THE HIGH COURT

[2024] IEHC 45

Record No. 2020/215S

BETWEEN

GRADUAL INVESTMENTS

PLAINTIFF

-and-

FIONA GRANT

DEFENDANT

JUDGMENT of Ms. Justice Hyland delivered on 18 January 2024

Introduction

1. These proceedings commenced by way of Summary Summons dated 10 August 2020 arising from the relationship of landlord and tenant as between the plaintiff and defendant respectively. The substantive claim concerns the alleged breach of an abatement agreement of 11 February 2016 which provided for an abated rent on a sliding scale up until 27 July 2019.
2. The case comes before me in circumstances where the defendant, by way of a Notice of Motion of 17 October 2023, seeks the following relief:

> *"An Order restricting the Plaintiff, its servants and/or agents, and/or any other person with notice of this Order from entering and/or re-entering the Healthcare Clinic at 3 The Village, Stepaside, Dublin 18 for the purposes of executing Forfeiture of the Lease agreement dated 14th September 2009 as between Richmond Properties Ireland Limited (predecessor to the Plaintiff) and Fiona Grant;"*

3. In essence, the defendant seeks to restrain the plaintiff from re-entering the premises on foot of a Notice of Forfeiture. It will be noted that the Order sought is unlimited in time. However, in the written legal submissions and at the hearing, it became clear that the relief was sought until judgment was delivered in the within proceedings. For the reasons set out in this judgment, I have decided to grant the defendant the interlocutory relief sought in the Notice of Motion but only until the trial of the action before the High Court.

Background

4. The plaintiff is the landlord of the premises rented by the defendant for her GP's practice, the Healthcare Clinic. The premises is located at 3, The Village, Stepaside, Dublin 18. The practice provides primary care to both public and private patients in the area. The plaintiff issued proceedings seeking summary judgment in respect of a claim for unpaid rent, interest on unpaid rent and on the arrears, service charges and expenses which it claimed to have incurred and which it argued it should be indemnified for by the defendant. The relief sought was, *inter alia*:

> *"1. Judgment in the sum of €275,884.82*
>
> *2. Judgment in such further sum in respect of arrears of rent and service charges as may accrue pending the trial of the action.*
>
> *3. Interest pursuant to contract and/or pursuant to statute."*

5. On 25 July Bolger J. refused summary judgment and sent the matter forward for plenary hearing.

Application for injunction by defendant

6. The defendant identifies that she received a Notice of Forfeiture dated 3 October 2023 indicating that the plaintiff intended to re-enter the premises and treat the lease agreement as terminated. The Notice of Forfeiture identified four purported breaches:

(i) monthly rather than quarterly rent payments, (ii) a shortfall in rent of €55,818.03, (iii) non-payment of service charges of €10,553.40, and (iv) the purported inclusion of subtenants without the consent of the landlord.

7. The defendant notes that this was the third such notice received since December 2022, although the two previous notices had been withdrawn. The defendant wrote to the plaintiff on 4 October 2023 indicating that if the Notice of Forfeiture was not withdrawn an application would be made to the Court to preserve the current position pending the determination of the within proceedings. She avers that the threat of forfeiture is particularly serious where she has ongoing obligations to her patients who attend her practice and given the need to continue providing medical services to them.
8. The defendant states that rent of €3,946.25 has been paid monthly since the rent was reviewed and avers that the rent has always been paid in accordance with the relevant abatement agreement save for *de minimis* administrative issues where an amount was not increased at the start of 2016 and 2017. The defendant maintains that the Notice of Forfeiture is an attempt to usurp the process of the High Court and/or render moot the plenary proceedings.
9. The defendant avers that damages will not be an adequate remedy were the plaintiff to forfeit the lease. She argues that were forfeiture to proceed, it would interfere with the High Court proceedings, damage her character and reputation, and will result in the medical services to countless patients being withdrawn without any warning and without allowing for rescheduling or the arrangement of alternative medical services.
10. The defendant argues that the majority of the issues raised in the Notice of Forfeiture are in fact the subject of these proceedings. In her affidavit of 16 October 2023, the defendant avers that there are three main issues in contention between the parties (i) the level of rent and accrued arrears (ii) the payment of service charges, and (iii) subtenants

in the premises. The defendant further avers that there has been extensive correspondence on these issues, and they are the subject matter of the extant plenary proceedings which are at an advanced stage. The defendant maintains that there is a real dispute between the parties as to the correct rent figure due and that a finding on this point will determine what rent is actually due to the plaintiff, if any.

11. I should emphasise that the defendant is continuing to pay rent during the interim period and has offered an undertaking in damages in her grounding affidavit.

Defendant's arguments

12. The defendant identifies the jurisdiction of the Court to make orders that are necessary to the parties before them and which will help avoid a multiplicity of actions, under s.27(7) of the Supreme Court of Judicature (Ireland) Act 1877 as follows:

> *"(7.) The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act, in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter, so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."*

13. The defendant further draws attention to the terms of s.28(8) of the same Act which provides that the Court has a wide power to grant interlocutory orders:

> *"(8.) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the*

Court to be just or convenient that such order should be made and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just ...."

14. The defendant acknowledges that these proceedings do not concern the validity of the forfeiture notice and accepts that generally interlocutory orders will reflect the orders that may be made after a plenary hearing. However, she notes that this is not always the case. In this respect she relies on the decision of Finlay C.J. in *Caudron v Air Zaire* [1985] IR 716 where the Court observed that there were a variety of orders that could be obtained, including by way of injunction, between the issuing of the summons and final determination, the overall thrust of which are to maintain the status quo so as to facilitate the plaintiff realising their claim in the event they are successful. The defendant also relies on Kirwan, Injunctions Law and Practice 3rd Edition for the same proposition:

> *"In the normal course, interlocutory orders granted will reflect the final Order which would be granted after a plenary hearing. However, that is not an immutable principle."*

15. The defendant also relies on the recent decision of the Supreme Court in *Merck Sharp & Dohme v Clonmel Healthcare Group* [2019] IESC 65 where the Court found it necessary to emphasise the fundamental flexibility of the inherent jurisdiction to grant equitable injunctions.

16. In light of the foregoing the defendant submits that the Court can in this case Order interlocutory relief for the purposes of maintaining the status quo which is all she seeks.

Plaintiff's Arguments

17. The plaintiff objects to the granting of an injunction on a number of grounds. Firstly, it argues that there is no fair issue to be tried as the subject matter of the injunction does

not fall to be decided in these proceedings. The defendant seeks to restrain the taking of steps on foot of the Notice of Forfeiture, yet the trial of this matter will not resolve any dispute as to the legality of the Notice or the plaintiff's entitlement to act on the Notice as those issues are not raised in the pleadings. No counterclaim has been filed challenging the legality of the Notice of Forfeiture. The plaintiff argues that it is not open to the defendant to seek an interlocutory injunction that is not in aid of the reliefs ultimately sought at trial. An analogy was drawn with a Mareva injunction, being an interlocutory relief specifically designed to aid a final relief by preserving funds for recovery as damages.

18. Accordingly, the granting of an injunction could not maintain the status quo for the purposes of these proceedings where the situation sought to be preserved is not in any way related to the underlying proceedings.

19. Additionally, it is submitted that the matter falls short of a fair issue to be tried where an underpayment of €38,500 is not disputed, where the affidavit grounding this application does not refer in any detail to the plaintiff's claims that the rent has been paid on a monthly rather than quarterly basis, and where service charges remain unpaid, in breach of the lease agreement.

20. Finally, the plaintiff impugns the reasonableness of the defendant's conduct in seeking the injunction where the plaintiff had offered an undertaking until the trial of the action which would have obviated the need for the case to run. In the light of this, it is argued that given the equitable and discretionary nature of the remedy sought, relief should be refused. The defendant has other avenues open to her apart from litigation.

Discussion

21. The principles in relation to injunctions were identified in *Campus Oil v The Minister for Industry (No. 2)* [1983] IR 88 where the Supreme Court adopted the principles

established by the House of Lords in *American Cyanimid Co. v Ethicon Ltd.* [1975] AC 396. Traditionally, the test is identified as follows; (i) there must be a serious issue to be tried, (ii) damages would not be an adequate remedy, and (iii) the balance of convenience weighs in favour of granting the injunction sought. That traditional understanding has been illuminated by a significant amount of jurisprudence since *Campus Oil* was decided, but the current approach is best identified by the eight-stage procedure set out by O'Donnell J. (as he then was) in *Merck, Sharp & Dohme*. For the purposes of this decision, the considerations at the start and the end of that analysis are the most important. They are as follows:

> *"(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted;*
>
> *(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined."*

22. O'Donnell J.'s observations at paragraph 35 in respect of the decision in *American Cyanimid* also bear emphasis:

> *"Second, the underlying theme of the decision was to reassert the flexibility of the remedy and the essential function of an interlocutory injunction in finding a just solution pending the hearing of the action*."

23. In this case, the relief sought i.e., to restrain the plaintiff from re-entering the premises on foot of a Notice of Forfeiture prior to the determination of the substantive dispute,

is a relief designed to "hold the line" i.e., to ensure that the defendant remains in her premises carrying on a medical practice pending the determination of these proceedings. It is true that the determination of these proceedings will not resolve the question of the validity of the Notice of Forfeiture. The validity of that notice is not the subject of these proceedings.

24. The plaintiff suggested permitting the defendant to amend its pleadings to challenge the validity of the Notice of Forfeiture in these proceedings by way of counterclaim. That approach had much to commend it as it would have avoided a multiplicity of proceedings and obviated any argument as to jurisdiction to entertain the application. But the defendant vehemently opposed such an approach on the basis that these proceedings were issued in 2020, that they are ready for trial, that amendment of the pleadings to include a counterclaim would significantly delay the trial, that these proceedings will in any case determine the allegations of breach of lease that underlie the Notice of Forfeiture and – most significantly in my view – that the plaintiff only issued its Notice of Forfeiture on the eve of the trial of these proceedings and that the trial should not be delayed by reason of the delay of the plaintiff in this regard. For those reasons, the defendant declined to bring a counterclaim to challenge the legality of the Notice of Forfeiture.

25. It was clear from the arguments before me that the determination of these proceedings will certainly determine many, if not all, of the arguments that the plaintiff relies upon to justify the service of the Notice of Forfeiture. This means that, should the plaintiff manage to effect entry pursuant to the Notice of Forfeiture at this point in time, certain of the grounds relied upon by it to justify the Notice may subsequently be found to be incorrect following the trial of these proceedings. That might of course give rise to a claim for damages by the defendant: but in the meantime, the lease will have been

treated as forfeited and the defendant will have been obliged to vacate the premises with all the ensuing disruption, not just to her but to her patients, who are, by definition, a vulnerable category of people. That may well give rise to detriment that cannot be fully compensated in damages. That consideration alone points to a maintenance of the status quo.

26. In fairness to the plaintiff, there is a recognition of these difficulties such that, in open correspondence on 31 October 2023, prior to this hearing, the plaintiff offered the following undertaking:

> *"Our client hereby gives an undertaking not to take any steps to enforce the forfeiture notice dated 3 October 2023 ("the Forfeiture Notice") which our client issued to your client in respect of the lease dated 14 September 2009 of Unit 3, The Village, Stepaside, County Dublin ("the Lease"), pending the trial of the within proceedings."*

27. The defendant's solicitors purported to accept this in a letter dated 1 November 2023, stating "*1. Our client will accept your undertaking not to take any steps or to enforce the Forfeiture Notice hearing until the date of the Judgment of the action."*.

28. In replying correspondence on 1 November 2023, the plaintiff clarified the following:

> *"For the avoidance of doubt, our client is willing to give an undertaking at this juncture that extends to the conclusion of the* ***trial*** *of the proceedings. We can review at that juncture whether it is appropriate to further extend the undertaking, for example, in the event that judgment is reserved following the trial. Given that some issues germane to this undertaking may fall away or be resolved during the course of the trial, it would be premature at this point to extend the undertaking beyond the trial. Our client intends to take a reasonable approach to any such extension and to give your client comfort in that regard,*

we have no objection to your client's motion for an interlocutory injunction being adjourned to the trial of the action rather than struck out now, so that your client has the means to reanimate the application if necessary."(emphasis original)

29. The solicitors for the defendant replied on 2 November 2023, identifying that it was their position that it was unreasonable and wasteful to limit the undertaking to the date of trial rather than its conclusion.

30. It may be seen from that correspondence that there was a large measure of agreement on an undertaking but that the compromise fell at the last hurdle, being the date on which the undertaking would expire. Where an injunction is granted, the usual approach is to direct an injunction until the trial of the substantive proceedings. The application can be renewed during the hearing. If judgment is reserved, an application can be made that the injunction be continued until the delivery of the judgment. This permits the trial judge to take into account any new information or events during the hearing of the action and to make the appropriate orders. It would generally be inappropriate for the judge hearing the injunction to bind the trial judge up to the delivery of the judgment given that the trial judge will have seisin of the matter from the first day of the trial. That would be the effect of directing an injunction to continue until the delivery of the judgment in the substantive proceedings.

31. As I have emphasised in this judgment, injunctions are a flexible equitable tool available to the Court and there may be some situations where an injunction up to the date of judgment will be appropriate; but no compelling reasons have been provided as to why this is such a situation. Indeed, because I am granting the injunction primarily for the purpose of maintaining the status quo up to the date of the trial, it would be particularly inappropriate to direct an injunction beyond that date. For that reason, I

will grant the injunction up to the trial of the action. Returning to the correspondence between the parties, the terms of same shows that the opposition of the plaintiff to the injunction may perhaps be described as opposition in principle rather than opposition in substance.

32. It is in these very unusual circumstances that I have concluded that I should make an Order in the terms sought. I accept that even if the defendant fully defends the case and the plaintiff is wholly unsuccessful, no Order can be made permanently restraining the plaintiff from re-entering on the basis of the Notice of Forfeiture. But a determination in favour of the defendant on the question as to whether rent or service charges are owing and as to whether sub-tenants have been permitted without the consent of the landlord will significantly impact upon the question of the entitlement of the plaintiff to serve a Notice of Forfeiture. In this way the proceedings will potentially determine – albeit indirectly – some of the issues underlying the Notice of Forfeiture. In other words, the question of the validity of the Notice of Forfeiture is undoubtedly linked with the entitlement of the plaintiff to the relief it is claiming in these proceedings.

33. The grant of an injunction would ensure that the status quo i.e., the defendant's continuing presence in the premises, is maintained pending the determination of these proceedings, being proceedings that will determine at least some of the claims upon which the Notice of Forfeiture is based. One cannot view the determination of the issues in this case in isolation from the issues that underlie the Notice of Forfeiture.

34. There is another factor from a balance of justice point of view that points towards the grant of the relief sought, namely the timing by the plaintiff of the service of the Notice of Forfeiture. This was only done in October 2023. No reason has been given by the plaintiff for choosing to move, *inter alia*, on the basis of disputed issues that will shortly be the subject of a trial. I find it difficult to understand why, in those circumstances, the

plaintiff did not await the outcome of these proceedings before serving a Notice of Forfeiture. That too points in the direction of maintaining the status quo until these disputed issues are determined.

35. The plaintiff has separately asserted that the defendant has not put forward an arguable defence. But given that Bolger J. refused to grant summary judgment, I do not consider that argument is open to the plaintiff.

36. Finally, the plaintiff is willing to give an undertaking although the parties have been unable to agree the precise terms of same. It has relied upon that willingness as a reason to refuse the injunction; but the very fact that this application has been hard fought by the plaintiff demonstrates there is no extant agreement as to an undertaking. The question as to whether this application had to be brought in view of the offer of an undertaking is a matter relevant to costs; but the existence of an offer of an undertaking should not count against the grant of an injunction when no agreement as to an undertaking has crystallised by the time the application comes on for hearing.

Conclusion

37. When I consider the essential function of an injunction – in the words of O'Donnell J., to find *"a just solution pending the hearing of the action",* I am of the opinion that in view of the factors set out above, an injunction here will maintain the status quo, allow the defendant to continue offering medical services from the premises and from a balance of justice point of view, provide a just solution. Insofar as my jurisdiction to make the Order is concerned, the following extract from *Merck Sharp & Dohme* reassures me that I have the necessary jurisdiction:

> *"The grant of an injunction is an equitable remedy. While statutory authority for the grant of an injunction when a court considers it just and convenient to do so can be traced to the provision of the Judicature Acts, the injunction*

nevertheless retains its origins in the law of equity administered in the Courts of Chancery. It has always been a flexible remedy."

38. I acknowledge that the circumstances here are highly unusual given that the relief sought at interlocutory stage cannot be granted at trial; but unusual circumstances may require flexibility to ensure justice. For the reasons identified above, it is appropriate to make use of this flexibility in the circumstances of this case to ensure a just remedy.

39. Accordingly, I will grant an injunction in the following terms:

> *"An Order restricting the Plaintiff , its servants and/or agents, and/or any other person with notice of this Order from entering and/or re-entering the Healthcare Clinic at 3 The Village, Stepaside, Dublin 18 for the purposes of executing forfeiture of the lease agreement dated 14th September 2009 as between Richmond Properties Ireland Limited (predecessor to the Plaintiff) and Fiona Grant pending the trial of the action in the within proceedings or such further order as may be made."*

40. I will put the matter in for submissions on costs on **24 January 2024** not before 12pm. No written legal submissions are required.