Neutral Citation: [2014] IEHC 555

THE HIGH COURT

[2014 No. 5703P]

BETWEEN

AIM CASH AND CARRY LIMITED

PLAINTIFF/APPLICANT

AND

ALLPOINTS BUILDING AND MAINTENANCE LIMITED

DEFENDANT/RESPONDENT

AND

[2014 No. 5702P]

BETWEEN

ONLY THREE EURO LIMITED

PLAINTIFF/APPLICANT

AND

TAMCO MANAGEMENT LIMITED

DEFENDANT/RESPONDENT

Judgment of Mr Justice David Keane delivered on the 25th November 2014

Introduction
1. This is an application for interlocutory relief in two related sets of proceedings. The hearing of the application proceeded solely by reference to the motion papers in the application brought in the first set of proceedings, since the parties accept that the material facts and the relevant issues are essentially the same in each application and that, accordingly, they must stand or fall together.

The relief sought
2. The applicant seeks three different kinds of interlocutory relief. The first is an order prohibiting the respondent, as its landlord, from ejecting it, as tenant, from certain premises it occupies in Moore Street and Moore Lane in Dublin city centre ("the premises"). The second is an order requiring the specific performance by the respondent of an alleged agreement to grant the applicant a further short-term lease of those premises. The third is an order granting three separate declarations: first, that the applicant is entitled to a further short-term lease; second, that the applicant is entitled to rely on certain alleged representations made by the respondent to that effect; and third, that the respondent is estopped from ejecting the applicant from the premises.

The history of the proceedings
3. The plenary summons in this case issued on the 30th June 2014. The first five reliefs identified in the general indorsement of claim contained in it are precisely those that I have just described as the reliefs sought in the present interlocutory application. The only other reliefs claimed in the proceedings are damages and costs. On the same date, the applicant was granted leave to issue and effect short service of the motion papers in the present application, returnable for the 3rd July 2014. A memorandum of appearance was entered on behalf of the respondent on the 14th July 2014. The application came before me and was heard on the 17th July 2014.

The evidence
4. The following matters are not in dispute. On the 1st July 2013, the parties executed a lease in respect of the premises, the term of which was expressed to be "from the 23rd November 2011 to the 29th June 2014 (both days inclusive), subject to the provisions for early termination." The clause in the lease dealing with early termination provides that the lease was to "automatically terminate upon the termination by the Head Landlord of the Head Lease." The lease defines the "Head Landlord" as one Joseph O'Reilly and the "Head Lease" as one between Mr O'Reilly and the respondent.

5. The said lease also contains a covenant on behalf of the applicant, as tenant, "[n]ot to assign, sublet or part with, or share in, the possession of the [p]remises or any part thereof nor permit any other person or company to occupy the same as a licensee or otherwise...."

6. On the 1st July 2013, the applicant executed a deed of renunciation of any right that it might otherwise have had to a new tenancy in the premises.

7. The parties also agree in respect of a number of other matters. The applicant's original short-term letting of the premises commenced on or about the 16th November 2009 when one Peter McNally granted it a lease. Mr McNally is associated with the respondent. On the 16th November 2009, Mr McNally executed a side-agreement with the applicant whereby he agreed that the applicant would be allowed to remain in the premises as long as Mr McNally held a leasehold interest or equivalent from the superior landlord.

8. The superior (or head) landlord Mr O'Reilly is associated with a company named Chartered Land Limited. By letter dated the 29th May 2012, Chartered Land Limited wrote to the applicant to confirm that it had agreed to the change of name of the applicant's

lessor from Peter McNally to the respondent. The respondent was incorporated on the 14th March 2012. Although, the respondent did not formally enter into its own short term lease agreement with Mr O'Reilly in respect of the premises until the 14th May 2013, it forwarded a draft of the onward lease of the premises that it proposed to enter into with the applicant to the latter on or about the 14th February 2013. The head lease agreement later entered into between Mr O'Reilly and the respondent terminated, in accordance with its terms, on the 30th June 2014.

9. The applicant has sub-let the premises at issue to a company named Malik & Sons Food Limited.

The dispute between the parties

10. In the affidavit that he swore on the 30th June 2014 to ground the present application, Mr Naeem Maniar avers that he is the director and executive chairman of the applicant.

11. In the said affidavit, Mr Maniar deposes to his understanding that the applicant "would be granted one or perhaps two further short-term letting agreements in respect of the premises." Mr Maniar avers that this understanding was based on oral and written representations that he alleges were made to him by Mr Basil Good, a director of the respondent.

12. Mr Maniar identifies the relevant alleged oral representation as follows. In or about November 2013, Mr Good indicated to Mr Maniar that, once the applicant company in each set of proceedings executed a deed of renunciation concerning any right to a new tenancy it might have, "new short term leases running for a further two or three years would be issued by the [r]espondent to both companies."

13. In respect of the written representations upon which the applicant seeks to rely, Mr Maniar exhibits two documents. The first is a letter dated the 29th May 2012 from one Andrew Diggins, on behalf of Chartered Land Limited, to Mr Maniar as executive chairman of the AIM group. It is the letter that confirms the agreement of Chartered Land Limited (presumably, on behalf of Mr O'Reilly) to the change of name of the applicant's lessor from Peter MeNally to the respondent. Although it is not a representation made by Mr Good (or, indeed, any other person on behalf of the respondent) and although it predates the execution of the lease between the parties that has since expired, the applicant places reliance on the following statement in that letter:

> "Please note new documentation will be issued shortly in this regard and deeds of renunciation to facilitate a lengthening of agreements."

14. The second document exhibited by Mr Maniar in this connection is an e-mail sent to him by Mr Good on the 10th September 2013. According to Mr Maniar, this e-mail was sent in circumstances where Mr Maniar had been considering the assignment of the relevant lease (in each set of proceedings) from the applicant company to another company under Mr Maniar's control. The representation in that e-mail upon which the applicant seeks to rely is the following:

> "I know you have asked that we do up two new leases in the new company name, but since they are soon going to issue new leases going forward from June 2014 I thought it best to leave it until then."

15. For the sake of completeness, it should be noted that Mr Maniar further avers that, in a telephone conversation between them in or about April 2014, Mr Good indicated to him that, while the respondent was still in negotiations with Mr O'Reilly concerning the issue of a new lease to it, the respondent would nevertheless issue a new short term lease in the premises to the applicant. Mr Maniar exhibits a letter that he wrote to the respondent on the 29th May 2014, in which he stated that he was awaiting "the new two year term lease as agreed", and to which letter, he avers, he received no reply.

16. In his grounding affidavit, Mr Maniar goes on to address a number of separate matters to which the applicant attaches some importance.

17. The first concerns the position of the applicant's sub-tenant in the premises, Malik & Sons Food Ltd. While Mr Maniar does not address the term of the lease between the parties that appears to prohibit the applicant from allowing any other person into occupation of the premises, he does depose to an alleged discussion that he had on the 18th June 2014 with one Amjad Pervaiz Malik, a director of Malik & Sons Food Ltd. Mr Malik himself swore an affidavit in the proceedings on the 30th June 2014, in which he confirms that he holds a sub-lease of the premises from the applicant on a monthly tenancy. Mr Malik purports to confirm Mr Maniar's averments concerning an incident whereby, in the week prior to the 18th June 2014, Mr Good and Mr McNally of the respondent visited Mr Malik at the premises. In essence, it is asserted that Mr. Malik was informed that the respondent wanted vacant possession of the premises for the month of July 2014, after which the respondent would issue Mr Malik with a new lease. Mr Maniar avers that Mr Malik was told that, if he did not co-operate, his company would be locked out of the premises and he would not get a new lease. Mr Maniar goes on to aver that Mr Diggins of Chartered Land also visited Mr Malik at the premises to inform him that he should vacate the property by the end of June 2014. Mr Maniar deposes that Mr Malik was advised not to pay rent to the applicant and was told that the applicant would not be getting any further lease in respect of the premises. Mr Maniar further deposes that Mr McNally again visited Mr Malik at the premises on the 29th June 2014, telling him that, if he did not vacate the premises he would be locked out and would "lose his house."

18. In his affidavit, Mr Malik also avers that Mr Good told him in late June 2014 not to continue to pay the applicant rent and not to back Mr Maniar. In the concluding paragraph of his affidavit, Mr Malik avers that the business operated at the premises by the company of which he is a director is his family's livelihood, adding, rather dramatically, that without the income derived from it his family would be destitute. Mr Malik does not say what steps, if any, his company took before entering into occupation of the premises to satisfy itself that the applicant could lawfully sub-let the premises to it, nor does he indicate what impediment, if any, there might be to the relocation of the business should it transpire that his company has no lawful entitlement to occupy the premises.

19. Although, as previously noted, the applicant has chosen not to address the clause in the prior lease agreement between the parties that appears in terms to prohibit the applicant (as lessee) from permitting "any other person or company to occupy the same as licensee or otherwise", Mr Maniar avers in his grounding affidavit that the applicant "has issued a licence to its sub-tenant Malik & Sons Food Limited" to occupy the premises. The relevant licence, which is exhibited to Mr Maniar's affidavit, recites on its face that it was made on the 2ih June 2014. It is expressed to take effect "pending the outcome of court proceedings in being" between the applicant and respondent. Of course, the plenary summons in this case did not issue until the 30th June 2014, three days later.

20. Another matter deposed to by Mr Maniar to which the applicant attributes particular significance is that, in 2009, it paid Mr McNally a deposit for rent for the premises in the sum of€25,000, which it was agreed was to be applied against the last quarter's rent. Mr Maniar exhibits a copy of an e-mail to him from Mr Good dated the 30th July 2012 that refers to the latter having obtained confirmation of that deposit from Chartered Land Limited. In a subsequent affidavit, sworn on the 16th July 2014, Mr Maniar alleges

that, in a telephone call prior to the 30th July 2012, Mr Good had assured him that the relevant deposit had been forwarded to Chartered Land Limited and was being held by that company, rather than the respondent.

21. On behalf of the respondent, Mr Basil Good swore an initial replying affidavit on the 10th July 2014. Mr Good avers that he is a director of the respondent and goes on to outline the respondent's position as follows. The premises concerned constitute part of a much larger development site that fronts onto O'Connell Street in Dublin and which the development company Chartered Land Limited assembled before the property market collapsed. The site has been managed to ensure that any occupied buildings forming part of it are held on foot of tenancies capable of being terminated at short notice, so that vacant possession of the entire site can be obtained without difficulty, if and when required. The grant of short-term leases to the respondent, which in turn may grant short-term leases to commercial occupants with the consent of the owner, represents the implementation of this site management strategy. Mr O'Reilly has required the respondent to execute deeds of renunciation of any right to a new tenancy in respect of each of the leases granted to it as a further component of the same strategy.

22. Mr Good asserts that, in those circumstances, it would be absurd for the respondent to make representations to, or enter into an agreement with, any sub-tenant that would result in it being obliged to renew an existing sub-tenancy or to grant a new subl tenancy, and avers that he made no such representation to, or agreement with, Mr Maniar. Mr Good accepts that he did indicate to Mr Maniar that, for as long as the owner of the site was prepared to renew the respondent's leases, the respondent would be prepared to allow the occupants of the relevant premises to remain in occupation on foot of short-term tenancies, provided that there was no question of any tenant acquiring statutory rights of renewal and provided also that vacant possession could be recovered at short notice, if required. On behalf of the respondent, Mr Good asserts that the applicant's case is based on a misconstruction of the respondent's position.

23. Mr Good emphasises that the respondent's short-term letting of the premises at issue terminated on the 30th June 2014 and has not been renewed. In the circumstances, he submits on behalf of the respondent that it cannot be required to perform an agreement with the applicant to grant it a further short-term letting of the premises, and that an order restraining it from ejecting the applicant from the premises would be futile in that it no longer has any interest in the premises to enforce. Mr Good exhibits the following documents in support of that claim: the short-term business letting agreement between the respondent and Joseph O'Reilly, which recites on its face that the tenancy was to terminate on the 30th June 2014; the deed of renunciation of any right to a new tenancy executed by the respondent in that regard; and a letter dated the 2nd July 2014 from the respondent's solicitors to Mr O'Reilly's solicitors, confirming that the respondent had relinquished possession of the property on the expiration of its lease on the 1st July 2014.

24. On behalf of the respondent, Mr Good rejects Mr Maniar's claim of a conspiracy against the applicant. Mr Good avers that the applicant has been treated differently than other tenants because it has breached its short-term lease agreement with the respondent by sub-letting the premises to Mr Malik's company contrary to the terms of that agreement. Mr Good avers to his understanding and belief that Mr O'Reilly is unlikely to have any objection to Mr Malik's company remaining in occupation of the premises, provided that the appropriate renunciation is put in place and that no impediment is created to the recovery of vacant possession, if required, and provided that no intervening interest is created in any such tenancy between those of Mr O'Reilly's chosen lessee (currently, the respondent) and the occupant.

25. On the issue of the oral representations allegedly made, Mr Good avers as follows. First, he asserts that, insofar as Mr Maniar developed the "understanding" that the applicant would "be granted one or perhaps two further short-term letting agreements in respect of the [p]remises", that understanding is not inconsistent with the respondent's position *i.e*. that if the respondent was itself granted a new short-term lease, it would be open to granting further short-term tenancies. Second, he denies that he ever stated to Mr Maniar in any circumstance that "new short-term leases running for a further two or three years would be issued by the [r]espondent to both [applicant] companies" and submits that, even if he had made such a statement, it would lack the necessary certainty to constitute an enforceable agreement, promise or representation.

26. As regards the written representations on which the applicant seeks to rely, Mr Good responds as follows. Concerning the statement in his e-mail to Mr Maniar of the 10th September 2013 that the respondent was "soon to issue new leases going forward from June 2014", Mr Good avers that, while the granting of new sub-leases was under discussion, it was always the case that the granting of new sub-leases would only occur if: (i) new leases were granted by the site owner to the respondent; and (ii) the site owner consented to the creation of the new sub-tenancies. Mr. Good deposes that there was never an unconditional agreement, promise or representation that such leases would be granted.

27. Mr Good avers that Mr Maniar attended a meeting on the 14th May 2014 with Andrew Diggins on behalf of Chartered Land Limited and the deponent and Peter McNally on behalf of the respondent, at which Mr Diggins made it clear to Mr Maniar that the site owner was not making any commitment to grant new leases to traders and was requiring vacant possession of the premises to be yielded up on the 29th June 2014. Mr Good avers to his belief that Mr Maniar could not have been under any misapprehension as to the position following that meeting. Mr Good further deposes to his understanding that the site owner was anxious to ensure that the units it owned on Moore Street were closed and vacated at the end of June 2014 to ensure that there was no continuity of occupation of them, but that it was intended to enter into new short-term lettings commencing in August 2014, subject to the desire not to permit any person or company, such as the applicant, to hold an intermediate interest between the site owner's chosen lessee (*i.e*. the respondent) and the occupants of those units.

28. In the further affidavit that he swore on the 16th July 2014, Mr Maniar avers that he did not refer to the meeting just described in his grounding affidavit on the basis that Mr Diggins had stated at the outset of the meeting that it was to be conducted "without prejudice" and none of the participants had demurred from that arrangement.

29. Finally, Mr. Good avers that he has been advised that Mr McNally strenuously disputes that he told Mr Malik that he would be locked out of the premises and would lose his home.

The law

30. No authority was opened to the Court for the purpose of the present application. Instead, on behalf of the applicant, the Court was simply invited to consider the matter by reference to the established principles governing interlocutory injunction applications generally and the particular principle in company law whereby, in certain circumstances, separate entities may be treated as a single economic unit.

31. The Supreme Court reviewed the principles governing interlocutory injunction applications in *Okunade v. Minister for Justice* [2012] 3 I.R. 152. In a judgment with which Denham C.J., Hardiman, Fennelly and O'Donnell JJ. concurred, Clarke J. referred to the general test set out in *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88, and the analysis of the basic rules that comprise

that test contained in the judgment of McCracken J. in *B. & S. Ltd v. Irish Auto Trader Ltd* [1995] 2 I.R. 142, which Clarke J. described as an application of the basic principle under which the court is required to minimise the risk of injustice pending trial.

32. Clarke J. then proceeded to provide examples of certain types of case in which a refinement of the "pure" *Campus Oil* principles has evolved as a response to the need to minimise the risk of injustice in the context of such cases. The first two such examples are particularly relevant to the facts at issue in this case and that portion of the judgment (at p.182) is worth quoting in full:

> "[***76***] A first example may be found in relation to mandatory interlocutory orders. As Megarry J. observed in *Shepherd Homes Ltd v. Sandham* [1971] Ch. 340, at p. 351:-
>
> > "In a normal case the court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."
>
> O'Higgins C.J. made similar comments about the difficulty in granting mandatory orders at an interlocutory stage in *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88 itself. Perhaps the area where mandatory interlocutory orders have received their most extensive recent consideration is in the field of so-called employment injunctions (that is application brought by plaintiffs seeking either to restrain dismissal or certain steps being taken in a disciplinary process) where the courts have applied a test which involves a variation of the pure *Campus Oil* principles. Where, for example, the substance of the order sought in those cases involves something which, in substance, is a mandatory order (as to which see *Bergin v. Galway Clinic Doughiska Ltd* [2007] IEHC 386, [2008] 2 I.R. 205 and *Giblin v. Irish Life & Permanent plc* [2010] IEHC 36 (Unreported, High Court, Laffoy J., 10th February, 2010), the courts have required the plaintiff to establish not just a fair or arguable case but rather the higher standard noted by this court in *Maha Lingam v. Health Service Executive* [2005] IESC 89, (2006) 17 E.L.R. 137. [***76***] Second, it may well be that there is a category of case where the court has to take into significant account the fact that the grant or refusal of an interlocutory order may go a long way towards resolving the case itself: see *N.W.L. Ltd. v. Woods* [1979] 1 W.L.R. 1294. Likewise, *Allied Irish Banks plc v. Diamond* [2011] IEHC 505, [2012] 3 I.R. 549 involved a so-called springboard injunction, which involves the court in taking action to deprive former employees, who are alleged to have acted unlawfully (either by taking their employer's secrets properly so described or by improperly dealing with the former employer's clients while still in employment or the like) of the fruits of that alleged unlawfulness. In *Allied Irish Banks plc v. Diamond* [2011] IEHC 505, it was held that a higher standard, similar to that required for the granting of a mandatory interlocutory injunction, required to be established. The so-called springboard injunction is only for a limited period of time and once granted cannot be undone even if the defendants win at trial leaving the court with only an award of damages on the plaintiffs undertaking as remedy."

33. On behalf of the applicant in this case it is conceded that, as an interlocutory relief, the specific performance of the contract contended for is one equivalent to a mandatory interlocutory injunction. Insofar as there is any issue concerning the true nature of the injunction sought restraining the ejectment of the applicant from the premises, I am satisfied that it is also essentially mandatory in nature in that it disregards (rather than maintains) the *status quo*, which is that the applicant currently holds no short-term lease or other interest in the premises. Accordingly, I am satisfied that, in the particular circumstances of this case, the relevant relief must be construed more properly as equivalent to a mandatory injunction requiring the respondent to refrain from enforcing its underlying property rights than as a true prohibitory injunction preventing the respondent from ejecting the applicant from the premises.

34. In *Maha Lingam v. Health Service Executive* (Unreported, Supreme Court, 5th October, 2005), Fennelly J. stated that where the relief being sought is, in substance, a mandatory injunction "it is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction.... In such a case it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action."

35. Even if the relief sought in this case were not mandatory in nature, some refinement of the *Campus Oil* principles would be required nevertheless by reference to the second of the two examples provided by Clark J. in *Okunade*, as this is plainly a case in which the grant or refusal of an interlocutory order may go a long way towards resolving the case itself. The interlocutory reliefs now sought - orders directing the respondent to grant (or perform) a new short-term lease agreement and to refrain from ejecting the applicant from the premises - are materially identical to the substantive reliefs that the applicant claims in the underlying proceeding. As was the case in *Allied Irish Banks plc v. Diamond* in respect of an application for a so-called springboard injunction, it seems to me that the test by reference to which such an application must be considered is whether the applicant has made out a "strong arguable case" for the relief that it seeks in those circumstances.

A strong arguable case?

36. The applicant faces two substantial obstacles in seeking to establish the existence of a strong arguable case that it is entitled to the interlocutory relief it seeks against the respondent. First, it must establish such a case for the existence of the agreement it contends for and seeks to have enforced. Second, it must also establish such a case for the proposition that it is appropriate to enforce the agreement contended for in respect of the premises at issue despite the uncontroverted evidence before the court that the respondent no longer has any interest in those premises.

37. On the first point the applicant contends that is has concluded a new short-term lease agreement with the respondent, as evidenced by the alleged representations on which it seeks to rely. However, the respondent submits that, even if the representations concerned were unqualified (and the respondent contends that they could not have been and were not), they would still lack the certainty necessary to create a binding agreement. In that regard, the respondent relies on the absence of any demonstrated agreement on, for example, the precise term of the lease (two years or three years or some other term); its commencement date (from the termination of the preceding lease, from a date one month later or from some other date); or the rent payable (the same as that payable under the previous lease or some other sum). One might also ask whether such a lease agreement would contain an early termination provision comparable to that in the recently expired lease whereby it automatically terminates upon the termination of the respondent's own lease.

38. Insofar as it may be suggested that the agreement concerned, as evidenced by the alleged representations relied upon, was instead an agreement to negotiate, then it cannot form the basis for any relief directed towards the enforcement of a lease agreement that does not yet exist. Moreover, as an agreement to negotiate, it would give rise to the obvious problems with any application for specific performance of such an agreement addressed by Laffoy J. in *Triatic Ltd. v. Cork County Council* [2007] 3 I.R. 57, *viz* that agreements to agree or to negotiate in good faith are unenforceable.

39. Before leaving this point, it should also be pointed out that the requirement of certainty applies not only to the terms of the agreement contended for but also to the terms of the injunction sought. In *Bula Ltd. v. Tara Mines Ltd. (No. 2)* [1987] 1 I.R. 95 (at

p. 104), Murphy J. approved the following principle enunciated by Maugham L.J. in *Fishenden v. Higgs & Hill Ltd*. (1935) 153 L.T. 128 (at p. 142):

> "I should like to observe, in the first place, that I think a mandatory injunction except in very exceptional circumstances, ought to be granted in such terms that the person against whom it is granted ought to know exactly what he has to do."

If the court in this case were to order the respondent to specifically perform a short term lease agreement with the applicant, what would be the term of that lease? What would be its commencement date? What would be the rent? Would it terminate automatically on the termination of the respondent's lease or in circumstances (such as the present) where the respondent does not have a lease?

40. I turn now to the second obstacle that the applicant must surmount *i.e.* the requirement to establish a strong arguable case that specific performance of the new short-term lease agreement concerning the premises should be ordered against the respondent as lessor, despite the uncontroverted evidence before the court that the respondent no longer has any interest in the premises.

41. In this regard, the applicant submits that the court should treat the respondent, on the one hand, and Joseph O'Reilly and Chartered Land Limited, on the other, as a single economic entity and that the court should be satisfied, on that basis, to make the order that the applicant seeks against the respondent, notwithstanding the fact that the respondent no longer has any evident legal interest in the premises at issue and the fact that neither Mr O'Reilly nor Chartered Land Limited are parties to either the present application or the underlying proceedings.

42. In advancing that argument, the applicant relies on two specific assertions of fact. The first is that the deposit on the premises of €25,000 that the applicant paid to Mr McNally in 2009, and which was to be applied to the last quarter's rent, has been passed to Chartered Land Limited, Mr O'Reilly's company. The second is that, on or about the 14th February 2013, the respondent was able to forward a draft lease to the applicant, although the respondent did not formally enter into its own short term lease of the premises with Mr O'Reilly until the 14th May 2013.

43. In response, it is first submitted on behalf of the respondent that the deposit arrangements between a sub-tenant and tenant are frequently reflected in those between the tenant and the landlord without any suggestion arising that the landlord and tenant should in consequence be treated as a "single economic entity". In respect of the second matter, the respondent relies on the averment of Mr Good in his affidavit sworn on the 17th July 2014 that Mr O'Reilly had agreed to grant the respondent a lease when it forwarded a draft sub-lease to the applicant in February 2014, whereas Mr O'Reilly has not agreed to grant the respondent a further lease now.

44. No authority was cited for the proposition that Mr O'Reilly and the respondent should be treated as a single economic entity. Instead, the applicant relied on the facts just described as establishing a "blurring of the lines" between those two entities sufficient to warrant the adoption of that approach by the court in this case.

45. The courts have on occasion been willing to disregard the separate legal personality of a company on the basis that it formed part of a single economic entity comprising itself and a number of other companies. Most notably, in the case of *Power Supermarkets Ltd v. Crumlin Investments Ltd and Dunnes Stores (Crumlin) Ltd* (Unreported, 22nd June 1981) the plaintiff had invited Costello J. "to pierce the corporate veil" as between the two defendants.

46. The established facts in that case were as follows. The first defendant leased a portion of a shopping centre to the plaintiff (a company trading as the supermarket chain Quinnsworth) for use as a supermarket. The lease contained a restrictive covenant whereby the lessor was not to allow any other supermarket to occupy a unit in the shopping centre. The first defendant (and, by extension, the shopping centre) was acquired by a company within the group of companies owned by Dunnes Holding Co. (an unlimited company at the apex of the group of companies comprising the Dunnes Stores supermarket chain). The second defendant was incorporated as another company within the Dunnes group to operate a competing supermarket within the shopping centre concerned. The first defendant, which was bound by the relevant restrictive covenant in its lease with the plaintiff, conveyed the fee simple in another unit within the shopping centre to the second defendant, which was not. In the circumstances, the plaintiff requested that the court should pierce the corporate veil by deeming that the two defendant companies were carrying on the business of the proposed competing supermarket as a single economic entity such that the second defendant should be held equally bound by the restrictive covenant entered into by the first defendant.

47. On the facts of that case, the court was satisfied that the Dunne family were actively involved in the running of the Dunnes Stores group of companies and that their wishes prevailed in the respect of each company in the group, including the first and second defendant.

48. Costello J. addressed the issue in the following terms:

> "The plaintiffs submit that I should pierce the corporate veil, look to the realities of this case and hold, notwithstanding the fact [the first defendant] and [the second defendant] are two separate entities, that the business in the unit is being carried on by a singe entity. I was referred to *Smith Stone & Knight Ltd v. Birmingham Corporation* (1939) 4 All ER 116, a case in which a parent company was held entitled to compensation in respect of a business carried on by a subsidiary on the basis that the subsidiary was in reality carrying it on on behalf of the parent company and to *D.H.N. Ltd v. Tower Hamlets London Borough Council* (1976) 1 W.L.R. 852, a case also dealing with the payment of compensation for the compulsory acquisition of property. The claimants in that case were a group of three companies associated in a wholesale grocery business. The Court of Appeal held that it should pierce the corporate veil, and that it should not regard the companies as separate legal entities but treat the group as a single economic entity for the purpose of awarding compensation. I need not refer to the facts of the case; however, the reasons which prompted the court's approach are very material for the resolution of the issues in the present case. Lord Denning pointed out (page 860) that the group of companies was virtually the same as the partnership in which all three were partners; that they should not be treated separately so as to defeat the claim to compensation on a technical point; that they should not be deprived of the compensation which should be justly payable for disturbance. So, he decided that the three companies should be treated as one. Lord Shaw (at page 867) pointed out that if each member of the group of companies was to be regarded as a company in isolation that nobody at all could claim compensation "in a case which plainly calls for it", and he said that the true relationship should not be ignored because to do so would be a denial of justice. He too considered that the group should be regarded as a single entity.
>
> It seems to me to be well established from these as well as from other authorities (see Harold *Holdsworth & Co. Ltd v. Caddies* (1955) 1 W.L.R. 352; *Scottish Co-operative Wholesale Society Ltd v. Meyer* (1959) A.C. 324) that a court may, if the justice of the case so requires, treat two or more related companies as a single entity so that the business notionally

> carried on by one will be regarded as the business of the group, or another member of the group, if this conforms to the economic and commercial realities of the situation. It would, in my view, be very hard to find a clearer case then the present one for the application of this principle. I appreciate that [the first defendant] is a property-owning not a trading company but it is clear that the creation of the new company and the conveyance to it of the freehold interest in a unit in the shopping centre were the means for carrying out the commercial plans of the Dunne family in the centre. The enterprise had a two-fold aspect (a) the creation of a new retail outlet for the Dunnes Stores Group in the shopping centre and (b) the enhancement of rents in the centre as a whole which the creation of such an outlet would hopefully produce. To treat the two companies as a single economic entity seems to me to accord fully with the realities of the situation. Not to do so could involve some considerable injustice to the plaintiffs as their rights under the covenant might be defeated by the mere technical device of the creation of a company with a £2 issued capital which had no real independent life of its own. If it is established that the injunction was breached there should in my opinion be an injunction against both defendants."

49. In considering the appropriate scope of the judgment in *Power Supermarkets Ltd.*, the following extract from the judgment of Murphy J. in the Supreme Court case of *Allied Irish Coal Supplies v. Powell Duffryn International Fuels Ltd* [1998] 2 IR 519 (at pp. 535-6) is instructive:

> "Counsel for the defendant sought in argument in this Court, and in the High Court to distinguish the facts of the present case and those in *Power Supermarkets Ltd. v. Crumlin Investments Ltd.* (Unreported, High Court, Costello J., 22nd June, 1981). There is little difficulty in making such a distinction. In that case Costello J. drew attention to the fact that [concerning the company in respect of which it was proposed that the corporate veil should be pierced], no meeting of the board had ever been held. There had been no meeting of shareholders. The supermarket, the subject matter of the case, had been purchased without any approval of any meeting of the board of directors and no meeting thereof was ever held to make decisions on trading or commercial matters. In fact the stock sold by the company was purchased not by the directors as such, but by a panel of the Dunnes Stores Group who apportioned liability for purchases to each trading company in the group to whom the goods were invoiced. In the instant case there was, as I have pointed out, a very substantial business carried on by the employees of the defendant who reported to monthly meetings of the board of that company. However, apart from the distinctions which may be drawn between this and other cases, the crucial feature of *Power Supermarkets Ltd. v. Crumlin Investments Ltd*. is that Costello J. did not purport to question the authority of *Salomon v. Salomon & Co*. (1897] A.C. 22. Indeed no reference was made to that case in the course of his judgment nor, as far as I am aware, the argument on which it was based. Again it is clear from the judgment in *Rex Pet Foods Ltd. v. Lamb Brothers (Ireland) Ltd.* (Unreported, High Court, Costello J., 5th December, 1985) that Costello J. had not intended in *Power Supermarkets Ltd v. Crumlin Investments Ltd.* to lay down any revolutionary principle of law."

50. The situation in this case is also significantly different than that which was addressed by Costello J. in *Power Supermarkets Ltd*. Here, the respondent is the tenant of the premises of which Mr O'Reilly is the owner. There is nothing to suggest that those two separate entities are controlled by the same overarching entity. While Mr O'Reilly may very well be a significant client of the respondent, there is no evidence that he controls it and, a *fortiori*, no evidence that it controls him. And of course, Mr O'Reilly is not a corporate entity at all. Therefore, I cannot be satisfied that to treat Mr O'Reilly and the respondent as a single economic entity would accord with the realities of the situation in this case. Nor can I be satisfied that to treat those separate entities in that way would not involve considerable injustice to them and, in particular, Mr O'Reilly who is not a party to the present proceedings.

51. By reference to the foregoing analysis, I am neither satisfied that the applicant has made out a strong arguable case for the agreement it seeks to rely upon nor a strong arguable case that it is appropriate to make any order against the respondent in respect of a premises in which it holds no interest. However, it is important to emphasise that I have not purported to finally decide any factual or legal aspects of the applicant's claim. I fully appreciate that, as Hardiman J. observed in *Dunne v. Dun Laoghaire Rathdown Co Council* [2003] 1 I.R. 567 (at 581), it would not be appropriate to do so when, at trial, the evidence may be different and more ample and the law will be debated at greater length.

Adequacy of damages and balance of convenience

52. In case I am error in the conclusions that I have just reached, I believe it is appropriate to consider the remaining aspects of the test for interlocutory injunctive relief.

53. The applicant submitted that damages will not be an adequate remedy if it is not granted the relief it seeks because the business relationship that it enjoys with its sub tenants would be adversely affected by the termination of its tenancy, and the value of that loss cannot be readily ascertained. In reply on this point, the respondent contends that damages are an adequate remedy for any loss the plaintiff might suffer. The respondent points out that the specific loss that the applicant would suffer on its own case is the loss of the balance between the rent it has been paying and that which it receives, which amount must be readily quantifiable. It seems to me that, while the value of the applicant's commercial relationship with its sub-tenants may not be entirely exhausted in the value of the rent that they pay to it, that relationship is a commercial one and, thus, should have an ascertainable financial value. Accordingly, I am satisfied that damages are an adequate remedy for the applicant.

54. Were the Court to apply the *Campus Oil* guidelines in the usual way, it would next have to consider the balance of convenience. For all of the reasons set out in the preceding paragraphs, I cannot avoid the conclusion that the balance of convenience does not favour the grant of an injunction in the terms sought.

Conclusion

55. The relief sought is hereby refused.