Neutral Citation No: [2024] NICh 11 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:*	**HUD12577**
	ICOS No:	**21/30588/03**
	Delivered:	**10/10/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

ISLAY VIEW MANAGEMENT COMPANY LIMITED

Plaintiff

and

HAROLD McCLOY and ALISON McCLOY

Defendants

Mr G Watt (instructed by Thompson Crooks Solicitors) for the Plaintiff
Mr M McEwen (instructed by Rosemary Gawn Solicitors) for the Defendants

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DECISION IN RELATION TO PRELIMINARY ISSUES

HUDDLESTON J

History and background

[1] The defendants, by way of summons, seek a trial pursuant to Order 33 rule 3 of the Rules of the Court of Judicature of three preliminary issues:

(i) Whether the plaintiff can maintain these proceedings when they have failed to serve a notice pursuant to section 14 of the Conveyancing and Law of Property Act 1881 ("the 1881 Act") prior to the commencement of the proceedings.

(ii) Whether the plaintiff can maintain these proceedings when they have demanded and accepted payment of service charges which are treated as additional rent under the terms of the Lease dated 10 October 2014 and have thereby treated the Lease as subsisting between the parties after a date when they knew of the breach of covenants;

(iii) Whether the plaintiff has waived any right to claim forfeiture by reason of claiming an injunction to restrain the defendants from admitting persons into the premises in breach of covenants contained in the Lease.

[2] The applications are grounded on the affidavit of Rosemary Gawn, solicitor, sworn on 17 November 2022.

[3] Prior to these proceedings there was an application brought under Order 18 rule 9 by the defendant for the plaintiff's action to be struck out, which was heard by the master and on appeal, by Shaw J who in turn gave written judgment rejecting the application.

The Lease

[4] The core of the issue is that the plaintiff claims that the defendants are in breach of covenants contained in a 10,000-year lease ("the Lease") dated 10 October 2014, under which they hold an apartment ("the Premises") which is located in a block of apartments in Portstewart. The plaintiff, which is the management company of the block, argues that the defendants are in breach because of the alleged continued use of the apartment as an Airbnb facility.

[5] The plaintiff's claim as originally framed in its statement of claim is for:

(a) An injunction requiring the defendants to cease admitting persons into occupancy of the premises for reward or otherwise in contravention of clauses 11 and 16 of Schedule 4 to the Lease;

(b) An order requiring the defendants to deliver up possession of the Premises;

(c) Damages for nuisance and breach of covenant; and

(d) Interest.

[6] I should say that the plaintiff has conceded that they are unlikely to be successful in relation to the relief they seek at (b) above. This concession has been made in exchange of correspondence, but the proceedings have not formally been amended because the defendants have not consented to it on the basis that the plaintiff wished the concession to be reflected in any debate in respect of costs – to which the defendants have not agreed.

[7] The relevant clauses in the Lease are as follows:

> "**Clause 16**
>
> Not to use the apartment or permit the same to be used for any purpose whatsoever other than as a dwelling for

> one family unit only and, in particular, not to carry on or permit to be carried on in or on the property including the apartment, any trade, business, profession or occupation or any illegal activity or any act or thing whereby a nuisance might arise to the owners or occupiers of the other apartments within the property.
>
> **Clause 5**
>
> If any covenant on the part of the lessee herein contained shall not be performed or observed then, and in any such case, it should be lawful for the lessor at any time thereafter to re-enter upon the apartment or any part thereof in the name of the whole and thereupon this demise shall absolutely determine but without prejudice to any action or remedy of the lessor in respect of any antecedent breach of any of the lessee's covenants or the conditions herein contained."

[8] The statement of claim under the heading "Breach of Covenant" sets out the alleged breaches which are confirmed by the affidavit evidence of Ms Eileen Ewing, solicitor, but those are not issues with which I need to involve myself in relation to this preliminary application. Mrs Eileen Ewing, on behalf of the plaintiff, exhibits to her affidavit of 29 January 2024, letters of 6 November 2020, 13 November 2020 and 23 November 2020 which the plaintiff largely relies upon now as the notice of breach of the covenants contained in the Lease. For completeness, those letters have been appended in the Appendix to this judgment. Ms Gawn, solicitor on behalf of the defendants, in her affidavit of 17 November 2022, alleges failure on the part of the plaintiff to comply with section 14 of the 1881 Act, whether through that correspondence or at all and, on the issue of waiver, exhibits evidence establishing that the defendants paid a service charge due under the Lease on an annual basis and that payment has been accepted by the plaintiff as a matter of fact.

Removal of the application for forfeiture

[9] As indicated above, the plaintiff's solicitors wrote to the defendants' solicitors on 16 July 2021 on the following basis:

> "We propose at paragraph (b) the prayer be removed but only on the understanding that there will be no cost implications for our client. In the event that your clients reject this proposal then we would rely on Order 18 Rule 7(4) and would not amend the Statement of Claim."

They say that this was an entirely reasonable condition made at an early stage of the proceedings.

Section 14 of the Conveyancing and Law of Property Act 1881

[10] The core preliminary point is whether the lack of a formal section 14 notice is fatal to the plaintiff's case.

[11] Section 14(1) of the 1881 Act provides as follows:

> "(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

[12] There was acceptance by the parties that the test for the relief sought is different at this stage than it was at the earlier stage when the strike-out proceedings were brought. In essence, this means the court must now be satisfied on the balance of probabilities that a notice complying with section 14 of the 1881 Act was served. As argued by the plaintiff it is accepted that section 14 has four distinct and express requirements:

(i) It must be a notice;

(ii) Specifying the particular breach complained of;

(iii) If the breach is capable of remedy, requiring the lessee to remedy the breach;

(iv) Requiring the lessee to make compensation in money for the breach.

[13] As to the formal requirements of any such notice, I was referred to Hill and Redman's Law of Landlord and Tenant at 4.664 which (in the context of the English equivalent section 146 LPA 1925) indicates that there is acceptance that "there is no prescribed form for such a notice." This is the argument made by the plaintiff, ie that the <u>substance</u> of the section 14 requirements have been met.

[14] The plaintiff categorises the requirement set out in section 14 as an "early variety of a pre-action protocol" and refers to the judgment of Lord Russell of Killowen CJ in the English Court of Appeal case of *Horsey Estate Limited v Steiger* [1899] 2 QB 79 on the analogous English section:

> "The reason is clear: he [meaning the tenant] ought to have the opportunity of considering whether he can admit the breach alleged; whether it is capable of remedy; whether he ought to offer any, and, if so, what compensation and, finally, if the case is one for relief, whether he ought or not promptly to apply for such relief. In short, the notice intended to give the person whose interest it is sought to forfeit the opportunity of considering his position before an action is brought against him."

[15] In terms of the breach complained of the plaintiff says that the letter of 23 November 2020 sets out how the defendants were (a) using the premises other than as a dwelling for one family unit; (b) how they were using it for business purposes; (c) how they were causing a nuisance, thus, clearly identifying the breach complained of and then sought remedy, ie cessation of the complained of conduct.

[16] The plaintiff accepts that no compensation was sought but, again, cites authority on the basis that in the authorities on point "there is virtual unanimity" that compensation is optional – see *Van Haarlam v Kasner* [1992] 64 P&CR214 at 222 per Harman J:

> "It is well-settled law that the notice does not have to make any demand for compensation in money and no attack can be made upon it on that ground."

[17] In the local context the plaintiff relies on the judgment of Andrews LJ in *Walsh v Wightman* [1927] NI 1 at 11:

> "Again, it did not demand compensation in money for breach, but this is not a fatal defect."

[18] What the plaintiff's argument distils down to is that section 14 is not a mandatory pre-action procedure (ie a pre-condition) per se but that forfeiture itself as the form of relief cannot be ordered unless section 14 has been complied with. To illustrate that they say that "where forfeiture is not to be ordered the plaintiff goes as far as to say that section 14 has no application whatsoever."

[19] On the second element, the question of reasonable time for remedial action, the plaintiff says that the notice upon which they rely did specify a time period (24 days) for compliance, although further highlight that the proceedings themselves were not issued until some substantial period after that.

[20] As to the reference to the Act itself, the plaintiff says that it "eschewed reliance on published formulas and attempted, from scratch as it were, to compose a

readable and comprehensible statement of its complaints" and that "in doing so it acted in harmony with the purpose of the section as stated by Lord Russell in *Horsey Estate*."

Injunctive relief as forfeiture

[21] The defendants' second argument, as regards forfeiture, is that a claim for an injunction is a waiver to the right to forfeiture itself because, fundamentally, it relies on the Lease's existence. The plaintiff's reply, fundamentally, is that although there are certain circumstances where the relief sought would be mutually exclusive there is no reason that the relief may not be pleaded as an alternative without one relief imperilling the other.

Waiver of breach by receipt of rent

[22] It is common case that clause 4 of the Lease, in essence, reserves the service charge under the Lease as "further or additional rent." It is also accepted that a service charge has been both demanded and been paid. The question then arises whether that represents a waiver of the alleged breach of covenant which the plaintiff says brings into play section 43 of the Landlord and Tenant Law Amendment (Ireland) Act 1860 ('Deasy's Act"):

> "43. Where any lease made after the commencement of this Act shall contain or imply any condition, covenant, or agreement to be observed or performed on the part of the tenant, no act hereafter done or suffered by the landlord shall be deemed to be a dispensation with such condition, covenant, or agreement, or a waiver of the benefit of the same in respect of any breach thereof, unless such dispensation or waiver shall be signified by the landlord or his authorized agent in writing under his hand."

[23] The plaintiff relies on the case of *Craigdarragh Trading Company Ltd v Doherty* [1989] NI 218. In that case a tenant informally assigned the benefit of a lease in contravention of its terms. The landlord sought possession, in response to which, the tenant argued that the formality had been waived to which the landlord prayed in aid section 43. Murray J provided the following (obiter) comments:

> "In view of the provision of section 43 of Deasy's Act requiring a waiver to be in writing – a provision not found in English law – there has always been a real doubt as to how far English cases on the waiver of the particular breach of covenant (as distinct from a general dispensation from a covenant) are applicable in this country: see *McIlvenny v McKeever* [1931] NI 161 and Wylie Irish Landlord (2nd edition 1986) paragraph 17.037.

> However, I must confess to having sympathy with a view that if the facts disclose a situation in which it would be unconscionable for the landlord to insist upon the formality of a written consent or written waiver, our law does allow for the lessee's equity, whether by estoppel or otherwise to prevail."

[24] The plaintiff also relies on the decision in turn of the Irish High Court in *Hafeez v CPM Consulting Ltd* [2020] which cited *Crofter Properties Ltd v Genport Ltd* (unreported) 15 March 1996, where McCracken J said:

> "The words 'any breach thereof' are quite clear and can only reasonably be interpreted as meaning that there cannot be a waiver of a specific breach unless that waiver is signified by the landlord in writing,"

[25] The plaintiff, therefore, says that Murray J's comment in *Craigdarragh* is that section 43 "would have to yield to any conduct which made it unconscionable" to permit the plaintiff to rely on the statute, and further, that there is nothing in the present case which raises such an equity to preclude the application of the statute in its literal form and that no evidence has been adduced by the defendant which comes "remotely close to establishing those premises on which the equitable jurisdiction may be invoked."

[26] In essence, they say, this is a simple case of payment and receipt of rent without any suggestion of a representation made or indicated other than that the plaintiff would rely upon its right to enforce breaches of covenant and that there was no unconscionability in its now seeking to rely on those alleged breaches. Indeed, they suggest that to consider otherwise would "run counter to commercial necessity" insofar as a landlord hoping to remedy a breach would firstly have to endure the breach and, secondly, deprive himself of income until the determination of the action.

The defendants' argument

[27] As to the section 14 argument, the defendants say that "a landlord when faced with an alleged breach of a covenant in a lease has the option of either seeking forfeiture of the lease or deciding to enforce the alleged breach by way of a claim for damages for the breach, with orders/injunctions to enforce compliance with the terms of the covenant."

[28] They say it is not possible to avoid making that selection and that the contention now made by the landlord that it did not seriously expect to obtain an order for possession, coupled with the conditional offer that has been made would, of itself, "appear to be a waiver of the right to forfeit."

[29] In its second preliminary issue the defendants submit that by demanding and accepting service charge as additional rent the plaintiff has affirmed the continued existence of the Lease and, therefore, has waived the alleged breaches. As for the authorities, they say the English case law does not provide assistance and prefer to rely on the obiter comments of Murray J in *Craigdarragh* (as above) as "opening the door" sufficiently to raise the question of unconscionability. The defendants say that the demand for a service charge in writing was itself signification of the waiver of the breach, re-emphasised by the renewal of those demands during the period of the proceedings with which this case is concerned sufficient to raise that question of unconscionability.

[30] On the final question, ie whether the claim for an injunction amounts to a waiver to the Lease (as set out in the statement of claim), the defendants say it is entirely inconsistent with an election to terminate the Lease by reason of forfeiture. They plead in aid the case of *Wheeler v Keeble (1914) Ltd* [1920] 1 Ch 57 which held that:

> "The issue of the writ to recover possession was an unequivocal determination of the lease on the part of the plaintiffs and that it was not open to them to move for an injunction on the footing that the lease was still subsisting."

Consideration

[31] Whilst not a criticism, it is perhaps unfortunate that the pleadings in this case were not a little more considered before they were issued. In reality, what appears to be the case is that rather than finessing them, everything which was available in the arsenal of complaints the plaintiff could make against the defendant were deployed. Clearly, there has been some retrenchment from that position insofar as it has been acknowledged that the plea for forfeiture was ambitious, but the approach has allowed for two hearings thus far on essentially factual grounds. The pleadings do not, as is often the case, make it clear that the reliefs sought are alternatives.

[32] Subject to that observation (and it is no more than an observation), my views on the preliminary points raised are as follows:

(i) Failure to serve notice pursuant to section 14 of the Conveyancing and Law of Property Act 1881

[33] There is no doubt the plaintiff did not adopt what is perhaps the normal approach to serving the notice. Such a notice is more normally served expressly pursuant to (and usually referencing) section 14 of the 1881 Act. Having said that, I am satisfied that the correspondence of 6 November 2020 (as appended) was, in substance, sufficient to – (a) appraise the defendants of the alleged breaches of the Lease; (b) give them an appropriate period within which to remedy the particular

breaches; (c) provide sufficient notice to make them aware that if they failed to take corrective action that they could face further proceedings. That I find is, in substance, sufficient.

[34] Section 14, when properly considered, does not require a particular form of notice and I am satisfied that in the present circumstances the substance of its requirements were met. The failure to seek compensation, in my view, for the avoidance of doubt, is certainly not fatal to such a notice. In short, therefore, I prefer the arguments advanced by the plaintiff as set out above.

[35] In my view, the position was and remains, correctly stated by Lord Russell of Killowen CJ in *Horsey Estate Ltd v Steiger* (as set out above) and, certainly, it is my view that in the present case the defendants were given the opportunity of considering their position in the face of alleged breaches of the Lease and of taking appropriate action – which obviously they have, firstly, by seeking a strike-out of the case and, then secondly, by raising these preliminary points.

[36] In my view, on this point the case should, therefore, proceed to full hearing.

(ii) Payment of service charge as a waiver

[37] I am of the view that section 43 of Deasy's Act or more properly, the Landlord and Tenant Law Amendment (Ireland) Act 1860, provides the answer to this preliminary point. The reality is that all that has occurred has been the normal demand and payment of what has been reserved by rent under the terms of the Lease. There has been no dispensation or waiver signified by the landlord or his agent and, whilst the defence argues that the written demands constitute such a waiver for the purposes of section 43 I cannot agree. All the defendants can pray in aid of their argument is the obiter comments of Murray J in *Craigdarragh Trading Company Ltd* (again, as set out above). Those comments, when properly construed (outside of the concept of a formal written waiver) express sympathy with "the view that <u>if the facts disclose a situation in which it would be unconscionable</u> [that] our law does allow for the lessee's equity, whether by estoppel or otherwise to prevail." [emphasis added] They do not, and cannot, change the plain requirements of the Act.

[38] In the present circumstances, I do not see and, indeed, there is no evidence to suggest, that such an equity of the type considered by Murray J arises in favour of the defendants. All that has occurred is that the normal incidents of the Lease were performed, namely that rent (and service charge) was demanded and paid. I agree with the plaintiff that it would fly against commercial expediency that a landlord should be denied the ability to demand service charge for services provided on an ongoing basis and, in effect, have to make up the deficit himself, in order to provide the services which a tenant such as the defendants continue to enjoy whilst there is ongoing dispute. The unconscionability and/or additional estoppel to which Murray J was referring, I interpret to be something outside of the terms of the Lease

where there has been a representation either by conduct or in writing from which it would be genuinely unconscionable to allow the landlord to resile. That is not evidenced on the facts of this case. There is nothing in the conduct here which evinced any intention to alter the legal relations established by the parties as set out in the Lease (to adopt the language of Denning LJ in *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616 at 623). Equally, there is no detriment because the defendants have continued to enjoy the services for which they have contributed along with the other tenants.

(iii) Waiver by reason of the claim for an injunction

[39] As I said above, I personally think it is unfortunate that the pleadings in this case have developed in the way in which they have. I am not, however, in favour of parties taking points in respect of pleadings purely for the sake of it, which I have to say is rather the position in this case. The reality is that in civil procedure it is very often (indeed, dare one say invariably) the case that pleadings are brought in the alternative. The real issue here is that the alternative nature of the reliefs sought was not, perhaps, made clear in the prayer itself. In July 2021, the plaintiff acknowledged that its claim for forfeiture was ambitious, but an impasse followed because there was no consensus between the parties that it could be withdrawn save in respect of the position regarding costs. In the final instance it is the court of final determination who resolves such issues. At this preliminary stage, however, I think the correct way forward is for the case to travel to full hearing by which stage one would hope that any contention in respect of the pleadings, albeit under the supervision of the court, would be resolved.

[40] For all of those reasons I find in favour of the plaintiff.

[41] I reserve the question of costs until determination of the principal action.

APPENDIX

Mr & Mrs H McCloy
[redacted]

Friday 6th November 2020

Dear Mr McCloy,

Re: Breach of Lease Covenant Apartment [redacted] Islay View, Portstewart - Short Term Lettings

It has come to the Company's attention that you are in breach of Covenants that you entered into when you purchased your property at Islay View.

Under Schedule 4 (Lessee's Covenants) Clause 16 of your Lease you covenanted as follows: -

"not to use the apartment or permit the same to be used for any purpose whatsoever other than as a dwelling for one family unit only and in particular not to carry on or permit to be carried on in or on the Property including the Apartment any trade, business, profession or occupation or any illegal activity or any act or thing whereby a nuisance might arise to the owners or occupiers of the other apartments within the Property"

We have taken legal advice and your letting of the apartment in the way that you do is clearly in breach of the above.

Therefore, the Company requires that you will cease immediately, all activity that breaches the aforementioned clause.

The Company also requires you not to let your property going forward in breach of the Clause.

Should you fail to respond to this letter, in writing, confirming your acceptance of the above and compliance with the Lease, by 30th November 2020, the Company will, without further notice to you, commence Legal proceedings to enforce your compliance with the Lease.

We shall also bring this letter to the attention of the Court in order to demonstrate that you were given the opportunity to resolve this matter without the need to issue legal proceedings and fix you with all Legal costs involved in bringing the matter to hearing.

Yours Sincerely,

_____
Tanya McKay
For and on behalf of
The Directors of
Islay View Management Company Limited

Rosemary Gawn
SOLICITORS

Armstrong Gordon Estate Agents
64 The Promenade
Portstewart
BT55 7AF

13th November 2020

Our Ref: RG/AJ/Mc/

Dear Sirs,

Re: Our Clients Harold McCloy and Alison McCloy
Property: [redacted]slay View Portstewart BT55 7BE

We confirm we act for our above named clients, the owners of the property at [redacted]slay View, Portstewart.

Your correspondence dated 6th November 2020 has been forwarded to ourselves.

Please specify exactly how you consider that our Clients are in breach of Clause 16 of the Lessee Covenants under Schedule 4 of the Lease herein.

We await hearing from you.

Yours faithfully,

Rosemary Gawn
ROSEMARY GAWN SOLICITORS

13 Greenvale Street, Ballymena, Co. Antrim BT43 6AR • DX 3210 NR Ballymena
T: 028 2563 0743 F: 028 2563 0926 E: info@gawnsolicitors.com
Rosemary Gawn
Louise Mulvenna

Monday 23rd November 2020

Dear Madam,

Re: Your Clients Harold McCloy and Alison McCloy
Property: [redacted] Islay View Portstewart BT55 7BE

Thank you for your letter of 13th November.

The lease in the present case establishes a comprehensive system of control which relates to the use of the apartments within the development known as Islay View.

Without prejudice to the following being enlarged upon, in due course, and in the context of the overall lease including clause 11 your clients are in breach of clause 16 in the following respects: -

Firstly, they are **"not to use the apartment or permit the same to be used for any purpose whatsoever other than as a dwelling for one family unit only"**

Your clients have been letting the apartment, to a succession of paying guests as holiday lets and for short breaks. They have advertised for paying guests on, inter alia, Airbnb, Facebook, Whatsonni.com, Causeway Coast & Glens.

There is clear legal authority, of which you no doubt are aware, that the use of residential property, for short term occupation by such paying guests, is a breach of the covenant to use the premises solely as a private residence or dwelling.

What is required, to use the property as a home/dwelling, is a degree of permanence of occupation. It is clear that there is no degree of permanence together with an intention to use no[redacted]as a home/dwelling by those using it.

The people using it are transient, staying only for a short time, a weekend or a few nights. This transient occupation falls foul of the above covenant. The covenant was clearly formulated to restrict the use of the apartments within Islay View for use as a dwelling for one family unit only. Such restriction has significant benefits for other owners including the control of nuisance, to which we return below.

Further, and in addition to the above, your clients are **"not to carry on or permit to be carried on in or on the property including the apartment any…. business…or any act or thing whereby a nuisance might arise to the owners or occupiers of the other apartments within the property."**

95

The nuisance problem, so far as it emanates from no[redacted] really stems from the transient nature of the occupation. The company have no control over the actions of or knowledge of the individuals staying. Further they are either not aware of the applicable rules governing community living or choose to ignore them with impunity. This is especially so during the CV19 pandemic.

We trust that the above is of assistance to you and look forward to hearing from you as per our original letter dated 6th November.

Yours faithfully,

Tanya McKay
For & on behalf of
The Directors of
Islay View Management Company Limited