[2020] IEHC_420

THE HIGH COURT

[2018 No. 8297 P.]

BETWEEN

ILG LIMITED AND TEMPLEVILLE DEVELOPMENTS LIMITED

PLAINTIFFS

AND

APRILANE LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 21st day of August, 2020

1. This is an application on behalf of the plaintiffs for an order pursuant to O. 26, r. 1 of the Rules of the Superior Courts "*directing and/or granting leave that the within proceedings be discontinued*" and for an order providing for the costs of the action to date, including the costs of the motion. No defence has been delivered in the action and the plaintiffs are entitled under O. 26, r. 1 to give notice of discontinuance but if they were to exercise that right, they would be bound to pay the defendant's costs. The object of the motion, therefore, is to avoid the costs consequences of doing so.

2. Order 26, r. 1 allows a plaintiff, at any time before receipt of the defendant's defence, or after the receipt of the defence, but before taking any other proceeding in the action save any interlocutory application, to discontinue. Thereafter, but before the action is set down for trial, the plaintiff may discontinue with the written consent of all parties, with or without costs to be paid by any party, as the parties may agree. Save as in the rule otherwise provided, the leave of the court is required.

3. If an action is discontinued and a subsequent action brought for the same or substantially the same cause of action, the court by O. 26, r. 4 may stay the subsequent action until the costs of the earlier action have been paid.

4. The motion is vigorously opposed on behalf of the defendant, but counsel did not contest that the jurisdiction in O.26, r. 1 to give leave to a plaintiff to discontinue applies before as well as after the case has been set down and I am content to deal with the motion on the premise that court has jurisdiction, if persuaded to do so, to absolve the plaintiff from the liability to pay the costs that would ordinarily apply.

5. The defendant is entitled to the lessor's interest in a lease of commercial premises in Dun Laoghaire, County Dublin to the first plaintiff dated 6th December, 2000.

6. This action was commenced by plenary summons issued on 20th September, 2018 by which the plaintiff claimed: -

   "1. An injunction (including if necessary such interim or interlocutory orders as may be necessary) restraining the defendant, its servants or agents, from entering the premises at the Pavilion, Royal Marine Road, Dun Laoighaire, and retaking possession thereof, with a view to determining the lease dated 6th December 2000 (as varied by a deed of variation dated 25th June 2002).

2. *A declaration that no or no sufficient notice of forfeiture has been served by the defendant herein.*

3. *If required, an order granting the first named plaintiff relief against forfeiture.*

4. *A declaration that the defendant has unreasonably withheld its consent to the provision of services by West Wood Club CLG to the first named plaintiff at the said premises and that the first named plaintiff is free to avail of the services of West Wood Club CLG at the said premises.*

5. *A declaration that the defendant has unreasonably withheld its consent to the assignment of the lease of the premises aforesaid to the second named plaintiff, and that the defendant has unreasonably withheld its consent to the provision of sporting services by West Wood Club CLG at the said premises.*

6. *A declaration that notwithstanding the terms of the lease, the first named plaintiff is free to assign the remainder of the term created by the lease (as varied) to the second named plaintiff and that the second named plaintiff is free to avail of the services of West Wood Club CLG at the said premises.*

7. *Such further or other relief as to this honourable court shall seem fit.*

8. *Damages for breach of contract.*

9. *The costs of these proceedings."*

7. On the same day, the plaintiffs applied for and secured from O'Connor J. an interim injunction restraining the defendant from entering or retaking possession of the premises with a view to determining the lease, and issued a motion for an interlocutory injunction in the same terms. That motion eventually came on for hearing before me on 16th May 2019. For the reasons given in a short *ex tempore* judgment on the following morning, I refused the application. On the application of counsel for the defendant, with the agreement or the acquiescence of counsel for the plaintiffs, the costs of that motion were ordered to be costs in the cause.

8. The plaintiffs had a stenographer in court, if not for the entire hearing then at least to take a note of my judgment, but for some reason, or for none, refused to share it with the defendant which was prepared to share the cost.

9. By notice of motion issued on 23rd May 2019, application was made on behalf of the defendant for a transcript of the digital audio recording (DAR) of my ruling, and for the costs of the motion. That application was moved by counsel on behalf of the defendant on 30th May 2019. There was no appearance by or on behalf of the plaintiffs, but the plaintiffs' solicitors had written a letter to say that they did not object to it and I made an order accordingly.

10. On the motion now before the court, the plaintiffs rely on the transcript of the stenographer they engaged and which they previously refused to share, and the defendant relies on the transcript of the DAR. Neither side suggests that there is any difference between the transcripts.

11. Following service of the plenary summons on or about 20th September 2018 an appearance was entered on behalf of the defendant on 25th September 2018. By the notice of entry of appearance, the defendant required delivery of a statement of claim. As is by no means unusual in practice but quite contrary to principle, no statement of claim was delivered pending the hearing of the motion for an interlocutory injunction.

12. On 17th May 2019, immediately on the disposal of the plaintiffs' motion, the solicitors for the defendant wrote to the solicitors for the plaintiffs consenting to the late delivery of a statement of claim within 21 days and threatening a motion to dismiss the action for want of prosecution if it was not delivered. The plaintiffs failed to deliver a statement of claim and by notice of motion issued on 10th June 2019 and originally returnable before the Master on 18th July 2019, the defendant applied for an order pursuant to O. 27, rule 1. The motion on behalf of the plaintiffs now under consideration was issued on 16th July, 2019 and was originally returnable for 21st October, 2019.

13. The plaintiffs' motion for leave to discontinue and the defendant's motion to dismiss for want of prosecution travelled together and were listed together on 24th June, 2020. Mr. Stephen Fennelly, for the plaintiffs, acknowledged that he would have to pay the costs of the motion for judgment in any event, but it was agreed that logically the plaintiffs' motion, although issued second in time, should be dealt with first.

14. The application for leave to discontinue was grounded on a reasonably succinct affidavit of the plaintiff's solicitor, Mr. Michael Ohle. At the hearing of the motion the court was presented with a folder of papers on the motion to discontinue; the original thick folder of papers prepared for the plaintiffs' motion for an interlocutory injunction; two sets of written legal submissions running to between 6,000 and 7,000 words; and two folders of authorities. As far as I could see, the plaintiffs' application was to reopen the order for costs which had been made more or less by consent thirteen months earlier but in deference to the industry of counsel I reserved my judgment.

15. The affidavit of Mr. Ohle, solicitor, sets out a brief background to a wide range of disputes which arose between the plaintiffs and the defendant and have continued since the acquisition by the defendant of the landlord's interest in the premises on 27th July 2017. Mr. Ohle gives an overview of the corporate structure of what he calls the *"LMG family of companies"* which, it is said, carry on gymnasium businesses under the name West Wood Club "*in conjunction with*" a company called West Wood Club CLG. He then moves to an exchange of correspondence mostly between the parties' solicitors in September, 2018 which prompted the issue of the proceedings and the plaintiffs' application for interim and interlocutory relief, and from there to my judgment on the plaintiffs' motion.

16. If it were possible (which I am inclined to doubt) it is not necessary or useful to try to disentangle the thicket of allegations and counter allegations in the correspondence exchanged prior to the institution of these proceedings. It is now acknowledged that the plaintiffs' application for an interlocutory application was refused and that on the application of counsel for the defendant, without demur on the part of counsel for the plaintiffs, the costs of that motion were ordered to be costs in the cause. In practical terms, the plaintiffs' object by this motion is to have the court revisit that costs order about thirteen months after it was made. I observe here that by the affidavit of Mr. Ohle, the plaintiffs actually sought the costs of the proceedings and of their interlocutory application but in the written legal submissions exchanged shortly before the hearing modified their position to say that there should be no order as to costs.

17. The affidavit grounding this application asserts that the motion for an interlocutory injunction went the way it did because of a concession made by counsel for the defendant in the course of the injunction application. If that is so (and I do not say whether it is or is not so) its significance would have been immediately apparent, and if not immediately there was time to have reflected on its significance overnight, before judgment was given on the following morning. If counsel were not in a position to deal with the costs at the conclusion of the *ex tempore* judgment on the following day, application could have been made – as routinely such applications are made – for time to consider the judgment, of which there was a stenographic note.

18. According to the affidavit of Mr. Ohle, the proceedings were instituted as a direct response to the defendant's threat to re-enter and its unequivocal refusal to rescind that threat and are no longer necessary because the threat has been withdrawn. It seem to me that if that were so, it would have been obvious as soon as the threat was withdrawn.

19. There was some suggestion in the course of argument on this application that the action is moot. I will come to that, but what Mr. Ohle says is that the plaintiff has achieved its purpose in issuing the proceedings and that the plaintiff no longer sees the need to pursue the proceedings. That, of course, is far short of an assertion that the action is moot.

20. I am absolutely satisfied that the action is not moot. The substance of the exchange of correspondence in September, 2018 was whether, if at all, and if so on what basis or on what terms, West Wood Club CLG was in possession or occupation of, or was carrying on business from the premises, or what its relationship was with whomever else was carrying on the business.

21. As a matter of first principles, the basis of an application for an interlocutory injunction is almost invariably that there is a *bona fide* issue to be tried as to the plaintiff's entitlement to a permanent injunction in the same terms. The plaintiffs' claim, at para. 1 of the general endorsement of claim, is for "*an injunction (including if necessary such interim or interlocutory orders as may be necessary*)" is plainly a claim for a permanent injunction. While it is true that one of the issues raised was whether the defendant had served a

forfeiture notice or a sufficient forfeiture notice, the plaintiffs also claimed that the involvement of West Wood Club CLG at the premises was lawful.

22. Without getting bogged down in the detail of the exchange of correspondence and affidavits leading up to the hearing on 17th May, 2019 it was perfectly clear that the defendant was not abandoning its objection to the presence of West Wood Club CLG at the premises or to the involvement of West Wood Club CLG with the business being carried on at the premises. Neither the refusal of the interlocutory injunction nor anything said on that application could possibly be said to have rendered moot the issue as to the entitlement of the first plaintiff to avail of the services (whatever they are) of West Wood Club CLG, still less the issue as to whether the defendant has unreasonably withheld its consent to the assignment of the lease to the second plaintiff and the issue as to the entitlement of the second plaintiff to avail of the services or sporting services of West Wood Club CLG at the premises, or, indeed the claim for damages for breach of contract.

23. Mr. Fennelly identifies four issues which are said to be relevant to the issue of the costs of this motion.

24. The first is the suggestion that the defendant's threat in correspondence to re-enter the premises was abandoned by counsel in the course of the interlocutory hearing and after the exchange of written legal submissions. The plaintiffs' written submissions on the motion for the interlocutory injunction, it is said, spelled out that while the requirement under s. 14 of the Conveyancing Act, 1881 as it was enacted did not apply to a breach of covenant against assignment, subletting or parting with possession, the disapplication by s. 14(6)(i) of the Act of 1881 to such breaches had been removed by s. 35 the Landlord and Tenant (Ground Rents) Act, 1967. The declaration by counsel for the defendant that it did not intend to effect a physical re-entry was said to be a belated acknowledgement that its earlier threat in correspondence to do so was unlawful.

25. It seems to me that this argument fails to recognise the basis on which first the threat and later the statement or concession were made, both of which I dealt with in my judgment on 17th May, 2019. The premises in Dun Laoghaire is the subject of a lease between the defendant's predecessor in title and the first plaintiff. The lease, in the ordinary way, includes a covenant against alienation. The background to the defendant's threat to re-enter was that the first plaintiff had filed abridged financial statements which suggested that it had no assets – and so, inferentially at least, that it had somehow divested itself of the lessee's interest in the lease – and that the plaintiffs' solicitors had unequivocally denied in correspondence that West Wood Club CLG had a licence to occupy the premises. The change in the defendant's position came after a change in the plaintiffs' position in the affidavit grounding the application for an interlocutory injunction in which it was asserted, for the first time, that West Wood Club was a licensee. The threat in the defendant's solicitors' correspondence was to recover possession from someone who had been said by the tenant to have no permission to be there. Once it was sworn on behalf of the first plaintiff that West Wood Club had a licence, it followed

that there could be no effective forfeiture by re-entry unless a forfeiture notice was served, as required by s. 14 of the Act of 1881.

26. The second issue identified as being relevant to the costs of this motion is the question of peaceable re-entry. This issue also arose in the course of the hearing in May, 2019 but was elaborated upon in the argument on this motion. It is submitted that the plaintiffs, or perhaps the first plaintiff, apprehended a physical re-entry and was justified in seeking first an interim injunction and then an interlocutory injunction to prevent it. Mr. Fennelly submits that the degree of force which a landlord may use when effecting a re-entry is not entirely settled. He refers to the decision of Carroll J. in *Sweeney Ltd. v. Powerscourt Shopping Centre Ltd*. [1984] I.R.501 and a suggestion made repeatedly in articles published in the Conveyancing and Property Law Journal and the textbooks that a landlord is entitled to take such steps to effect a re-entry as would cause no more than minimal damage to the property. This proposition appears to have originated in the first edition of *Wylie Landlord and Tenant Law* (1990) and to have been taken up by Ms. Ruth Cannon (2007) 12(1) C.P.L.J. 7, Mr. Martin Canny (2007) 12(4) C.P.L.J. 94 and Ms. Mema Byrne *Landlord and Tenant Law: The Commercial Sector* (2013) but appears to me to be unsupported by any judicial authority. In support of the proposition that a landlord may do minimal damage, Professor Wylie cites *Sweeney Ltd. v. Powerscourt Shopping Centre Ltd*. [1984] I.R.501, 504 but I see nothing there to suggest that the landlord is entitled to cause damage, so long as it is no more than minimal. What Carroll J. said, approving the statement in Deale *The Law of Landlord and Tenant in the Republic of Ireland* (1968) is that the landlord may not use force, for that is a criminal offence.

27. Without finally deciding the point, I am extremely sceptical of the argument that whether an entry is forcible or not might turn on the degree of force used, or the extent of damage done to the property – whether by the drilling, forcing or cutting of locks or whatever. In the instant case, on the facts, the point does not arise because the defendant's threat to re-enter was that it would do so at 10:50 p.m. when the premises was open for business and at a time when, to the defendant's knowledge, the plaintiffs had arranged to have the premises protected by a private security firm. The prospect of the defendant securing peaceable possession struck me as so remote that I rather wondered whether there was baiting going on.

28. The third issue identified by Mr. Fennelly as being relevant to this application was whether there had been full and frank disclosure on the plaintiffs' application for an interim inunction. The plaintiffs seek to revisit my finding on the interlocutory application that they had not sufficiently brought to the attention of the court that the premise of the application for an interim injunction – that West Wood Club had a licence – was at variance with what the defendant's solicitors had previously been told in correspondence – that West Wood Club did not have a licence – as well as the arguments made on that application which sought to explain or excuse the manner in which the case had been presented. Apart from the difficulty in principle of seeking to relitigate issues which have already been decided, it seems to me that the plaintiffs' attempt to do so is inconsistent with fact that having regard to the findings of the court on the interlocutory application,

and on the application of counsel for the plaintiffs, it was ordered that there would be no order as to the costs of the interim application, which had been reserved.

29. The fourth issue is closely linked to the first. It is the proposition that the acknowledgement by counsel for the defendant that a forfeiture notice was required and the statement that the defendant did not intend to physically re-enter the premises rendered the application moot. As I have already explained, the defendant justifies the change in its position by reference to the change in the plaintiffs' position as to the status of West Wood Club in the premises. In any event, the argument is limited to the costs of the motion for interlocutory relief and does not go to the costs of the action.

30. Counsel on both sides referred to the decision of Laffoy J. in *Shell E & P Ltd. v. McGrath (No.3*) [2007] 4 I.R. 277 which, it was agreed, is authority for the proposition that the court has a broad discretion as to whether to grant leave to a plaintiff to discontinue and a broad discretion as to whether and what conditions it might impose as a condition of such leave. It is also firm authority for the proposition that the underlying precept of O. 26, r. 1 is that justice will ordinarily require that where an action is discontinued the costs of the proceedings should be borne by the plaintiff.

31. *Shell E & P Ltd. v. McGrath (No.3*) was a case in which, I think it is fair to say, the plaintiff had been worn down by the defendants and had changed the proposed route of an onshore gas pipeline to avoid the defendants' lands and wished to discontinue the action. Laffoy J. undertook a detailed review of the several authorities to which she had been referred but, in the end, concluded that they contained very little by way of definitive statement of principle. Laffoy J.'s conclusions are set out at paras. 35 to 37.

"[35] Going back to the wording of O. 26, r. 1, it is clear that, in a situation where a plaintiff cannot discontinue without obtaining the leave of the court, the court has a discretion as to whether to grant such leave or not. There is little or no guidance given as to the basis on which the court should exercise that discretion and, in that sense, the discretion is a broad discretion. It is also clear that the court may impose terms as a condition to granting leave, but, again, little guidance is given on how the discretion to impose terms should be exercised, save that the court should strive to maintain justice between the parties. In relation to the imposition of terms as to costs, the provision for discontinuance at an early stage suggests that the underlying precept is that the requirements of justice will normally result in liability for the costs to the date of discontinuance being borne by the plaintiff. Notwithstanding that, it is clear that what is just must be determined in each case having regard to the particular circumstances.

[36] I agree with the submission made by counsel for the plaintiff that it is neither possible nor appropriate on an application under O. 26, r. 1 for the court to enter upon a consideration of the merits of the issues raised by the plaintiff on its claim. However, I am not satisfied that the plaintiff has adhered to that stricture in making its case that it should be given leave to discontinue without an order for costs, but I will return to that aspect of the matter later. In a case where the core

issues on a discontinuing plaintiff's claim remain to be fought out on the defendant's counterclaim, which is being defended, it is difficult to see how a court could properly assess whether the plaintiff's claim has become 'academic' in any sense other than that the plaintiff no longer wishes to pursue it.

[37] In general, I find it hard to envisage a situation in which a court would refuse to allow an unwilling litigant to discontinue his action, because of the probable futility of adopting such an approach."

32. In this case there is no statement of claim, but it is quite clear from the correspondence and the affidavits which have been exchanged that there is an issue as to the entitlement of West Wood Club to be in occupation of, or to carry on business from, or to provide services (whatever they may be) in connection with the gym business at the premises. The disposal of the plaintiffs' motion for interlocutory relief may have dealt with the immediate crisis of an apprehended purported forfeiture without a forfeiture notice but the substantive issue is very much alive. This was thrown into sharp focus when Mr. Redmond S.C., for the defendant, citing the judgment of Noonan J. in *Joint Stock Company Togliattiazot v. Eorotoaz Limited* [2019] IEHC 342 urged that if the plaintiffs were to be given leave to discontinue it should be granted – apart from upon terms that the plaintiffs should pay the costs – on condition that the plaintiffs undertake not to institute any further proceedings against the defendant arising from the same issues as were raised by the plenary summons. It is true, as Mr. Fennelly says, that the concession on behalf of the defendant that it cannot forfeit for breach of the covenant against alienation unless it first gives notice of the breach and allows a reasonable time within which the breach is to be remedied may not be limited to whatever licence has already been given to West Wood Club, but it seems to me that the interim and interlocutory orders in this case were sought at least partly in aid of the substantive declarations that the defendant has unreasonably withheld its consent to the provision of services by West Wood Club either to the first or the second plaintiff and that the first plaintiff is entitled to assign the lease to the second plaintiff for the remainder of the term. The plaintiffs – as Mr. Fennelly says – may make a further application to the defendant for consent to assign or sub-let or licence, but in the meantime, there is an unresolved issue as to the lawfulness of what has been done to date.

33. Mr. Fennelly relies upon a passage from the judgment of Henry J. in *Barretts & Baird (Wholesale) Ltd. v. Institution of Professional Civil Servants* (1988) 138 N.L.J. Rep . 357 to the effect that the general rule that a discontinuing plaintiff should pay the costs should only apply when the discontinuance can safely be equated with defeat or likely defeat, which he submits was approved by Laffoy J. in *Shell E & P Ltd. v. McGrath (No.3*). The passage in *Barretts & Baird (Wholesale) Ltd. v. Institution of Professional Civil Servants* now relied on was cited by Laffoy J. at p. 288 of the report in the course of her review of the authorities to which the court had been referred but I do not believe that it is correct to say that she approved it. Of all the authorities to which she had been referred, it was *In re Walker Wingsail Systems plc* [2005] EWCA Civ 247, [2006] 1 W.L.R. 2194 which Laffoy J. identified as the most persuasive. It seems to me that any attempt to assess

whether the discontinuance was a defeat or acknowledgement of likely defeat would amount to a consideration of the merits of the claim: which Laffoy J. found would not be a correct approach. The argument by reference to a further passage from *Barretts & Baird (Wholesale) Ltd.* that the action would not have been brought at all if the undertaking had been offered in the first place, comes back to the point that the threat to re-enter was made in the context of a denial that West Wood Club was a licensee.

34. This may very well be, as Mr. Ohle puts it, a case in which the plaintiff has achieved what it set out to achieve and which the plaintiffs no longer see the need to pursue but I accept the submission on behalf of the defendant that there are justiciable issues which remain to be determined. The plaintiffs have achieved whatever they have achieved at a very early stage of the proceedings and are free to discontinue if they wish, upon terms only that they pay the defendant's costs. Perhaps I ought not to have engaged to the extent to which I have with the plaintiffs' attempt to re-open the question of the costs of the motion for interlocutory relief but having done so I am far from persuaded to revisit the order for costs made on that application.

35. In the end the case is very simple. The plaintiffs are entitled to discontinue the action upon terms that they pay the defendant's costs. Those costs will include the costs of the motion for an interlocutory injunction which were more or less by consent ordered to be costs in the cause and which, in any event, would likely to have been ordered to be costs in the cause. That being so, it would not be just to fetter an unrestricted right by imposing terms as to the conduct of further litigation in which the same issues might be raised.

36. The plaintiffs' motion for leave to discontinue will be refused, with costs.

37. The defendant submits that the court should mark its disapproval of the plaintiffs' unreasonable behaviour by ordering the plaintiffs to pay the costs of the proceedings on a solicitor and client basis. The matters identified as unreasonable conduct are (1) the deficiency in the plaintiffs' disclosure on the interim application, which has been dealt with by the making of no order for costs on that application, (2) the plaintiffs' refusal to share the transcript of the judgment of 17th May, 2019, which was dealt with by the order for costs made on the defendants' motion for a transcript of the DAR, (3) the plaintiffs' failure to deliver a statement of claim, which will be dealt with on the defendant's motion to strike out, and (4) the plaintiffs' failure to inform the defendant or the court on the strike out motion that it did not intend to deliver a statement of claim, which remains to be seen. The suggestion that the plaintiffs have been coy in their correspondence seeks to engage the court in a consideration of the merits of the correspondence, which is not appropriate.

38. The defendant submits that the motion for leave to defend was designed to avoid the consequential costs order that would follow from a successful strike out application. Of course it was, but the advantage which the plaintiffs sought to achieve was directly related to the proceedings and not some unrelated or collateral advantage and while the

motion has failed, it seems to me that it was not illegitimate. In default of agreement, the defendant's costs will be adjudicated on a party and party basis.

39. On the defendant's motion to dismiss for want of prosecution, subject to any submission in writing within fourteen days of the date of this judgment, the appropriate order appears to me to be to extend the time for delivery of a statement of claim by twenty eight days and to make an order for the defendant's costs of that motion.