Neutral Citation: [2013] IEHC 389

THE HIGH COURT

COMMERCIAL

[2013 No. 6119 P]

BETWEEN

ESSO IRELAND LIMITED AND IRELAND ROC LIMITED

PLAINTIFFS

AND

911 RETAIL LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Kelly delivered on the 4th day of July, 2013

Introduction
1. This is an application for a series of interlocutory injunctions arising from the defendant's refusal to vacate 32 ESSO filing stations owned by the first plaintiff and operated by the second. The defendant in turn operates food service facilities from those premises and has been doing so for the last eleven years.

2. In respect of all but one of the 32 premises, the defendant has been working on foot of an operating agreement and 31 separate licence agreements entered into between the second plaintiff and the defendant. In respect of the 32nd premises known as the "*Belmont premises*", the defendant operates under a concession agreement entered into in 2001, the operation of which is, in effect, similar to the operating and licence agreements in the other 31 premises.

Principles Applicable
3. There is no dispute between the parties as to the principles which have to be applied on an application for an interlocutory injunction. First, it is necessary that the plaintiffs demonstrate a serious issue for trial. In the present case it is conceded that that threshold of proof has been achieved. Indeed it is conceded that the plaintiff has demonstrated not merely a serious issue for trial but has shown a strong case. Even if one were to consider the form of injunctive relief sought as being mandatory in nature it is conceded that the arguably higher threshold of proof which has to be achieved in such as case has been met.

4. Second, the plaintiff has to demonstrate that damages are an inadequate remedy. The plaintiff concedes that in the circumstances of this case it is unable to discharge that onus of proof.

5. The third matter which has to be demonstrated is that the balance of convenience lies in favour of the grant rather than the refusal of the injunction. Again, the plaintiff concedes that at this interlocutory stage it is unable to discharge that onus of proof having regard to the particular circumstances which obtain.

6. In due course I will touch upon why those concessions were made. In my view it was sensible to make those concessions having regard to the facts.

7. Given that the plaintiffs accept that they cannot discharge two of the three proofs normally required for an application of this sort one might ask on what basis is interlocutory relief sought?

8. The argument made by the plaintiffs is that the agreements governing their relationship with the defendant have all expired by efflux of time as of 20th June, 2013. Therefore, the defendant is a trespasser with no right or entitlement to remain on the premises in question.

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.

12. In the present case the plaintiffs contend that the line of argument identified by the defendant is utterly devoid of merit and that it is an unarguable proposition that the defendant has no entitlement to continue to operate at any of the premises subsequent to the date of expiry of the agreements namely 20th June, 2013.

The Agreements
13. The operating agreement governing the relationship between parties to this litigation became effective on 21st June, 2002. When it was entered into the plaintiffs and defendant both had the benefit of independent legal advice. The purpose of this agreement was

to set out how the parties to it should establish and operate food service facilities at agreed ESSO premises in Ireland (see Clause 2.7).

14. Under the operating agreement it is provided that the defendant shall be permitted to operate the food service facilities from the premises owned and operated by the plaintiffs. The consideration for this is the payment by the defendant of operating fees as provided for under clause 5 of the agreement. ESSO agreed to pay for the erection and equipping of the food services facilities (see Clause 2.4). Under Clause 3.8, the defendant warranted that there was, in existence, as of the date of the agreement a supply agreement between it and a company called 911 Manufacturing Limited. The defendant was obliged to use its best endeavours to ensure that that supply agreement or some other supply agreement was kept in force during the currency of the agreement to ensure a continued and uninterrupted supply to the food service facilities. The defendant agreed to assign the benefit of such supply agreement to the assignee of the defendant's interest under the agreement.

15. Clause 4 of the agreement deals with the term of the operating agreement. It reads as follows:-

> *"4.1 Term*
>
> > *The term of this agreement shall be ten years from the date hereof. Any licence granted in pursuance of Clause 3A(1) shall be for a term ending on the last day of the term of this agreement. Each party shall notify the other before the end of the ninth year of this agreement of its intention to negotiate a new agreement or not as the case may be. In the event of the parties entering into negotiations in relation to a new agreement both parties shall negotiate in good faith with a view to entering into a new contract.*
> >
> > *If on the expiration of this agreement ESSO/Artane withdraw from the sale of permitted categories in ESSO premises ESSO/Artane shall indemnify the operator against the cost of statutory redundancy payments, if applicable, up to a maximum of €100,000."*

Artane was the predecessor of the second plaintiff.

16. It is crystal clear that the term provided for under this agreement was due to expire on 21st June, 2012.

17. On 4th May, 2012, the plaintiffs and defendant entered into a supplemental agreement by which it was agreed that the term of the original agreement would be extended by a further twelve months. That is specifically provided for in the supplemental agreement at Clause 2.1 thereof where it simply states:-

> *"For the purposes of Clause 4.1 of the operating agreement the term is hereby extended for a period of twelve months from 21st June, 2012."*

18. The supplemental agreement does not bring about any change or alterations to the terms of the original operating agreement.

19. In a moment I will consider the circumstances in which this extension to the original operating agreement came about.

20. The operating agreement is a lengthy document containing five schedules. The first schedule is the form of licence which obtains in respect of 31 of the premises in suit. Under the terms of the licence it was agreed that it would commence on a specified date and continue for a period of time to coincide with the term of the operating agreement (see Clause 2A). The licence also provided that it was subject to the terms of the operating agreement and without prejudice to that might be terminated during its currency for any of the reasons set out in Clause 8 of the operating agreement "*and in any event this licence will automatically terminate in the event of termination of the operating agreement*" (Clause 4). The plaintiff contends that it follows that the 31 licences also terminated at midnight on 20th June, 2013.

21. The 32nd premises i.e. Belmont, is subject to a concession agreement which permitted the defendant to operate for a three year period commencing on 23rd April, 2001 and was thereafter terminable by either party on not less than one calendar month's written notice expiring on any day. By letter of 14th May, 2013, the defendant was notified that the plaintiffs were exercising their right to terminate that concession agreement from midnight on 20th June, 2013.

22. Returning to the operating agreement there are a number of specific provisions which are pertinent for the purposes of this application.

23. The plaintiffs are obliged to repair and maintain the premises and to use their best endeavours in conjunction with the defendant in developing markets and sites. The defendant is obliged to source and pay for the materials and equipment and to construct and equip the food service facility. The defendant is given the right to control specifications and quality of products, fit out, décor, image, packaging and the like. It must obtain all necessary licences and authorisations or permits that are required to operate the food service facility. It is solely and exclusively responsible for the hiring, terms and conditions of employment and dismissal, if any, of all personnel assigned to the operation of the food service facilities as well as the payment of salaries and social charges. It is common case that 150 persons are employed by the defendant in these food service outlets.

24. Clause 6 of the operating agreement provides that the defendant is to use the food service facilities solely for the purpose of preparing and selling the permitted material under the "*911*" brand to the public and may not use the food service facility for any other purpose without the second plaintiff's consent. Both the second plaintiff and the defendant are independent businesses selling their goods from the premises. The defendant is obliged to keep the facility open for business as agreed with a management committee which is provided for under the operating agreement.

25. Insofar as alterations to premises are concerned the second plaintiff is entitled to carry out such alterations but not to do so in a way that materially interferes with the defendant's operations or obstructs the defendant's sign on the premises. If the second plaintiff wishes to make permanent or long term changes in the operation use or appearance of the food service facility it must give 120 days advance written notice to the defendant of such (para. 6.6).

26. If the defendant wishes to sell, transfer, assign or otherwise part with its interest under the agreement or any part of it, it must immediately give notice of that desire to the first plaintiff.

27. Although the operating agreement is made between limited liability companies, mention is made through it of a "*principal*". The principal is defined as Charmaine Keenan who is in fact the owner and managing director of the defendant. She is a woman of

considerable experience in the food trade. The agreement contains specific provisions which deal with her death or incapacity.

28. The operating agreement contains termination provisions. It may be terminated by reason of certain defaults which are identified in the agreement. They are not of any relevance of the purpose of this decision.

29. It is also possible to terminate the operating agreement for no cause. That is specifically provided for at para. 9.3. That clause provides that either party to the agreement shall be entitled to terminate it without cause by giving the other twelve months notice. In such a case, if the party terminating is either of the plaintiffs, the defendant is to be entitled to damages equal to the greater of €1m or of the operating fees paid for all food service facilities during the previous twelve month period immediately preceding the giving of the termination notice.

30. As one might expect, the agreement also provides for insurance cover, indemnities, business practices, trademark protection, confidentiality, audits, force majeure, dispute resolution, *etc*.

31. Clause 16.2 is of some importance in that it provides:-

> *"No representations or statements other than those expressly set forth in this agreement have been relied upon by the parties in entering into this agreement. No modification or amendment of the terms of this agreement shall be effective unless reduced to writing and signed by authorised representatives of each party."*

32. Clause 16.3 provides:-

> *"This agreement, including the schedules appended to it, contains the entire agreement and understanding between the parties with respect to the subject matter."*

The Licence
33. The licences are in the form of schedule A to the operating agreement. Under the licence, the second plaintiff agrees to permit the licensee i.e. the defendant, to use the premises described in it together with the use of staff facilities to be provided by the plaintiffs and access to the food service facility 24 hours a day. The licence is described as being personal to the licensee i.e. the defendant. It is not assignable.

34. It specifically provides that nothing in it is "*intended to have the effect of giving exclusive possession of the food service facilities to the licensee or of creating any tenancy between*" the second plaintiff and the defendant. It specifically provides that the second plaintiff continues to have a right of possession. It then goes on:-

> *"Although (the second plaintiff's) entitlement to possession is a general entitlement it would be its intention to exercise this right, save in exceptional circumstances, for the following stated purposes only."*

Those circumstances are defined as the inspection of the food service facility, the erection and display of signs or the carrying out of repairs.

35. Of considerable importance is the provision contained at Clause 4(c) of the licence. It provides:-

> *"This agreement is not intended to create the relationship of landlord and tenant and the licensee acknowledges that the premises remain vested in the possession of (the second plaintiff)."*

36. Clause 7 of the licence provides that it is subject to the terms of the operating agreement and without prejudice to that may be terminated during its currency for any of the reasons set out in Clause 8 of the operating agreement and (as I have already pointed out) in any event the licence will "*automatically terminate in the event of termination of the operating agreement*".

Dealings
37. Prior to the expiry of the original term of the operating agreement, the parties entered into negotiations in an effort to reach a new agreement for the future. It must have been clear that it would not be possible to complete those negotiations prior to the expiry of the original term of ten years hence the supplemental agreement of 4th May, 2012, was entered into. It continued the term of the operating agreement and therefore of the licences until 20th June, 2013.

38. It is common case that the negotiations continued but ultimately proved to be unsuccessful. That became apparent as of October 2012 and in particular at a meeting which took place on 25th of that month. At that meeting a letter was given to Ms. Keenan by hand. Ms. Keenan contends that the negotiations were not conducted in a bona fide fashion by the plaintiffs.

39. The letter which is on the headed paper of the first plaintiff reads as follows:-

> *"Dear Charmaine,*
>
> *When we open negotiations with a view to entering into a new contract (against the backdrop of the expiry of the current agreement in June 2013) we agreed that any new contract consequent on successful negotiations should be signed by 4 October and that the negotiation should be conducted in that timescale. From the outset we have been very clear that this timing is critically important and have reiterated this repeatedly. Following negotiations between July – December, we agreed, despite our reservations and the very slow progress we had made, to extend the negotiations by a further two – three weeks.*
>
> *We are disappointed that despite the additional time allowed we have been unable to reach agreement on critical items. There is still fundamental disagreement between us on key matters, as your email of 16 October clearly demonstrates. We regret that we must now end our negotiations with 911 and will open negotiations with other parties.*
>
> *Any negotiations with third parties which we may enter into shall not affect our ongoing contractual relationship with you, which continues in accordance with the terms of the operating agreement dated 21 June 2002 and the supplemental agreement dated 4 May 2012.*
>
> *Yours sincerely*

Gordon Lawlor"

40. That letter makes the plaintiffs' position quite clear.

41. Notwithstanding that there was subsequent correspondence and communications between the parties. Included amongst that correspondence was an email which was sent by Ms. Keenan to the plaintiff and which ultimately was purportedly exhibited as Exhibit GL13 to the grounding affidavit. What was exhibited was not in fact a true copy of the original email but one upon which Mr. Lawlor had interposed his own comments. That was put before the court as an exhibit as representing what was actually said by Ms. Keenan. It clearly did not and she quite rightly took issue with that fact in her replying affidavit. That in turn led to Mr. Lawlor explaining the position and apologising. This ought not to have happened but I do not believe that it was a deliberate attempt to mislead me and in any event it did not do so. I do not accept the argument which has been made that this failure of itself and/or coupled with a number of other criticisms which were made of the way in which the case was presented on affidavit and in exhibits amounted to conduct so odious as to bar in limine the plaintiffs seeking relief. Some of the other criticisms which I do not propose to deal with in detail bordered on the fanciful.

Defences
42. The defendant accepts that it must demonstrate the existence of a serious issue for trial on the question of its being entitled to remain in possession of these premises notwithstanding that the operating agreement and licences, on their face, have come to an end by efflux of time.

43. The first line of argument is that notwithstanding the clear terms of the operating agreement and the licence, the "*complete agreement*" clause and the fact that the agreements were entered into with legal advice on both sides nonetheless the court ought to imply a term into them over and above what is there in order to give them business efficacy.

44. In short, it is said that the operating agreements demonstrate an intention to negotiate in good faith. That negotiation was carried on albeit that the defendant animadverts on the plaintiffs *bona fides* in that regard. It gave rise to an extension of the operating agreement for one year. When negotiations broke off as of October 2012, it is said that there must be implied into the agreement, an obligation on the part of the plaintiffs to at that stage serve a termination notice of one years duration. In the absence of such a notice it is said the agreement has continued. It follows that the defendant is in lawful occupation of the premises absent such a notice being served. That is one way in which the argument was put. The same argument was put in a slightly different way by saying that it is implicit in the agreement that negotiations have to be concluded before the end of the penultimate year's notice so that the parties know and have a year to organise their affairs. If that does not happen one years notice of termination is required. Whichever way the argument is put the contention is that once negotiations were entered into and were not concluded a year before the agreements expired by efflux of time then at the conclusion of the negotiations, a year's notice from such conclusion was required to validly terminate the continuing agreement by notice.

45. Reliance was placed on well known cases dealing with circumstances in which the courts imply terms into contracts in order to give them business efficacy. We ranged from the *Moorcock* [1889] 14 PD 64 to *Dakota Packaging v. AHP* [2005] 2 I.R. 54 to *Rainy Sky v. Kookmin Bank* [2011] 1 WLR 2900.

46. The matter is, I think, succinctly summarised by Murphy J. in *Sweeney v. Duggan* [1997] 2 I.R. 531, where he said:-

> *"There are at least two situations where the courts will, independently of statutory requirement, imply a term which has not been expressly agreed by the parties to a contract. The first of these situations was identified in the well-known Moorcock case, where a term not expressly agreed upon by the parties was inferred on the basis of the presumed intention of the parties. The basis for such a presumption was explained by MacKinnon L.J. in Shirlaw v. Southern Foundries (1926) Ltd. [1939] 2 K.B. 206 at p. 227 in an expression, equally memorable, in the following terms:—*
>
> > *'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course'.'*
>
> *In addition there are a variety of cases in which a contractual term has been implied on the basis, not of the intention of the parties to the contract but deriving from the nature of the contract itself. Indeed in analysing the different types of case in which a term will be implied Lord Wilberforce in Liverpool C.C. v. Irwin preferred to describe the different categories which he identified as no more than shades on a continuous spectrum."*

47. It is, I think, on this latter basis that the argument is sought to be made.

48. I am of opinion that, having regard to the case law on the topic, the defendant will have an uphill struggle to persuade a court of the correctness of the view that is now propounded. But I do not believe that I can go so far as to say that the case sought to be made is frivolous or vexatious or has no prospect of success. Indeed in this context I have to bear in mind the limitations on the jurisdiction to draw such a conclusion at an interlocutory stage.

49. In *Barry v. Buckley* [1981] I.R. 306, Costello J. emphasised that the jurisdiction to strike out proceedings on such a basis is one which has to be exercised sparingly and only in clear cases. Again in *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425, McCarthy J. cautioned that "*generally the High Court should be slow to entertain an application of this kind*". He explained the need for this restraint on the basis that "*experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture*".

50. Therefore though I have grave misgivings as to the ability of the defendant to bring this line of argument home, I do not believe that I would be justified in regarding it as so totally unstatable as to warrant it being dismissed at this stage.

51. The second line of argument which is sought to be made is that notwithstanding the clear words of the licence agreement and the circumstances surrounding its execution, the defendant has acquired rights under the Landlord and Tenant code. Much of the relevant case law was traversed including *Shell & BP Limited v. Costello* [1981] ILRM; *Kenny Homes v. Leonard* [1997] IEHC 230; *Gatien Motor Company Limited v. Continental Oil Company* [1979] I.R. 406.

52. Again I come to the conclusion that in attempting to make this case the defendant will be facing formidable difficulties.

Nonetheless, I do not believe that I can go so far as to say that the case sought to be made is unstateable. Again I bear in mind the injunctions of Costello J. and McCarthy J. to which I have already made reference.

53. I also bear in mind that all of the case law cited to me on this issue referred to cases that had been decided at trial rather than at an interlocutory stage. The nearest case procedurally to the present one is the *Kenny Homes* case. It began life before Costello J. as an application for an interlocutory injunction. As is clear from his judgment, the motion was treated as the trial of the action and was dealt with on oral evidence. Neither is the case here.

Discretion

54. In exercising my discretion to refuse the injunction, I also bear in mind the following. It is conceded on the part of the plaintiffs that they are unable to demonstrate that the continued presence of the defendant on the premises would amount to them suffering irreparable damage. They do not, as yet, have any third party ready to move in to take over the operation that up to now has been carried on by the defendant. Accordingly, over the next number of months the premises will be lying vacant should the injunction be granted against the defendant. If the defendant continues in occupation she will have to pay all of the normal outgoings which are due to the plaintiffs on foot of the contractual arrangements between them. Thus the refusal of the injunction in fact secures a continued income stream to the plaintiff for as long as the defendant remains in the premises.

55. On the balance of convenience it is quite clear that if an injunction is granted against the defendant, apart from the loss and inconvenience it will suffer, it will also mean that its 150 employees will lose their jobs. For whatever period the defendant remains on the premises at least those persons will continued to be employed. In the current dismal economic climate, the making redundant of another 150 persons is not something I would wish to bring about save in compelling circumstances. In fairness to the plaintiffs, they accept that on the balance of convenience they are unable to make a case more persuasive than that of the defendant.

56. Finally, during the course of the hearing, counsel on behalf of the plaintiffs indicated that if an injunction were to be granted, the plaintiffs would be sympathetic to the notion of a stay being placed upon it for a period of three months. It would be possible to have a trial of the entire matter in a timescale which will exceed that three months by only a very small amount.

57. To grant the injunction sought now would be effectively to decide the entire of this litigation at this interlocutory stage thus depriving the defendant of the ability to make the case which it wishes in full.

58. I do not believe that that would be a justified course and the better thing is to enable the defendant to make the case which it wishes at a full trial.

59. I refuse the injunctions subject to the court's directions concerning pre-trial matters being scrupulously observed and the defendant continuing to discharge its obligations to the plaintiffs on foot of the agreements which are in place.

60. There will be liberty to apply in the event of any breach of the foregoing.