occupation conferred by s. 28.

51. Counsel for both parties referred to the potential relevance of the principles according to which a court will grant relief against forfeiture where a landlord seeks to re-enter and forfeit a lease. Whilst these are relevant, they must be treated with caution having regard to the very different position of a landlord who is seeking to forfeit a lease under which a tenant is in occupation, and a landlord who is seeking to bring to an end a tenant's right of occupation under s. 28 of the Act of 1980. In the former situation, if a landlord is permitted to re-enter and forfeit the lease, the tenant will suffer a permanent loss of the leasehold interest in the premises. In the latter situation this does not appear so. As already stated, the right under s. 28 of the Act of 1980 is a temporary bare right of occupation. Such property right as Genport now possesses in the premises, is the right to apply for a new tenancy in accordance with the scheme of Part II of the Act of 1980. The determination of that application is subject to the exclusive jurisdiction of the Circuit Court. Any order which the High Court now makes on this application in relation to its occupation under s. 28, should not and cannot interfere with that jurisdiction.

52. Crofter in submission sought to rely upon what it alleged was a failure by Genport to pursue with appropriate expedition the application in the Circuit Court. That does not appear to be a matter which the High Court should take into account for the following reason. Crofter is a party to the Circuit Court proceedings. It could have applied to the Circuit Court at any stage to have the

application struck out by reason of an alleged failure of Genport to prosecute the proceedings. It did apply in 2003, to dismiss the application for failure by Genport at that time to reply to particulars. However, such order was subsequently vacated on the delivery of the particulars. The scheme of Part II of the Act of 1980 gives to a landlord a certain control over the continuing occupation by the tenant pursuant to s. 28 through its rights as a party in the proceedings before the Circuit Court. If a tenant fails to prosecute those proceedings the landlord can apply to have the proceedings struck out, and if granted and not appealed, the right of occupation under s. 28 is automatically at an end.

53. Even if contrary to the above, it appeared appropriate to take into account the steps taken by the respective parties in the Circuit Court in determining whether the Court should now bring to an end Genport's right of occupation under s. 28, it does not appear to me on the facts of the chronology in the Circuit Court which was put in evidence by agreement, that the behaviour of the parties is such that it favours Crofter's application herein. My reason for that conclusion is that it appears from such chronology that at approximately the same time as the High Court proceedings were issued, Genport served on the 14th July, 2005, a fourteen day warning letter of intention to issue a notice of trial as required by the Circuit Court. The proceedings appear to have been ready for trial at that time. No significant steps were taken on behalf of Crofter to ensure that the matter came on for trial. If this had been done, as a matter of probability, Genport's current temporary right of occupation under s. 28 would have ended and either Crofter would have rights under a new lease for any breaches thereof by Genport, or in the alternative, if Genport were unsuccessful in its claim for a new tenancy, Crofter should have obtained possession of the premises.

54. Genport submitted that the Court, in considering the present application should take into account what it contends was the wrongful behaviour by or on behalf of Crofter as found in earlier proceedings and, in particular, those relating to telephone calls made on behalf of Crofter in relation to Genport and Mr. Philip Smyth who was then a director of Genport. It does not appear to me that these are matters which should now be taken into account by the Court. Those matters were fully litigated and finally determined. Genport has been awarded damages and such damages have been paid (whether by way of set off against rent or otherwise).

55. Accordingly, I propose disregarding each of the above matters for the purpose of determining whether I should now terminate Genport's occupation under s. 28 and grant possession to Crofter. In accordance with the approach set out above it is necessary to identify those breaches of the terms of the expired lease as found, which if permitted to continue while Genport remained in occupation under s. 28 could result in a serious injustice to Crofter. Such breaches appear to be the failure to pay rent, to reimburse insurance paid and the failure to pay rates. My reason for so concluding is that if the Circuit Court proceedings end in a determination that Genport is not entitled to a new tenancy, then as already stated Crofter will only have a valueless potential claim for the sums due against Genport which is an insolvent company. It would be a gross injustice to Crofter if Genport were entitled to remain in possession with Crofter bearing such a risk.

56. In respect of the remaining breaches of the terms of the lease identified, it does not appear to me that any such potential risk of serious injustice exists. The intoxicating liquor licence has already lapsed. No case is made that there would be any particular prejudice by Genport remaining in occupation for a further period without an intoxicating liquor licence. In respect of the failure to repair, if the Circuit Court grants a new tenancy then under s. 23(7) it may require Genport to expend a specified sum in the execution of specified repairs and postpone the grant of the new tenancy until that requirement has been complied with. No case was made that the continuing failure to repair was such that there was any current continuing serious deterioration to the condition of the property. If the Circuit Court determines not to grant a new tenancy then Crofter will recover the property in its current condition. In the absence of evidence that there is serious continuing deterioration, it does not appear to me that the past failure to carry out repair would warrant bringing Genport's current temporary occupation to an end. Further, there was evidence that there was an agreement that necessary roof repairs would be carried out subject to the terms in a letter of 4th December 2006 from Lavelle Coleman to Peter Duff & Co with the consent of Crofter. In reaching this conclusion, I am also influenced by the fact that Crofter sought and obtained in July, 2005, an undertaking from Genport (as recorded in an order of the 11th July, 2005 in the injunction proceedings) "to refrain pending the trial of this action from carrying out any building works on the building known as Sachs Hotel situated at nos. 19 – 29 Morehampton Road in the city of Dublin, without the prior consent of the plaintiff or further order of the court".

57. Further, it appears from the evidence given, that the works now required to be carried out on the premises to enable it to reopen as a hotel go beyond what is properly repair and maintenance in accordance with the terms of the lease. Such works would constitute building works within the meaning of clause 2(j) of the lease and require the consent of Crofter. Further, such works would as a matter of probability constitute improvements within the meaning of Part IV of the Act of 1980. An issue arose in these proceedings as to whether Genport at present is entitled to serve an improvement notice pursuant to s. 48 of the Act of 1980. I have formed the view that Genport, whilst in occupation under s. 28 of the Act of 1980, is not entitled to serve an improvement notice within the meaning of s. 48(1). That section provides:

48 - (1) "Where a tenant proposes to make an improvement to his tenement, he may serve on his landlord a notice in the prescribed form (in this Act referred to as an improvement notice) together with—"

58. A "tenement" is defined in s. 5 for the purposes of the Act. The premises to be a tenement must comply with the conditions set out in s. 5(1)(a) (or be a premises to which s. 14 or 15 applies, which is not relevant). Section 5(1)(a)(iii) requires that the premises:

"... are held by the occupier thereof under a lease or other contract of tenancy express or implied or arising by statute;"

59. It is undisputed that Sachs Hotel was a tenement within the meaning of s.5 until the date of expiry of the lease. However, the premises are no longer held by Genport as an occupier "under a lease or other contract of tenancy expressed or implied or arising by statute". The premises are only occupied pursuant to s. 28, which does not give rise to any such express or implied contract of tenancy. Hence since the date of application to the Circuit Court on the 18th January, 2002, the premises have not been a tenement within the meaning of s. 48(1) and Genport is not entitled to serve an improvement notice pursuant to such section.

60. The final issue is whether the court should now exercise its discretion to bring to an end the occupation of Genport, by reason of the failure to pay rents, insurance and rates on the property, or as urged by Counsel for Genport, in reliance in particular on the principles in relation to relief against forfeiture for non payment of rent, that the Court should accept the undertakings offered by Mr. Philip Smyth to the Court in the course of evidence in relation to the payment of rent, insurance and rates, and not make an order for possession provided the outstanding amounts and ongoing payments are now made.

61. Mr. Smyth was for many years the person in effective control of Genport. In 1999, he appears to have sold the entire share capital to Mr. McNulty and Mr. Leneghan. He does not appear to have had any formal connection with the company (other than in relation to ongoing litigation) in the subsequent period to which these proceedings relate. His evidence is that he reacquired the entire share capital of Genport in October, 2006. This transaction may not be complete but nothing turns on this. Mr. Smyth gave

evidence that he is in a position from his own assets to make the outstanding payments and provide for the ongoing rent, insurance and rates. Ultimately in his evidence he made clear that if, as he put it, the court granted "relief against forfeiture" in these proceedings, that he would pay the rent (and insurance and rates) and take his chance that Genport would be granted a new tenancy by the Circuit Court.

62. I have concluded that if Crofter now receives the full amount outstanding for rent and insurance and continues to be paid rent and recouped insurance is paid on an ongoing basis and the rates on the property are discharged, then Crofter will not suffer the type of injustice which would warrant now bringing to an end the right of Genport to continue in occupation under s. 28 of the Act of 1980. Counsel for Crofter has legitimately in my view criticised the uncertainty surrounding the undertakings offered by Mr. Smyth to the Court and the lateness of the time in the proceedings in which they were offered. He has also drawn attention to the earlier relief against forfeiture granted by McCracken J, also in relation to non payment of rent. Whilst I have formed the view that Genport should be permitted to remain in occupation under s. 28 provided the relevant payments are made, it appears to me that the form of order I now make should be such that if there is any default, Crofter should not have to engage in any further litigation to terminate such occupation. The form of order which I now propose making is to achieve a situation whereby Genport's continued occupation pursuant to s. 28, is only on terms that it complies precisely with its obligations in relation to the payment of rent, insurance and rates as follows.

63. There will be an order restraining Genport from continuing in occupation under s. 28 of the Landlord and Tenant Act, 1980, of the premises known as Sachs Hotel, with a stay on such order provided there is compliance with each of the following conditions:-

1. The payment to Crofter of all sums now due in respect of rent and insurance (which I estimate to be €954,644.45) within fourteen days of the date of this judgment.
2. Production by Genport to Crofter of proof of discharge of all rates now due on the premises within 28 days of the date of this judgment.
3. Payment to Crofter of the rent at €141,634.06 per quarter on or before each due date in accordance with the terms of the Lease.
4. Production by Genport to Crofter of proof of discharge of the rates due on the premises on or before each due date.
5. Payment to Crofter of the amount due in respect insurance paid under the Lease within fourteen days of the date of demand.

64. In the event of a failure by Genport to comply with any one of the above conditions on the specified date, the stay to be automatically at an end. Proof of failure to comply with a condition to be made by the filing of an affidavit from the plaintiff's solicitor deposing to the facts constituting such failure.

65. The intention is that such order would be made in one proceeding only, and by its terms remain operative only for so long as Genport purports to remain in occupation under s.28 of the Act of 1980. It is confined to occupation under that section. The final decision in the Landlord and Tenant proceedings will determine any subsequent occupation and relationship between the parties.

66. I will hear counsel on the precise form of order to give effect to the intention to the above proposed order and in relation to the amounts now due or the mechanism and timing for the discharge of the rates and the proof thereof.