THE HIGH COURT

COMMERCIAL

[2018 No. 9496 P.]

BETWEEN

MARTIN FERRIS AND PATRICK MCCOY

PLAINTIFFS

AND

MARKEY PUBS LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Twomey delivered on the 21st day of February, 2019

INTRODUCTION

1. This case concerns an application by the plaintiffs, Martin Ferris and Patrick McCoy (the "Receivers") for an interlocutory injunction directing the defendant, Markey Pubs Limited ("Markey Pubs") to vacate a property known as 'O'Donoghues Pub' which is at 15/15a Suffolk Street, Dublin 2 (the "Property"). The owner of the Property is Thingmote Limited ("Thingmote").

2. For the reasons set out hereunder and in particular since this Court has determined that the Receivers have established a very strong case that Markey Pubs will not be granted in the Circuit Court a renewal of its alleged tenancy from the owner of the Property, Thingmote, this Court grants the injunction. One of the reasons that the Receivers have established a strong case that Markey Pubs would not get in the Circuit Court a renewal of its alleged tenancy is because, as outlined in greater detail hereunder, the claim for a tenancy renewal is based on the extraordinary claim that Markey Pubs had been assigned a lease of the Property, yet even the most cursory examination of the lease in question would reveal that it was a complete nullity since the alleged landlord had no interest in the Property and so could not grant a lease over the premises.

FACTUAL BACKGROUND

3. The Receivers were appointed by Havbell DAC ("Havbell") on 18th July, 2018 as receivers of the Property arising from a mortgage dated 30th November, 2004 (the "Mortgage") which was executed by Thingmote as security for a loan of €9.48 million which was extended by Permanent TSB plc ("PTSB") under its previous name, Irish Life and Permanent plc, to EOD Investments Limited ("EOD"), which was the parent company of the owner of the Property, Thingmote.

4. Approximately €6 million of this loan is outstanding at present. On 19th June, 2015 the loan was lawfully assigned and transferred by PTSB to Havbell, along with the security relating to the Property. Thus, it is Havbell which will benefit from the actions of the Receivers in seeking vacant possession of the Property in order to sell the Property, which is estimated to have a value of approximately €2.5 million, which proceeds are intended to be used to partially discharge the outstanding loan.

5. The crux of this dispute is that while the Receivers wish to realise the value of the security by selling the Property, Markey Pubs, which was incorporated on 13th January, 2016, claims to be entitled to a tenancy in the Property from the owner of the Property, Thingmote, and has instituted Circuit Court proceedings in which it seeks a new tenancy under Part II of the Landlord and Tenant (Amendment) Act 1980 (the "1980 Act").

6. In particular, Markey Pubs claims that the Receivers should not be granted an interlocutory injunction to force it to vacate the Property because Circuit Court proceedings are in being, which, if successful, would deny the Receivers any entitlement to possession, since in those proceedings Markey Pubs claims to be entitled to a new tenancy from the owners of the Property, Thingmote.

Connection between Markey Pubs and borrower and provider of security

7. While Markey Pubs did not borrow any of the funds lent by PTSB, the sole director and sole shareholder of Markey Pubs, Mr. Des Markey ("Mr. Markey"), and thus the controlling mind of Markey Pubs, was a director of EOD, the borrower of the secured funds, from February 2011 to October 2013. In addition, sworn evidence was provided by the Receivers that Mr. Markey owned 2/3 of the shareholding in EOD up until the date of EOD's dissolution in January 2016, and that upon EOD's court ordered restoration in 2018, a Ms. Markey, with the same address as Mr. Markey, owned a 2/3 shareholding in EOD.

8. It is not a determinative factor in this case that Mr. Markey was the sole shareholder of Markey Pubs (the alleged tenant), and also the majority shareholder in EOD (the borrower), or that EOD was itself the owner of Thingmote (the owner of the Property and the grantor of the security). It is nonetheless relevant that this Court is not dealing with a completely unconnected third-party tenant challenging a receiver's right to possession of the secured property. Rather, this is a case where there is a connection between the owner and director of Markey Pubs (the alleged tenant), on the one hand (which is seeking to restrict the Receivers in realising their security over the Property), and on the other hand, the owners and directors of the company (EOD) which borrowed the funds, which company itself owned Thingmote, which charged the Property as security for the loan to its parent company, EOD.

Connection between Markey Pubs and previous tenant

9. It is also relevant to note that the controlling mind of Markey Pubs, Mr. Markey, was also a director of a company called San Benedetto Limited ("San Benedetto") and he owned the entire shareholding in the company along with Ms. Jacqueline Markey, whom he avers (at para. 5 of his affidavit of 14th November, 2018) was his wife until their divorce which he avers (at para. 16 of his affidavit of 11th December, 2018) took place around January 2016.

10. San Benedetto is a critical part of Markey Pubs' claim to be entitled to a tenancy in the Property, since San Benedetto was a tenant in the Property under at least one lease prior to its dissolution on 18th May, 2016. As noted hereunder in more detail, Markey Pubs claims to have been assigned San Benedetto's lease on 15th January, 2016, such that Markey Pubs is now entitled to the renewal of that lease. It is on this basis that Markey Pubs claims to be entitled to defeat the Receivers' application for an injunction ordering Markey Pubs to vacate the Property.

11. The Receivers, for their part, argue that despite the issue of Circuit Court proceedings by Markey Pubs for a tenancy renewal,

there is no possible entitlement on the part of Markey Pubs to a renewal of a tenancy under the 1980 Act, and that this is a suitable case for the granting of an interlocutory injunction, notwithstanding the existence of Circuit Court proceedings.

JURISDICTION
12. It seems clear to this Court from the caselaw (including the Supreme Court case of *Kenny Homes Ltd v. Leonard* [1997] IEHC 230 (Supreme Court, unreported, 18 June, 1998)), and, in particular, Article 34(1) of the Constitution (which provides that the High Court has full original jurisdiction to determine all matters of law and fact), that this Court does in fact have jurisdiction in appropriate circumstances to determine whether an alleged tenant has a strong case for entitlement to a renewal of a lease in High Court proceedings in which such a renewal is relevant (such as in this case, which are, in essence, possession proceedings against that tenant), notwithstanding the fact that the Circuit Court has exclusive jurisdiction to determine the renewal of tenancies under the 1980 Act.

13. For example, in *Walpoles (Ireland) v. Dixon* (1935) 69 ILTR 232 at 233, O'Byrne J. in the High Court (and affirmed on appeal in the Supreme Court) states in relation to the predecessor of the 1980 Act, i.e. the Landlord and Tenant Act, 1931:

> "Mr. Campbell, who appears for the defendant, says that his client has served a notice under that Act, and that the issue raised therein will come on for hearing in the Circuit Court; and that pending such hearing I should adjourn this action."

However, O'Byrne J. rejected this application, which is similar to the application made by counsel for Markey Pubs in this case, in the following terms:

> "I would certainly take that course if I thought there was any substantial ground in which such application might be granted, but in my opinion, having regard to the facts of the case, and to the documents, and to the provisions of the Act of 1931, such an application could not possibly succeed."

14. A similar approach, regarding the jurisdiction of the High Court to effectively determine the prospect of the renewal of a tenancy application being successful in the Circuit Court, was taken by the High Court in *Crofter Properties Limited v. Genport Limited* [2007] IEHC 80. The comments of Finlay Geoghegan J. in that case seem particularly relevant in the context of the case before this Court, since she notes that if the proceedings before the High Court (in that case for possession) were to be stayed pending the outcome of the Circuit Court proceedings for the renewal of the tenancy then:

> "it would mean that a tenant could deliberately decide not to make any payment of rent whilst in occupation under s 28 [of the 1980 Act] and in the event that a new tenancy is not granted the landlord would have no right of redress other than a potential judgment against the tenant."

15. To put the matter another way, if the alleged tenant is making an application for a renewal of a tenancy under the 1980 Act with little or no hope of success, but in the hope of gaining rent-free or rent-reduced use of the property (for the year or two that it takes to have the Circuit Court proceedings, and any appeal to the High Court, determined) at the expense of the holder of security over the property that funded the purchase of the property, this Court can exercise its full original jurisdiction under Article 34(1) of the Constitution to decide whether there is, in reality, any merit to the claim for a new tenancy, notwithstanding the fact that the general rule is that the Circuit Court has exclusive jurisdiction under the 1980 Act to determine claims for a new tenancy.

16. If the High Court were to do otherwise, and allow proceedings which have little or no hope of success to thwart or delay the enforcement of the rights of a holder of security, this would, in this Court's view, amount to permitting an abuse of process since it would permit the use of the court's processes for tactical or other motives, rather than being used for the genuine resolution of *bona fide* disputes.

Relevance of the fact that an interlocutory injunction is being sought
17. In this case, the injunction being sought by the Receivers is being sought at the interlocutory stage of these proceedings. It is therefore relevant to refer to the High Court case of *Emo Oil v. Oil Rig Supplies* [2017] IEHC 594 which also concerned an interlocutory injunction in similar circumstances. In that case a tenant sought an interlocutory injunction requiring a sub-tenant to give up possession of a retail service station, notwithstanding that the sub-tenant had brought Circuit Court proceedings claiming a new tenancy in that property. Even though the injunction was sought as part of interlocutory proceedings, McDermott J. granted the injunction. However, it is relevant to note that McDermott J. placed a stay on the injunction on condition that the defendant pay full rent each month and that it fully discharge the rent arrears.

Payment of rent and arrears by an alleged tenant seeking a tenancy renewal
18. It is particularly relevant to the present case to note that at para. 33 of *Emo Oil v. Oil Rig Supplies*, McDermott J. made the following comments in relation to the obligation to pay arrears of rent as a condition of the stay:

> "[I]t appears to me that the payment of this sum will in any event be necessary if the defendant is to establish its claim for a new tenancy in the Circuit Court under s. 28 of the Landlord and Tenant (Amendment) Act 1980 (though it may well be regarded as in default of its obligation in that respect, but that is not a matter for this Court)."

19. In placing a stay on the injunction in these terms, McDermott J. was making the entirely practical point that if the alleged tenant is to succeed in getting a renewal of its tenancy, it will be required to pay rent on an ongoing basis as well as pay off all rent arrears. This, therefore, means that in a situation such as the one Markey Pubs is in, where it is alleging that it is entitled to a renewal of a lease, there is no injustice in it being required to pay rent as it falls due as well as paying off all arrears of rent.

Payment of rent by Markey Pubs to date and its financial position
20. In this regard, submissions have been made on behalf of the Receivers that Markey Pubs, since its alleged tenancy began in January of 2016, has not paid the annual rent of €239,200 per annum under the 2008 Lease (defined below) leading to rent arrears of €650,000. (For reasons that will become obvious, this Court is concentrating on the 2008 Lease, rather than the 2013 Lease which is also defined below).

21. For its part, Mr. Markey, on behalf of Markey Pubs acknowledges on affidavit (at para. 23 of 11th December, 2018) that it is in arrears of rent, but he also avers that Markey Pubs spent a total of €250,000 on the Property (being €150,000 on improvements and €100,000 on fire safety), which in submissions it alleges should be set off against any arrears of rent.

Test for granting of a mandatory injunction
22. Since one is dealing with a mandatory interlocutory injunction, as, by its terms, the injunction which the Receivers seek will

require Markey Pubs to vacate the Property, it seems clear to this Court that the test laid down in the Supreme Court case of *Maha Lingham v. Health Service Executive* [2006] 17 E.L.R. 137 is applicable, namely that the plaintiffs in this case must show that they have a strong case that is likely to succeed at trial in order to be granted the injunction they seek. In addition, of course, as is clear from the Supreme Court case of *Campus Oil Ltd v. Minster for Industry and Energy & ors*. [1984] I.L.R.M. 45, before an interlocutory injunction will be granted, damages must not be an adequate remedy and the balance of convenience must favour the granting of the injunction.

Damages as an adequate remedy for either party?
23. In this regard, Markey Pubs' most recent accounts for the period ending 31 December 2017 show that it has a deficit in its balance sheet and that it made a loss in its most recent financial year. This is relevant for two reasons, as detailed below.

24. First, if Markey Pubs continues not to pay the full rent which it has averred is the current situation, then, as noted by Finlay Geoghegan J. in the *Crofter Properties v. Genport case,* the Receivers would have no right of redress other than a potential judgment against the tenant, which is likely to be of limited use in light of Markey Pubs' current financial position.

25. Secondly, of course, if the injunction is not granted and it takes up to two years for the Circuit Court proceedings and any appeal to the High Court to be determined, the prospect of Havbell recovering rent or damages from Markey Pubs appears, based on the evidence before the Court, to be low. Thus, it is difficult to see how damages could be an adequate remedy for the Receivers if they were not granted the injunction they seek (if they do establish before this Court a strong case that Markey Pubs would not be entitled to new tenancy from the Circuit Court).

26. On the other hand, if, after granting the injunction at the plenary hearing of the action, the trial judge determines that the injunction should not have been granted, there is no evidence to suggest that Havbell would not be able to meet any damages claimed by Markey Pubs. Furthermore, since Markey Pubs made a loss, according to their most recent accounts, it should be a relatively straight forward matter to estimate the financial damage which would result to Markey Pubs from the loss of its right to renewal of a tenancy caused by the granting of the injunction.

27. However, that analysis still leaves the key issue of whether the Receivers have established a strong case and of course, if so, whether the balance of convenience favours the granting of an injunction.

A STRONG CASE THAT MARKEY PUBS WILL BE UNSUCCESSFUL?
28. In order to determine whether the Receivers have a strong case that Markey Pubs would not be entitled to a renewal of its alleged tenancy, such that the High Court would grant the order for vacant possession at the full plenary hearing despite the existence of Circuit Court proceedings, it is necessary to consider the grounds upon which Markey Pubs claims to be a tenant in the Property.

29. Markey Pubs rests its entitlement to a new tenancy on two possible grounds, which are based on what can be termed the '2008 Lease' and the '2013 Lease'. Because of the extraordinary nature of the claims based on the 2013 Lease, this Court proposes to deal with that ground first.

A tenancy based on the 2013 Lease?
30. One of the most unusual features of this case is the fact that Markey Pubs claims to be entitled to a new tenancy in the Property in reliance on a written Assignment dated 15th January, 2016 (the "Assignment"). This Assignment is between San Benedetto and Markey Pubs for a consideration of €10, and it is executed on behalf of San Benedetto by Mr. Markey and is also executed on behalf of Markey Pubs by Mr. Markey. As previously noted, Markey Pubs is wholly owned by Mr. Markey, its director, and San Benedetto was wholly owned by Mr. Markey and his former wife, who were also its directors.

31. However, the truly extraordinary aspect of this claim is the fact that the alleged lease, which is purported to be assigned by the Assignment, is a lease dated 15th August, 2013, between EOD as alleged landlord and San Benedetto as tenant (the "2013 Lease") and is stated to be a lease of the Property for a term of 10 years at rent of €93,000 per annum.

32. The reason the claim by Markey Pubs, that it is entitled to a new tenancy because of the assignment of this 2013 Lease, is so extraordinary is because EOD never, at any stage, owned the Property. Hence it was a legal impossibility for EOD to grant any person, and in particular Markey Pubs, a lease over a property it did not own. The background to this sham lease is worth bearing in mind since it does provide some context to its execution and subsequent assignment.

- First, at the time of this sham lease by EOD to San Benedetto in 2013, Mr. Markey owned a majority shareholding in EOD and was a director of EOD.

- Secondly, at the time it entered the sham lease, the putative landlord, EOD, owed PTSB circa €6 million, which is still outstanding, which loan was secured by a mortgage over the Property in favour of PTSB by EOD's wholly owned subsidiary, Thingmote.

- Thirdly, the recipient of the sham lease, San Benedetto, was also controlled by Mr. Markey, since he was a director and majority shareholder of that company.

- Fourthly, the terms of the sham lease provided for the rent in the Property to be €93,000 per annum. This is a fraction of the then current rent (€239,200 per annum), which had been agreed five years previously between the actual landlord (Thingmote) and San Benedetto under the 2008 Lease (referred to below).

- Fifthly, Mr. Markey became the sole shareholder and director in Markey Pubs on its incorporation in January 2016, which company became the beneficiary of the sham lease under the terms of the Assignment in January 2016.

In summary therefore, this sham lease was between EOD and San Benedetto, two companies controlled by Mr. Markey and it was then assigned by San Benedetto to another company controlled by Mr. Markey (Markey Pubs) and that sham lease provided for the rent to be a fraction of the previous rent agreed by the owner of the Property (Thingmote), while allegedly granting Markey Pubs occupancy rights and thereby thwarting the rights of the security holder (Havbell), in connection with the unpaid loan, to possession of the Property as well as drastically reducing any rent recoverable from the Property.

33. While the foregoing matters do provide some context to the issues in dispute in this case, they are not determinative of this case, since the determinative issue is the fact that the owner of the Property is, and always has been Thingmote. It is patently clear

therefore that the 2013 Lease is a nullity. It is also patently clear that the Assignment is a nullity in the sense that it assigns an alleged lease that never existed.

34. Accordingly, neither the 2013 Lease nor the 2016 Assignment of that lease could ever be a basis for a claim that Markey Pubs is entitled to a new tenancy under the 1980 Act. Therefore, this Court has little hesitation in saying that the Receivers have a strong case that is likely to succeed at trial that Markey Pubs does not have any entitlement to a new tenancy in the Property based on the 2013 Lease.

A tenancy based on the 2008 Lease?

35. Markey Pubs' next claim is that that it is entitled to a new tenancy based on a lease executed in 2008 by San Benedetto. This lease is at least executed by the owner of the property, since it is between Thingmote and San Benedetto and is dated 17th July, 2008 (the "2008 Lease") and provides for the lease of the Property for a term of 4 years and 9 months. The rent under the 2008 Lease is stated to be €4,600 per week, which amounts to €239,200 per annum.

36. It is clear therefore that this lease expired on 16th April, 2013 once the 4 year and 9 month term had expired. Markey Pubs alleges, in the alternative to the 2013 Lease founding the basis for its new tenancy under the 1980 Act, that it was assigned in January 2016, when it took up occupancy of the Property, the benefit of this 2008 Lease which expired in April 2013.

37. In essence, Markey Pubs' claim is that San Benedetto overheld on the 2008 Lease after its expiry in 2013, and that if the Assignment in January 2016, of the 2013 Lease, did not work to transfer a tenancy to Markey Pubs (which it could not do, since it was an assignment of a nullity), then Markey Pubs somehow stepped into the shoes of what San Benedetto held in January 2016, namely its overholding of the expired 2008 Lease. In para. 15 of his affidavit of 11th December, 2018, Mr. Markey outlines the logic of its reliance on the 2008 Lease, in the alternative to its reliance on the 2013 Lease, as follows:

> "Even if this was not the case that EOD did not have the capacity to grant a lease in the premises to San Benedetto in 2013, that transaction clearly shows that San Benedetto considered itself to be in occupation of the premises as a tenant and, although more appropriately a matter for legal submission, I am advised that if it is the case that the lease entered into on 15 August 2013 is of no effect, then San Benedetto's occupation of the property after that date continued as a periodic tenant on the same basis as that which obtained since the expiration of the term under the 2008 lease."

38. However, there is no written assignment of the 2008 Lease, which Markey Pubs claims that San Benedetto overheld on, in favour of Markey Pubs. The only assignment that exists is the Assignment, which is an assignment by San Benedetto of the 2013 Lease, which is a nullity.

39. Indeed, it seems clear that even if the Assignment was in fact an assignment of the overholding of the 2008 Lease (which it is not), that would also not be legally possible. This is because the leading text on the subject, J.C.W. Wylie, Landlord and Tenant Law (3rd edn, 2014), makes it quite clear that it is not legally possible for a tenant to assign its overholding as a tenant to another party. At para 4.34 it is stated:

> "A tenancy of, or on, sufferance is a peculiar type of "tenancy" which arises where a tenant holds over, after expiry of his existing valid tenancy, without the assent or dissent of the landlord and without statutory right."

And at para. 4.37:

> "Since a tenant at sufferance has no estate in the land he has nothing he can assign or otherwise dispose of."

40. It seems clear therefore to this Court that Markey Pubs, when it allegedly took up occupation of the Property in January 2016 immediately after its incorporation in that month, could not have got an assignment from San Benedetto of a tenancy at sufferance, which is the most that the 2008 Lease could have been after April 2013. Accordingly, Markey Pubs can have no basis for seeking a renewal of a tenancy which it never had. Therefore, it seems clear to this Court that the Receivers have established that they have a very strong case, that is likely to succeed at trial, that Markey Pubs cannot rely on the 2008 Lease for a renewal of their alleged tenancy of the Property.

BALANCE OF CONVENIENCE

41. Finally, as regards whether the balance of convenience favours the granting of the injunction, this Court adopts the approach of Allen J. in *Regan & Anor. v. Havbell DAC & Ano*r. [2018] IEHC 656 at para. 56, where he adopted the approach of Hoffman J. in *Films Rover International Ltd v. Cannon Film Sales Ltd* [1987] 1 W.L.R. 670, namely that:

> "the fundamental principle on an interlocutory application, whether for a prohibitory or a mandatory injunction, should be that the court should adopt whatever course would carry the lower risk of injustice if it turns out to have been the "*wrong*" decision."

42. The argument was made in support of Markey Pubs that there is a lesser risk of injustice with refusing the injunction, since granting the injunction would lead to an extinguishment of Markey Pubs' property rights (since it would not be able to pursue its claim for a new tenancy), while refusing the injunction would only lead to a postponement of Havbell's rights until the Circuit Court proceedings and any appeal to the High Court conclude.

43. As it was in the *Regan v. Havbell* case (at para. 54), this Court concludes that:

> "Not for the first time the issue as to the adequacy of damages is bound up with the issue of the balance of convenience."

44. In this instance, this Court has already concluded that the 'adequacy of damages test' favours the granting of the injunction.

45. Furthermore, and presumably to support its argument that a refusal of the injunction carried the lower risk of injustice, Markey Pubs indicated at para. 32 of its written submissions that it would pay rent of €93,000 per annum to the Receivers pending the determination of the Circuit Court proceedings.

46. With this in mind, and in order to buttress this Court's decision that the granting of the injunction carries a lesser risk of injustice than refusing it, this Court proposes to adopt the approach of McDermott J. in *Emo Oil v. Oil Rig Supplies* where he put a stay on the injunction on condition that the tenant pay the monthly rent.

47. In the interests of reducing the risk of any injustice, and in the particular circumstances of this case, this Court is not proposing to make the stay conditional also on the payment of the arrears of rent by Markey Pubs (as was done by McDermott J.), since there is uncertainty about the extent to which monies spent on improvements and fire safety would reduce the arrears of rent. In refusing to make the stay conditional on the payment of arrears, this Court takes account of the fact that these proceedings are still at an interlocutory stage and thus one is dealing with a situation where there has not been full discovery nor have witnesses' evidence been subject to cross examination.

48. In this way, the risk of Markey Pubs having its property rights extinguished is within its own control since it can choose to pay the rent, or not, (particularly as this Court is not making the stay conditional on Markey Pubs paying the arrears of rent which is alleged to amount to €650,000), and thereby pursue its tenancy renewal claim. The rent which Markey Pubs must pay is the rent due under the terms of the 2008 Lease, which it alleges governs its tenancy, *albeit* that it also claims that its tenancy is governed by the reduced rent of €93,000 per annum in the 2013 Lease. However, as previously noted, this Court believes that there is a compelling argument that at a plenary hearing the 2013 Lease will be found to be a nullity. Hence the rent payable by Markey Pubs, if it wishes to benefit from this stay, is the rent under the 2008 Lease, namely €239,200.

49. It is also relevant to note that Mr. Markey averred (at para. 18 of his affidavit of 29th January, 2019), when arguing against the need for any injunction, that:

> "the Circuit Court proceedings, and indeed, any appeal to the High Court can be determined and concluded within a period of no more than 6 months, particularly, in circumstances where the parties agree to apply to the Circuit Court to have the proceedings case managed to an early hearing and agree to also do likewise with regard to any appeal to the High Court."

If Mr. Markey is correct, this would reduce the length of time during which the rent of €239,200 is payable by Markey Pubs to six months, under the conditions of the stay to be imposed by this Court.

CONCLUSION

50. For the reasons set out in this judgment, this Court grants the injunction sought by the Receivers ordering Markey Pubs to give up vacant possession of the Property. I will hear from counsel for Markey Pubs whether it wishes to have a conditional stay put on the order in the foregoing terms and from counsel generally regarding the terms of the order.