

**THE HIGH COURT**

[2021] IEHC 388

[Record No. 2019/3385 P.]

**BETWEEN**

**JASON INVESTMENTS UNLIMITED COMPANY**

**PLAINTIFF**

**AND**

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

**DEFENDANTS**

**EX TEMPORE JUDGMENT of Ms. Justice Reynolds delivered on the 25th day of May, 2021**

**Introduction**

1. A written judgment was delivered on the 27th February, 2020 in respect of the plaintiff's application to obtain vacant possession of the property, the subject matter of the proceedings herein. Thereafter, the court facilitated an adjournment with a view to resolving the outstanding issue of costs. Such resolution has not been achieved and the court has been furnished with legal submissions from the parties, each party maintaining that it is entitled to its costs.
2. I do not propose to regurgitate the issues in dispute between the parties in these proceedings as same have already been set out in the judgment. However, it is necessary to highlight some of the salient facts and findings for the purpose of resolving the costs issue.

**Background**

3. In the proceedings, the plaintiff sought possession of the property on two grounds: -
  - (i) The failure of the first named defendant to pay rent due and owing, and
  - (ii) The plaintiff's exercise of a break option contained in the lease.
4. Pre-litigation correspondence had issued in the ordinary way comprising two warning letters to the first named defendant indicating that proceedings would issue unless all arrears of rent were discharged.
5. It is common case that at the time the interlocutory application issued, the balance due and owing in respect of rental arrears was €40,128.85.
6. At the date of the hearing of the application for injunctive relief, the defendants had discharged all rent arrears due. Furthermore, the first named defendant had, arising out of the exercise of the break option, claimed relief under Part II of the Landlord and Tenant (Amendment) Act, 1980 ("the 1980 Act") and also relief against forfeiture.
7. The plaintiff's asserted position, however, was that the existence of a claim pursuant to Part II of the 1980 Act was no ground for refusing to grant injunctive relief and that there was no entitlement to relief against forfeiture despite the defendants having discharged the arrears in full shortly after the issue of proceedings.

8. This position was maintained despite the fact that the first named defendant (a company carrying on a similar business to the plaintiff) had been in occupation of the premises as a tenant for a significant period of time prior to the exercise of the break option and issuance of proceedings, and had built up substantial goodwill in relation to same.
9. The plaintiff's application for interlocutory relief was refused.

#### **The plaintiff's position**

10. It is contended by counsel on behalf of the plaintiff that in circumstances where the court grants relief against forfeiture, it is common for costs to be awarded to a landlord. In this regard, reliance is placed on the decision in *Whipp v. Mackey* [1927] IR 372 at 385, wherein Kennedy C.J. stated as follows: -

*"Generally speaking, however, where the forfeiture is only for securing payment, and where there is no injury from the delay in payment, or only such injury that payment of a sum for interest and – if needs be – costs will be full compensation for it, the equitable relief will not be refused."*

11. Counsel argues that this view is echoed by Wylie in *Landlord and Tenant Law*, 3rd Ed. (Bloomsbury, 2014) at para. 24.20, who endorsed the view that "*relief upon the terms of payment of all arrears, plus interest and costs, is common*". The plaintiff maintains that it was forced to go to court so as to secure its contractual entitlements and is, therefore, entitled to its legal costs.
12. In addition, it is submitted that the undertaking offered on behalf of the defendants during the hearing of the interlocutory injunction in relation to the payment of rent, insurance and rates was a significant factor in refusing to grant the plaintiff the relief sought and, in this regard, counsel relies on para. 59 of the judgment which states as follows: -

*"Even if the plaintiff had satisfied the 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."*

#### **The defendants' position**

13. Counsel for the defendants relies on the decision in *Crofter Properties Ltd v. Genport Ltd* [2007] 2 ILRM together with the judgment in the instant case as authority for the proposition that, where a tenant has made a claim under the 1980 Act, occupation pending the hearing of the claim should only be terminated in exceptional circumstances where there appears 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.
14. Counsel refers to paras. 50 to 54 of the judgment in the instant case where the court identifies the fact of the first named defendant having served a Notice of Intention to

Claim Relief as operating to preclude the grant of interlocutory relief in circumstances where the court endorsed the view 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.

15. Counsel also cites a similar view which has been subsequently expressed by McDonald J. in *KW Investments v. Lorgan Leisureplex Jurisdiction* [2020] IEHC 132, wherein he endorsed *Crofter* and stated as follows: -

*"It is only in exceptional circumstances that the High Court will intervene where a claim to a new tenancy is pending before the Circuit Court."*

16. In that case, McDonald J. concluded that KW Investments Ltd had not established that an injustice would be done to it in the event that the High Court declined to accept jurisdiction. He further directed that the matter should proceed in the usual way in the Circuit Court as the matter was not sufficiently urgent to justify the maintenance of the proceedings in the High Court. He stated that the application for an interlocutory injunction should, in any event, be refused. Whilst he was satisfied that KW Investments Ltd had made out an arguable basis for the case made by it, it had failed to establish a sufficiently strong case to meet the standard for the granting of a mandatory injunction.
17. In the circumstances, counsel argues that the approach taken by McDonald J. entirely accords with the findings in the instant case in circumstances where the court was not satisfied that the plaintiff had succeeded in establishing a *prima facie* case for relief.
18. Further, it was argued that the absence of a *prima facie* case was in no way the only ground on which the application was refused in this case.
19. Counsel contends that what is of far greater significance is that not only did the plaintiff fail to satisfy a single one of the cumulative grounds for the granting of interlocutory relief in this case, but that the court held (at para. 55-61) that the plaintiff had failed to come to court with "*clean hands*" insofar as it had failed to disclose that it had a subsidiary company trading as "Weir & Sons" jewellers in the vicinity of the property, a comparable business for the purposes of the application.
20. Further, reference is made to the court's finding (at para. 57) that the "*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*".

#### **Legal principles applicable to costs application**

21. The law in relation to costs is currently set out in Part 11 of the Legal Services Regulation Act, 2015 ("the 2015 Act") commenced in October, 2019, which empowers the courts to apportion and allocate costs between the parties to legal proceedings.
22. Section 169(1) of the 2015 Act provides: -

*"A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties..."*

23. The section then goes on to enumerate some criteria which may be taken into account by the court with regard to the exercise of that discretion, including: -
- (a) conduct before and during the proceedings;
  - (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings;
  - (c) the manner in which the parties conducted all or any part of their cases;
  - (d) whether a successful party exaggerated his or her claim;
  - (e) whether a party made a payment into court and the date of that payment;
  - (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer; and
  - (g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

**Discussion**

24. At the outset of these proceedings, the issue as to the jurisdiction of the High Court to entertain the application was raised, in circumstances where the defendants contended that the Circuit Court had ample jurisdiction to deal with same, having regard to the amount of arrears due and the rateable valuation of the subject property.
25. In submissions furnished by the defendants prior to the hearing of the interlocutory application, it was argued that whilst the court was not precluded from dealing with the matter, the issue regarding jurisdiction might be something which the court may wish to take into account in setting the terms of any relief granted and, in particular, in relation to any order for costs made as a condition of such relief.
26. The parties accept that the basis upon which the matter proceeded before the court was subject to circuit court costs being applied.
27. In considering the issue of costs, and having regard to the particular circumstances of this case, I am satisfied that the appropriate matters to be taken into account are as follows:
- - (a) The plaintiff's failure to satisfy a single one of the cumulative grounds for the granting of interlocutory relief in this case;

- (b) The plaintiff's failure to come to court with "*clean hands*" and its lack of candour as outlined in my judgment;
  - (c) The defendants' failure to discharge the rental arrears until the matter came before the court for hearing;
  - (d) The defendants' failure to pay rent on a monthly basis (in the terms of the undertaking furnished) between February and June, 2020, although I am conscious of the difficulties faced by all retailers during that period due to COVID-related difficulties.
28. Further, I am mindful that in determining the matters at issue in the interlocutory application, I was merely endorsing the principles as enumerated by Finlay Geoghegan J. in *Crofter* (and amplified in subsequent authorities) and that no new issue of law arose.

**Conclusion**

29. In all the circumstances, I am satisfied that the appropriate order is to direct each party to bear its own costs in the matter.