[2020] IEHC 272

THE HIGH COURT

[2020 No.3377 P]

BETWEEN

O'FLAHERTY'S (NASSAU STREET) LIMITED

PLAINTIFF

AND

SETANTA CENTRE UNLIMITED COMPANY

DEFENDENT

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 2nd day of June, 2020

1. Introduction

1.1 This is an application for an interlocutory injunction. The Plaintiff began its submissions with a quotation from a case called *AIB v Diamond*. This judgment begins with a quotation from Neil Diamond: *"Money talks. But it can't sing and dance and it can't walk."* That is to say, while money is important to us all, some things are more important than money.

2. The Facts

2.1 Both parties have engaged in years of commercial trading, albeit in different businesses. The Plaintiff's business has changed somewhat over the years but is now one providing print and design services, broadly speaking, and the Plaintiff company, trading as Read's, rents its premises from the Defendant company. The demised premises [hereafter, *the premises*] is a unit in the Setanta Centre which building is owned by the Defendant. Access to the premises is gained from Nassau Street, though a concourse, or from Setanta Place through what is currently a fire door. The Defendant is in the process of redeveloping the whole building, it has obtained planning permission in this regard and has begun the redevelopment works.

2.2 The Plaintiff has four more years' occupation of the premises, according to the lease. Notwithstanding this, the initial building work has included the obstruction, by scaffolding and hoarding, of the concourse leading from the premises to Nassau Street. This obstruction is permanent in that it will be replaced, in due course, by the planned new build. The concourse is not to be restored. The Plaintiff has operated in three different premises over the past few decades, all with a frontage on Nassau Street. Any Dubliner old enough to know who Neil Diamond is will recall their slogan: *Read's of Nassau Street*.

2.3 The Plaintiff claims that this is the main access route to its premises and that this access from Nassau Street is protected as it is an implied easement, created by the common intention of the parties, the destruction of which is an interference with its property rights. The Plaintiff also relies on the related and somewhat overlapping doctrine of non-derogation from a grant. The Plaintiff points to years of advertising the premises on Nassau Street and to its strategic location, directly opposite one of the busiest entrances to Trinity College Dublin, as support for its case. The students of Trinity, it is said, form a major part of the Plaintiff's business, with

footfall business, students or otherwise, estimated very broadly as comprising from 50 to 90% of the shop's trade.

2.4 The Defendant replies that it is entitled to build on its own premises, that the lease and other documents, including those relied upon by the Plaintiff in other circumstances, refer to the premises as being situated on Setanta Place and that the lease includes no express right to access by the concourse. The Defendant points out that the original plans of the centre show no door at the Nassau Street concourse into the demised premises. It is argued that the original intention was to build in the centre of the complex, as can be seen by looking at plans dating back to 1997. Therefore, the Defendant concludes, there could be no easement by the common intention of the parties regarding this mode of access – there was no intention to leave the middle of the centre open, as such - and no derogation from a grant, since there was no such grant. The Defendant points, moreover, to the convenient location of the Setanta Place door in terms of access from other parts of the city, or access by car. This shows, it is argued, that the access by the Setanta door is not only the intended access but is the more convenient in a modern business, which must also, incidentally, include much more online business than heretofore. Thus, it cannot be said that to block access by Nassau Street is in breach of the Plaintiff's rights, still less can it obliterate its right of access. The Defendant has offered to pay for improvements to the Setanta Place access by whatever means the Plaintiff chooses to enhance it. The door, albeit on a different street, is a very short walk around the building for students or other passers-by and is much easier to access by car.

2.5 In the event that the Court finds there is an issue to be tried, the Plaintiff argues that the access route must be protected by an interlocutory injunction as, once the building work is completed, there is no prospect of returning to the status quo and their case is one which relies on the Court intervening to protect their property rights rather than one which seeks to assert any right to compensation for disturbance.

2.6 In this regard, the Defendant argues that if the Plaintiff is successful at trial, an award of damages is sufficient to compensate the Plaintiff such that an interlocutory injunction is not necessary. The Defendant also points out that the lease, and any easement on which this tenant may be entitled to rely, will expire in four years, at which point the building works will be almost complete if they are permitted to proceed. To grant the interlocutory relief would prejudice its position causing huge commercial losses for the moderately smaller gain of a few more years of access through a concourse which will be redeveloped by 2024 at latest.

2.7 The Defendant further argues that while it is in a strong position to pay damages and costs, should the Plaintiff succeed at trial, the Plaintiff, although an undertaking as to damages has been given, has not shown that it is in a position to honour that undertaking. The Plaintiff has not shown its most recent accounts to the Court,

although they appear to be available to its accountants. The 2018 accounts exhibited show a modest profit but are not such as would reassure a court as to the ability of the Plaintiff to pay damages at the level which might be payable should the Plaintiff lose this action at trial.

3. The Test – Interlocutory Injunctions

3.1 The injunction is an equitable remedy. At interlocutory stage, the Court must attempt to do justice between the parties and to decide what is a fair resolution of their difficulties, pending a full trial. This being an interlocutory hearing which takes place without any opportunity to test the facts set out on affidavit, the Court must be wary of reaching conclusions of fact and all views expressed in this ruling carry this warning: none of the deponents have been cross-examined and the full extent of the evidence is not before the Court. This must affect the weight of the evidence in all but the clearest of cases and much of what was put before the Court remains in issue. Hence the clear line of authority that it is not the function of the Court to delve too deeply into the facts at this stage of the hearing. The very nature of interlocutory proceedings mitigates against this.

3.2 The applicable test is whether or not there is a fair issue to be tried. This was set out by the Supreme Court in *Merck, Sharp and Dohme v Clonmel Healthcare*, [2019] IESC 65 and in the words of Mr. Justice O'Donnell, "[this] *means no more than the case not being frivolous or vexatious. If so, the court should then proceed to consider how the matters should best be regulated pending the trial which involve[s] a consideration of the balance of convenience.*" O'Donnell J. added that "*the essential function of an interlocutory injunction [is] in finding a just solution pending the hearing of the action*."

4. The Lease

4.1 If the Plaintiff can establish at a full trial that it has an implied easement, then it appears to be entitled to an injunction to prevent the destruction of that easement for the duration of its lease. Permanent injunction is the correct term, although here, it refers to a relatively short term, as an implied easement will not necessarily survive the expiry of the lease.

4.2 The lease in this case permits interference with easements such as rights to air and light. The most relevant paragraphs in the lease are 1.1.3. and 5.4.1. both of which describe the rights of the Landlord and which read as follows:

Clause 1.1.3: - "full right and liberty on giving due notice in writing at any time hereafter to execute works and make erections upon or to erect rebuild or alter any buildings or erections on their adjoining and neighbouring lands and buildings in such manner as they may think fit notwithstanding that the access of light and air to the demised premises or any part thereof may thereby be interfered with otherwise than in a material fashion"

Clause 5.4.1:- "that the Landlord shall have power at all times without obtaining any consent from or making any compensation to the Tenant to deal as the

Landlord may think fit with any of the lands and premises adjoining neighbouring or opposite with any of the lands and premises hereby demised and to erect or suffer to be erected on such adjoining opposite or neighbouring lands and premises any buildings whatsoever whether such buildings shall or shall not affect or diminish the light or air which may now or at any time or times during the said term be enjoyed by the Tenant or other lessees or tenants or occupiers of the demised premises or any part thereof provided however that any such buildings shall not materially adversely effect (sic) the Tenant's use and enjoyment of the demised premises or the access thereto."

4.3 While the first clause permits the Landlord to undertake works on or near the premises even if they cause some interference with light and air, this is not of great assistance in determining the rights of access in this case. The clause is a standard one in many leases.

4.4 The second permits buildings to be erected by the Landlord even if they cause interference with light or air provided the Tenant's use and enjoyment of the property *or the access thereto*, is not materially adversely affected. The Defendant argues that because the access to the property is just as convenient by Setanta Place, this clause has not been breached. The Plaintiff submits, correctly in the Court's view, that the easement for which the Plaintiff argues is not inconsistent with these express terms in the lease.

5. The Disputed Easement

5.1 Ms. Justice Laffoy sets out the law in relation to implied easements and the doctrine of non-derogation from a grant in *Conneran and O'Reilly v Corbett & Sons Limited & Radical Properties Ltd* [2004] IEHC 389. There, the plaintiff retail owners succeeded in establishing that their property rights, specifically express and implied easements in a lease, had been destroyed when a loading area for deliveries was blocked off permanently by the redevelopment of a shopping centre. While the case involved express rights in the lease, these were not the determining factor, according to Laffoy J. at page 14 of her judgment. The combination of express easements (involving the use of a particular delivery area) and the implied rights of access which were created by the common intention of the parties, gave rise to an implied easement which gave effect to that intention and rendered the express easements effective. At page 16, Laffoy J. quoted from Wiley on Land Law [at para. 6.059], applying the principle of non-derogation from a grant to these facts:

> "*… when a man transfers his land to another person knowing that it is going to be used for a particular purpose, he may not do anything which is going to defeat that purpose and thereby frustrate the intention of both parties when the transfer is made. Usually application of this principle creates property rights in favour of the grantee which take the form of restrictions enforceable against the grantor's land.*"

5.2 Regarding easements generally, it is clear that easements are commonly qualified by clauses permitting conduct by a landlord, which would otherwise be an interference with the tenant's rights - in order to redevelop property, for instance - but interference is not usually permitted if it would destroy the right in question, as in the Conneran case, above.

5.3 Turning to the facts of the present case, the Plaintiff signed a lease in 1999, and a supplemental lease in 2001. The Plaintiff's various arguments can be summarised by pointing to the fact that access has been materially affected and that an easement of common intention is not the equivalent of an easement of necessity, therefore the question is one for a full trial. Pointing to an alternative access route does not dispose of the issue if this is so. One must look at the time the lease was entered into in order to discern, insofar as one can, the intentions of the parties and to decide whether or not an easement was intended – specifically a right of access to Nassau St. The Plaintiff had an association with the street and had traded from three separate premises on that street. The contrast between Nassau Street and Setanta Place, which is a very quiet street, coupled with correspondence from 2004 supports the view that both parties understood the importance of a trading location on the street, coupled with access to Read's from Trinity College via the concourse to Nassau Street.

5.4 The requirement to show continuous use in order to establish an easement is, as we see in Gale's summary, one which can only begin at the time of the creation of an easement, where one is considering a manmade pathway or access route, as is the case here [see para 3.99 of the 20th Ed of Gale on Easements, 2017]. 1999 is thus the earliest relevant date as it is the date of the first lease and it is the date on which the Defendant submits that the Court must try to ascertain the intention of the parties. While 2001 may be, in fact, the correct date from which to assess intention, as it is the date of a subsequent lease between the same two parties, Mr. Murphy's affidavit address the situation in 1999 comprehensively. He was a previous tenant of the premises and he refers to a main access route to Nassau Street, by way of a door put there by the landlord, and he confirms that the other door at Setanta Place was never used. This evidence contradicts a drawing, made prior to the building being constructed, upon which the Defendant relies, which shows no door to the concourse. The existence of an entrance to the premises through the concourse from the time of that grant in 1999 suggests that there is an implied easement, created by the common intention of the parties, that access would be in and out of this concourse.

5.5 While the existence of an easement remains disputed, the Court's task is to examine whether it is an issue which requires further examination and assessment of the evidence. It clearly does. The first limb of the test has been satisfied by the Plaintiff: there is a fair question to be tried and it is arguable that the Defendant has diminished the Plaintiff's use and enjoyment of the premises in an impermissible way by interfering with this access route.

6. The Balance of Convenience

6.1 A refusal to grant this relief means that the building works would continue and if, at a full trial, another judge agrees with my preliminary view, she may decide to award damages and they may be calculated. The Defendant has submitted in this respect that the apprehended loss is a commercial one and it relies on *Curust Financial Services v Loewe-Lack-Werk* [1994] 1 I.R. 450 and *Camden Street Investments v Vanguard Property Finance* [2013] IEHC 478 in this regard. The Defendant adds that the Plaintiff has not shown what, if any, damage will be done to its business by the change of access necessitated by these works. The argument is made that the business appears to have moved online, at least to some degree and that the very wide estimate as to footfall traffic into the premises was never substantiated, nor was there any accountants' evidence to assist the Court.

6.2 The Plaintiff responds that destruction of an implied easement is a breach of the lease which is actionable in itself, which appears to this Court to be correct. *Curust and Camden Street Investments* can be distinguished as the former case dealt with what Finlay C.J. described as "exclusively a commercial loss" and the latter with an anticipated loss of business. Here, there is an argument based on interference with property rights. If that is made out, the Plaintiff does not have to show or quantify the damage which will be caused to the business and has a case even if it emerges that the business was unaffected or that the move online has substantially mitigated the effect of the change.

6.3 While many events can be monetised, it is not doing justice if this is done in every case. By that yardstick, any breach of rights could be justified after the fact by offering money. It is better to look at the law; there may be an easement here - and there is a fair question to be tried as to whether that is so – if so, the breach of that right is a breach of the lease and an infringement of property rights which the law should encourage the landlord to correct. It is not only specific to this case, it is the function of the law to uphold the contract; leases are important to society generally. Both landlords and tenants must be able to rely on their leases and must be able to enjoy their property, while respecting each other's rights.

6.4 The Court is not creating the problem, nor is the Plaintiff. The Defendant, in commencing works that could never be completed without the demolition of the premises which cannot, by definition, happen until 2024, have created the problem that now arises. This Defendant had the benefit of a tenant which continues to pay its rent and is entitled to the rights it enjoys under the lease until 2024. The Defendant cannot be so gravely prejudiced by the maintenance of the status quo as to persuade the Court to refuse an otherwise reasonable order which has the benefit of maintaining a right of access until a court can determine at trial if it is an implied easement attracting the full protection of a permanent injunction. If the redevelopment is gravely prejudiced, the prejudice has been caused by its own haste in commencing the works without confirming and agreeing the position as regards this tenant and how it is to continue the use and enjoyment of its tenancy

during the redevelopment. In the specific circumstances of this case, where the Plaintiff has traded on Nassau Street for decades, using the address in its advertising and moving from premises to premises but always with its main entrance on that street, it is not a convincing argument that the alternative access route on a quiet street, no matter how close by, is not a foreseeably problematic change to the Plaintiff's business even if there were no easement in question. But in any event, if the implied easement has been created, that is the end of the matter.

6.5 The Court also relies on *Redfont Ltd & Wrights v Customs House Dock Management Ltd & Hardwicke Property Management Ltd* [1998] IEHC 206, per Shanley J., in holding that damages would not be an adequate remedy as there is a potential breach of property rights in the case. Even before considering the convenience or otherwise of halting a major development plan, the more important value to uphold is that of the property rights freely agreed between the parties and beginning in 1999. While the Defendant is entitled to carry out building works, it does not appear to this Court that the Defendant is entitled to demolish the access route the tenant has used since 1999, or that it is entitled to insist that the tenant use the fire door at the back of the premises (howsoever enhanced) and that it can, by offering to pay damages if it is wrong, persuade the Court not to take action to uphold the terms of the lease.

6.6 Another factor often referred to in assessing the balance of convenience is the *status quo*. Here, the *status quo* is not the ongoing building works. It is the access which has been enjoyed since the building was constructed (whether as an easement of common intention or not is a question for the court of trial). The Defendant argues that it cannot continue its building works at all without preventing access to the concourse in order to protect public safety. But to complete the works, the final demolition must await 2024 in any event, as the Plaintiff is entitled to remain there until then. There has been a factual dispute as to this aspect of the case also. It is argued by the Plaintiff that the plans originally submitted by the Defendant show no indication of any intention other than to demolish the Premises in its entirety as part of the building works. Further, the Plaintiff points out that the works cannot continue safely above, below and around a functioning print shop. As it is also claimed by the Defendant that the public cannot safely pass into the premises by the concourse, this makes it all the more unlikely that the shop can continue to trade during these extensive works.

6.7 The Defendant argues that building can proceed without risk to the premises, albeit that the works cannot accommodate safe access to Nassau Street. Its original application shows that the Defendant's stated intention was to protect another entity trading from a different unit, namely Kilkenny Design, and Read's was named in the same sentence. On closer reading of the plans, it is clear that no specific measure was outlined in respect of Read's and it appears that there was no anticipation that this Plaintiff would remain in situ during the demolition.

6.8 Later documents show a plan which has been described as a non-traditional or creative solution permitting the premises to remain untouched during the demolition. The plan does not provide sufficient detail for the Plaintiff's expert to assess it. There is a further complication here in that the Defendant's expert has professed independence apart from applications for this build, but the Plaintiff points out that he routinely works for the Defendant and related companies. These issues must await full trial and it is important to state that the Court makes no finding of fact in this regard. However, it is abundantly clear that whatever question arises as to the integrity of one of the experts and however imaginative the new proposed solution, the facts which can be seen in the documents put before the Court show that while Read's was named, there was no plan in the original construction management plan [CMP] as to its preservation and this is in sharp contrast with the details set out in relation to the Kilkenny Design Unit, which is to be preserved throughout the redevelopment.

6.9 Standing back from the detail as to how the demolition is to be completed leaving Read's still standing in the middle of it, and why any passer-by might want to go into a building site to have her thesis printed or wedding invitations designed, it is striking that the Defendant proceeded to block the disputed access with no plan for the premises (other than demolition) evident from its original CMP which was lodged prior to planning permission being granted. In particular, it is noted that the Defendant proceeded to cut off access by its tenant to the main shopping street on which it has traded for many years during a global pandemic when both parties had to cease business activity for obvious reasons. The revised CMP resurrects the premises but not the disputed access and it is a plan that does not appear to be within the contemplation of the original planning permission. There is no detail as to how this will be achieved. It is difficult to avoid the conclusion that it was created as a response to the prospect of these proceedings.

7. Undertakings as to Damages

7.1 It is not fatal to the Plaintiff's action that there is a question as to whether the Plaintiff has the financial means to meet, in full, the costs of this action and the consequent loss to the Defendant, should the company fail in its attempt to secure a permanent injunction.

7.2 In *Allied Irish Banks Plc v Diamond* [2012] 3 IR 549 and in *Merck, Sharpe and Dohme v Clonmel Health Care* the issues involved were employment contracts and patents respectively. In each case the judgments contained references to the role of the courts in upholding the legal rights of the parties even in circumstances where one party was capable of paying substantial damages if required to do so by a court, following a full trial. Notwithstanding ability to pay, a court should be reluctant to allow the relative strength of one party to override every other factor in an otherwise strong case. Here, it seems to this Court that there is a fair case to be tried, that the balance of convenience lies in favour of upholding the Plaintiff's claim of an implied easement and preventing the premature destruction of that

access at a time when the lease still has some years to run. To say that the Defendant is now building and that it would be too expensive to change its plans as regards the concourse rings somewhat hollow in light of the comprehensive change of plans set out in the redrafted CMP which suggest (though they do not describe in any detail) an inventive approach whereby the premises would remain untouched despite comprehensive demolition all around it. The same ingenuity may find a solution to the access route: necessity is the mother of invention.

7.3 If the injunction is refused due to the Defendant's ability to compensate the Plaintiff after the fact for a breach that ought not to have taken place at all (if this easement is found to exist) such a refusal sends a dangerous message to litigants who are well-resourced. The message being that money can buy a party out of any breach of the law. That is not so. As O'Donnell J. commented in *Merck, Sharp and Dohme,* "*while the end point of most civil cases is the award of damages, the interests that the law exists to protect often extend beyond the purely financial.*" In the context of interlocutory injunctions, Mr. Justice Clarke, as he then was, in *AIB v Diamond*, confirmed that: "*the mere fact that it may… be possible to put a value on property rights lost does not, of itself, mean that damages are necessarily an adequate remedy for the party concerned is entitled to his property rights instead of their value.*"

7.4 Returning to the opening paragraph, it is important to identify what it is that the Court seeks to protect. The Defendant submits that the interests on both sides are commercial and that it is in the wider public interest that the development proceed. Certainty for leaseholders, in commercial leases just as in residential, is more important as a societal value than a single building project. It is also more important than the availability of compensation if leasehold rights are breached. An interlocutory injunction will be granted in order to preserve the access route to Nassau Street pending a full trial of the action.