Neutral Citation Number: [2006] IEHC 125

THE HIGH COURT

[2006 No. 933P]

BETWEEN

DAMIEN SHERIDAN

PLAINTIFF

AND

THE LOUIS FITZGERALD GROUP LIMITED AND BURSTON LIMITED

DEFENDANTS

Judgment of Mr. Justice Clarke delivered the 4th day of April, 2006

1. Introduction

1.1 The plaintiff ("Mr. Sheridan") operates a catering business. The defendants ("Fitzgerald") are connected companies which operate a chain of well known public houses. In particular Fitzgerald operates a public house at Temple Bar in Dublin City Centre known as "The Quays Bar". On the first floor of the same premises there is a restaurant known as the "The Quays Kitchen". In the middle of 2005 Mr. Sheridan and a colleague, a Mr. Alan Hughes, became the proprietors of a company called Damal Catering Limited ("Damal"). Mr. Sheridan was already involved in business with Fitzgerald having entered into an agreement in the form of a licence to provide restaurant and catering facilities at another public house premises owned by Fitzgerald and known as "The Big Tree" on Dorset St. in Dublin.

1.2 However as of June 2005 Damal had been established for the purposes of running the business at the Big Tree and also entered into negotiations to conduct a business at the Quays Kitchen.

1.3 While there is a dispute between the parties as to the nature and terms of the agreement entered in respect of the Quays Kitchen, it is common case that an agreement was entered into which resulted in Damal commencing to provide catering and restaurant services at the Quays Kitchen.

1.4 It is also clear that Damal ran into financial difficulties in the latter part of 2005 and was put into voluntary liquidation by resolutions passed at meetings of creditors and members held on 19th December, 2005. By that time Damal had been operating the restaurant at the Quays Kitchen for a number of months.

1.5 While I will return to certain aspects of the contentions of the parties as to the relevant agreements allegedly entered into, in the course of this judgment, in substance Mr. Sheridan contends that in August, 2005 (after two trial periods of one month each), it was agreed between himself on behalf of Damal and Mr. Alan Murtagh, Group Operations Officer of Fitzgerald, that Damal would obtain a lease in respect of the Quays Kitchen restaurant for a term of five years at an initial rent of €100,000 per annum payable weekly which was to be "fixed for eighteen months and reviewable thereafter". Mr. Sheridan contends that Mr. Murtagh also required that a deposit of €30,000 would be paid and that the relevant lease would be drafted by Fitzgerald's solicitors. Mr. Sheridan further contends that on the day after Damal went into liquidation he met again with Mr. Murtagh who agreed, on behalf of Fitzgerald, that a lease in the same terms as had previously been agreed in favour of Damal would be granted to Mr. Sheridan personally. On his case the only reason why a lease had not been executed in favour of Damal was because no lease had been produced to him for signature.

1.6 Fitzgerald denies that any agreement was ever entered into in respect of a lease and further denies that any long term agreement was ever entered into in respect of any other form of arrangement. In substance Mr. Sheridan brings these proceedings for the purposes of enforcing the contract which he contends exists between the parties for a lease on the terms which I have outlined above.

1.7 Matters came to a head in the latter part of February of this year. It would appear that at a meeting on 30th January, 2006, Mr. Murtagh indicated that no long term arrangement would be entered into between the parties. While there is some dispute as to precisely what was said at the relevant meeting (a dispute which cannot be resolved at this interlocutory stage) it seems clear that as a result of that meeting Mr. Sheridan became aware that Fitzgerald did not intend to execute any long term arrangement whether lease or otherwise. Fitzgerald's position was and is that, as a result of the meeting of 30th January, Mr. Sheridan was required to vacate the premises by late February. It is accepted that Mr. Sheridan received a formal letter requiring him to vacate the premises by 26th February. It appears clear that locks were changed as of the 26th February and other actions taken to exclude Mr. Sheridan from that time. It would appear that between the weekend of the 25th/26th February and the commencement of proceedings on 1st March arrangements with a third party were entered into by Fitzgerald to provide for the continuance of restaurant/catering services at the Quay Kitchen. Thereafter these proceedings followed.

2. The Proceedings

2.1 The matter came before me as an application for an interlocutory injunction. Having regard to the urgency of the matter I indicated to the parties that I would deliver a brief ruling within a short number of days of the conclusion of the hearing and would give further details of the reasons behind such ruling in due course. Accordingly, having reserved judgment for two days, I indicated to the parties that I did not consider it appropriate to make an interlocutory order. The purpose of this judgment is to set out the detailed reasons which led me to that conclusion.

3. The Injunction

3.1 In essence each of the three matters of which I am required to be satisfied in order to grant an interim or interlocutory injunction was in contest. There was a dispute as to whether there is a fair issue to be tried between the parties. There was a dispute as to whether damages would be an adequate remedy. There was a dispute as to where the balance of convenience lies.

3.2 In those circumstances it is necessary for me to start with a consideration as to whether the plaintiff had established that there was a fair issue to be tried. The plaintiff's principal claim in these proceedings is for specific performance of what he alleges is an agreement to enter into a lease in the terms which I have set out earlier in the course of this judgment. There is a significant contest on the facts as to whether any such agreement was ever entered into. It is common case that Mr. Sheridan and/or Damal commenced providing catering and restaurant services at the premises concerned on foot of a short-term trial agreement. The first major factual dispute between the parties is as to whether there was a subsequent agreement with Damal for a lease. The second major factual dispute between the parties is as to whether any such agreement (if it existed) was replaced, on Damal going into liquidation, with an agreement in similar terms in favour of Mr. Sheridan personally.

3.3 The position adopted by Fitzgerald is that there were ongoing discussions about the possibility of the parties (whether Damal or

Mr. Sheridan personally) entering into a long-term agreement. However, it is contended that no conclusion was ever reached to such discussions and that, in any event, the discussions related to the possibility of a long-term licence agreement for the provision of catering and restaurant services rather than a lease.

3.4 In support of this contention, Fitzgerald refers to the fact that the arrangements between the parties in respect of "the Big Tree" were such a long-term licence agreement. Reliance is also placed upon the fact that Fitzgerald (and other similar public house proprietors) do not normally enter into leases for any restaurant portions of such public houses for a variety of reasons but including the fact that there would, almost certainly, be significant difficulties in respect of the licensing status of the premises should a lease be entered into in favour of a third party. While the matters relied upon by Fitzgerald in that regard are all, doubtless, matters which Fitzgerald will be able to advance at the trial of the action as a means of seeking to persuade the court that no agreement of the type contended for by Mr. Sheridan was entered into, I agree with the submission of counsel for Mr. Sheridan to the effect that they are only matters which go to the likelihood or otherwise of an agreement having been entered into. They do not affect the question of whether it has been established that there is a fair issue to be tried. Similarly both sides place reliance on contentions that the position now adopted by their opponent differs from the stance adopted in initial correspondence. Such matters may well arise at the trial but they are not of such a nature as would allow me to reach any conclusion as to the facts at this stage. Having carefully reviewed all of the affidavit evidence submitted it seems to me that I must conclude that there is a factual issue to be tried as to whether the parties entered into an agreement for a lease.

3.5 There were, however, other issues canvassed on behalf of Fitzgerald, which, it is suggested, ought lead to the conclusion that there is no fair issue to be tried.

3.6 Firstly it is contended that, even on the basis of the agreement contended for on the part of Mr. Sheridan, substantial matters remained for further agreement sufficient to lead the court to take the view that there could not be a concluded agreement. In that context it is necessary to give a brief description of the way in which the premises is operated, although in so doing I should note that the evidence in this regard was quite limited and it may well be that a court of trial will have a much fuller picture. As indicated above the restaurant premises is located on the first floor. It would appear, on the evidence currently before the court, that Damal or Mr. Sheridan (at the appropriate relevant times) had the facility to sell wine to restaurant customers. However it would also appear that restaurant customers had the facility of being served drink from the bar and that bar staff circulated in the restaurant portion of the premises for that and allied purposes.

3.7 There was no evidence to suggest that the agreement between the parties (if there was one and whatever its terms might have been) contemplated a change in that arrangement. On that basis counsel for Fitzgerald contended that, even at the high point of the agreement asserted by Mr. Sheridan, same could not amount to an agreement which conferred on Damal/Mr. Sheridan the level of possession required for such an agreement to amount to a lease. Counsel for Mr. Sheridan contended that there was no reason in principle why there could not be an agreement which provided for exclusive possession, sufficient for a lease, in favour of Damal/Mr. Sheridan while providing, by way of covenant or otherwise, for the entitlement of Fitzgerald and its staff to supply alcohol to customers on the premises. The issue raised by counsel on behalf of Fitzgerald is undoubtedly a major hurdle which Mr. Sheridan will require to surmount at trial. However, at this stage, I am not persuaded that it is necessarily insurmountable sufficient to rule that there is no fair issue to be tried on that ground.

3.8 A second issue raised concerns the rent. As noted above the agreement contended for by Mr. Sheridan was to the effect that there be a rent of €100,000 per annum, payable weekly and reviewable after eighteen months. If, after a full hearing, a court was prepared to accept that such an agreement had been entered into, there would, nonetheless, be a significant difficulty in giving effect to any such agreement having regard to the absence of any basis for calculating the review of rent. There are a wide range of rent review clauses typically used in the market place. In some cases rent is reviewed by reference to the consumer price index or other similar indices of inflation. In other cases rent is reviewed by reference to the open market rent. In some such latter cases review is only permissible in an upwards direction so that, if the open market rent might be determined to have fallen, the rent remains the same rather than reduces. In all cases it is typical that appropriate mechanisms (such as the service of notices and provision for arbitration) are agreed for the purposes of determining any reviewed rent. While it may be possible for a court to imply an appropriate mechanism for determining a review of rent (including in an appropriate case a determination by the court itself) there can be little doubt but that Mr. Sheridan faces a major hurdle, on the basis of the evidence currently before the court, which stems from the apparent absence of an agreement between the parties as to the basis upon which the rent is to be reviewed. However, it remains possible that a court might conclude, when it is in possession of all of the relevant facts, that appropriate terms could be implied into the agreement to give effect to a binding contractual relationship. Alternatively a court might conclude that it was possible to give effect to the initial agreement for eighteen months at €100,000 per annum and to sever the remaining forty two months, with agreement in respect of that period being void for uncertainty as to the manner of the calculation of the appropriate rent.

3.9 In all those circumstances I do not believe that I can conclude, at this stage, that there is not a fair issue to be tried as to the terms of the lease.

3.10 Counsel for Fitzgerald also raises another significant issue which concerns the absence of a note or memorandum in writing of the alleged agreement. Section 4 of Deasey's Act provides that every lease or contract with respect to lands whereby the relation of landlord and tenant is intended to be created for any freehold estate or interest or for any definite period of time not being from year to year or any lesser period shall be by deed executed or note in writing signed by the landlord or his agent thereunto authorised in writing. There is no evidence of any written agreement or other note or memorandum witnessing such agreement.

3.11 However, Mr. Sheridan contends that there has been a sufficient act of part performance. Reliance is placed on the test set out by the Supreme Court in *Mackey v. Wilde* [1998] ILRM 449 (per Barron J., speaking for the court at p. 458) to the following effect:-

> "The doctrine is based upon principles of equity. There are three things to be considered:
>
> (1) The acts on the part of the plaintiff said to have been in part performance or of concluded agreement;
>
> (2) The involvement of the defendant with respect to such acts;
>
> (3) The oral agreement itself.
>
> It is obvious that these considerations only relate to a contract of a type which the courts will decree ought to be specifically performed. Each of the three elements is essential. In my view it does not matter in which order they are

considered. Ultimately what is essential is that:

(1) There was a concluded oral contract;

(2) That the plaintiff acted in such a way that showed an intention to perform that contract;

(3) That the defendant induced such acts or stood by while there were being performed;

(4) It would be unconscionable and a breach of good faith to allow the defendant to rely upon the terms of the statute of frauds to prevent performance of the contract."

3.12 Mr. Sheridan also places reliance on *McManus v. Cook* [1887] 35 Ch. D 681 where Kay J. stated that:-

> "Between landlord and tenant, when the tenant is in possession at the date of the agreement, and only continues in possession, it is properly observed that in many cases that continuance amounts to nothing; but admission into possession having unequivocal reference to contract, has always been considered an act of part performance."

3.13 It is clear, therefore, that the mere allowance of a person, who is already in possession, to continue in possession cannot amount to an act of part performance. On the other hand allowing someone who was not in possession to go into possession can, in an appropriate case, amount to such an act of part performance. The circumstances of this case are, undoubtedly, complicated. There would seem to be little doubt but that up to 19th December, it was Damal who was in possession of the premises and not Mr. Sheridan personally. This would be so whether or not there was, as Mr. Sheridan contends, an agreement between Fitzgerald and Damal for the grant of a lease. It would therefore seem to be the case that Mr. Sheridan was let into possession in a personal capacity on 20th December, being the date upon which he contends that he entered into an agreement with Fitzgerald for the grant of a lease. The case is not as clear as a simple one where a person who was wholly out of possession goes into possession immediately after the conclusion of an oral agreement. In practical (as opposed to legal) terms there would seem to have been very little different about the possession of the property on 20th December as opposed to the 19th. Mr. Sheridan may well, in those circumstances, have a significant further hurdle to climb in order to persuade the court at trial that an act of part performance sufficient to obviate the necessity for a written agreement between the parties can be said to exist. I am not, however, prepared to hold, at this stage, that there is no fair issue to be tried on this ground either.

3.14 As will be clear from the above analysis there are a significant number of major hurdles which will need to be surmounted by Mr. Sheridan in order that he might succeed. However the jurisprudence is clear. It is not appropriate for the court, at this stage, to assess or to place any reliance upon the strength or otherwise of the case. All that is required is for the court reach a conclusion as to whether it has been established that there is a fair issue to be tried to the effect that the plaintiff might succeed. I concluded, and so indicated, that I was satisfied that a fair issue to be tried had been established. In coming to that view I also had regard to the fact that it is common case that invoices were issued both to Damal and to Mr. Sheridan which described the periodic payments which were required to be made in respect of the premises as "rent". It is certainly open to the inference, as contended for by counsel on behalf of Mr. Sheridan, that a company such as Fitzgerald, which would be likely to be well aware of the difference between a lease (and accordingly the payment of rent) on the one hand and a licence (and accordingly the payment of a licence fee) on the other hand, would not have used the term rent unless there was an agreement for a lease.

3.15 Furthermore I am mindful of the principle established in *Irish Shell Ltd v. Costello* [1981] ILRM 66. While that case was one in which Mr. Costello successfully contended that the terms of what was described as a licence agreement in relation to a petrol filling station amounted in substance to a lease (thus conferring appropriate landlord and tenant rights) the overall principle to be derived from that case, it seems to me, is to the effect that commercial agreements are to be characterised by the substance of the terms agreed between the parties with little weight being attached to the name given to the arrangement where that name is inconsistent with significant aspects of the terms. It is therefore possible that a court of trial might conclude that, even though the parties had agreed to the grant of what was described as a lease, the substance of the arrangements agreed amounted to a licence. In those circumstances it is possible that the court of trial might conclude that the parties had entered into what, in its terms, was agreed to be a lease for five years but what, in substance, might be found to amount to a licence agreement for five years.

3.16 Having concluded that there is a fair issue to be tried between the parties it was then necessary for me to turn to the question of the adequacy of damages.

4. The adequacy of damages

4.1 It is well established that in order to obtain interim or interlocutory relief a plaintiff must satisfy the court that damages would not be adequate to compensate the plaintiff in the event that he should establish his case at trail but not have obtained an interlocutory injunction.

4.2 In that context the position of Mr. Sheridan, should he not obtain an injunction at this stage, but succeed at trail would be that he would have been deprived of the ability to run the restaurant for the intervening period and might suffer further losses. In *Curust Financial Services Limited and Another v. Loewe-Lack-Werk Otto Loewe Gmbh and Company* [1994] I.R. 450 Finlay CJ. set out the test as follows:-

> "The loss to be incurred by *Curust* if they succeed in the action and no interlocutory injunction is granted to them is clearly and exclusively a commercial loss in what had been, apparently, a stable and well established market. In those circumstances*, prima facie* it is a loss which should be capable of being assessed in damages both under the heading of loss actually suffered up to the date when such damages would fall to be assessed and also under the heading of probable future loss. Difficulty, as distinct from complete impossibility, in the assessment of such damages should not, in my view, be a ground for characterising the awarding of damages as an inadequate remedy."

4.3 In *Smith Cline Beacham PLC v. Genthon BV* (unreported, High Court, 28th February, 2003, Kelly J.) this court noted that the onus was on the plaintiff, as a matter of probability, to demonstrate the risk that damages would prove to be an inadequate remedy.

4.4 Against that background it is necessary to analyse the situation in this case. The arrangements are undoubtedly commercial. As of the date of the refusal to grant interlocutory relief, the restaurant business was already up and running and, indeed, on the evidence, it would appear that an alternative contractor had already been put in place to run same. While there may be questions as to whether Mr. Sheridan would have been in a position to do a better job in the running of such business during the period up to trial than the operator who is currently in place, that issue is no more complex than many issues which arise in the course of the calculation of damages in commercial litigation. Counsel for Mr. Sheridan places reliance on the fact that (as per his written

submissions)

> "while an award of damages in his favour might compensate the plaintiff for the loss of turnover that he suffered during the interregnum period, although this is not admitted, it would not compensate him for the retardant effect that the closure would have on his business."

4.5 I am afraid I cannot agree. It is clear from *Curust* that Finlay CJ. had regard not only to the loss which could be established up to the date when damages would be assessed but also to probable future loss. There is no reason in principle, therefore, why Mr. Sheridan would not be entitled to damages to compensate him for any loss which he could establish as being likely to arise subsequent to the date of assessment of damages. If he can persuade the court that, as a matter of probability, the business as of that date was less than it would have been had he been operating it, he would, undoubtedly, be entitled to damages to compensate him for losses that would accrue during whatever period the court considered would be needed to enable the business to catch up to the position in which it would have been, had Mr. Sheridan had the opportunity to run it from the beginning. While there would undoubtedly be difficulties in such calculation it seems to me that such difficulty falls far short of the impossibility identified by Finlay CJ. in *Curust*.

4.6 In those circumstances I was satisfied that damages would be an adequate remedy. There is no suggestion that Fitzgerald would not be in a position to meet any such damages. On that basis it did not seem to me to be appropriate to grant the interlocutory injunction sought.

4.7 Finally, lest I be wrong on that issue, I should note two further matters which would have disinclined me to grant an interlocutory injunction even if I had been persuaded that damages would not have been an adequate remedy for Mr. Sheridan. It would appear that Mr. Sheridan was aware from the 30th January, that Fitzgerald did not intend to continue with their arrangements with him beyond 26th February. While there is a partial explanation for his failure to move the court prior to the expiry of the notice period given to him at that stage, he nonetheless allowed that notice period to expire without commencing proceedings. The explanation given concerns correspondence sent by Mr. Sheridan's solicitor to the Fitzgerald which, on the evidence currently before me, would appear to have been delivered by courier at a public house premises (which was also Fitzgeralds principal office) outside of ordinary business hours, and which was not replied to on the basis, it is contended by Fitzgerald, that it never came to the attention of management.

4.8 Notwithstanding this factor it seems to me that Mr. Sheridan either was or ought to have been aware that, so far as Fitzgerald was concerned, his entitlement to remain in occupation of the premises had come to an end. In those circumstances it seems to me that it would have been more appropriate for Mr. Sheridan to have commenced proceedings prior to the termination of his arrangement (on Fitzgerald's case) so as to retain the benefit of the status quo.

4.9 Separately, in *Ó'Murchú v. Eircell Limited* (unreported, Supreme Court, 21st February, 2001, Geoghegan J.) the unanimous decision of the court delivered by Geoghegan J. (having concluded, as I have done in this case, that damages would be an adequate remedy) noted the following in relation to the balance of convenience:-

> "First of all there is the well known principle that in general the courts will not grant an injunction which would involve ongoing supervision. A court, therefore, is very slow to grant injunctions in either service contracts or trading contracts because it is very difficult to assess, at any given time thereafter, as to whether such injunctions are being obeyed or not. It is also usually impracticable and undesirable that two parties be compelled to trade with one another when one, for reasons which are perfectly rational, does not want to carry on such trading."

4.10 On the evidence currently before me the operation of the two businesses are very closely linked. It would appear that Fitzgerald, on the basis of the established trading practice, was entitled to make important decisions as to the use of the restaurant portion of the premises for, for example, special events. It seems to me that the grant of an injunction which would require the parties to "live together" in the sense of making day to day business decisions as to how the premises as a whole should operate would be fraught with the type of difficulties identified by Geoghegan J. in *Ó'Murchú*. While it is true to state, as was pointed out by counsel for Mr. Sheridan, that no difficulties appear to have occurred in the past, it must be remembered that "that was then and this is now". The parties are now in significant dispute. The fact that they were able to operate an entirely appropriate *modus operandi* when business relations were good, does not mean that the continuance of those arrangements would not be fraught with difficulty now that the parties are in significant dispute. I would, therefore, have come to the view, on that ground also, that it would not have been appropriate to grant an interlocutory injunction.