Neutral Citation Number: [2011] IEHC 107

**THE HIGH COURT**

**2009 2789 S**

**BETWEEN**

**ALBION PROPERTIES LIMITED**

**PLAINTIFF**

**AND**

**MOONBLAST LIMITED AND CIARAN KILLALEA**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Hogan delivered on the 16th day of March, 2011**

1. Where a commercial tenant defaults in a material respect on the payment of rent to a landlord, does this Court have a jurisdiction to grant a mandatory interlocutory injunction requiring the tenant to deliver up possession of the premises in question to the landlord? While it might seem surprising that the existence of such a jurisdiction is in dispute, this is the net question which arises following an application to this Court by the plaintiff landlord ("Albion Properties") for such an injunction.

2. In the original judgment delivered by me on 12th November 2010 I gave summary judgment in favour of Albion Properties as against the first defendant ("Moonblast") in the sum of €75,080 in respect of unpaid rent. That application had arisen in the following circumstances, the details of which may now be briefly re-stated.

3. In these proceedings the plaintiff had originally claimed summary judgment in the sum of €191,566. Moonblast is a company which was engaged in the running of a newsagent's outlet at Unit 12, Phibsboro Shopping Centre, Dublin 7. The second named defendant is a director of Moonblast and he also executed a guarantee which is the subject matter of the present proceedings. Moonblast ceased trading at the Unit 12 premises on December 24, 2010.

4. The parties originally entered into a lease of the premises in 12th November, 2001. The lease was for a period of four years and nine months and it was expressed to run from 6th November, 2001, to 6th August, 2001. It provided for a rent of the unit for the sum of IR£50,000.00, albeit that this was abated to IR£45,000.00 for the first year of the lease. The background to the present dispute has it origins at the time the lease was due to expire in August, 2006. At the time, the tenant was anxious to stay in the premises. The plaintiff landlord, on other hand, was determined to ensure that the tenant would not acquire any statutory rights to a new tenancy and it was, therefore, not anxious to continue the lease.

5. A curious situation then ensued whereby the first named defendant ("Moonblast") paid the monthly rent of €5,750 via standing order to the plaintiff's agents, Chatham Services Ltd. ("Chatham"). However, these sums were repaid at the behest of Albion Properties because it did not want Moonblast to acquire any statutory rights in respect of the retail unit in question. It is not in dispute but that at the end of January, 2007 Chatham sent Moonblast a notice to quit which was previously sent on the 12th August, 2006. The letter was addressed to Mr. Killalea and stated:

> "Please find enclosed a copy of 'notice to quit' which was previously issued to yourself. I have also enclosed cheques totalling of €28,750.00, the amount of five months direct debits of €5,750.00 which were received into our account in error. Please arrange to have your direct debit cancelled with immediate effect".

6. At the first hearing in early November 2010, it appeared to be common case that the cheques which were then sent on by Chatham were not cashed by either Moonblast or Mr. Killalea. If this was correct, then the effect of this was that Albion Properties had actually received rent in the sum of €28,750.00. It equally followed that the maximum sum which Albion Properties could recover by way of unpaid rent is thus reduced to the sum of €162,816.00. In effect, therefore, on this analysis, the rent was paid for September, October, November, December, 2006 and for January, 2007. I should here record that in advance of the latest hearing before me on 7th March 2011, Albion Properties' financial controller, Mr. O'Sullivan, swore a further affidavit disputing whether Moonblast is, in fact, entitled to claim credit in respect of €28,750 for the period now in dispute. For the purposes of the present application, at least, it is unnecessary to examine this question further and it must remain an open question as to whether I have any jurisdiction to re-open this issue, at least so far as the summary judgment issue is concerned.

7. Returning to the narrative, Moonblast remained in occupation of the premises. It appears that it continued to pay the monthly rent by standing order until in or about August 2008, but that on each occasion a corresponding cheque for the sum in question was issued by Chatham on behalf of Albion Properties and, on this occasion, the cheques were actually cashed by Moonblast.

8. By August, 2008, the economic storm clouds were gathering and Albion Properties had second thoughts with regard to Moonblast. It decided that it did want Moonblast as a tenant after all. While Moonblast did pay the rent by standing order up until August 2008, this was cancelled out by the fact that Chatham sent Moonblast a corresponding amount on Albion Properties' behalf which cheques, as we have just seen, were cashed by Moonblast on this occasion. The effect of this was that Moonblast has in fact paid no rent in respect of the premises in question since early 2007. Clause 4(b) of the lease provides that:-

> "If the tenancy hereby created should continue beyond the term herein specified it shall, in the absence of a new agreement, be deemed to be a tenancy determinable by one calendar month's notice in writing to be given by either party to the other and expiring on any gale day."

9. Having regard to the provisions of Clause 4(b), it is difficult, at least at first blush, to see how the tenancy did not continue on the same terms and conditions as heretofore obtained before the lease expired in August 2006. While it is true that Clause 4(b) does not in precise terms, quite provide for this, this, in my view, is nonetheless the clear sense of that provision.

10. It is, of course, quite correct to say that Albion Properties had served a notice to quit on Moonblast. But since they took no steps

in pursuant to this notice to quit, the position remains as if it had never been served. On the face of it, therefore, the tenancy remains in place by virtue of the continuation clause in Clause 4(b), the expiration of the original lease notwithstanding.

11. This latter point is, however, vigorously denied by Moonblast. They contend that the lease was, in fact, altered by virtue of an oral agreement dating from 15th March, 2007. But, in his first affidavit of 1st December, 2007, Mr. Killalea says at para. 6:-

> "At the said meeting of [15th March, 2007] a verbal binding agreement was reached between your deponent and the plaintiff to the effect that the original lease would be disregarded for the purpose of creating a new lease, but that the first named defendant [would] remain in occupation of the said retail unit as a tenant of the plaintiff herein. The position pertains as of the date of swearing hereof. The terms of the new written lease were to provide for a significant increase in the rent of retail unit 12 so as to reflect the current market value rent applicable at that period, and it was furthermore agreed that the premium rent was no longer to apply. I received a further representation at this meeting to be that redevelopment works in the shopping centre were imminent and would be completed by mid 2010."

12. While the existence of this agreement is vigorously denied by affidavits filed on behalf of Albion Properties, Mr. Killalea contends that the net rent payable was some 67% over the going market rent. The defendants thus contend that the rent payable in respect of unit 12 was IR£45,000.00 as compared with IR£27,000.00 which was the rent payable by unit 11 next door. They thus contend that Moonblast was paying some 67% over the going market rate at the time.

13. Thus, on behalf of the defendants, Mr. Ó Scanaill S.C. submitted that while Moonblast remained on as tenant of the premises, the terms of that tenancy were not agreed and were not reduced to writing. He further contended that Moonblast is not governed by the lease of 2001, but rather by the verbal agreement of March 2007.

14. I took the view that it would be inappropriate to determine these contentions save by means of a plenary hearing. It was, however, significant that Mr. Ó Scanaill S.C. did not deny but that the plaintiff was entitled to payment in respect of the rent due and that rent is due since January, 2007. While Mr. Ó Scanaill S.C. maintained that no new terms are agreed, as I read para. 3 of the second affidavit of Mr. Killalea, the height of the defendants' case is that the rent which Moonblast was paying in respect of unit 12 is 67% over the going market rate at the time. While this particular contention was vigorously denied by the plaintiff, this averment nonetheless shows the furthest to which Moonblast have advanced – or could advance - their case. The affidavit thus acknowledges the lowest rent which would be payable would be at least IR£27,000 per annum, which equates to some €34,283. Putting this another way, this is the lowest possible annual rent which Moonblast could realistically have hoped to pay even if all of its contentions regarding the re-negotiation of the rent in March, 2007 were to be accepted at a full hearing.

15. While it should be appreciated that this was a rent which was never actually agreed, I took the view that it would be unfair to Albion Properties if Moonblast could have avoided summary judgment at this stage in circumstances where substantial rent is clearly due to Albion Properties, simply because it contended that the actual amount of the rent was never finally agreed in the wake of the March 2007 negotiations. It is clear that rent is outstanding for some two years and six months to the date of the commencement of the proceedings, *i.e.,* from February, 2007 to July, 2009 inclusive. By my reckoning, even if the lowest realistic annual rent of €34,283 was taken as the benchmark, that figure for unpaid rent comes to €75,708.

16. It was for these reasons that I directed a summary judgment in favour of the plaintiff in the sum of €75,708. I further directed that the balance of the plaintiff's claim, including the claim for interest on that sum be adjourned to plenary hearing. By order of 23rd November 2010, I directed that this sum was to be discharged in three tranches, commencing on 15th January 2011. The uncontradicted affidavit evidence shows that, to date, Moonblast have not adhered to this payment schedule and there does not appear to be any prospect that it will do so.

17. There is, in addition, the question of the guarantee given by the second defendant. While I appreciate that the guarantee is joint and several, I took the view that it was not appropriate at that juncture to give summary judgment as against Mr. Killilea, since I considered that it would only be fair to give Moonblast a reasonable opportunity to discharge the judgment in its own right before there was any question of recourse to the guarantor. At the conclusion of the first hearing, I therefore adjourned the application as against the second defendant and gave the plaintiff liberty to apply for summary judgment in the event of default by Moonblast in respect of the sum €75,708.

18. In view of the acknowledged default by Moonblast, Albion Properties then issued a further motion seeking judgment as against Mr. Killilea in his capacity as guarantor in the sum of €75,708. Albion Properties also sought a mandatory interlocutory injunction order permitting it to re-enter Unit 12 and, if necessary, to re-let that unit to a fresh tenant. At the second hearing, I indicated that I was in a position to accommodate the parties by offering an early trial of the main action which is presently scheduled for 24th May 2011. I accordingly adjourned the application for summary judgment in respect of the guarantee to that hearing.

**Whether the Court has jurisdiction to grant an interlocutory injunction**

19. There remains, therefore, the question of the jurisdiction of this Court to grant an interlocutory injunction requiring Moonblast to vacate the premises. Mr. Ó Scanaill SC urges that where a plaintiff has elected to go by way of summary summons, he cannot seek an injunction. He further submitted that it was inappropriate for this Court to grant an injunction in circumstances where I had adjourned the balance of the claim to plenary hearing, since - or so the argument ran - the granting of an injunction in such circumstances would be effectively to pre-determine the outcome of that claim. In effect, therefore, it was urged that I could only look to the balance of the claim for this purpose and that I could not have any regard to the summary judgment.

20. It seems to me that such an approach would be wholly artificial. The plain fact of the matter is that Moonblast has been in occupation of the premises without the payment of rent since 2007. Even though I directed summary judgment in the sum of €75,708, I also allowed a relatively generous payment schedule for the discharge of this sum. Moonblast has defaulted on the first of these payments of €25,000 and there is absolutely no suggestion that it would be in a position to comply with the order regarding the payment of the two further tranches of some €25,000.

21. It is all too obvious that Moonblast has not discharged highly material obligations under the lease and, furthermore, that it is unlikely to be able to do so, not least given that it ceased trading from the unit in December 2010.

22. It is true that the courts are very reluctant to grant a mandatory interlocutory injunction, save in the clearest of cases: see, *e.g.,* the judgment of Keane C.J. in *Attorney General v. Lee* [2000] IESC 80, [2000] 4 I.R. 68. Because the effect of such relief is generally to disturb the *status quo ante*, the granting of such an order is properly regarded as exceptional. It would normally not be granted unless it was more or less inevitable that the plaintiff would succeed at the trial of the action or, at least, where a strong prima facie case had been made out: see, *e.g., ICC Bank plc v. Verling* [1995] 1 I.L.R.M. 123 at 130, per Lynch J.. In addition, the

balance of convenience would have to favour the grant of such exceptional relief. In this respect, the test for relief is higher and more exacting than that which obtains under the conventional *Campus Oil* criteria *(Campus Oil Ltd. v. Minister for Industry and Commerce (No.2)* [1983] I.R. 88).

23. In my view, however, this is such an exceptional case for reasons I will shortly set out. It is true, of course, that a plaintiff who elects to proceed by way of summary summons must normally be confined to the limits of that procedure. It is also true that Ord. 2 (dealing with procedure by way of summary summons) does not normally envisage the grant of an injunction. Nevertheless, Ord. 2, r. 1(2) provides that the summary summons procedure may be adopted in the following classes of claim-

> "In actions where a landlord seeks to recover possession of land, with or without a claim for rent or mense profits –
>
> ….. (b) for non-payment of rent."

24. This Court enjoys a general jurisdiction to grant an injunction whenever it is just and convenient to do so: see s. 27(7) of the Supreme Court of Judicature (Ireland) Act 1877, as applied to this Court by s. 48 of the Courts (Supplemental Provisions) Act 1961. In this regard, I entirely agree with the submission of counsel for Albion Properties, Mr. Gibbons, that it would be pointless to require his client to issue separate plenary proceedings before an interlocutory injunction of this kind could either be sought or granted. A requirement of this kind would simply represent legal formalism at its worst. Any supposed jurisdictional bar which prevented the court from granting injunctive relief in an appropriate case to require a defaulting tenant to yield up possession of a commercial tenancy would be at odds with duty imposed on the courts by Article 40.3.2 of the Constitution to ensure that the property rights of the plaintiff landlord are appropriately vindicated in the case of injustice done. The courts are under a clear constitutional duty to ensure that the remedies available to protect and vindicate these rights are real and effective: see, *e.g.,* the comments of Kingsmill Moore J. in *The State (Vozza) v. O'Floinn* [1957] I.R. 227 at 250; those of Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3 and the authorities set out in my own judgment in *S v. Minister for Justice, Equality and Law Reform* [2011] IEHC 31. For good measure, a similar obligation is imposed on the State by Article 13 of the European Convention of Human Rights, albeit that it must be recalled that the courts are not an "organ of the State" for the purposes of s. 3(1) of the European Convention of Human Rights Act 2003, with the result that the courts are not, apparently, as such under any direct statutory obligation to perform their functions in a Convention compatible manner. The question of whether the courts are under any duty *independently of the constitutional considerations which I have just mentioned* to re-fashion or re-shape existing remedies in order to secure compliance with Article 13 ECHR is a mater which must await an appropriate case for resolution.

25. In my view, it would be entirely just and convenient to grant a mandatory interlocutory injunction at this juncture for the following reasons.

26. First, it has already been judicially determined that the Moonblast owes Albion Properties a substantial sum in rent. In this respect, Albion Properties have already gone much further than that required of a plaintiff in the first limb of the *Campus Oil* test, namely, establishing that there is a fair question to be tried.

27. Second, Moonblast has defaulted on the payment schedule directed by the court and there is no reason to think that it will able to discharge these debts.

28. Third, Moonblast has indisputably defaulted in a material and fundamental on its basic obligations qua tenant by not paying rent for a long period of time.

29. Fourth, it is obvious that considerations based on the balance of convenience which might obtain in the case of a viable business do not apply here, not least where Moonblast ceased last December to trade at the unit. In this respect, the present case is very different from the situation which obtained in *Barnaton Investments Ltd. v. O'Leary* [2004] IEHC 155. In that case Peart J. refused to grant an interlocutory injunction in circumstances where there was a genuine dispute as to whether a lease had been lawfully assigned to the defendant. Furthermore, the balance of convenience favoured permitting the defendant to continue to trade as a restaurant while the plaintiff could be adequately compensated in damages. It is plain that Moonblast would simply not be in a position to compensate Albion Properties in the event that an injunction were refused. It may also be noted that in *ICC v. Verling* the inability of the defendant to pay any damages was also a factor which was held by Lynch J. to warrant the granting of interlocutory relief requiring the tenant to yield up possession to the landlord: [1995] 1 I.L.R.M. 123 at 129. It seems all too obvious that Moonblast will not be able to pay the rent which would fall due on the property in the event that the injunction is refused.

30. Fifth, the existence of a closed-up premises within the precincts of the shopping centre doubtless creates a negative impression on the general public and acts as a depressing effect on business generally within the centre. This clearly prejudices the interests of the landlord.

31. In such circumstances, it is all but inevitable that Albion Properties will succeed at the trial of the action and recover possession of the unit. It would be intolerable if a landlord could not immediately recover possession of the property in circumstances of repeated and continuous material breaches of the tenant's obligations, not least where there is every probability that damages would be ultimately prove to be inadequate remedy. While acknowledging that the grant of a mandatory interlocutory injunction is confined to exceptional cases for the reasons indicated by the Supreme Court in *Lee,* this is, to my mind, for the reasons just stated, one such case.

**Conclusions**

32. Since I consider that in these circumstances the claim of Albion Properties for possession of the property is virtually unanswerable and since the balance of convenience is very much in its favour, I propose to grant a mandatory interlocutory injunction with immediate effect requiring Moonblast to yield up possession of Unit 12. This, however, is subject to two conditions. First, I record here that Albion Properties have, through counsel, tendered the usual undertaking as to damages. Second, I will require it to withdraw the existing Circuit Court proceedings seeking possession of Unit 12 (which proceedings, I understand, were issued but not served on the defendants) and not to seek the costs of those proceedings.

33. Subject to this, I propose to discuss the precise form of order with counsel.