

THE HIGH COURT

[2021] IEHC 694

[Record No. 2020/233 CA]

IN THE MATTER OF THE LANDLORD AND TENANT (AMENDMENT) ACT 1980 (AS AMENDED)

BETWEEN

CLYDAVILLE INVESTMENTS LIMITED

PLAINTIFF/APPELLANT

AND

SETANTA CENTRE

DEFENDANT/RESPONDANT

JUDGMENT of Mr. Justice Barr delivered electronically on the 20th day of October, 2021

Introduction.

1. This is an appeal by the plaintiff/appellant against the order of Linnane J. in the Circuit Court that the plaintiff is precluded from claiming a new tenancy in the demised premises due to the fact that the defendant/respondent, as landlord, was entitled to rely on sub-s. 17(2)(a) (i) and (ii) of the Landlord and Tenant (Amendment) Act 1980. In essence, the learned Circuit Court judge found that the defendant had a complete defence to the plaintiff's claim to a new tenancy in the demised premises, as it had a final planning permission to demolish and redevelop the entire building, of which the demised premises formed a part, and had an intention to carry out the redevelopment on the basis of the planning permission that it had.
2. As this was a circuit appeal, the matter was heard *de novo* before the High Court. Accordingly, the defendant moved its original motion that the court should exercise its inherent jurisdiction to strike out the plaintiff's action on the basis that its claim to a new tenancy was bound to fail.
3. The defendant is the owner of the freehold title to a large commercial site known as the Setanta Centre, Nassau Street, Dublin 2.
4. The plaintiff is the tenant to the defendant of two premises in the Setanta Centre. The premises the subject matter of this application comprises 1,412 square feet of office space on the first floor of the Setanta Centre, which it held pursuant to a sub-lease from the Commissioner of Public Works in Ireland for the period 31st December 1988 to 31st March, 2013.
5. The plaintiff is also tenant to the defendant of a large ground floor unit, which fronts onto Nassau Street in Dublin. This unit is used as a retail shop premises. It also contains a café at a mezzanine level within the unit. These proceedings only relate to the first floor office premises.
6. In essence, the defendant makes the following submissions as to why the court should exercise its inherent jurisdiction to strike out the plaintiff's claim to a new tenancy as being bound to fail: It was submitted that the essential facts in the case are not in dispute. The plaintiff was the tenant of a portion of the first floor under a sub-lease, which expired in March 2013. The plaintiff instituted its claim seeking a new tenancy in the

premises by civil bill issued on 6th April, 2016. In December, 2018 the defendant obtained planning permission for the demolition and redevelopment of the Setanta Centre, with the exception of the ground floor retail unit occupied by the plaintiff. That planning permission became final by virtue of a grant of permission by An Bord Pleanála in May 2019. The defendant is desirous of carrying out the development in accordance with the terms of its planning permission. Indeed, it has already incurred considerable expense in having its demolition contractors carry out a "soft strip" of the Setanta Centre, such that it is essentially now just a shell, with just the exterior walls remaining in place.

7. In these circumstances, it was submitted that the case clearly comes within the provisions of s.17 of the 1980 Act; meaning that the defendant has an absolute defence to the plaintiff's claim to a new tenancy. It was submitted that it is appropriate for the court to exercise its inherent jurisdiction and strike out the plaintiff's claim for a new tenancy as being bound to fail. The defendant accepts that the plaintiff would be entitled to compensation for disturbance in lieu of a new tenancy.
8. In response thereto, it was submitted on behalf of the plaintiff that there was a very high bar for a defendant to reach to persuade the court that it should strike out the plaintiff's claim as being bound to fail; in effect, it meant that the defendant had to persuade the court that it would be impossible for the plaintiff to be successful at the trial of the action.
9. It was submitted that in the circumstances of this case, it was not sufficient for the defendant landlord merely to establish that he had planning permission for redevelopment of the site, to include the demised premises. The burden of proof lay on the defendant to establish not only that it had planning permission and that it had the intention to carry out the works under that permission, but also that there was no other impediment to the landlord proceeding on the basis of the permission that it had obtained.
10. It was submitted that in this case there was a serious impediment in the form of allied proceedings that had been instituted by the plaintiff before the High Court in respect of the ground floor retail unit. In those proceedings the plaintiff had claimed a number of quasi property rights in the nature of easements that it alleged it enjoyed over portions of the premises that were proposed to be demolished by the defendant. It was submitted that it could not be said that the defendant would definitely be successful in its defence pursuant to s.17 of the 1980 Act, unless and until the plaintiff had failed in its High Court proceedings. It was submitted that in these circumstances, it would be inappropriate and unjust for this Court to dismiss the plaintiff's claim in limine, when there was considerable doubt as to whether the defendant would be in a position to establish its defence pursuant to s.17 at the trial of the action.
11. It was further submitted on behalf of the plaintiff that the defendant should be denied the relief that it sought in its notice of motion, due to the fact that it had delayed for six months between May 2019, when it had obtained final planning permission and November 2019, when it issued the within notice of motion. It was further submitted that the present proceedings were an attempt by the defendant to circumvent the protection that was afforded to the plaintiff under s.28 of the 1980 Act, which provided that a tenant was

entitled to remain in the property while its claim to a new tenancy under Part II of the Act was being determined. It was submitted that the present application was an inappropriate application by the defendant designed to circumvent the protection afforded to the plaintiff by that section.

12. As can be seen from the brief outline of the arguments put forward by the parties, there is a long and acrimonious history between the parties in relation to the redevelopment of this site. The court has formed the view that in considering this application, it cannot look solely at the circumstances of the plaintiff and defendant as landlord and tenant of the demised premises; it has to take account of the wider issues that arise, in considering how best to exercise its inherent jurisdiction. For that reason, it will be necessary to set out in a little detail the background to this dispute.

Background.

13. The background to these proceedings can be briefly stated in the following way: By indenture of lease dated 6th February, 1981, CIN Properties Limited demised a portion of the first floor of the Setanta Centre comprising 18,670 square feet to the Commissioner of Public Works in Ireland for the term of 35 years from 1st April, 1978. As already noted, by a sub-lease executed in or about 1988, the Commissioner of Public Works in Ireland sublet a portion of the first floor premises, comprising 1,412 square feet of office space to Blarney Woollen Mills Limited for the term 31st December, 1988 to 31st March, 2013. By order of the High Court dated 10th July, 2000 the plaintiff became entitled under a scheme of arrangement to the leasehold interest that had formerly been held by Blarney Woollen Mills Limited.
14. On 27th March, 2013 the plaintiff served a notice of intention to claim relief seeking a new tenancy under the 1980 Act. On 6th April, 2016 the plaintiff issued a landlord and tenant civil bill seeking a declaration of its right to a new tenancy and fixing the terms thereof. A short proforma defence was filed on behalf of the defendant on 8th July, 2016.
15. On 7th March, 2018 the defendant filed an amended defence, wherein it set out a number of grounds on which it contested the plaintiff's claim to a new tenancy in the premises. In particular, it was pleaded that the defendant had applied for planning permission to demolish and redevelop the entire structure, which included the demised premises on the first floor.
16. On 21st March, 2018 the defendant lodged its application for planning permission in respect of redevelopment of the Setanta Centre. On 18th December, 2018, Dublin City Council made a decision to grant planning permission to the defendant. The plaintiff had objected to the grant of planning permission being made. On 23rd January, 2019 the plaintiff appealed the grant of planning permission to An Bord Pleanála. On 28th May, 2019 An Bord Pleanála granted planning permission to the defendant for redevelopment of the site. It should be noted that the demolition and redevelopment of the site did not include the ground floor retail unit held by the plaintiff.

17. On 3rd October, 2019 the plaintiff issued proceedings in the High Court in respect of the retail unit held by it on the ground floor. In those proceedings, the plaintiff asserted that it had a number of quasi property rights in the nature of both express and implied easements over areas of the Setanta Centre that were outside its retail unit, but were covered by the proposed demolition and redevelopment works. Those proceedings were admitted to the commercial list. They are due for hearing in that list in November, 2021.
18. On 28th November, 2019 the defendant issued its notice of motion herein, seeking an order pursuant to the inherent jurisdiction of the court, striking out the plaintiff's claim as being bound to fail and/or in the alternative, an order directing that there be the trial of a preliminary issue in relation to the defence pleaded by the defendant pursuant to s.17 of the 1980 Act.
19. On 15th June, 2020 the defendant obtained a modification of the original planning permission. Under the further permission, the defendant was permitted to increase the overall height of the building by 1.36m.
20. On 2nd July, 2020, the plaintiff issued a motion in the High Court seeking an interlocutory injunction to prevent the continuation of demolition works which were being carried out by the defendant; which the plaintiff alleged were being done in breach of the terms of the planning permission. That application was due to be heard in the High Court on 18th and 19th November, 2020. In advance of the hearing, the defendant agreed that it would not recommence demolition works pending the outcome of the plaintiff's High Court proceedings, which had issued on 3rd October, 2019.
21. On 17th December, 2020 the defendant's application to strike out the plaintiff's claim as being bound to fail was heard in the Circuit Court. The learned Circuit Court judge determined that the issue as to whether the plaintiff was entitled to a new tenancy should be tried by way of a preliminary issue. She treated the hearing of the motion as the hearing of the preliminary issue as to whether the plaintiff was entitled to a new tenancy. The court determined that the plaintiff was precluded from claiming a new tenancy pursuant to sub-s. 17(2)(a) (i) and (ii) of the Landlord and Tenant (Amendment) Act 1980. The court dismissed the plaintiff's claim to a declaration that it was entitled to a new tenancy in the premises and dismissed the application for an order fixing the terms of a new tenancy. The court adjourned the remaining questions for determination in February 2021. In the events that transpired, the hearing in relation to the plaintiff's claim for compensation for disturbance in lieu of a new tenancy, was directed to be heard on 26th October, 2021.
22. On 22nd December, 2020, the plaintiff issued its notice of appeal in respect of the determination made in the Circuit Court.

Relevant statutory provisions.

23. The most relevant provisions in relation to this application are sub-s. 17(2)(a) (i) and (ii) of the 1980 Act, which are in the following terms: -

"(2)(a) A tenant shall not be entitled to a new tenancy under this Part where it appears to the Court that—

- (i) *the landlord intends or has agreed to pull down and rebuild or to reconstruct the buildings or any part of the buildings included in the tenement and has planning permission for the work, or*
- (ii) *the landlord requires vacant possession for the purpose of carrying out a scheme of development of property which includes the tenement and has planning permission for the scheme, or".*

Conclusions

24. Although briefly stated, the submissions of the parties have been adequately summarised in the introduction section of the judgment.

25. There was broad agreement between the parties on the principles which govern the exercise of the court's discretion when considering whether to exercise its inherent jurisdiction to strike out a claim as being bound to fail. It was agreed that this is a jurisdiction which the court should exercise sparingly and only where it is clear that the plaintiff's action is bound to fail.

26. The relevant principles and the authorities on which they are based were set out by the Supreme Court in *Keohane v. Hynes* [2014] IESC 66. At paras. 6.5 and 6.6 of his judgment, Clarke J. (as he then was) summarised the applicable principles in the following way: -

"6.5 *It is important, for the avoidance of any doubt, that the overall principle be clearly stated. As pointed out in many of the authorities, not least in the judgment of Murray J. in Jodifern, the underlying basis of the jurisdiction to dismiss as being bound to fail stems from the court's inherent entitlement to prevent an abuse of process. Bringing a case which is bound to fail is an abuse of process. If it is clear to a court that a case is bound to fail, then the court has jurisdiction to prevent that abuse of process by dismissing the proceedings. However, as again noted by Murray J. in Jodifern, whatever might or might not be the merits of some form of summary disposal procedure, an application to dismiss as being bound to fail is not a means for inviting the court to resolve issues on a summary basis.*

6.6 *It is for that reason that all of the jurisprudence emphasises that the jurisdiction is to be sparingly exercised and only adopted when it is clear that the proceedings are bound to fail rather than where the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law. It is against that background that the extent of the court's entitlement to look at the facts needs to be judged."*

27. In the course of argument, counsel for the plaintiff, Mr. McGrath SC, laid particular emphasis on the decision in *KW Investment Funds ICAV v. Lorgan Leisure Limited* [2020] IEHC 132, in support of the submission that an application such as the present application

brought by the defendant, should not in general be allowed to succeed, as it was, in effect, an attempt by a landlord to circumvent the statutory protection afforded to a tenant by s.28 of the 1980 Act. In particular, counsel relied on the following dicta from the judgment of McDonald J. at para. 84: -

"...in short, there is nothing in the terms of Part II of the 1980 Act to suggest that the right of a tenant to remain in the premises pending the determination of an application for a new tenancy is at risk where the landlord appears likely to be able to satisfy the requirements of s.17(2)(a) (i). There is no 'carve-out' from the operation of s. 28 in such circumstances. Thus, the fact that planning permission is held by the plaintiff which would appear to entitle it in due course to rely on s.17(2)(a) (i) to defeat the claim to a new tenancy does not appear to me to be a circumstance that makes this case exceptional. On the contrary, the 1980 Act expressly envisages that a tenant will remain in occupation pending the determination of an application for a new tenancy even where the landlord has the ability to rely on s.17(2)(a) (i)."

28. Counsel submitted that that case and others cited in the judgment, clearly established that the protection conferred on a tenant pursuant to s.28 of the Act, when seeking a new tenancy, should not be abrogated or set at nought by the landlord seeking, by way of an application for injunctive relief, to obtain possession of the premises and thereby deprive the tenant of the protection afforded by the section. It was submitted that in the present application the defendant was attempting to do the same thing. He was seeking by way of this application to have the matter determined in a summary manner without a full hearing on the issues that would arise and thereby deprive the tenant of the usual protection afforded to it under s.28 of the Act.
29. While the cases referred to by counsel in this regard were certainly relevant, they were not on all fours with the present case. Those cases involved applications to the High Court by landlords in an attempt to circumvent the statutory jurisdiction of the Circuit Court to determine the tenant's right to a new tenancy and thereby, to deprive the tenant of the right to remain in the property pursuant to s.28, while the issue of that entitlement was being determined.
30. This case is different, because it is an application by the defendant landlord within the Circuit Court proceedings seeking an order pursuant to the inherent jurisdiction of the court to strike out a claim as being bound to fail. If this Court were to find for the defendant on that application, that would be the end of the claim by the tenant to a new tenancy, so the question of a right to remain pursuant to s.28 could no longer arise.
31. The court is satisfied that the wording of s.28 makes it clear that the protection that it affords only arises while there is an extant claim to a new tenancy. The section states, *"where an application is pending under this part for a new tenancy, or to fix the terms of a new tenancy..."* and it goes on to provide that the tenant may remain in the demised premises until the issue of its right to a new tenancy has been finally determined. The court is satisfied that if it were to find that it was appropriate to strike out the plaintiff's

application for a new tenancy as being bound to fail, that would bring an end to its claim to a new tenancy under Part II of the 1980 Act and thereby bring to an end its entitlement to protection under s.28 of the Act. The fact that there would then be an outstanding claim to compensation for disturbance in lieu of a new tenancy, would not be sufficient to enable the tenant to remain in the premises pursuant to s.28 of the Act.

32. Accordingly, the court is of the view that the cases referred to by counsel for the plaintiff are not strictly speaking germane to the present application, which is an application brought within the original Circuit Court proceedings and on appeal to this Court. Furthermore, in the *KW Investments* case, it was recognised that even where an injunction was sought in the High Court to obtain immediate possession of the premises, it could in certain circumstances, be appropriate for the court to grant such injunctive relief, where it was clear that the plaintiff's claim to a new tenancy was bound to fail. McDonald J. stated as follows at para. 86: -

"86. The authorities also demonstrate that the High Court may be persuaded to assume jurisdiction in cases where a plaintiff can establish that the claim made by the tenant in the Circuit Court has no prospect of success. It seems to me, however, that the court should only proceed in this way where it is clear that the tenant has no case. In cases of doubt, it would be unwise to pre-empt the outcome of the determination by the Circuit Court of the issue. This is particularly important given the statutory entitlement of the tenant to remain in occupation under s. 28. On the other hand, if it is clear that the claim of the tenant to a new tenancy has no prospect of success, it would be unjust if a landlord was prevented from pursuing an immediate remedy in the High Court particularly if the landlord is likely to suffer uncompensatable damage in the event that the High Court were to refuse to intervene."

33. The plaintiff also complained about the delay of six months from when the defendant received its planning permission from An Bord Pleanála in May 2019, and November 2019, when it issued its motion herein. It was submitted that the court should refuse to grant the reliefs sought, on grounds of that delay.
34. The court does not regard that submission as having substance for the following reasons: firstly, the proceedings have not been pushed on with great speed by either party. Both parties have been guilty of delay at various stages. Secondly, the plaintiff has not incurred any additional expense, or been otherwise prejudiced by the delay. Thirdly, the court regards the delay as being excusable. It was reasonable for the defendant to await the grant of final planning permission by An Bord Pleanála and thereafter, it was reasonable to wait a further eight weeks to see if that permission would be challenged by way of a judicial review application. When it was not challenged, the defendant's solicitor wrote in August 2019 seeking the withdrawal of the applicant. When that was refused, the motion issued in November 2019. The court regards that timeline as being reasonable.
35. I turn now to the issue which has determined the decision of the court on this application. If the court were to consider this application in isolation from its surrounding

circumstances, the court would have found in favour of the defendant. As submitted by Mr. Fanning SC on behalf of the defendant, the essential facts are not in dispute: The lease has expired; the defendant has planning permission for demolition of the building, of which the demised premises forms a part, and the landlord has an intention to carry out works in furtherance of the planning permission. In terms of the proof of the intention held by the landlord, the court is satisfied that the defendant has an intention to proceed on the basis of the planning permission that it has obtained.

36. The evidence in relation to the landlord's intention is strong. The landlord has engaged a firm of demolition contractors to commence demolition work on the site. Those contractors have already carried out a "soft strip" of the building. This means that all internal finishes (stud partitions, doors, raised access floors, carpets and ceilings) and all services (including wiring, plumbing and air-conditioning) have been removed. The toilet cubicles have been removed and associated pipe work has been removed. A substantial number of external windows have been removed and a portion of the fourth and fifth floors have been demolished. To date, the defendant has already paid Walmac Demolition EC Limited, €3,613,082.80 in respect of the works carried out by it. Thus, if the matter were looked at in isolation, the evidence is almost overwhelming that the defendant would be entitled to rely on s.17 of the 1980 Act as a complete answer to the plaintiff's claim for a new tenancy.
37. However, the court accepts the submission made by Mr. McGrath SC on behalf of the plaintiff, that it is not sufficient for the landlord to establish that it has planning permission and intends to act on it and for that reason requires vacant possession of the property; the court must be satisfied that there are no impediments to the landlord actually carrying out that intention.
38. This is where the surrounding circumstances become relevant. The court has to have regard to the fact that the plaintiff has proceedings in the commercial list of the High Court in which it claims that, as tenant of a different premises in the Setanta Centre, it has rights in the nature of easements and allied rights which, if the plaintiff is successful in that action, will mean that the defendant cannot realistically proceed on the basis of the planning permission that it currently has.
39. The High Court proceedings were described in the affidavit sworn by Mr. Conor Lynch on 28th February, 2020 on behalf of the plaintiff and were elaborated upon in the course of argument by Mr. McGrath SC. While the court has not been provided with copies of the pleadings in that action, it appears that those claims relate to an assertion that the plaintiff enjoys a number of rights in the nature of easements and quasi property rights that it has enjoyed with the express or implied consent of the landlord's predecessor in title, in some instances for more than 20 years. It is claimed that there are express and implied easements and in addition the plaintiff asserts that it acquired easements by prescription and also relies on the doctrine of non-derogation from grant. The court was told that the rights claimed are very significant. They include matters such as a right of access to the rear of the premises for the making of deliveries, which would include a

right to traverse the courtyard that exists in the building as it stands at present, but which would be removed in the new development; together with asserted rights in relation to air extraction units and waste compaction facilities.

40. It is not necessary, nor would it be possible, for this Court to determine the likelihood of the plaintiff being successful in those proceedings. It will suffice for this Court to be satisfied that having regard to the nature and extent of the claims asserted by the plaintiff in those proceedings; if the plaintiff is successful therein, there is a realistic possibility that the defendant may not be able to proceed on the basis of the planning permission that it currently has. The court is satisfied that that possibility exists.
41. The effect of that on the present application is that, if the plaintiff is successful in its High Court action and if it transpires that the defendant cannot proceed on the basis of its current planning permission, then it would not be able to establish the defence to a new tenancy under s.17 of the Act, because that defence can only be based on the planning permission which the defendant currently has, coupled with his having an intention to execute the works on the basis of that permission, or having a requirement for vacant possession so as to carry out the works stipulated in that permission.
42. The court is mindful of the fact that if it accedes to the defendant's application, that is the end of the plaintiff's claim to a new tenancy. If the plaintiff were to be successful in its High Court proceedings, it would be too late for the plaintiff qua tenant of the first floor premises.
43. Given the high bar that must be reached in order to obtain an order under the inherent jurisdiction of the court to strike out a claim as being bound to fail, the court is not satisfied that it can be said that it would be impossible for the plaintiff to succeed in its application before the Circuit Court, for the reason that if the plaintiff is successful in its High Court action, it may very well be able to defeat the defendant's defence pursuant to s.17 of the Act.
44. This Court is not making any finding in relation to the defence put forward by the defendant pursuant to s.17. What the court is doing is saying that having regard to the existence of the High Court action, the result of which may have significant consequences for the defendant in respect of its capacity to continue the development on the basis of the planning permission that it currently has, it would be incorrect and unjust to lock out the plaintiff from making its claim to a new tenancy at this early stage. It is preferable that the matter be properly heard and determined before the Circuit Court, when the situation has been clarified.
45. Thus, this Court is not finding against the defendant in respect of its substantive defence; it is merely stating that at the present time, one cannot say that the plaintiff's claim to a new tenancy is bound to fail.

46. For the reasons set out herein, the court refuses the defendant's application to strike out the proceedings pursuant to its inherent jurisdiction on the basis that the plaintiff's claim to a new tenancy is bound to fail.
47. The defendant did not strenuously pursue the alternative application for a direction that the issue of its defence pursuant to s.17 be tried as a preliminary issue. On balance, the court is of the view that it would in all probability be easier and quicker if the substantive application by the plaintiff to a new tenancy were heard before the Circuit Court in the usual way. Accordingly, the court refuses to direct the trial of a preliminary issue.
48. As this judgment is being delivered electronically, the parties will have two weeks within which to file brief written submissions in relation to the terms of the final order and on costs and on any other matters that may arise.