

THE HIGH COURT

[2019 No. 3385 P.]

**BETWEEN**

**JASON INVESTMENTS UNLIMITED COMPANY**

**PLAINTIFF**

**AND**

**C&S JEWELLERY LIMITED,  
CHARLIE CULLEN AND SUZANNE GILHOOLY**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Reynolds delivered on the 27th day of February 2020**

1. The plaintiff is an unlimited company and the owner of a premises known as 7 Castle Market and 43 Drury Street, Dublin 2 ('the property'). The plaintiff acquired the property on 23 January 2018 subject to a lease in favour of the first named defendant.
2. The first named defendant is in occupation of the property pursuant to a lease granted by the plaintiff's predecessors in title, the term of which runs from 10 July 2014. The first named defendant runs a jewellery shop from the property.
3. The second and third named defendants are the guarantors under that lease.
4. In the within proceedings, the plaintiff seeks possession of the property on two grounds:
  - (a) The failure of the first named defendant to pay rent due and owing, and
  - (b) the plaintiff's exercise of a break option contained in the lease.

**Factual background**

5. Pursuant to the terms of the lease granted by the plaintiff's predecessor in title, rent was fixed at €65,000 per annum payable quarterly in advance.
6. Further, the lease contains a break option entitling the landlord to determine the lease at the end of the fifth year by giving not less than six calendar months' prior notice thereof.
7. By letter dated 22 November 2018, the plaintiff gave notice of its intention to determine the lease.
8. It is common case that between 16 January 2019 and 7 June 2019, the first named defendant failed to pay any rent to the plaintiff.
9. By letter dated 22 May 2019, the first named defendant served a Notice of Intention to Claim Relief pursuant to s.20 of the Landlord and Tenant (Amendment) Act 1980.
10. Proceedings were commenced by the plaintiff in April 2019 by way of plenary summons seeking, *inter alia*, a declaration that the plaintiff had by letter dated 22 November 2018 validly exercised the break option contained in Clause 9 of the lease together with an order requiring the first named defendant to deliver up vacant possession of the property to the plaintiff in accordance with the terms of the lease.

11. In June 2019, the plaintiff issued a motion seeking interlocutory injunctive relief.
12. Prior to the hearing of the motion, all rent arrears were discharged. Further, by letter dated 5 July 2019 the first named defendant undertook to discharge the rent payable monthly in advance to the plaintiff and comply with all covenants in the lease pending the determination of the within application.

**Failure to pay Rent/Forfeiture**

13. Clauses 1 and 3 of the lease fixed the initial rent at €65,000.00 per annum payable quarterly in advance.
14. Clause 6 of the lease further provides as follows:

“FORFEITURE

*Without prejudice to any other right, remedy, or power herein contained or otherwise available to the Landlord: -*

*(a) If the rents or any other sums reserved by this Lease or any part or parts thereof shall be unpaid for twenty-one (21) days after becoming payable (whether formally demanded or not) ...*

*THEN, and in any such case, the Landlord may at any time thereafter re-enter the Premises or any part thereof in the name of the whole and thereupon the Term shall absolutely cease and determine but without prejudice to any rights or remedies which may then have accrued to the Landlord against the Tenant in respect of any antecedent breach of any of the covenants or conditions contained in this Lease”.*

15. During the period January 2019 to June 2019, the first named defendant failed to pay any rent to the plaintiff with arrears for that period totalling €19,987.51. At the time the interlocutory application was issued, the balance due and owing in respect of rental arrears was €40,128.85.
16. By letter dated 15 March 2019, the plaintiff’s property manager wrote to the first named defendant advising that rent remained due and owing and further that failure to discharge same within seven days would result in court proceedings.
17. By letter dated 11 April 2019, the plaintiff’s solicitors wrote to the first, second and third named defendants demanding payment of all rent outstanding and enclosing draft proceedings which it advised would issue unless all rent arrears were discharged.
18. By reply dated 12 April 2019, the defendants’ solicitors acknowledged that the rent remained due and owing and advised that it would discharge same.
19. However, it is clear that the arrears of rent were not discharged until 7 June 2019 and the defendants accept the default in that regard.

## **Break Option**

20. Clause 9 of the lease provides as follows:

### *"LANDLORDS BREAK OPTION*

*The landlord shall have the right to determine this Lease at the end of the fifth year only of the term (the 'Break Option') subject to the following conditions:-*

- (i) If the Landlord wishes to exercise his Break Option, he shall serve on the Tenant not less than six calendar months prior to the expiry of the fifth year of the Term written notice of the exercise of the Break Option and immediately on the expiration of such notice the said term hereby created shall thereupon cease but without prejudice to the remedies of either party and together in respect of any antecedent claim or breach of covenants.*
- (ii) The Tenant shall give vacant possession of the entire of the Demised Premises to the Landlord freed and discharged from all encumbrances and all rights of the third parties affecting same".*

- 21. By letter dated 22 November 2018, the plaintiff wrote to the first named defendant enclosing a notice seeking to exercise its break option under the lease and advised that the lease would "determine on 10 July 2019".
- 22. Solicitors for the defendants in their letter dated 12 April 2019 indicated that as their clients had not executed any deed of renunciation in relation to the tenancy, their clients had acquired statutory rights. It was further indicated that they were happy to discharge arrears of rent and further called upon the plaintiff to carry out repairs to the property which had been overdue since September 2018.
- 23. On 22 May 2019, the first defendant served a Notice of Intention to Claim Relief under the Landlord and Tenant (Amendment) Act 1980 claiming a new tenancy under Part II on determination of the existing lease.
- 24. In the circumstances, the defendants claim an entitlement to a set-off and/or counterclaim against rent and asserts that the counterclaim/set-off may be relevant in assessing an entitlement to and terms of relief against forfeiture.
- 25. The plaintiff is eager to take possession of the property to expand its existing business and asserts that it will suffer a substantial loss of earnings if the reliefs sought are denied.

## **The Law on Forfeiture of Leasehold Interest and Non-Payment of Rent and Relief against Forfeiture**

- 26. I have already referred to Clause 6 of the lease permitting the landlord to re-enter for non-payment of rent.
- 27. Section 14 of the Conveyancing Act 1881, as amended ('the Act') imposes restrictions on and relief against forfeiture of leases. However, s.14(8) exempts from notice any re-entry for non-payment of rent and provides:

*"(8) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent."*

28. In the circumstances, the plaintiff claims that the lease is now determined and cites a number of authorities in support of this contention.
29. In *Rayan Restaurant Limited v. Keane* [2012] IEHC 29 at para. 71-73, the High Court confirmed that the Conveyancing Act 1881 as amended had no application in the case of non-payment of rent but acknowledged that a tenant was entitled to claim equitable relief against forfeiture for non-payment of rent. Further, it was noted that "the normal way of proving a valid forfeiture was by an action for possession."
30. In submitting that the defendants should not be granted relief against forfeiture, the plaintiff relies on the decision of the Supreme Court in *Cue Club Ltd v. Navaro Ltd* unreported, 23rd October, 1996. In that case rent arrears of €15,611.00 had accrued and the landlord took possession of the premises. Murphy J. noted as follows:

*"The nature of the discretion exercised by the Courts of Equity in granting relief against forfeiture is hardly applicable or applicable to the same extent, at any rate where the Court is dealing with substantial commercial transactions in which the lessor and lessee are on equal terms".*

In considering the facts in that case, the court concluded as follows:

*"...no court exercising its equitable jurisdiction would grant relief against forfeiture for non-payment of rent in the circumstances of the present case."*

31. In *Campus and Stadium Ireland Development Limited v. Dublin Waterworld Limited* [2006] IEHC 200 at 97, Gilligan J. in considering the approach to be adopted by the court stated as follows:

*"I take the overall view that in order to exercise my discretion fairly, I must take into account the conduct of the parties, the wilfulness of any breach by the tenant, the general circumstances particular to the issue, the nature of the commercial transaction the subject matter of the lease, whether the essentials of the bargain can be secured, the value of the property, the extent of equality between the parties, the future prospects for their relationship, the fact that even in cases of wilful breaches it is not necessary to find an exceptional case before granting relief against forfeiture and then apply general equitable principles in reaching a conclusion."*

32. In refusing the claim for relief against forfeiture, the court concluded that having regard to the "wilful breaches of covenant" and the general circumstances of the case that it would be inappropriate for the court to grant the relief sought.
33. Counsel for the defendants highlights that the authorities on which the plaintiff seeks to rely in which relief against forfeiture was refused are the very cases that were specifically

considered in *Foley v. Mangan*, High Court August 24 2009 in which relief against forfeiture was granted. Laffoy J. noted as follows:

*"The lease at issue in the Cue Club case was a lease of unit in a shopping centre and the "commercial realities" adverted to by Murphy J. by reference to the judgment of Carroll J., were the implications for the commercial viability of a shopping centre of non-payment of rent and service charges by a tenant or tenants. The lease at issue in the Campus and Stadium Ireland case was a lease of a major national sports facility, which had been sponsored by the State.*

34. In *Foley* the property concerned was a farm in North County Dublin. The plaintiffs sought a declaration that the lease between the parties had been terminated by forfeiture and sought an order for possession of the lands demised by the lease, together with arrears of rent and main mesne rates. The court concluded that the motivation of the landlord in seeking to forfeit the lease was for the purpose of denying the tenant rights under an option agreement which would have arisen had the lease continued for its full term. In applying equitable principles, the court granted the defendant relief against forfeiture on terms and conditions to "give redress for his conduct".
35. In *Leopardstown Club Limited v. Templeville Developments* [2013] IEHC 529, Charleton J. granted relief against forfeiture to a tenant of substantial commercial premises at Leopardstown Race Course who was in arrears of rent to a very significant degree stating that:

*"The general principle of relief against forfeiture is that the court will relieve a tenant from having its leasehold forfeited if, and only if, the tenant remedies the breach of covenant which lead to the forfeiture."*

#### **Section 28 of the Landlord and Tenant (Amendment) Act 1980**

36. Section 28 of the said Act provides as follows:

*"Where an application is pending under this Part for a new tenancy or to fix the terms of a new tenancy and the pre-existing tenancy was terminated otherwise than by ejectment or surrender the tenant may, if he so desires, continue in occupation of the tenement from the termination of the tenancy until the application is determined by the Court or, in the event of an appeal, by the final appellate court, and the tenant shall while so continuing be subject to the terms (including the payment of rent) of such tenancy, but without prejudice to such recoupments and readjustments as may be necessary in the event of a new tenancy being granted to commence from such termination."*

37. The issue of whether relief against forfeiture should be granted to a tenant who has made a claim of rights under the Landlord and Tenant (Amendment) Act 1980 was considered by Finlay Geoghegan J. in *Crofter Properties Limited v. Genport Limited* [2007] 2 ILRM 528.

38. In that case, the plaintiff was the owner of a hotel which was occupied by the defendant pursuant to section 28 of the Act of 1980. The defendant held a 21-year lease which expired on July 31, 2001 and on that date served notice of intention to claim relief pursuant to section 20 of the Landlord and Tenant (Amendment) Act 1980. In January 2002 the defendant issued Circuit Court proceedings claiming a new tenancy under section 21 of the 1980 Act.
39. In May 2005 the plaintiff issued proceedings in the High Court claiming possession of the premises for non-payment of rent and insurance. The expired lease contained provision for re-entry and forfeiture in the event of a failure to pay rent or breaches of other terms of the lease. At the hearing of the rent and covenant proceedings the plaintiff contended that breach of the terms of the lease automatically brought to an end the defendant's entitlement to remain in occupation pursuant to section 28 of the 1980 Act.
40. The defendant contended that it had an absolute right pursuant to section 28 to remain in occupation pending the final determination of the application for a new tenancy in the Circuit Court and that the court had no jurisdiction to make any order for possession. In the alternative, each side contended that if the court had discretion to grant an order for possession such discretion should be exercised in its favour. During the hearing of the proceedings, undertakings were offered on behalf of the defendant in relation to the payment of rent, insurance and rates.
41. Finlay Geoghegan J. made an order restraining the defendant from continuing in occupation under section 28 but placed a stay on the order in the event of compliance by the defendant with its obligations in relation to the payment of rent, rates and insurance under the terms of the lease.
42. She held that, although a court retained a discretion to determine whether or not to terminate a right to remain in occupation under section 28, this right should only be terminated in exceptional circumstances where there appeared to be a risk of a serious injustice to the landlord if the tenant was permitted to remain in occupation whilst continuing to act in breach of the terms of the tenancy. If the plaintiff received the full amount outstanding for rent and insurance and continued to be paid rent and insurance, it would not suffer the type of injustice which would warrant bringing to an end the right of the defendant to continue in occupation under section 28 of the Act.

**Exercise of break option**

43. I have already referred to Clause 9 of the lease which deals with the landlord's break option. It is clear that the landlord's right to determine the lease at the end of the fifth year is subject to and "without prejudice to the remedies of either party".
44. Section 13 of the 1980 Act provides as follows:
  - "(1) *This Part applies to a tenement at any time if –*
    - (a) *the tenement was, during the whole of the period of five years ending at that time, continuously in the occupation of the person who was the tenant*

*immediately before that time or of his predecessors in title and bona fide used wholly or partly for the purpose of carrying on a business."*

45. Section 16 of the Act further provides:

*"Subject to the provisions of this Act, where this Part applies to a tenement, the tenant shall be entitled to a new tenancy in the tenement beginning on the termination of his previous tenancy, and the new tenancy shall be on such terms as may be agreed upon between the tenant and the person or persons granting or joining in the grant of the new tenancy or, in default of agreement, as shall be fixed by the Court."*

46. It is clear, therefore, that a tenant who is in continuous occupation of a property for a period of five years is entitled to a new tenancy.

47. It is accepted that the property at issue herein is a "tenement" for the purposes of the 1980 Act.

48. There is no dispute but that the Circuit Court has exclusive jurisdiction to hear applications for a new tenancy.

49. The plaintiff contends that the defendants were out of time to claim such relief having regard to the provisions of s.20 of the 1980 Act. Counsel for the defendants argue that s.20 is moreover subject to s.83 of the 1980 Act and that it is at all times open to the Circuit Court (which has exclusive jurisdiction) to grant an extension of time, if necessary.

#### **Analysis**

50. Clearly the provisions of the Landlord and Tenant (Amendment) Act 1980 were designed to afford protection to tenants who have built up their business in a certain location and for whom it would be unjust to have to endure forfeiture without recourse to equitable relief.

51. Section 28 gives a tenant an express right to continue in occupation until the application for a new tenancy is determined by the court. It further provides that the tenant whilst remaining in occupation shall be "subject to the terms (including the payment of rent) of such tenancy."

52. The plaintiff's claim that the failure of the first named defendant to pay rent due and owing automatically brings to an end its right to continue in occupation has to be viewed in the context of relief available under the 1980 Act.

53. The authorities relied upon by the plaintiff are clearly distinguishable on the facts from what is at issue in the instant case. In the *Cue Club and the Campus and Stadium Ireland* cases, the court was dealing with major commercial developments whereas the property at issue herein is a small shop unit. In any event, it is clear from the more recent decisions in *Foley and Leopardstown Club Limited* that the court, in applying equitable

principles, will grant relief against forfeiture if the tenant remedies the breach of covenant which led to the forfeiture.

54. Further, it is clear from the principles laid down in *Crofter* that the right to remain in occupation under s.28 should only be terminated in exceptional circumstances where there appears to be a serious risk of injustice to the landlord if the tenant was permitted to remain in occupation.

#### **Application for injunctive relief**

55. In any application for injunctive relief, there is a duty on the parties to make full and frank disclosure to the court and to come before the court with "clean hands". It is notable that in the within application the plaintiff failed to disclose that it has a subsidiary company which trades as "Weir & Sons" jewellers in the vicinity of the property. Whilst the plaintiff's grounding affidavit makes reference to a desire on its part to expand its existing business, it did not disclose that it proposes to replace the first named defendant's jewellery business with its own comparable business.
56. In addition, the plaintiff failed to disclose the ongoing issues in relation to the condition of the property which remain unresolved and in respect of which the first named defendant seeks to claim a set-off and/or counterclaim against rent.
57. Further, I can only conclude from the approach adopted by the plaintiff in its pursuit of interlocutory relief where all arrears of rent have been discharged and undertakings in place in respect of future rent, that its true motivation in seeking possession of the property is with a view to undermining and frustrating the intended application by the first named defendant to seek a new tenancy under the provisions of the 1980 Act.
58. In all the circumstances, I am not satisfied that the plaintiff has made out a *prima facie* case for possession.
59. Even if the plaintiff had satisfied this threshold, the balance of convenience clearly lies in favour of refusing the relief in circumstances where the arrears of rent have been discharged and undertakings furnished in respect of future rents and where the first named defendant is entitled to pursue its claim for a new tenancy in the Circuit Court.
60. Finally, the plaintiff has failed to establish, as a matter of probability, that damages would not be an adequate remedy.

#### **Conclusion**

61. I am satisfied that the status quo should be preserved pending the determination of the first named defendant's application and will therefore refuse the reliefs sought.