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(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF LANDS AND PREMISES SITUATED AT AND KNOWN AS UNIT 1, PHASE 1, DARGAN CRESCENT, BELFAST

BETWEEN:

SHAH DIN & SONS LTD
(Company Voluntary Arrangement)

Plaintiff

and

DARGAN PROPERTIES MANAGEMENT LTD

Defendant

BURGESS J

[1] The defendant holds a leasehold interest in premises known as Dargan Estate Belfast (the Estate) as successor in title of the lessee of a lease granted by Belfast City Council. At present the defendant is liable to an annual rental of in and around £170,000 together with other outgoings.

[2] By an Indenture of Lease (the Lease) made 6 June 1998 between Dargan Estates Ltd and David Ernest Nimmons and Maureen Elizabeth Nimmons a portion of the Estate (the premises) was demised for a term of 123 years from 12 February 1987 on the terms therein. By various assignments the estate of the original lessees in the premises was assigned to the plaintiff on the 26th October 2001, together with the benefit of the covenants contained in the Lease but subject to the payment of the rent reserved and to the performance and observation of the covenants therein contained.

[3] In addition to the rent reserved by the Lease (which was subject to review) the lessee also had an obligation to pay a reasonable proportion of services. Initially, the lessee was obliged to pay a reasonable proportion of the insurance premium, but by a Deed of Variation (to which the Council was not joined) the obligation to insure the premises was undertaken directly by the lessee.

[4] The court is grateful to the legal representatives of both parties for a chronology of events from the date that the plaintiff took possession of the premises, the 26th of October 2001, up to the date of these proceedings. There was no dispute about the chronology and that allows me to record that from the outset the plaintiff persistently did not pay the rent and service charges when due, despite constant demands and reminders from the defendant. In 2004 the defendant had to issue proceedings in the Small Claims Court in respect of arrears of rent and service charges to that date. However, the pattern of failure to pay rent then continued until 23 August 2010, the last date on which the plaintiff paid the rent. Again however, rent and service charges began to accrue. In addition debts due by the plaintiff to others resulted in the Department of Finance and Personnel, Land and Property Services, securing judgment against the plaintiff in December 2010 and in August 2011. In November 2011 the Department of Finance served a letter demanding payment on the plaintiff.

[5] On 17 November 2011 the defendant again commenced proceedings against the plaintiff in the Small Claims Court to recover arrears of rent to that date, and on the first of February 2012 a default decree was obtained against the plaintiff.

[6] In February 2012 the defendant's agent sought clarification from the plaintiff's solicitors as to whether the plaintiff was insuring the premises. It is now clear that that was not taking place.

[7] To complete the picture I return to the year 2006 when, on 1st of May 2006, the plaintiff ceased operating their business from the premises. In November 2006 it began to market its interest in the premises. I also note that in November 2010 the Directors of the plaintiff advised the defendant that they were in receipt of social security benefits and had no other form of income.

[8] Stopping at that point it is clear that the plaintiff, and indeed its Directors, were conspicuously ignoring the demands for payment of the rent and other service charges and their obligations generally under the Lease. Only when proceedings were issued in the past were payments made, but even that action on the part of the defendant in 2011 failed to secure payment.

[9] On 6 March 2012 the defendant's solicitor furnished the plaintiff with a copy of the decree granted on 1 February 2012 and advised that if the full amount was not cleared within 7 days "further action would be taken". The following week, on 15 March 2012, the Department of Finance issued a winding up petition on the plaintiff in respect of the sum secured by the judgment obtained in December 2010.

[10] By March 2012 the defendant had been in a position for more than 10 years during which it was constantly demanding payments due to it in circumstances where, in their role as lessee of the Estate, it was responsible for paying the head rent, services and other outgoings. At that point, and indeed for a long time

previous to that time, the defendant would have been fully justified in concluding that the default on the part of the plaintiff was wilful. They were also by 15 March 2012 aware that a petition for the winding up of the plaintiff had been issued.

[11] On the 2 April 2012 the defendant re-entered and recovered possession of the premises by changing the locks, the plaintiff having vacated the premises in 2006. No point has been taken on behalf of the plaintiff, in my opinion correctly, that there was any unlawful forcible re-entry.

[12] As I have stated, on 6 March the defendant had warned the plaintiff that further action would be taken. It had a number of options.

(a) To institute enforcement proceedings in respect of the default decree and to issue further proceedings for payment of the rent which had accumulated since the date of the rent referred to in the default decree. However, it would have been fully aware of the previous defaults to make payment.

(b) To recover the premises either under any statutory provision or any contractual provision.

(A) STATUTORY

[13] Mr Michael Egan BL on behalf of the plaintiff argued that the defendant was obliged to comply with the provisions of section 14 of the Conveyancing Act 1881, which requires a landlord to serve a notice on the lessee specifying the particular breach complained of; 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. Mr Egan argues that since the defendant gave no notice under the provisions of section 14 of the 1881 Act, the entry by the defendant into the premises was unlawful, and that this failure determines this application that the defendant deliver up possession of the premises to the plaintiff.

[14] The breach which grounded the defendant taking possession of the premises was the non-payment of rent. For the sake of clarity the defendant confirmed to the court that re-entry was on this basis alone, although the issue of other breaches may become relevant to their argument in the context of the exercise by the court of any discretion to relieve the plaintiff of the forfeiture.

[15] While section 14(1) refers to a right of re-entry or forfeiture under any provision or stipulation in a lease, for a breach of any covenant or condition in the lease, by sub-section (8) it states:

> "This section shall not affect the law relating to re-entry of forfeiture or relief in case of non-payment of rent."

I am satisfied that section 14 relates to forfeiture or re-entry for breach of covenant relating to matters other than non-payment of rent. Mr Egan points to a lack of authority on this particular point, but I believe the matter is straightforward. In relation to re-entry or forfeiture for non-payment of rent the provisions of section 14 did not affect previous remedies available to a landlord. This finds voice in Wylie, Irish Land Law, Fourth Edition, at paragraph 17.101 which states:

> "The 1881 and 1992 Acts do not cover forfeiture or re-entry for non-payment of rent"

and cites as authority for that proposition the provisions of sub-section 14(8). He continues

> "..there seem to be no statutory provisions governing the subject in Ireland, corresponding to the English provisions in sections 210-212 of the Common Law Procedure Act 1852. The only requirement would seem to be the common law one that the Landlord must make a formal demand for the rent, unless the tenancy agreement exempts him from this."

[16] A formal demand for rent was made although under the Lease as will be seen, there was no such requirement. I therefore determine that the provisions of Section 14 of the 1881 Act do not apply in this matter.

(B) CONTRACTUAL RIGHTS

I now turn to the rights of the landlord under the terms of the Lease. The relevant provisions are

> "**PROVISOS**
>
> **RE-ENTRY**
>
> "7.1 If the rents or any of them or any part thereof shall be in arrears for 21 days after the sum shall have become due (whether formal demands shall have been made for same or not), or in the event of the breach of any of the tenant's covenants and stipulations on the part of the tenant herein contained in any such case it shall be lawful for the landlord or any person on the landlord's behalf at any time thereafter to re-enter upon the Premises or any part thereof in the name of the whole and thenceforth hold and enjoy the same as if this Lease had not been made but without prejudice to any right of action or remedy of the Landlord in respect of any antecedent breach of

any of the covenants and stipulations on the part of the Tenant herein contained.

…

DETERMINATION

7.6 If the rents hereby reserved or any of them or any part thereof or other monies due to the Landlord hereunder shall be in arrears for at least 21 days after becoming payable (whether any formal demand therefore shall have been made for same or not) or if there shall be a breach of any of the Tenants Covenants or stipulations on the part of the Tenant herein contained then and in any such case it shall be lawful for the Landlord to give to the Tenant one week's notice in writing expiring at any time determining this Lease and immediately on the expiration of such notice (unless all rent and other monies then due have been paid and any breach of any covenant or stipulation on the part of the Tenant remedied) this Lease shall absolutely cease and determine that so that this power may be exercised without prejudice to the other remedies of the Landlord which operate in such circumstances."

[17] The defendant exercised its right of forfeiture by taking possession under the provisions of Clause 7.1. It would have been open to it to serve a notice under the provisions of Clause 7.6 if it had been their wish to afford to the plaintiff the opportunity to make all of the payments then due, and to allow the Lease to continue. The decision not to take that approach is not hard to understand given the continuous chapter of non-compliance.

However it was also open to the defendant to proceed under Clause 7.1. Given the fact that the premises were empty and it was able lawfully and peacefully to take possession without any further legal action, I am satisfied that the taking of possession in itself was lawful and completed the act of forfeiture which I determine was lawful.

RELIEF

[18] That then brings the court to its consideration of the relief against forfeiture sought by the plaintiff. It is common ground between the parties that the court has such a jurisdiction based in equity, although there are differences in the approach which each party argues that the court should take in the exercise of that discretion. The plaintiff argues that while the remedy is discretionary, some good reason must be shown before relief will be refused if the tenant complies with certain requirements. Mr Egan argues on its behalf that the provisions of Section 94(1) of the Judicature Act (Northern Ireland) 1974 should be taken as a template in cases

where possession is obtained by reason of failure to pay rent. Those would be the payment of the rent and arrears with costs; and that the application to be restored to possession is made at the earliest opportunity at which a tenant can reasonably do so after the enforcement of the order of possession. He argues that the discretion exercisable under the provisions of Section 94(1) is therefore "nominal". He referred to Whipp v Mackie [1927] IR 372 and Newbolt v Bingham [1895] 72 LT 852. He also argues that except in exceptional circumstances in determining whether to grant relief against forfeiture for non payment of rent the court should ignore other breaches of covenant. Those exceptional matters he refers to as:

- Whether the landlord has altered his position in reliance on the eviction;
- Whether any third parties have acquired rights which will be affected if relief is granted; and
- The conduct of the applicant for relief.

[19] Counsel for the defendant argues that in this case no Order of the court was applied for or made and therefore the provisions of the 1974 Act do not apply, and that the court should take into account a wider range of issues, not least the prior behaviour of the defendant in relation to the payment of rent and service charge and the observance of other covenants. He also points to the delay in making the application.

[20] While I acknowledge that the provisions of Section 94(1) can be looked at by the court they are not the sole criteria of how the court should exercise its discretion. In Campus & Stadium Ireland Development Ltd v Dublin Waterworld Ltd [2006] IEHC 200 Gilligan J gave a detailed analysis to whether to grant relief against forfeiture. In considering how the court should approach wilful breaches of covenant, having regard in particular to Shiloh Spinners Ltd v Harding [1973] AC 691 and Southern Depot Co Ltd v British Railways Board [1990] 2 EGLR 39, he stated:

> ".. In order to exercise my discretion fairly, I must take into account the conduct of the parties, the wilfulness of any breach by the tenant, the general circumstances particular to the issue, the nature of the commercial transaction the subject of the lease, whether the essentials of the bargain can be secured, the value of the property, the extent of equality between the parties, the future prospects for the relationship, the fact that even in cases of wilful breaches it is not necessary to find an exceptional case before granting relief against forfeiture and then apply general equitable principles in reaching a conclusion."

I adopt that approach and have considered each of the relevant factors as they arise in this case.

[21] In addition to the background of breaches in respect of non-payment of rent and service charge and the obligation to insure the premises, there are a number of other matters that have been considered by me.

- On 5 April 2012, 3 days after entering and recovering possession of the premises, the defendant's solicitor wrote to the plaintiff advising it of the steps that had been taken. There was no response from the plaintiff to the defendant, but we now know the plaintiff consulted solicitors who set in process the necessary steps for a proposed Creditors Voluntary Arrangement (CVA). The directors had, through their solicitors, approached Mr David McClean, of McClean & Co, in his capacity as Nominee and Nominated Supervisor for the proposed CVA.

  A statement of affairs was prepared in which the only asset of the plaintiff was the premises. The valuation placed on them was £135,000, a valuation placed on them some years earlier when the then plaintiff sought to market its interest after it had closed its business. No adjustment was made to reflect any decline in the market. The statement of affairs was not qualified in any way as to the fact that the defendant had taken possession of the property and had indicated to the directors that its interest had been forfeited.

  The valuation is, in the opinion of the defendant, grossly overstated given the decrease in market values of property. Its agents valued the plaintiff's interest at £65,000, based on its investment value - which in turn depended upon a suitable tenant being found. In the event the defendant's agents have received an expression of interest from a potential tenant at a rack rent of some £7,000 per annum, together with liability for the other outgoings, for a period of 5 years, although in year 1 and year 2 the payment would be £3,500 in each year. That lease has not been completed. Initially when the plaintiff's solicitors were advised of the proposed lease the plaintiff refused the offer, but I understand that it has now agreed it could proceed. It was on that rental value being achieved that the defendant's agents arrived at their valuation, a value which the plaintiff now accepts albeit reluctantly.

- In May 2012 the plaintiff's solicitors corresponded with the defendant's solicitors maintaining that the plaintiff would pay the rent and service charge arrears, together with reasonable costs, but not until the premises were sold. On that basis they sought the defendant's consent to relief. That was refused. If the plaintiff was to enter into the lease with a third party, it would be the plaintiff who would receive a rent, which on the above figures would be well in excess of that payable by themselves - and at the same time would be relieved of the service charge and other outgoings. However the defendant would be obliged to look to the plaintiff for payment of the rent and service charge due under the Lease. There would be no contractual nexus between the defendant and any third party taking a sublease lease.

- Notwithstanding the offer of payment of arrears of rent on 22 May 2012 the plaintiff's solicitors indicated they had received monies from a third party to the sum of £2,102.15, the amount recovered by the defendant in the Small Claims Court in November 2011. Of course further amounts in respect of rent and service charge had accumulated since that date. No offer was made to pay that amount. By the time of the hearing of this action the amount due was some £4,000 in respect of rent and service charge. A cheque in that amount was received by the defendant's solicitors on the eve of the hearing of the action. No offer was made to discharge any additional costs incurred by the defendant in the exercise of their right of forfeiture. At this stage I make no comment on the amount claimed by the defendant's solicitor for such costs, but Mr Egan raised as a matter of principle that no costs should be payable by the plaintiff in relation to the advices obtained by the defendant as the rights of exercise and the exercise itself. I believe that is flawed. It was the inactivity over a very long period of time that required the defendant to take the steps they did and all reasonable costs that would flow from those steps should be payable by the plaintiff - determined by the court in default of agreement rather than the specific amount claimed by the defendant. If proceedings had been instituted there would be no argument but that the defendant would have been entitled to its costs.

- The first correspondence disclosed to the court from the plaintiff's solicitors challenging the forfeiture and asking for relief from forfeiture was 4 May 2012 although reference is made to a "recent discussion" between the solicitors. Nevertheless some 4 weeks passed before any communication took place and then against a background where, with legal advice, the plaintiffs had made no contact with the defendant, but had taken steps in relation to the CVA. The proceedings were issued on 1 June 2012, although I accept that in between time the defendant's solicitors were taking instructions and the plaintiff's solicitors were awaiting the outcome of those instructions. However any time taken by the defendant should not be regarded in any way as any waiver or compromise on their view that they were entitled to exercise the right of forfeiture and did not wish relief of forfeiture to be granted.

- The premises are commercial premises and the plaintiff's interest in the Lease has a possible value. There was much discussion about windfalls - whether to the defendant if relief is refused or to the plaintiff in the event that relief is granted. It has to be said that at the moment this is purely academic. The plaintiff has sought to dispose of its interest since 2006. It is only now in 2012 that interest has been shown by a possible tenant, an interest that has not yet been brought to fruition and which, even if brought to fruition, has not been the subject of any offer from a third party to purchase the benefit of that rental as an investment.

- A further area of uncertainty as far as the defendant is concerned is the future. I raised this issue with Mr Egan at the end of the hearing and after consultation with the plaintiff directors he indicated that a guarantor would be available for the rent for a period of 12 months. The 12 month period was linked to the proposal in the CVA where it would last for some 18 months (subject to extension), but on the basis that the interest in the Lease had been disposed of within 12 months, the balance time being afforded to settling all other aspects of the CVA and distribution. The uncertainty, over and above whether such a guarantee would be put into place, is what is to happen at the end of the period of the CVA if a new sub-lease has not been obtained and/or a sale of the plaintiff's interest in the Lease has not taken place. The defendant has ongoing obligations to Belfast City Council and is obliged to maintain the Estate in with its covenants to the Council. I was advised that the rental stream to them allows them about a 10% profit once their obligation to Belfast City Council has been discharged. This is a relatively modest sum. This plaintiff has wilfully not been making any payments under the terms of the Lease except on two occasions.

  To adopt the words of Carroll J in Sweeny Ltd v Powerscourt Shopping Centre [1984] IR 501 at 504:

  > "The commercial viability of the shopping centre may well depend on all the tenants paying their rents and service charges promptly and, no doubt the [landlords] have financial commitments in relation to the development, or the acquisition thereof, which must be paid. Why should a lessee have a `free ride' as far as rent and service charges are concerned for as long as it takes the lessor to bring an action in the Circuit Court and then wait for an appeal to the High Court?"

  This plaintiff has to all intents and purposes taken a free ride from the outset, both before it ceased business and after it ceased business. The defendant has had to discharge its obligations in all respects and continues to have to do so. It will continue to have to do so into the future. If it is to be put into a proper position in terms of the bargain struck with the plaintiff, they are entitled in my opinion to have full confidence that those obligations will in future be discharged and discharged promptly.

[22] Returning to the factors addressed by Gilligan J in Campus & Stadium Ireland Developments Ltd v Dublin Waterworld Ltd.

(a) The conduct of the parties in this matter are in total contradistinction to each other – the defendant has carried out all its obligations whereas the plaintiff has singularly failed to carry out its obligations whether the payment of rent, the payment of service charges or the insurance of the premises;

(b) Those breaches have been wilful and have extended over many years;

(c) I have addressed the nature of the commercial transaction, the subject of the Lease. I believe that if it were the case that the plaintiff would lose a substantial windfall that may be something the court could consider. However I have no certainty if any such value will be obtained, let alone the amount of any such value;

(d) Can the essentials of the bargain be secured? Whilst Mr Egan was able to suggest a form of guarantee for rent and service charges there is no certainty as to how long this situation may continue, since in the absence of a sub-lease and subsequently in the absence of any sale of the investment value in the Lease this matter could go on for a substantial period of time;

(c) There is no offer on the part of the plaintiff to discharge the costs of the forfeiture which I have determined are due in a sum to be agreed or determined by the court.

(d) The parties are of equal standing. The plaintiff has had the benefit throughout, should it have wished to do so, of legal advices in relation to their interest and any steps in relation to protecting that interest;

(f) As regards the future prospects of the relationship, I regard the attitude of the plaintiff to be vague and uncertain. It is unreasonable to expect the defendant to continue to deal with a company and directors who have singularly failed to address their responsibilities in the past;

(g) I accept that even in cases of wilful breaches it is not necessary to find an exceptional case before granting relief against forfeiture. Nevertheless in this particular case the plaintiff's attitude towards its responsibilities in the face of legal proceedings and warnings has been culpable to the highest degree.

[h] As regards equitable principles, the plaintiff seeks an equitable remedy in circumstances where it has come to the court against the backdrop of culpable and wilful non observance of its obligations, leaving the defendant to incur responsibilities.

[23] Having carefully considered all factors I have concluded that I should not exercise my discretion to grant relief of forfeiture in this matter.