

THE HIGH COURT

[2015 No. 5742P]

BETWEEN

CAMIVEO LIMITED

PLAINTIFF

AND

DUNNES STORES

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 9th day of September 2015

1. This is an application brought by the plaintiff for an interlocutory injunction restraining the defendant from disabling the automatic opening mechanism of doors from its unit in Edward Square Shopping Centre, Galway to Castle Street/Barrack Lane during the opening hours of the shopping centre. The applicant is the landlord of the Edward Square Shopping Centre in Galway and the defendant is the tenant and occupier of what is described as the anchor unit in that shopping centre.

2. The defendant holds the premises under a lease dated 3rd April, 2000. Although the text of the lease does not appear to refer to "anchor unit" the cover page of the lease describes it as a "LEASE of Anchor Unit Edward Square Shopping Centre, Barrack Lane, Galway".

3. Before I deal with the issues arising in the application it seems to me appropriate to comment on the number of affidavits sworn by each party in support of their position on the application. I do so for the purpose of setting out some guidelines as to what I believe should be the approach that parties to interlocutory applications should take having regard to the limited time and resources of the Courts.

4. In this case there were a large number of affidavits going well beyond what was required to enable the Court to come to a view on the issue before it. Many of the affidavits were sworn in reply to earlier affidavits and did little more than reiterate the position previously adopted by the deponent and to rebut averments in other affidavits. In both cases the supplemental affidavit(s) introduced little or no additional information for the assistance of the Court. If a party to such an application wishes to produce a replying affidavit it should only do so if it can introduce new relevant information and should not use the opportunity for the purpose of rehearsing arguments already made and merely rebutting the contents of other affidavits. To do so is unnecessarily wasteful of Court time and resources and should, in appropriate cases, be dealt with by structured costs orders.

5. Moving to the application for an interlocutory injunction I am satisfied – for reasons which I will explain later in this judgment – that this is, in reality, an application for a restraining or prohibitory injunction and not a mandatory injunction. One of the important agreed facts in this case is that, up until the doors in question were closed on the 17th June, 2015, they had been operating normally for a period of fifteen years as a means of access to and egress from the premises during normal shopping hours. That represents the *status quo* so far as this application is concerned.

6. From the information available to the Court at this stage it appears that the doors in question (hereinafter referred to as "the doors") were designed and intended to be the main entrance/exit at the defendant's premises and operated as such for a period of fifteen years. It is of course clear that there were a number of entrances/exits at other locations in the store leading in and out of other streets or passageways in the vicinity but the evidence at this stage suggests that they were not the principal entrance/exit. So far as the Edward Square Shopping Centre was concerned the doors gave access onto Castle Street/Barrack Lane which was the common concourse from which all the shops in the Edward Square Shopping Centre could be accessed.

7. Having regard to the agreed facts in this case I am satisfied that this application is one brought by the plaintiff to restrain the defendant from keeping the doors closed at all times and in particular during the opening hours of the defendant's premises. In seeking such an order the plaintiff is seeking to maintain the *status quo* pending the determination of the issues in dispute between the parties.

8. I am satisfied therefore that the *Campus Oil* principles apply in this case. The Court is not forming any final view on the issues between the parties at this stage but is concerned with maintaining the *status quo* having regard to the *Campus Oil* test.

Fair, Bona Fide or Serious Issue to be Tried

9. Having considered the affidavits and submissions made in this case I am satisfied that the plaintiff has raised a fair or *bona fide* or serious question to be tried.

10. Although the lease on foot of which the defendant holds the premises does not define "anchor tenant" the cover page of the document describes the lease as being of the anchor unit at Edward Square Shopping Centre, Barrack Lane, Galway. While I do not have to decide anything definitively at this stage for the purpose of meeting the *Campus Oil* test it seems to me that the description of the lease as being in respect of the anchor unit is of some significance. I also have regard to the fact that the lease is described as being in respect of such a unit in "Edward Square Shopping Centre". In other words, the lease is in respect of one of a number of premises in a shopping centre and on its face states that it is in respect of the interest of the anchor tenant. On the state of the evidence at this stage it appears that the only entrance to the defendant's premises from Castle Street/Barrack Lane is the one which is now closed and is the subject of this dispute. If the purpose of having an anchor tenant is to draw shoppers to the premises of that tenant and thereby benefit the other tenants in the centre it would seem odd and contrary to normal commercial letting principles that the premises of the anchor tenant cannot be accessed from Castle Street/Barrack Lane which is the common concourse serving all the premises in the shopping centre.

11. The defendant has raised a number of issues as to why an interlocutory injunction should not be granted. One of these is the fact that there is no "keep open clause" in the lease. This is accepted by the plaintiff. For the purpose of this application it seems to me that this is not a matter of great significance. The point is not whether the defendant is obliged to keep the store open at all times, or at particular times, but rather whether the doors in question should be used as a means of ingress to and egress from the store during its trading hours having regard to the fact that this is the only means of access to the premises of the anchor tenant from Castle Street/Barrack Lane which it shares in common with other tenants in the centre.

12. An affidavit from Mr. Cormack MacEochainn of Douglas Newman Good sworn on the 23rd July, 2015, states that the doors were always perceived as the main and front doors of the anchor unit. While this may be open to debate at the substantive hearing this statement does appear, at least *prima facie*, to be supported by the plans and photographs which have been produced to the Court.

13. There is a substantial body of evidence to suggest that in the minds of the planning authority linkage between the Edward Square Shopping Centre and Eyre Square Shopping Centre was important in helping to create connectivity between different parts of the city centre. The defendant's planning expert Ms. Auveen Byrne has deposed to the fact that planning a pedestrian route through a particular premises to link one part of a city centre to another would be unusual. That may well be so and is something that will have to be trashed out at the full hearing in determining whether or not the defendant is in breach of planning permission as contended for by the plaintiff. But at this stage it seems to me that the plaintiff has met the test of setting out a fair *bona fide* question to be tried on this issue and specifically whether such connectivity is been impeded by the defendant closing the doors.

14. On the two main issues relevant to this injunction application I am satisfied that the plaintiff has made out a good *bona fide* and arguable case, namely, that the defendant as anchor tenant, is obliged to keep the doors open when it is trading for the benefit of the other occupiers of premises in the Edward Square Shopping Centre and also that it is required to do so for the purpose of achieving the objective of the planning authority to create connectivity between different parts of the city, this being the basis on which the planning permission for the centre was granted.

Balance of Convenience

15. The doors in question were open for fifteen years and were only closed as recently as 17th June, 2015. The defendant has not adduced any evidence which satisfies me that it would be unfairly inconvenienced by making the doors available for use as a means of access to and egress from its premises until the final determination of this dispute. The plaintiff has produced evidence to show that its other tenants have been affected by the closure of the doors and while this is disputed and will have to be examined in more detail at the substantive hearing in due course the relief sought by the plaintiff in this application merely seeks to preserve the *status quo* which existed up until recently and I am satisfied that the balance of convenience lies in favour of granting an injunction to achieve that end.

Adequacy of Damages

16. The evidence adduced as to the ongoing consequences of the doors remaining closed satisfies me that damages would not be an adequate remedy for the plaintiff if the application for an injunction was refused and the plaintiff succeeded at the trial of the action. The local authority have threatened enforcement proceedings in respect of the closure of the doors. The legitimacy of this action is challenged by the defendant and will have to be determined at the substantive hearing. An arguable case has been made that the various tenants' property rights will be affected if the doors remain closed and this will have a knock on effect on the plaintiff as the owner of the centre and with obligations to National Asset Loan Management Limited. The protection of property rights is a matter in respect of which the Courts will grant injunctive relief and it seems to me that the plaintiff has established, to the degree of proof required at this stage, that damages would not be an adequate remedy.

Adequacy of Undertaking as to Damages

17. The defendant has questioned the ability of the plaintiff to give a meaningful undertaking as to damages. I have considered the affidavit of Mr. Enda Woods sworn on the 22nd July, 2015, and I am satisfied from the information set out therein that the plaintiff is in a position to give an adequate undertaking as to damages having regard to its interest in the Edward Square Shopping Centre.

Conclusion

18. Having applied the *Campus Oil* test in this case I am satisfied that the plaintiff is entitled to an interlocutory injunction restraining the defendant from disabling the automatic opening mechanism of the doors from its unit in Edward Square Shopping Centre, Galway to Castle Street/Barrack Lane during the opening hours of the defendant's store. This order will do no more than restore the *status quo* as it existed for fifteen years up until the 17th June, 2015.