

## THE HIGH COURT

[2012 No. 3732P]

BETWEEN

PETER SAVILL

PLAINTIFF

AND

LAURENCE BYRNE

DEFENDANT

**Judgment of Ms. Justice Laffoy delivered on 19th day of October, 2012.****1. The proceedings and the application**

1.1 These proceedings were initiated by a plenary summons, wherein the plaintiff claims declaratory and injunctive relief in addition to damages, which issued on 13th April, 2012. At the time, a firm of solicitors was acting for the plaintiff and the plenary summons was issued by that firm.

1.2 On the same day, 13th April, 2012, on foot of an *ex parte* application, the plaintiff was given liberty to serve a notice of motion for an interlocutory injunction returnable on Monday, 16th April, 2012. Various orders have been made by the Court in the interim while a veritable mountain of documentation, affidavits and exhibits, has built up on the interlocutory application. The current position is that on 25th May, 2012 the defendant gave the Court an undertaking to behave in a lawful manner, some specific details of which were elaborated on in the undertaking and in the order made on foot of the undertaking.

1.3 This judgment deals with the application for the interlocutory injunction in which the plaintiff seeks the various orders in relation to the defendant's possession, occupation and use of the property referred to in the notice of motion as Ballykilbride Stud, Ballymoney, Wicklow, County Wicklow (the Property), that is to say, orders:

- (a) that the defendant forthwith vacate the dwelling house situate on the Property;
- (b) that the defendant forthwith vacate all or any part of the Property including the stables and outhouses situate thereon;
- (c) that the defendant forthwith remove all animals and chattels belonging to the defendant from the said dwelling house and from the Property including stables and outhouses thereon;
- (d) restraining the defendant, his servants or agents from –
  - (i) re-entry or trespassing or otherwise interfering with said dwelling house and all or any part of the Property;
  - (ii) from interfering with the access of the plaintiff, his servants or agents, invitees, licensees and assignees to the said dwelling house or all or any part of the Property, including the stables and outhouses thereon, and
  - (iii) from interfering with the quiet use and enjoyment by the plaintiff, his servants or agents, invitees, licensees and assignees, of the said dwelling house, the stables and outhouses and all or any part of the Property.

1.4 Although a firm of solicitors was in correspondence on behalf of the defendant with the plaintiff for a brief period before these proceedings commenced, the defendant has not at any time been legally represented in these proceedings and he appeared in person. During the course of the hearing of the interlocutory application the solicitors formerly representing the plaintiff applied to the Court to come off record. That application was acceded to. Thereafter, the plaintiff appeared in person.

1.5 The fundamental proposition underlying the plaintiff's application is that the defendant is a trespasser on the Property and is committing nuisance. The evidence in support of that proposition is primarily to be found in the grounding affidavit sworn by the plaintiff on 12th April, 2012, which sets out the factual background to the application, and also in his supplement affidavits sworn on 23rd April, 2012 and 3rd May, 2012. Although the relief sought by the plaintiff as outlined at (a), (b) and (c) in para. 1.3 above is framed as mandatory relief, in reality, given the basis of the plaintiff's claim, the plaintiff is seeking prohibitory relief, that is to say, orders restraining the defendant from trespassing and committing a nuisance.

**2. The core facts as represented by the plaintiff**

2.1 The Property comprises seventy three acres or thereabouts statute measure and contains a number of farm buildings incorporating a total of twenty eight stables, two horse walkers, two lunge rings, a small dwelling, a number of grazing paddocks and a separate area used as a runway for small private aircraft. The Property is registered on Folio 23763F of the Register of Freeholders County Wicklow, the registered owner being Irish Properties Ltd. The only evidence of the plaintiff's title put before the Court is a document headed "Lease Assignment", which is described as an agreement dated 6th February, 2008 made between Kilbride Stud Ltd, referred to as "the Tenant", the plaintiff, referred to as "the Assignee", and Irish Properties Ltd., referred to as "the Landlord". It is recited in this document that Kilbride Stud Ltd. was then the owner of seventy three acres of land, which I assume corresponds to the Property, under "a lease agreement commencing January 1st 2006 and expiring December 31st 2026". It is further recited that Kilbride Stud Ltd. is a company one hundred per cent owned by the plaintiff and that Kilbride Stud Ltd. wished to assign the lease to the plaintiff and that the Irish Properties Ltd. consented to the assignment. In the operative part of the document, it is provided as follows:

"The Lease shall henceforth be assigned in full from . . . [Kilbride Stud Ltd.] to the [plaintiff] from the date first above written and the [plaintiff] shall assume all the rights and obligations of the tenant specifically set forth in the Lease."

The document was signed by the plaintiff, as director, on behalf of Kilbride Stud Ltd. The document was signed on behalf of Irish Properties Ltd. by Paul Lewis, who is described as "authorised agent" and who is the plaintiff's general manager and one of the deponents on his behalf on this application. The document was also signed by the plaintiff as assignee. The document is not in the conventional form of an assignment of a twenty one year lease and appears not to have been created by a solicitor. Notwithstanding that, having regard to the acknowledged legal relationship of the plaintiff and the defendant in relation to the land subsequently created, that is immaterial.

2.2 That relationship was created by a document which is referred to as a lease dated 5th April, 2011 made between the plaintiff of the one part and the defendant (therein referred to as "Larry Byrne") of the other part (the Sub-lease). While the Sub-lease is in the conventional form, once again, there does not seem to have been any participation by a solicitor in its creation. In the Sub-lease the Property, which is described as "agricultural lands", was sub-demised by the plaintiff to the defendant for the term of four years and nine months commencing on 1st April, 2011 at the yearly rent of €20,000, the rent for the first year of the term being payable in full in advance on 1st April, 2011. It was paid in advance. There was reserved out of the Sub-lease to the plaintiff:

(a) the rights of way across the Property for the lessor (the plaintiff) or his nominees to land aircraft as more particularly set out on the map annexed to the Sub-lease and to the extent more particularly described in the first schedule thereto, which stated that the plaintiff should have the right, upon prior notice to the defendant, to land and park aircraft on the landing strip on the Property, and that the landing strip was identified by a series of gallop rails and that its approximate location was indicated on the map annexed to the Sub-lease, and

(b) the right of the plaintiff and all designated persons authorised by him to enter on the Property at all reasonable times during daylight hours for the purposes of viewing the use and condition thereof and for all other reasonable purposes.

2.3 The covenants by the defendant in the Sub-lease, as exhibited in the grounding affidavit, on which the plaintiff relies are the following:

(a) to keep in good and substantial repair order and condition using the best and most suitable materials any buildings on the Property and "all fixtures and fittings spoutings and fall pipes fences walls pumps gates posts stiles bridges culverts wells ponds banks watercourses ditches drains waterworks dams and roads thereon" (clause 2(c));

(b) to maintain fences (all parts of fencing excluding fence posts) and hedges in stock proof condition (clause 2(d)); and

(c) not to assign any part of the Property or to sublet or part with or share the possession of the Property or any part thereof or to enter into any conveyance or agreement in relation to the Property or any part thereof without the prior consent in writing from the plaintiff which consent would not be unreasonably withheld (clause 2(n)).

Clauses 2(d) and 2(n) were misquoted by the plaintiff in his grounding affidavit, in that he quoted what was set out in an earlier draft of the Sub-lease. However, the undisputed fact which the Sub-lease itself establishes is that the defendant entered into covenants with the plaintiff in the terms I have set out above.

2.4 The Sub-lease contained a proviso for re-entry in the event of the rent being in arrears (which did not happen by reason of rent for the first year having been paid in advance) or in the event of there being any breach or non-performance or non-observance by the defendant of any of the terms, covenants, conditions and provisions therein contained, entitling the plaintiff to re-enter the Property, whereupon the term of the Sub-lease would determine.

2.5 On 14th October, 2011 the plaintiff wrote to the defendant alleging that the defendant was in contravention of the terms of the Sub-lease. The alleged contraventions set out in the letter may be summarised as follows:

(a) that the defendant had sublet portions of the Property to tenants without the prior consent in writing of the plaintiff, two of whom remained on parts of the Property;

(b) that the Tenant had not kept the Property properly maintained, the specific complaints being that –

(i) the horse walker was inoperable,

(ii) fences had been placed on the runway, which was required for aircraft landing,

(iii) the defendant's tenants were dumping muck on the Property,

(iv) the defendant had attempted to effect "water repairs" which were of an extremely poor standard,

(v) unsightly fencing had been erected from pallets,

(vi) the entrance gates were not working and were being left open all day, giving rise to a security risk,

(vii) a very poor quality switch had been installed to the inside wall of the entrance, which was of very poor quality and the sealant around was unsightly.

In relation to the items at (b), the plaintiff requested the defendant to remedy the situation by specifying what was to be done, for example, that all the muck should be removed from the site. In the penultimate paragraph of the letter the plaintiff stated:

"It is therefore with regret that I hereby issue you with formal notice that you are in breach of the terms of your lease. I require you to correct each of the breaches listed above within the period of 30 days from today (such notice to expire on 12th November, 2011) or I shall be forced to consider an early termination of your lease."

2.6 Obviously, what the plaintiff was attempting to do in that notice was to pave the way for invoking the proviso for the entry in the Sub-lease. Equally obviously, he did not get legal advice in relation to the content of the notice. If he did, he would have been

advised of the requirements of s. 14(1) of the Conveyancing Act 1881 (the Act of 1881) and it is probable that, if the notice was drafted by a solicitor, it would have expressly referred to s. 14(1). The following extract from Wylie on *Irish Land Law* (4th Ed.) at para. 17.99 explains that provision in a summary manner:

"Section 14(1) . . . requires the lessor to serve a notice on the lessee before he enforces any right of forfeiture, whether by re-entry or action for possession. This notice must: (1) specify the breach complained of; (2) require it to be remedied, if it is capable of remedy; (3) require the lessee to make compensation for the breach, if the lessor wants this."

In the same paragraph, Wylie explains the position of a lessee under s. 14(2) of the Act of 1881, again in a summary manner, as follows:

"Where the lessor is proposing to exercise his right of forfeiture or re-entry or to bring proceedings for possession, the lessee can apply to the court for relief against the forfeiture and the court has a general discretion to grant whatever relief it thinks fit in the light of the parties' conduct and all the circumstances of the case. There are no fixed rules for the exercise of this discretion which is administered by the courts on general equitable principles. It is important to note that relief in these cases must be sought before the forfeiture or re-entry is completed and the lessee should apply as soon as he receives the statutory notice under s. 14 . . ."

2.7 The plaintiff's position is that the defendant failed to rectify the breaches of the covenants in the Sub-lease, identified in the notice of 14th October, 2011. On 31st December, 2011 the plaintiff gave notice of termination of the Sub-lease to the defendant by e-mail. That notice was in the form of a letter from the plaintiff to the defendant. It referred to the notice of 14th October, 2011 and noted that the defendant had neither responded to it nor corrected the breaches outlined in the letter. The final paragraph in the letter was to the following effect:

"Since I have already issued you with formal notice that you are in breach of the terms of your lease with me dated 5th April, 2011 and since you have failed to correct those breaches within the notice period, I therefore wish to inform you that I am immediately terminating your Lease at Ballykilbride and I hereby inform you that you no longer have any right to set foot on the premises. I would be grateful if you would return any keys, zappers or other items that belong with the property."

The plaintiff has averred that the notice was also served on the defendant by registered post on 4th January, 2012, in accordance with the provisions of the Sub-lease. The defendant has averred that he has no memory of receiving the notice of termination and he has further averred that the signature on the postal receipt is "definitively" not his signature. That is one of the many factual controversies which cannot be resolved on this application. It cannot be disputed that the defendant received the notice of termination by e-mail on 31st December, 2011.

2.8 The plaintiff has averred that on 5th January, 2012 he took peaceable possession of the Property, that is to say, physical possession thereof and changed locks, security codes and such like. The defendant was not on the lands on that day and had not been on the lands for some time. There was no livestock or bloodstock the property of the defendant on the lands. A small number of possessions of the defendant comprising books, a suitcase, a carpet and some documents were safely stored and delivered to him at a later date. The plaintiff averred that at no time during "this open process" was any objection raised by the defendant.

2.9 One of the peculiar features of this case is that just a week after he contends he took peaceable possession of the lands the plaintiff entered into a lease of part of the Property comprising approximately fifty six acres with one of the tenants to whom the defendant had granted a sub-lease which was the subject of an allegation of contravention of Clause 2(c) of the Sub-lease in the letter of 14th October, 2011. The term thereby created was four years and nine months from 13th January, 2012. As regards the other tenant who was the subject of the complaint in the letter of 14th October, 2011, it has been averred by the plaintiff that he remained on part of the Property after 5th January, 2012 "on an informal basis", presumably by arrangement with the plaintiff. What is to be implied from these events as to the validity of the invocation of the proviso for re-entry in the Sub-lease by the plaintiff is an issue which cannot be determined on this interlocutory application.

2.10 It is the plaintiff's position that on 25th January, 2012 the defendant commenced "a pattern of behaviour involving assault, trespass, causing deliberate damage to property, harassment and obstruction", which behaviour continued through to the commencement of the proceedings. The affidavit evidence contains considerable detail of the wrongdoing alleged against the defendant. The averments of the plaintiff are corroborated in affidavits sworn by Paul Lewis, by Russell Andrews, the maintenance manager employed by the plaintiff, and by Olive O'Connor, to whom the lease of fifty six acres was granted by the plaintiff on 13th January, 2012. The matters alleged against the defendant are of a serious nature and the assistance of An Garda Síochána was sought by the plaintiff on a number of occasions.

### **3. The defendant's response**

3.1 The defendant has sworn three affidavits on this application: on 20th April, 2012; on 26th April, 2012; and on 22nd May, 2012. As regards the alleged breach of Clause 2(n) of the Sub-lease, which contained the restriction on assignment and sub-letting, for reasons which are too complicated to record here, the defendant contends that, although he did not get prior consent directly from the plaintiff, he was not in breach of that clause. As regards the alleged breaches of Clause 2(c) and Clause 2(d), dealing with maintenance and repair of the Property, the defendant denies those breaches. Further, it is the defendant's contention that most of the issues complained of were already in existence when he took possession of the Property in 2011.

3.2 The solicitors who were acting for the defendant briefly in January and February of 2012, W.R. Joyce & Co., wrote to the plaintiff by letter dated 24th January, 2012. In that letter it was stated that the defendant did not accept that the Sub-lease had been terminated, that it remained in existence, and that he remained in possession of the Property. That was rejected in the plaintiff's response of 14th February, 2012 to W.R. Joyce & Co., in which the plaintiff complained of the behaviour of the defendant, which at that stage had been reported to An Garda Síochána on a number of occasions.

3.3 In his first replying affidavit sworn on 20th April, 2012, the defendant altered his stance. Having outlined what originally had been his proposals for the Property and having impugned the plaintiff's motivation in purporting to terminate the Sub-lease, he averred:

"I say that in circumstances where [the plaintiff] has intentionally undermined the lease I feel I have no option but to abandon the lease as [the plaintiff] by his deceptions and actions, has made it impossible and impractical for me to pursue my business strategy."

He went on to aver that he will fully defend the allegations against him in a full defence and will seek to recover appropriate damages

in a counterclaim. He averred that in the meantime he would give up full possession of the Property to the plaintiff on conditions he outlined, among which was that the plaintiff lodge in court a sum of €200,000 "as partial security for the damages which would be the subject of my counterclaim" and another of which was that the plaintiff return the "upfront payment" he made on the signing of the Sub-lease, that is to say, the rent of €20,000 for the first year. The plaintiff did not address that proposal in the next affidavit filed on his behalf. However, the plaintiff gave the usual undertaking as to damages on the making of the orders which were previously made in these proceedings and is required to give a similar undertaking on this interlocutory application.

3.4 Further, it was emphasised by the plaintiff that notwithstanding the averment quoted above, the defendant had continued to occupy the Property, in the sense that he continued to have his animals on the Property, and to enter the lands and buildings.

3.5 The defendant resides in County Wexford. As I understand the evidence, he has never resided, and never intended to reside, in the dwelling house on the Property.

#### **4. The function of the Court**

4.1 As the elements of the defendant's first replying affidavit referred to at para. 3.3 above indicate, the defendant, or whoever is assisting him in addressing these proceedings, understands that the relief being sought by the plaintiff on an interlocutory basis is intended to continue only until the hearing of the substantive action. As O'Higgins C.J. stated in *Campus Oil Ltd. v. Minister for Industry & Energy (No. 2)* [1983] I.R. 88 in explaining the purpose of an interlocutory injunction:

"Interlocutory relief is granted to an applicant where what he complains of is continuing and is causing him harm or injury which may be irreparable in the sense that it may not be possible to compensate him fairly or properly by an award of damages. Such relief is given because a period must necessarily elapse before the action can come for trial and for the purpose of keeping matters in statu quo until the hearing."

4.2 The parties must also understand that, as Lord Diplock stated in *American Cyanamid v. Ethicon* [1975] 1 All ER 498 (at p. 510):

"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."

The ten affidavits which have been filed on this application, some of which are quite extensive, are replete with conflicts of evidence. As one reads through them, one finds, on the part of both parties, a lexicon of allegations of untruths of which the following epithets are but a sample: inaccurate, misleading, disingenuous, disputed, unfounded, and false. If the matter goes to trial, the facts will require to be proved by oral evidence and each party will have the opportunity of cross-examining the other's witnesses.

4.3 The principles which the Court applies in determining whether to grant or refuse an application for an interlocutory injunction are well settled and, as explained in Delany on *Equity and the Law of Trusts in Ireland* (5th Ed.) at p. 543, raise five questions. I propose considering each of those questions now in the context of this application.

#### **5. Relevant principles and conclusions**

5.1 On the basis that what the plaintiff is seeking is, in substance, prohibitory orders, as indicated at para. 1.5 above, the first question is whether the plaintiff has raised a fair *bona fide* question for determination. As I said at the outset, the nub of the plaintiff's case is that the defendant is trespassing, because the Sub-lease has terminated by reason of forfeiture and that his behaviour constitutes a nuisance. I am satisfied that there is a fair *bona fide* question that, as regards the Property, the defendant has been a trespasser since 6th January, 2012 on the basis that:

(a) the notice of 14th September, 2011 complied with s. 14(1) of the Act of 1881,

(b) the defendant did not comply with the said notice and remedy the breaches of the covenant on his part in the Sub-lease alleged by the plaintiff,

(c) the plaintiff was entitled to terminate the Sub-lease, as he did by the notice of 31st December, 2011, and

(d) the plaintiff re-entered "peaceably under a valid re-entry clause for a valid cause after service of a valid notice under s. 14 of the Act of 1881" (per Carroll J. in *F.G. Sweeney Ltd. v. Powerscourt Shopping Centre Ltd.* [1984] I. R. 501 (at p. 504)).

The parties must understand that the test applied requires the plaintiff to reach a low threshold as to the sustainability of his claim. The fact that I have found that it has been reached is by no means definitive of the final outcome of the substantive proceedings, which will in all probability involve difficult issues of fact and of law in relation to each of the propositions outlined above. I am also satisfied that there is a fair *bona fide* question that the behaviour of the defendant between January and April 2012 constituted a nuisance.

5.2 The second question is whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he could adequately be compensated by an award of damages. Given the nature of the plaintiff's claim, that he is entitled to possession of the Property and he is entitled to use it as he thinks fit, if he were to establish that entitlement as and from 5th January, 2012 at the trial, in my view, he could not be adequately compensated by an award of damages.

5.3 The third question is whether, if the defendant were successful at the trial, he could be adequately compensated under the plaintiff's undertaking as to damages for any loss which he could have sustained by reason of the grant of interlocutory relief. Effectively, the defendant has answered that question himself in the averments in his first replying affidavit which I have quoted and outlined at para. 3.3 above. He has stated that he does not want possession of the Property for the duration of the term of the Sub-lease. Instead, he wants to be compensated in damages for the wrongs he alleges against the plaintiff. The grant of an interlocutory injunction in this case will be subject to the plaintiff's undertaking as to damages, so that, if the defendant is successful in due course in his claims against the plaintiff, he may seek recourse against the plaintiff on foot of that undertaking.

5.4 The fourth test is in a sense superfluous in this case, because there is no question but that damages would not be an adequate remedy for the plaintiff and the defendant himself has indicated that his choice of remedy against the plaintiff is damages. The test is where the balance of convenience lies. I have no doubt that the balance of convenience lies in favour of the grant, rather than the refusal, of an interlocutory injunction.

5.5 The final test is whether there are any “special factors” in this case. I can say emphatically that there is no special factor in this case.

#### **6. Order**

6.1 There will be an order which will note the plaintiff’s undertaking as to damages and will grant the plaintiff orders in the terms sought in the notice of motion, which are outlined at para. 1.3 above pending the trial of the action. However, before the order is perfected the plaintiff will have to satisfy the Court on an issue which arises on copies of certain documents exhibited by the plaintiff, which will be explained to the plaintiff.