THE HIGH COURT

[2020] IEHC 527

[No. 2020/4049 P]

BETWEEN

OYSTERS SHUCKERS LIMITED T/A KLAW

PLAINTIFF

AND

ARCHITECTURE MANUFACTURE SUPPORT (EU) LIMITED

AND

WOOI HEONG TAN

DEFENDANTS

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 23rd day of October, 2020

Introduction

1. This judgment concerns an interlocutory application by notice of motion issued on 5th June, 2020 seeking an injunction "…*restraining the First Named Defendant, and/or servants or agents, from taking, or seeking to take, possession of the property more particularly described in the schedule hereto ('the Property') and/or from disabling any alarm and/or changing any locks or otherwise interfering with the Plaintiff's use and quiet enjoyment of the Property, pending the determination of the within proceedings…".*

2. The property in question is a premises at 5A Crown Alley, Temple Bar, Dublin 2, ('the premises'), which is more commonly known by its trading name of 'Klaw'. The plaintiff describes the business as a "*small, boutique, award-winning seafood restaurant*". The plaintiff alleges that it is the tenant of the premises in circumstances which I will set out below. The first named defendant is the owner of the premises, and the second named defendant is a director of that company.

3. An application was made on 5th June, 2020 to this Court by the plaintiff for interim relief on foot of an *ex parte* docket seeking an order in the same terms as the notice of motion. On that date, Humphreys J. made the order sought pending further order of the court. It was fairly conceded by counsel for the plaintiff in the hearing before me that a major factor in the grant of interim relief was the fact that, under the Emergency Measures in the Public Interest (Covid-19) Act, 2020 ('the 2020 Act'), "…*all proposed evictions in all tenancies in the State [S.5(7)]*" were prohibited during the operation of that Act.

4. However, the "*emergency period*" during which that Act was in operation is no longer in force. Counsel before me agreed therefore that the 2020 Act is no longer a factor to be taken into account for the purpose of the interlocutory application, and the matter is to be decided according to the usual principles governing an interlocutory application.

Background

5. There has been an extensive exchange of affidavits between the parties prior to the hearing of the present application. The parties also proffered detailed written submissions in support of their respective positions. All of this material, together with the oral submissions made at the hearing, have been considered by me in coming to my decision. What follows in this judgment is a non-exhaustive summary of the facts and a consideration of the key arguments on both sides.

6. The application is grounded upon the affidavit of Wing Lee, who is a director of the plaintiff company. Mr. Lee avers that, on 11th February, 2016, the plaintiff entered into a lease agreement with the first named defendant for a term of four years and nine months from 1st July, 2015. The lease was subject to yearly payments of €30,000 exclusive of VAT for the first and second years, and €34,000 exclusive of VAT for the remainder of the lease.

7. The plaintiff contends that, on 19th November, 2018, a further lease was executed by the first named defendant in respect of the premises for a term of 15 years from 1st October, 2018 with an annual rent of €40,000 per annum. It is alleged that the lease was executed by the second named defendant for and on behalf of the first named defendant at a meeting at which Mr. Lee was present. Also present were Mr. Patrick Kelly, a solicitor who appears to have advised both sides to the transaction at various times, and Mr. Tadgh Moriarty, the first and second named defendants' accountant.

8. Mr. Lee avers that he did not execute the lease on behalf of the plaintiff at that meeting "*…as it was specifically represented to me by Mr. Kelly that both myself and Mr. Niall Sabongi, also a Company Director in the Plaintiff, were required to execute the lease at the same time*" [para. 10]. Mr. Lee further avers that Mr. Kelly represented that he would retain a copy of the lease which had been executed by the second named defendant on behalf of the first named defendant until such time as Mr. Lee and Mr. Sabongi could execute the lease. Mr. Lee avers that he is advised "*that a valid, binding and irrevocable lease came into existence on 19 November 2018 in respect of the Property and in favour Plaintiff company, such that the First Named Defendant herein is bound by the said terms therein" of the* [para. 11].

9. Mr. Lee also avers that the common seal of the first named defendant was applied to the lease by the second defendant at this meeting. Mr. Lee had in fact been a director of the first named defendant at some time prior to the meeting, and avers that he had *"specifically been directed by the First Named Defendant…to bring with me the company seal of the First Named Defendant to be used by the Second Named Defendant… for the purposes of executing the lease on behalf of the First Named Defendant*" [para. 12].

10. Mr. Lee avers that, despite repeated requests from the plaintiff, the first named defendant has not delivered a copy of the executed lease to the plaintiff. He also says that the broader context to the execution of the new lease was the "*buy-out*" of the second named defendant's shareholding in NRW Holdings Limited ('NRW'), which company was the 100% shareholder in the plaintiff company as well as a shareholder in a number of other related companies run by Mr. Lee and Mr. Sabongi. It appears that the second named defendant's shareholding in NRW and certain other entities was purchased for the sum of €350,000 pursuant to a heads of agreement dated 17th August, 2018.

11. It is clear from the evidence that there was a falling out between the second named defendant on the one hand and Mr. Lee and Mr. Sabongi on the other, and that the agreement of 17th August, 2018 was part of a general disengagement between the parties. Mr. Lee further avers that the sum of €350,000 *"included all of the monies which*

the Second Named Defendant had personally invested in the Plaintiff and related companies in relation to 'start-up' costs". Mr. Lee avers that *"it was agreed and represented by the Second Named Defendant that, subject to the payment and clearance of the sum of €350,000.00, he would resign his directorships from the Plaintiff and related companies and that the First Named Defendant would grant a further lease to the Plaintiff in respect of the Property*…" [emphasis in original – para. 21].

12. The plaintiff wrote a number of times through its solicitors in 2019 and 2020, initially to Mr. Kelly, but subsequently to Messrs Clerkin Lynch LLP Solicitors who represented the first named defendant, seeking a copy of the lease. The first named defendant's position was made clear by Clerkin Lynch, in particular in its letter of 29th May, 2020, that *"the alleged new or further lease to which you refer was not finalised or agreed*", and that the first named defendant had *"made definitive arrangements to take possession of and secure the Premises on 8th June, 2020*". It was as a response to this correspondence that the application for interim injunctive relief was made.

13. In his replying affidavit of 23rd June, 2020, the second named defendant ('Mr. Tan') sets out the position of the defendants. He asserts that no such lease as is contended for by the plaintiff was concluded on 19th November, 2018. He makes the point that, if the plaintiff is correct in asserting that a binding lease came into force on that date, the effect would have been to increase the monthly rental payment from €3,485 to €4,100 per month. However, the plaintiff continued to pay the lower rent of €3,485 per month, and at no stage increased its monthly payment beyond this figure.

14. Mr. Tan also alleges in his affidavit that the plaintiff has not paid any rent at all for the months of April, May and June, 2020. It was in fact accepted at the hearing by counsel for the plaintiff that the plaintiff has not discharged any rent in respect of the premises since March 2020.

15. Mr. Tan asserts that the failure of Mr. Lee in his grounding affidavit to refer to what the defendants assert is the failure of the plaintiff to pay what the plaintiff itself alleges is the full rent since November 2018, and to pay any rent at all since March 2020, is a breach of the plaintiff's obligation to make full disclosure of all facts relevant to the exercise of the court's discretion in an application for an interim injunction. As we will see, it was submitted on behalf of the defendants that, on this basis alone, the interim order should be discharged and that this alleged non-disclosure should weigh against the granting of any interlocutory order in favour of the plaintiff.

16. Mr. Tan makes various assertions concerning what he considers to be a "*breakdown of trust*" in his relationship with Mr. Lee. He denies that agreement for payment of the sum of €350,000 was contingent upon entering into a new lease between the plaintiff and the first named defendant. He acknowledges however that he did sign a copy of the second lease on 19th November, 2018, to be held by Mr. Kelly "*pending a decision whether I would grant a new lease of the property to the plaintiff"*. He states that he "*signed the lease in advance purely for reasons of convenience so that in the event that I should later decide to proceed an original lease could be delivered to the tenant"* [para. 31].

17. Mr. Tan avers that he ultimately decided not to enter into a new lease, and in February 2019 requested the return of the lease he had signed from Mr. Kelly. It is further asserted by Mr. Tan that the "*belated attempt in correspondence*", some eight months after the meeting of 19th November, 2018, "*…to suggest that a binding agreement had been entered into, is an act of dishonesty and opportunism on the part of…Mr. Lee…"* [para. 33].

18. The merits of the respective positions of the parties are rehearsed over several subsequent affidavits. Mr. Lee asserts that the plaintiff has been in possession of the property since 30th January, 2015, when keys of the premises were allegedly handed to Mr. Sabongi, and that the plaintiff has had "*exclusive use and possession of the premises since that date"*. These matters are denied by Mr. Tan who refers to requests for keys to Mr. Kelly by Mr. Lee in April and May 2015, and the fact that, at the time these emails were sent, the sale of the property to the first named defendant had not in fact closed.

19. Mr. Lee sought to excuse the non-payment of rent by the plaintiff since March 2020 by stating that payment had always been made on foot of receipt by the plaintiff of an invoice from the first named defendant. As no such invoice had been received after March 2020, no payment had been made. Mr. Lee averred that the plaintiff would "*immediately discharge*" any such invoice raised. Mr. Tan however, in his affidavit of 17th July, 2020, refers to the terms of the lease, and in particular the term which entitles the landlord to forfeit the lease for non-payment of rent "*whether formally demanded or not*".

20. Mr. Lee also avers that the defendants "*cannot have it both ways*": They "*cannot seek to deny the validity of the new lease on the one hand, and on the other seek to criticise the plaintiff for not making the increased repayments referenced thereunder*" [para. 2 affidavit of 15th July, 2020, emphasis in original]. Mr. Tan however asserts that it is the plaintiff who "*wants it both ways by having exclusive use of the Property while paying no money in respect of its occupation in circumstances where it has never paid the rent provided for in the 'lease' upon which it now seeks to rely*…" [para. 24, emphasis in original].

21. Mr. Sabongi submitted an affidavit of 31st July, 2020. He avers that the premises is "*our flagship premises, our home and the place where our unique concept and trade brand 'Klaw' was conceived and established by me… 'Klaw' is a highly successful brand and has brought an established and innovative and attractive marketing process to our restaurants and to the sale of fish*". He gives lengthy evidence about the process of setting up the venture, and the interaction between himself, Mr. Lee – who in early 2015 was acting on behalf of the first named defendant – and Mr. Tan. He also asserts that the plaintiff was in continuous possession and control of the premises from 30th January, 2015, that he was in regular contact with the defendants and Mr. Tan in particular during this period, and that at no stage was any objection raised in relation to his presence in the property. He was assured by the second named defendant that the completion of the sale was a "*formality*"; the "*clear emphasis from the Second Named Defendant, a shrewd*

businessman, was that we were good to go and should try to get up and running immediately" [para. 11].

22. In his responding affidavit, Mr. Tan denies authorising Mr. Lee – from whom Mr. Sabongi received the key – to provide it to Mr. Sabongi. He makes the point that the sale of the premises had not completed, and that the plaintiff itself was not in fact incorporated until 20th July, 2015.

23. The respective affidavits set out much detail concerning the deterioration in the relationship between Mr. Lee and Mr. Sabongi on the one hand, and the defendants on the other. I do not believe it is necessary to set out these contentions in detail. The length of the affidavits was also increased considerably by the parties' respective opinions on matters such as whether there was a fair question to be tried, the balance of convenience, and so on. As these are legal issues, I will deal with them in the analysis set out later in this judgment.

Proposals regarding rent

24. At the outset of the hearing, counsel for the plaintiff indicated to the court that, by the plaintiff's calculation, the cumulative differential in rent between the alleged "*new*" lease and the "*old*" lease owing to date was €11,070, i.e. if the plaintiff had continued to pay the rent to date under the original lease, this sum would be due in respect of rent to date if the alleged November 2018 lease were found to be valid and subsisting. Counsel informed the court that the plaintiff would pay the sum of €15,000 into escrow immediately pending the trial in respect of this continuing differential, if the injunction were granted.

25. Counsel for the defendants proffered a calculation which showed this differential as being somewhat smaller - €10,455 to the date of the hearing – and which stated that the *"mesne rates"* under the old lease from April 2020 to October 2020 were €28,233.33. The first named defendant's overall current loss was therefore €38,688.33. Counsel objected to the sum of €15,000 being paid into escrow rather than to his client in respect of the differential arrears.

26. During the course of counsel's oral submissions on behalf of the plaintiff, I asked whether it was the plaintiff's position that, given that it was clear that Mr. Sabongi's position is that the plaintiff "*may need to defer opening until the first quarter of 2021*", it would not in fact pay any rent to the first named defendant until the plaintiff was trading again, even if the injunction were granted. Counsel expressed a wish to take instructions, and having done so, stated that the plaintiff would pay a further €2,000 per month into an escrow account, the performance of which commitment would be secured by appropriate undertakings and consequences in the event of default. Counsel also proposed that directions for an expedited trial be made by the court.

The plaintiff's submissions

27. As one might expect, there was no significant disagreement between the parties as to the principles governing interlocutory injunctions. The plaintiff referred to the well-established principles in *Campus Oil v. Minister for Industry and Energy (no 2)* [1983] 1

IR 88, *Okunade v. Minister for Justice & Ors*.[2012] 3 IR 152, *AIB v. Diamond* [2012] 3 IR 549 and the most recent judgment of O'Donnell J. in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare* [2019] IESC 65.

28. The defendants in their submissions referred particularly to para. 64 of the judgment of O'Donnell J. in the latter case:

> *"64. Finally, at the risk of perhaps creating a further rule that will require subsequent qualification and correction, it may be useful to outline the steps which might be followed in a case such as this:*
>
> *(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted;*
>
> *(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the American Cyanimid and Campus Oil approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;*
>
> *(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves the consideration of the balance of convenience and the balance of justice;*
>
> *(4) The most important element in that balance is, in most cases, the question of adequacy of damages;*
>
> *(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;*
>
> *(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it may be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial;*
>
> *(7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and*

weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;

(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined." [Emphasis in original]

29. In assessing whether or not there is a fair question to be tried, regard must be had to the claims made by the plaintiff. No statement of claim has been served in the present case. One must look therefore to the general endorsement of claim on the plenary summons to determine the plaintiff's case as disclosed by the pleadings. The substantive reliefs claimed by the plaintiff are:

"(1) A Declaration that the First Named Defendant executed and entered into a valid, binding and irrevocable lease on 19 November 2018 in respect of the property more particularly described in the schedule hereto ('the Property'); …

(3) Further, and/or alternatively, a Declaration that the First Named Defendant is estopped from denying the validity or effect of the lease dated 19 November 2018 or, in the alternative, an Order for the specific performance of the agreement of the First Named Defendant to grant a further lease in respect of the Property;

(5) In the alternative, and insofar as is necessary, a Declaration that the Plaintiff is beneficially entitled to the sum of €350,000.00, or such other figure as determined by this Honourable Court, in respect of the share transfer effected in or around 19 November 2018 in favour of the Second Defendant, and/or an Order directing the Second Named Defendant to return such monies to the Plaintiff and/or its related companies and/or, in the alternative, to hold such monies on account for said companies pending the reversal of the share transfer effected in NRW Group Holdings Limited;

(6) Damages for breach of contract or, in the alternative, damages for breach of contract for the agreement to create a further lease in respect of the Property;

(7) Aggravated or exemplary damages…" [Emphasis in original].

30. Mr. Brendan Donelon BL for the plaintiff submitted that "*a valid, binding and irrevocable*" lease came into existence on 19th November, 2018. It was suggested that the circumstances surrounding the transaction demonstrated that what was intended by both parties was that the signing of the lease by Mr. Tan on 19th November, 2018 was intended to be binding. Counsel submitted that it was highly significant that neither Mr. Moriarty or more particularly Mr. Kelly had sworn an affidavit as to their version of the import of the meeting. The point was made that Mr. Kelly had subsequently invoiced the

plaintiff for "*professional services*" on 17th December, 2018 in respect of "*stamp duty on lease [10% of annual rent]*".

31. It was submitted that, on the basis of the affidavit evidence, the plaintiff had demonstrated a "*strong case…that a valid, binding and irrevocable lease was executed on 19th November, 2018".*

32. With regard to the position of the defendants that the plaintiff had neither discharged the differential in rent necessitated by the alleged lease on which it relied, nor paid any rent at all since March 2020, the plaintiff submitted: -

> *"…that the First Named Defendant is estopped and/or disentitled and/or it is unconscionable for the First Named Defendant to seek to recover any such purported arrears of rent, in the sum of €615.00 per month, whereby it has specifically failed to recognise the validity of same and/or sought to evict the Plaintiff in the midst of a global pandemic"* [para. 23 written submissions].

33. It was submitted that the plaintiff must be regarded as having *"substantially performed*" the later lease, or that any breach of it was waived and/or was caused and/or contributed to by the first named defendant's default and/or conduct and/or actions, more particularly in failing to recognise the validity of the second lease and/or continuing to raise invoices under the first lease…" [para. 26 written submissions].

34. The plaintiff also sought to rely on clause 3.2 of the new lease, which is as follows: -

> *"If and whenever during the Term hereof the Demised Premises or any part of them or access to them are destroyed or damaged by any of the Insured Risks so that the Demised Premises or any part of them are unfit for occupation or use and provided that the insurance thereof has not been vitiated by the act, neglect, default or omission of the Tenant or any servant agent licensee or invitee of the Tenant or any person on the Demised Premises expressly or by implication with the Tenant's authority, then the rent payable under this Lease or a fair proportion thereof according to the nature and extent of the damage sustained shall be suspended and cease to be payable according to the nature of the damage and of the extent of the damage sustained until the Demised Premises, the damaged part, or the access to the Demised Premises shall have been reinstated so that the Demised Premises or the damaged part are made fit for occupation or use or until the expiration of the Term whichever is the shorter and any dispute with reference to this proviso shall be referred to arbitration by a single arbitrator under the Arbitration Acts 1954-1980"* [as quoted in submissions with emphasis].

35. It was submitted that there was a serious issue to be tried as to whether the plaintiff was entitled, in accordance with this clause, to regard rent as having been suspended in circumstances where it was not in a position to trade due to the Covid-19 Pandemic. In this regard, the plaintiff relied on Clause 1.1.2 of the lease which, in defining the insured risks, referred to:

"… loss or damage by fire, lighting, storm, flood, tempest, explosion, earthquake, riot civil commotion, accidental damage malicious injury and aircraft and articles dropped therefrom property owner's liability (and if appropriate public liability) and such other risks as the landlord shall in the landlord's absolute discretion from time to time think fit" [quoted at para. 30 written submissions].

36. In the event that the terms of the lease itself did not cover the plaintiff's present circumstances, it was submitted that *"the said lease readily admits an implied term that – in the present circumstances – the Plaintiff would be entitled to a rent suspension ex debito justitiae…"* [para. 35 written submissions, emphasis in original], and that the "*officious bystander test*" would cover such a situation.

37. Alternatively, it was argued that the doctrine of frustration would temporarily excuse performance of a particular contractual obligation in certain circumstances, without frustrating or discharging the contract as a whole, notwithstanding the views expressed in the judgment of Kelly J. (as he then was) in *Ringsend Property Limited v. Donatex Limited* [2009] IEHC 558, to which I will refer later in this judgment.

38. It was also submitted that, in all the circumstances, the plaintiff would be entitled to a "*business equity lease*" pursuant to s.13(1)(a) of the Landlord and Tenant (Amendment) Act 1980 as amended, on the basis that the premises was "*continuously in the occupation*" of the plaintiff for the requisite period of five years in accordance with that section. It was suggested that such an entitlement represented further grounds on which to grant the interlocutory reliefs sought.

39. The plaintiff submitted that damages were not an adequate remedy for the plaintiff. As Mr. Lee put it in his grounding affidavit: -

"48 …I say that the Plaintiff operates its well-known and award winning restaurant business from this premises. In that respect, I say that the Plaintiff has spent considerable time, effort and resources building up this business over that time, which premises was initially a clothes shop, including making planning permission applications, and there is a significant amount of goodwill in the business.

49. I say that the Plaintiff also employs approximately eight to ten full and part-time [staff] who, owing to the current pandemic, are currently on temporary leave. However, I say that, given the significant goodwill and reputation of the Plaintiff company, it is envisaged that the business could be fully operational relatively easily, subject of course to compliance and guidance from the relevant government authorities".

40. It was submitted that, on the other hand, damages were a more than adequate remedy for the first named defendant, as it would be "*almost impossible*" to rent or sell the premises given the effect of the pandemic. In all the circumstances, the balance of convenience favoured granting the injunction, and the "*the greatest risk of injustice*"

would lie in this court refusing the relief sought, given that it could be granted on terms, including as to any ongoing rental payments, that the court considered appropriate.

41. Finally, as regards the argument that the plaintiff was in breach of its responsibilities to the court as regards disclosure, counsel emphasised that the main thrust of the argument before Humphreys J. related to the then – applicable 2020 Act, and its prohibition on evictions of tenants, rather than any issues regarding payment of rent.

42. Counsel also relied upon the dicta of Peart J. in *European Paint Importers Limited v. O'Callaghan* [2005] IEHC 280, in which he stated:

> *"It is submitted that in material ways the Court was not given the full facts, especially in relation to the financial strength of the plaintiff company in the context of the offer of an undertaking as to damages. In particular it is submitted that the Court was misled into believing that the plaintiff company was a company with an asset value of €1.5 million, whereas it appears to be the case that of that figure the sum of €1.2 million represents the value of a premises which though contracted to be bought by the plaintiff company, was in fact purchased in the name of Kieran Mulcahy, the principal shareholder. This reduces the value of the company to perhaps €300,000, and the defendants submit that if the Court had been made aware of the true position in this regard it would not have granted the injunction, because it would not have been content to accept the undertaking as to damages. There are other respects also in which the defendants submit that there has been a breach of the uberrima fides, or utmost good faith, principle, and a lack of candour. I am not satisfied that a case has been made out in this regard. There will inevitably in applications for interim relief be some haste in the preparation of affidavits and exhibits. It is inevitable that there may later be found to be some shortcomings in those papers, but it would require such a shortcoming to go to something much more fundamental that anything in the present case before the Court would feel that the process had been abused to the extent of obtaining an order under a false pretence. I am satisfied that such is not the case in this instance."*

43. Counsel submitted that the plaintiff's position in the present case was similar to that of the plaintiff in *European Paint Importers*, and that any lack of detail in relation to payment of rent should be regarded as not being so fundamental as to disentitle the plaintiff to the benefit of the interim order, or to weigh against it in the exercise of the court's discretion as to whether to grant an interlocutory order.

The Defendant's Submissions

44. Mr. Padraic Lyons BL, for the defendants, submitted that, while it was suggested by the plaintiff that there was a significant factual conflict between the parties, there was in fact no material conflict in relation to the following facts: -

> *"1.11 First, it is not in dispute that the Plaintiff has made no payment whatsoever to [the first defendant] (whether characterised as rent or otherwise) since March 2020.*

1.12 Second, since March 2020 the Plaintiff has not carried on any business from the Property. It is not trading from the Property and on its own evidence does not have any plans to do so before 2021 at the earliest.

1.13 Third, it is apparent that the Disputed Lease was never released or delivered to the Plaintiff.

1.14 Fourth, it is accepted that the Plaintiff has never paid the rent of €40,000 plus VAT per annum provided for in the disputed lease and that it advances no proposal to do so." [Written submissions]

45. Against this background, counsel strongly urged that there had been material non-disclosure by the plaintiff in its application for interim relief in failing to apprise the court of the failure to pay the extra amount payable under the new lease, and the failure to discharge any rent since March 2020. Counsel referred to the decision of Clarke J. (as he then was) in *Bambrick v. Cobley* [2005] IEHC 43, pointing out that the criteria specified in that case for judging non-disclosure had been clearly infringed, and submitted that the court should discharge the interim order of Humphreys J. on this basis. It was also suggested that the court could take such an adverse view of the plaintiff's conduct in this regard that it would exercise its discretion not to entertain the interlocutory application.

46. It was submitted on behalf of the first named defendant that, as the disputed lease was never delivered, there is no fair question to be tried in relation to the issue of whether it is a "*valid, binding and irrevocable lease*".

47. The defendants laid particular emphasis on the non-payment of rent. It was argued that the plaintiff was in manifest breach of the rental payment obligations provided for in both the old and the new lease. The plaintiff in order to succeed would have to establish that it was not itself in breach of covenant. It was submitted that, in failing to pay the rent, the plaintiff was in breach of the most fundamental covenant in either lease from the tenant's point of view, and that there was "*not an iota of authority*" to support the grant of an injunction restraining forfeiture where the tenant was in fundamental default of its rental payment obligations. In this regard, counsel referred in particular to the decisions of this court in *F.G. Sweeney Limited v. Powerscourt Shopping Centre Limited* [1984] IR 501 (Carroll J.), and *Albion Properties Limited v. Moonblast Limited* [2011] IEHC 107 (Hogan J.).

48. It was submitted by counsel for the first named defendant that clause 3.2 of the new lease dealing with "*rent suspension*" was simply not applicable to a situation where the plaintiff had ceased to trade because of a pandemic. In relation to a submission by counsel for the plaintiff that the first-named defendant had not acceded to a demand for production of the insurance policy itself, counsel for the first named defendant submitted that the demand had only been made recently, and that the defendants did not in fact have a copy of the policy. The defendants do not accept that there were any circumstances in which a term could be implied into a lease that rent would be suspended due to the occurrence of a pandemic or the existence of governmental restrictions.

Likewise, it was not accepted that the rental obligation – but not the lease itself – could be regarded as "*frustrated*", and the defendants relied on the firm rejection of the concept of "*partial frustration*" in the judgment of Kelly J. (as he then was) in *Ringsend Property Limited v. Donatex Limited* [2009] IEHC 568.

49. As regards the balance of convenience and the adequacy of damages, the defendants rely on the approach to these issues as set out by O'Donnell J. in *Merck* at para. 35: -

> *"In my view, the preferable approach is to consider adequacy of damages as part of the balance of convenience, or the balance of justice, as it is sometimes called. That approach tends to reinforce the essential flexibility of the remedy. It is not a question of asking whether damages are an adequate remedy. As observed by Lord Diplock, in other than the simplest cases, it may always be the case that there is some element of unquantifiable damage. It is not an absolute matter: It is relative. There may be cases where both parties can be said to be likely to suffer some irreparable harm, but in one case it may be much more significant than the other. On the other hand, it is conceivable that while it can be said that one party may suffer some irreparable harm if an injunction is granted or refused, as the case may be, there are nevertheless a number of other factors to apply that may tip the balance in favour of the opposing party."*

50. The defendants submit that the effect of the interim order has been to constrain them from exercising the first named defendant's property rights, in circumstances where the defendants have received no payment of rent since the order. *Moreover, the defendants argue that "the Plaintiff has not used the benefit of the ex parte order granted to it on 5 June 2020 for any meaningful purpose and … has no imminent plans to do so"* [written submissions para. 2.11].

51. The defendants submit that it is significant that the plaintiff does not seek relief against forfeiture. The question was canvassed by counsel on both sides as to whether it would be permissible to make such an application at the hearing. In the event, no such application was made. The defendants submitted that the obvious reason for the plaintiff's reluctance to press such an application was what they contended would be the requirement of a party invoking such relief to pay the arrears under the lease for which it contended; as the submissions of the defendant put it "…*the plaintiff has studiously avoided seeking the only relief which might be available as the requirement to discharge its arrears of rent and interest is a necessary pre-condition to doing so*…" [para. 3.15].

52. The defendants also queried the efficacy of the plaintiff's undertaking as to damages. It was asserted that the only means by which the plaintiff could meet its undertaking was by generating income from its restaurant business. The fact that the evidence suggested that the restaurant was unlikely to re-open until Spring of 2021 suggested that the plaintiff's financial prospects were "*bleak"*.

53. The defendants also made the point that any apprehended harm to the plaintiff's goodwill had already taken place, given that the premises had been shut for approximately seven

months, and where it would not be reopening even if the injunction were granted. It was suggested therefore that there was in fact no irreparable harm suffered by the plaintiff, whereas the first named defendant would suffer "*an undoubted interference with his rights as a property owner, which is likely never [to] be compensated by an apparently impecunious plaintiff"*.

Discussion

54. Before embarking on an analysis of the issues, it is appropriate to reflect on the nature of the proceedings and the relief being sought by the plaintiff.

55. As is clear from the substantive reliefs in the plenary summons as set out at para. 29 above, the main thrust of the plaintiff's case is to establish the validity and binding nature of the "*new*" lease which the plaintiff alleges was concluded on 19th November, 2018. There is an alternative claim that the plaintiff should be entitled to the return of monies paid to the second named defendant in respect of a share transfer effected in or around 19th November, 2018; however, the reliefs claimed against the first named defendant relate to the validity and effectiveness of the alleged "*new*" lease. An injunction is sought on the plenary summons in substantially similar terms to that sought in the present application.

56. It is clear from Mr. Lee's grounding affidavit that what prompted the present application was the intimation by letter of 29th May, 2020 from the solicitors for the first named defendant that it would seek to take possession of the property on 8th June, 2020 and/or disable any alarm and change the said locks on the property. Those solicitors had previously, by letter of 14th May, 2020, demanded that the plaintiff deliver up vacant possession of the premises. The plenary summons issued on 5th June, 2020, together with the notice of motion for the present application.

57. It is clear, then, that the first named defendant's position was that the only subsisting lease between the parties had expired, and that the plaintiff was simply an overholding tenant, whereas the plaintiff considered that it had the benefit of the alleged lease of 19th November, 2018, the existence and validity of which was denied by the first named defendant.

58. The plaintiff is seeking interlocutory relief preventing the first named defendant from doing what, on the first named defendant's case, it would be perfectly entitled to do – regain possession from a tenant whose lease had expired and who has not paid any rent for the last six months. As we have seen, it does so on the basis that the "*old*" lease has been replaced by the "*new"* lease, which the plaintiff says binds the first named defendant. The validity of the alleged lease of 19th November, 2018 is therefore the core issue in the proceedings.

59. With respect to the framework suggested by O'Donnell J. in *Merck*, it seems to me that, if the plaintiff were to succeed on this issue at trial, a permanent injunction in the terms set out in the plenary summons – if deemed necessary – would be granted. If that is so, the court must determine whether there is a fair question to be tried.

60. In discussing the principles applicable to an interlocutory injunction, O'Donnell J. in Merck stated as follows:

> *"The logic of an interlocutory application is that it is heard and determined in advance of the trial. It will make little sense for valuable and expensive court time to be used in an attempt to predict, on the balance of probabilities, the outcome of a case which is yet to be heard, where the evidence had not yet been ascertained and, more relevantly, had only been adduced on affidavit, and where the arguments were not fully developed. Accordingly, Lord Diplock [in American Cyanamid Company v. Ethicon Limited [1975] AC 396] concluded that there was no rule that a prime facie case should be established before an injunction could be granted. Instead, the court should consider whether a fair issue was to be tried, which means no more than the case not being frivolous or vexatious. If so, the court should then proceed to consider how the matters should best be regulated pending the trial which involved a consideration of the balance of convenience." [para. 29]*

61. The plaintiff sets out a number of matters which it contends support the validity of the "*new*" lease. These are summarised at paras. 7-11 above. It places particular reliance on the signing of the lease by Mr. Tan - which he admits – and the presence of Mr. Kelly who appears to have advised both sides, together with Mr. Moriarty, the defendant's accountant, and indeed the fact that no affidavit from these individuals has been proffered by the defendants in this application to support the defendant's contention that no binding commitment was intended by the first named defendant. The plaintiff suggests that the fact that the first named defendant's common seal was affixed to the lease indicates the defendant's intention that the lease be formally executed by the first named defendant at the meeting of 19th November, 2018. The plaintiff relies on various representations which it alleges were made by Mr. Tan in the context of the "*buy out*" of Mr. Tan's shares in the plaintiff and various related companies.

62. It is important to emphasise that the defendants disagree fundamentally that the events of November 19th, 2018 bear the interpretation for which the plaintiff contends, and Mr. Tan has much to say, particularly in his affidavit of 23rd June, 2020, about the history of his relationship with Mr. Lee and Mr. Sabongi which he contends throws a different light on what occurred at the meeting.

63. However, this Court cannot make determinations as to factual matters such as these at an interlocutory stage. They are quintessentially matters for the trial judge. It seems to me that the totality of the affidavit evidence makes it clear that, in relation to the central question in the proceedings as to whether the first named defendant is bound by the alleged *"new"* lease of 19th November, 2018, the plaintiff has raised a fair question to be tried.

64. It was submitted on behalf of the defendants that the fact that "*the plaintiff is in manifest breach of the rental payment obligations provided for in both the lease and the disputed lease*" means that there is no fair question to be tried. I do not agree. Non-payment of

rent by the plaintiff is certainly an issue which is relevant to the balance of convenience and the exercise of the court's discretion. However, the central issue in the proceedings is as to whether a binding lease came into existence on November 9th, 2018. In relation to that issue, the plaintiff has raised a fair question to be tried.

65. It was also submitted on behalf of the defendants that the fact that the disputed lease was never "*delivered"* to the plaintiff means that there is no fair question to be tried in relation to the issue of whether it is a "*valid, binding and irrevocable lease*". However, it is not apparent to me that there is anything in the disputed lease which requires delivery of it when executed by the landlord to the tenant, nor was any submission made to me on behalf of the defendants which would suggest that there is some legal requirement in this regard. The plaintiff submits that the circumstances suggest that there has been sufficient compliance with s.4 of the Landlord and Tenant Law Amendment Act, Ireland 1860 ("Deasy's Act"). Whether this submission is correct is a matter for the trial judge.

66. As I am satisfied that the plaintiff has established a fair question to be tried, the Merck principles require an examination of the balance of convenience and the balance of justice, and in particular the adequacy of damages. However, the defendants raise an important issue as to whether it is at all possible to grant a plaintiff the sort of injunctive relief sought in the present case in circumstances where it is evident that the plaintiff is in breach of its fundamental obligation to pay rent. In this regard, the plaintiff has discharged no rent since March 2020 and has never paid the higher rent due under the lease for which it contends.

67. In the *Powerscourt Shopping Centre* case, the defendant lessor served a forfeiture notice under s.14 of the Conveyancing Act 1881 ('the 1881 Act') on the plaintiff lessee, which was in breach of a covenant to pay rent and service charges. The defendant effected peaceable re-entry to the premises, and the plaintiff sought and obtained an interim injunction restraining the defendant from obstructing the plaintiff's right to enter and occupy the premises. However, Carroll J. dismissed the plaintiff's application for interlocutory relief, holding that the interest of the plaintiff in the premises had been lawfully terminated by the peaceable re-entry.

68. Carroll J. commented as follows:

> *"Why should a lessee have a "free ride" as far as rent and service charges are concerned for as long as it takes a lessor to bring an action in the Circuit Court and then wait for an appeal to the High Court? The undertaking concerning damages that has been given by the plaintiffs is meaningless as the damages will be the equivalent to the rent and service charges for which liability already exists." [p. 504]*

69. The court also commented that "*the lessee's rights are fully protected by being able to apply to the court for relief against forfeiture under s.14 sub-s.2,* [of the 1881 Act*]. In this case I would not be surprised if the reason why no relief against forfeiture has been*

sought is because the court might enquire about the time when the lessee would be able to pay the arrears of rent and service charges" [pages 504-505].

70. *In Albion Properties Limited v. Moonblast Limited* [2011] IEHC 107, Hogan J. held that the court had jurisdiction to grant a mandatory interlocutory injunction to a plaintiff landlord requiring the defendant tenant to deliver up possession of the premises to the landlord. Hogan J. took the view that it would be intolerable if a landlord "*could not immediately recover possession of the property in circumstances of repeated and continuous material breaches of the tenant's obligations, not least where there is every probability that damages would ultimately prove to be an adequate remedy*". [See para. 31 of the judgment in this regard].

71. Obvious distinctions may be drawn between these cases and the instant case. In *Powerscourt Shopping Centre*, Carroll J. found that the defendant had acted entirely lawfully and in accordance with the lease between the parties in effecting peaceable re-entry, and thus refused to grant what was in effect a mandatory injunction reversing the re-entry. There was no dispute between the parties as to the terms or existence of the lease, as is the case in the present matter.

72. Also, counsel laid some emphasis on the comments of Carroll J. condemning the failure of the plaintiff to apply for relief against forfeiture. Counsel made much of the plaintiff's perceived failure to "*seek the only relief which might conceivably be of relevance to it, namely relief against forfeiture*", and speculated that the reason it had not done so was, as was suggested in *Powerscourt,* a reticence on the part of the plaintiff concerning the question of when it might be in a position to pay the rent outstanding.

73. However, it seems to me that the plaintiff faces a difficulty in this regard. The section requires that the application under s.14(2) of the 1881 Act must be made by a "*lessee*". It is not unreasonable to anticipate that such an application by the plaintiff would be met with the objection that it is not a "*lessee*", as the first named defendant contends that the disputed lease is not binding or in force. It is not clear to me that a court would have jurisdiction to entertain an application for relief in such circumstances, without first determining the central issue in the present proceedings: whether or not a valid and binding lease came into being on 19th November, 2018.

74. The facts in *Moonblast* were somewhat different to the present case, and it is evident to the reader of that judgment that the case for granting that injunction was extremely compelling. Nonetheless, the decision is indicative of an unwillingness on the part of the court to tolerate a failure to discharge rent over a prolonged period, particularly when the tenant has ceased to trade in the premises in question. A further consideration in that case, as in the present case, was that of the adequacy of the plaintiff's undertaking as to damages.

75. I do not think that these cases go so far as to constitute authority for the proposition that a tenant in default of rent can never in any circumstances get an injunction restraining a landlord from exercising its contractual rights to regain possession. The present case is

complicated by the fact that the fundamental dispute is as to whether the landlord and tenant relationship exists at all.

76. There can be no doubt that a major factor weighing against the plaintiff is its failure for some considerable time to pay rent even under the lease for which it contends. The plaintiff submits that it was a thriving and award-winning restaurant prior to the onset of the pandemic, and that its failure to reopen is due entirely to the fact that, due to the Covid-19 restrictions in force and the fact that the restaurant is situated in an area normally popular with tourists and heavily dependent on substantial footfall, the reopening of the business is not viable at present and it is difficult to say when that may change. That is certainly an unfortunate state of affairs and the plaintiff certainly deserves some sympathy in that regard.

77. However, the fact remains that the plaintiff has sought an injunction restraining the first named defendant from recovering its property in circumstances where it has paid no rent at all for six months, and has never paid the full rent under the lease for which it contends for almost two years. No proposal regarding discharge of arrears was made prior to the hearing of this application, and although proposals for certain payments to be made into escrow on an ongoing basis were made in the course of the hearing, these proposals are profoundly unsatisfactory from the first named defendant's point of view.

78. The monthly rent under the disputed lease, including VAT, is €4,032.93. It is suggested that €2,000 per month be paid until the trial in part-payment of this rent. There is no proposal as to how the shortfall, or the seven months rent from March to October 2020, would ultimately be paid.

79. While the plaintiff proposes to pay a sum of €15,000 in respect of the differential of rent between the old and disputed leases – an overpayment as it happens – this will not be paid to the first named defendant, but will be paid into escrow, as will the proposed monthly payment of €2,000. The first named defendant therefore faces the prospect of receiving no payment of rent at all unless the trial resolves in its favour, at which point it may recover the amounts in escrow, but may not have any comfort as to how or when the arrears over and above the amounts paid into escrow will be paid, if at all.

80. These are factors which weigh heavily in considering the balance of convenience and the balance of justice. Perhaps conscious of this, several creative arguments were put forward by counsel for the plaintiff in seeking to persuade the court that rent would not in fact be payable under the disputed lease in the circumstances of this case. I have referred to these arguments at paras. 32-37 above. It should be said that, when I asked counsel during the course of submissions why the proffered rent would be paid into escrow rather than to the first named defendant, I was informed that the plaintiff's position was that, if these arguments were successful, no rent would be payable to the first named defendant for the period for which the premises was closed due to the pandemic, and that it would therefore be more appropriate to pay the sums into escrow.

81. Having considered the various arguments put forward by counsel, I am not persuaded that there is any basis advanced to me on which it could be said that the tenant is not obliged to pay rent to its landlord for periods when the restaurant is closed due to the pandemic. To take these arguments in turn, I do not think there is any estoppel operating against the first named defendant by reason of its refusal to acknowledge the validity of the disputed lease. It is the plaintiff who contends for the validity of the disputed lease, and the obligation is on the plaintiff to act in accordance with its terms. The plaintiff has not advanced any basis for the contention that it is not obliged to pay the rent which it contends is due and owing under the disputed lease. Likewise, while the plaintiff in its submissions asserts that it would be "*unconscionable*" if the plaintiff "*sought to evict the plaintiff in the midst of a global pandem*ic", no specific reasons are given for this contention, nor is it substantiated by any legal principle or precedent.

82. Neither do I accept that the first named defendant has in some way waived its right to be paid rent under the disputed lease by failing to recognise its validity. It is for the plaintiff, who asserts the enforceability of the lease, to demonstrate its commitment to the alleged lease by abiding by its terms. If the rent under the disputed lease had been proffered by the plaintiff from November 2018 onwards, the first named defendant would have had the option of accepting it, in which case there would be an irresistible inference that it accepted the validity of the new lease, or refusing it, in which case the plaintiff could contend that it had fulfilled its obligation to proffer the reserved rent and could not be criticised in this regard. However, the plaintiff did not do this, but continued to pay rent until March 2020 under an agreement which it contends no longer exists, having been superceded by the disputed lease. The plaintiff cannot be regarded as having "*substantially performed*" the lease in such circumstances.

83. It was submitted that the "*rent suspension*" clause 3.2 of the disputed lease (quoted at para. 34 above) entitled the plaintiff to regard the rent as being suspended in circumstances where it could not trade due to the Covid-19 Pandemic. While a valiant effort was made by counsel to persuade me that this interpretation of the clause is possible, I cannot accept that this contention is correct. The premises cannot be regarded as "*destroyed or damaged*"; it is not "*unfit for occupation or use*". As the first named defendant correctly points out at para. 3.13 of its submissions, "…*the entire purpose and premise of the application for interlocutory relief is that the property is fit for occupation and use*". None of the insured risks (quoted at para. 35 above) applies to the plaintiff's situation. To interpret the clause in the manner contended for by counsel would do violence to the meaning of the actual words set out in the clause.

84. It does not seem to me that the doctrine of frustration assists the plaintiff either. Counsel suggested that there could be circumstances in which obligations under a contract could be regarded as having been "*temporarily suspended and/or partially frustrated*", and urged me to find that the plaintiff's rental obligations could be so regarded. Counsel referred to certain dicta of Lord Wright in the House of Lords' decision in *Cricklewood Property and Investment Trust Limited v. Leighton's Investment Trust Limited* [1945] AC

221 (at para. 36 of the plaintiff's written submissions) which admitted of the theoretical possibility that the doctrine could apply to a lease in certain circumstances.

85. However, Kelly J. *in Ringsend Property Limited v. Donatex Limited* [2009] IEHC 568 trenchantly rejected a defence of "*partial frustration*", commenting as follows: -

> *"As to 'partial frustration', it is considered in [Treitel, The Law of Contract, 11th Edition] at paras. 50-07 and following. The author refers to some civil law systems where partial destruction of the subject matter of the contract can lead to the same type of relief in respect of that part as would be available in respect of the whole in cases of total destruction. He cites German law and provisions of the civil code in that jurisdiction. The author goes on 'these rules have no direct counterpart in English law, under which, in cases of partial impossibility, the contract is either frustrated or remains in force. There is no such concept as partial or temporary frustration on account of partial or temporary impossibility…the concept of partial discharge in English law is restricted to obligations which are severable, whether in point of time or otherwise.'*
>
> *Thus, it can be seen that there is no concept of 'partial frustration', as such. It might apply if clause 5.1.19 (i) was capable of being severed from the rest of the loan stock instrument. But there is no arguable basis demonstrated for the severability of clause 5.1.19 (i) from the remainder of the contract. It is an integral part of the contract and not a standalone provision such as an arbitration clause.*
>
> *It follows that there is no such defence of 'partial frustration' available to the defendants. [Emphasis in judgment]*

86. I agree with the observations of Kelly J. in this regard. The obligation to pay rent is an integral and indeed fundamental part of the contract. The obligation may be suspended in certain circumstances set out at clause 3.2 of the disputed lease; those circumstances do not apply here. Accordingly, the plaintiff cannot argue that the rent obligation is frustrated, while arguing that the lease itself remains valid.

87. Likewise, there is no basis upon which the court can imply a term into the lease, whether pursuant to the "*officious bystander test*" as set down by MacKinnon J. in *Shirlaw v. Southern Foundries Limited* [1939] 2 KB 206, or otherwise. If the disputed lease is valid, it contains a clause – clause 3.2 – which provides for circumstances in which the rent would be suspended. This clause could have included the circumstances in which the plaintiff finds itself. Indeed, a decision of the Queen's Bench Division of the High Court of England and Wales to which counsel for the plaintiff referred – *The Financial Conduct Authority v. Arch Insurance (UK) Limited* [2020] EWHC 2448 (Comm.) – partly concerned the proper interpretation of "*disease clauses"* in an insurance policy, which purported to indemnify against, inter alia, "*infectious diseases".* Having contemplated and purportedly agreed the circumstances in which rent could be suspended, the plaintiff cannot now ask the court to amend this list to include hitherto unforeseen circumstances.

88. It was also suggested that the plaintiff would be entitled to a "*business equity lease*" – see para. 38 above – and that this factor should further incline the court towards granting the interlocutory relief sought. The plaintiff, in seeking a business equity lease, would be relying, not on the disputed lease, but an alleged continuous occupation of five years in the premises. One can foresee that there would be strenuous objections by the first named defendant to any such application, not the least of which would likely be that five years' occupation – if there were such – has only been achieved by overholding on the original period of four years and nine months without the consent of the landlord, at a time when the plaintiff was arguing that the original tenancy had been superceded by a new lease.

89. As regards adequacy of damages, emphasis is placed by the plaintiff on the amount of work and expense in building up the business at the premises, and the "*significant amount of goodwill in the business*". However, no evidence was presented to the court as to what exactly is comprised in this goodwill. Mr. Sabongi says in this regard: -

> *"4…I say and believe that the Property is our flagship premises, our home and the place where our unique concept and trade brand 'Klaw' was conceived and established by me, this Deponent. I say that 'Klaw' is a highly successful brand and has brought an established and innovative and attractive marketing process to our restaurants and to the sale of fish*" [affidavit sworn 31st July, 2020].

90. That may well be true. However, it is not evident to me how the goodwill of the business is dependent on the plaintiff remaining in the premises on Crown Alley, or that the goodwill in the "*unique concept and trade brand*" would not survive a move to a comparable premises elsewhere. The premises may be the plaintiff's "*flagship*", but there is no evidence before the court that it is configured or equipped in such a way as to make it impossible to move the business to another premises.

91. The defendant's submissions suggested that

> *"[the] plaintiff will not unduly be prejudiced if it is required to obtain an alternative premises in the area and will suffer no interruption to its business operations by doing so, which is in any event closed. On the contrary, the Plaintiff should be in a position to secure suitable alternative premises at a reduced rent going forward, thereby placing it in a better position if the application for injunctive relief is refused".*

92. The defendants may or may not be correct in these assertions. They have adduced no evidence regarding the comparative cost of alternative premises. However, neither has the plaintiff. There is no evidence before the court from appropriately qualified persons which would enable the court to assess whether the premises itself is generally an integral and essential part of the business, or conversely whether the business could be conveniently conducted somewhere else.

93. The court must also consider whether or not the plaintiff's undertaking as to damages has substance or whether, as the defendants contend in their submissions, "*…the Plaintiff's capacity and willingness to meet its undertaking as to damages is highly questionable"* [para. 3.20]. No financial information or records of the company are proffered by the plaintiff to substantiate its undertaking. Mr. Tan expressed "*very real and serious concerns about the capacity of the plaintiff to meet its undertaking as to damages*" in his affidavit of 18th September, 2020. There was no reply to this affidavit, or any application to this Court to adduce further evidence to meet those concerns.

94. The defendants take the view that "*the only means by which the plaintiff could meet an undertaking as to damages is by generating income from its restaurant business", and point to the fact that the plaintiff has not resumed trading since obtaining the interim* order, and is unlikely to resume trading until early 2021. This may well be due to circumstances beyond the plaintiff's control. However, there is no intimation from the plaintiff of any assets which would be available to satisfy the undertaking, other than monies generated from profitable trading. There is no offer of any security or guarantee which might underpin the undertaking. The plaintiff appears unable to discharge the rent under the lease for which it contends, offering some limited funds per month which represent just under half the monthly rent payment under the disputed lease.

95. In all the circumstances, it is difficult to conclude that the undertaking as to damages has substance.

96. Finally, there is the issue of non-disclosure raised by the defendants, referred to at para. 45 above. In my view, the defendants are correct in submitting that the failure by the plaintiff in Mr. Lee's grounding affidavit to apprise this Court of the fact that the extra monthly rent under the disputed lease had never been paid or proffered by the plaintiff, and that no rent at all had been paid since March 2020, were material failures of disclosure according to the principles set out by Clarke J. in *Bambrick*. The court should have been informed of these matters, and of any explanation or excuse in relation to them which the plaintiff considered relevant.

97. However, while the court does not condone any such non-disclosure, it does not appear that the omission of these matters was a crucial contributing factor to the grant of the interim injunction. The ban on evictions under the 2020 Act was in force at the time, and I accept the assurance of counsel for the plaintiff that this was the primary basis upon which Humphreys J. granted the order.

98. In any event, as is usual with interim injunctions, the order of 5th June, 2020 was made "*pending further order of the court*". It will be discharged when an order is made by me on foot of the present application. The question of penalising the plaintiff by discharging the interim order therefore does not arise. I have however borne in mind the non-disclosure in coming to the conclusions which I now set out below.

Conclusions

99. The following is a summary of my conclusions:

- As will be apparent from the foregoing, I am satisfied that the plaintiff has established a fair question to be tried as to whether the disputed lease is valid, binding and effective.

- I do not consider that the existence of arrears of rent automatically precludes a plaintiff from obtaining the type of injunction sought in the present application. As O'Donnell J. remarked in the passage from *Merck* quoted at para. 28 above, the application must be "*approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined*".

- However, the failure to discharge rent in the past and an admitted inability to discharge rent in the future are matters which weigh heavily when assessing the balance of convenience or justice;

- there is no stateable basis upon which the court could hold that rent is not payable under the disputed lease in respect of periods in which the plaintiff has had to close the premises due to circumstances caused by the Covid-19 Pandemic;

- there is therefore no basis upon which any future rent should be paid into escrow, rather than directly to the first named defendant;

- the plaintiff has not adduced sufficient or any evidence to persuade the court that irreparable harm will enure to it if an injunction is not granted, or that an award of damages would not fully compensate it;

- I am not satisfied that there is any substance to the undertaking as to damages offered by the plaintiff.

100. In all the circumstances, I conclude that the balance of justice requires that the plaintiff's application be refused. The plaintiff wants to remain in the premises, but although during the course of the application it proposed to make certain payments towards arrears and rent in the future, the first named defendant would still be at a substantial loss for an uncertain period going forward. The first named defendant is in effect being asked to subsidise or underwrite the future trading prospects and prosperity of the plaintiff, which in the current circumstances can only be regarded as precarious. In the meantime, the first named defendant is deprived of the use of its premises and the opportunity to attract another tenant.

101. One must have considerable sympathy for the plaintiff and indeed all other businesses which have found their prospects blighted by the pandemic. Mr. Sabongi deprecates the fact that the first named defendant was not prepared to accommodate the plaintiff in its difficulties:

> *"19 …the Defendants' conduct in this regard is in marked contrast to that of other lessors in Temple Bar and the local areas where rental payments have been stalled and/or postponed and/or, at the very least, significantly reduced until next Spring*

when were are told their landlords will undertake a mutual review" [affidavit sworn 31st July, 2020].

102. If Mr. Sabongi is correct in the above averment, it is certainly heartening to learn that landlords in Temple Bar and other local areas are being understanding towards tenants given the current circumstances. Where a current tenancy becomes difficult through no fault of the tenant, one would expect landlords who value their relationship with their tenants to assist them in working through their difficulties.

103. The problem in the present case is that there is a fundamental dispute between the parties as to whether a tenancy exists at all. This dispute was the subject of correspondence in the latter part of 2019, and ignited when the first named defendant's solicitors sought possession after the expiry of the "*old*" lease. It is clear also that the relationship between Mr. Tan on the one hand and Mr. Lee and Mr. Sabongi on the other has over the course of time deteriorated to a point where the mutual distrust between the parties is very evident.

104. Where the fault lies for all of this may ultimately be for the trial judge to determine. For the moment, no order will be made in the terms sought by the plaintiff. The parties must proceed however they see fit. The first named defendant appears to be minded to take possession of the property. The plaintiff intimated the possibility of making applications to court for relief against forfeiture, or for relief pursuant to s.13(1)(a) of the Landlord and Tenant (Amendment) Act 1980 as amended. I express no view as to the merits or appropriateness of any such course of action.

105. As this judgment is being delivered electronically, I would invite the parties to deliver brief written submissions as to the orders to be made by the court within 14 days of this judgment. In particular, I would expect the parties to address the issue of costs. I am also of the view that, as suggested by counsel for the plaintiff during the application, a timetable for expedited pleadings should be ordered so that the matter can proceed to trial as quickly as possible. The parties might let me have their suggestions in this regard.