

# THE HIGH COURT

[2023] IEHC 576

Record No. 2023/2273P

BETWEEN

MALDUA LIMITED

PLAINTIFF

AND

NAOMI WALTON

DEFENDANT

**JUDGMENT of Mr Justice Kennedy delivered on 16<sup>th</sup> day of August 2023**

## **Summary**

1. In these proceedings, the Plaintiff sought interim injunctions directing the Defendant to vacate a Property pending trial on the basis that the Defendant had breached the agreement between them (which it characterised as a licence) by changing its use (from that of guest house to refugee accommodation for a larger number of people) and by carrying out extensive unauthorised modifications to the Property without authorisation and without complying with fire safety, planning and other applicable regulations. While the final determination of these issues will be matters for full trial, the Court was satisfied that the

Plaintiff had made out a strong case that the agreement was a licence and that the Defendant had breached it by her actions (since authorisation should clearly have been sought for many of the alterations irrespective of whether the agreement was characterised as a licence or a lease).

2. The crucial issue was accordingly the balance of convenience. The Court was satisfied that certain issues could be adequately addressed by an award of damages if the Plaintiff ultimately succeeded at trial, but it was necessary to ensure that there were no further breaches of the agreement (without prejudice to the lease/licence issue) and, most importantly, it was necessary to ensure that the Property was fully certified in terms of fire safety and was otherwise being operated in compliance with planning and other applicable regulations. The Defendant provided undertakings to the Court to deal with the range of issues identified by the parties, obviating the need for immediate injunctive relief.

Accordingly, the application was resolved on the basis of the agreed undertakings together with agreed directions intended to progress the matter towards trial as quickly as possible.

While encouraging the parties to engage with each other in the first instance, the Court granted both parties liberty to apply if any further issue arose or if there was any issue with the undertakings, particularly in respect of the need for fire safety, regulatory and planning compliance. This judgment outlines the detailed reasons for the Court's decision.

### **Background**

3. These proceedings concern a guesthouse on Galway Road, Clifden, Co Galway ("the Property") which is owned by the Plaintiff and occupied by the Defendant, a businessperson.

In short, the Plaintiff says that:

- a) The parties entered into an agreement whereby the Plaintiff licensed the Property to the Defendant to permit her to operate it as a guest house;

- b) The Defendant carried out extensive unauthorised works which have severely damaged the Property, including structural and electrical works which ultimately caused a fire;
- c) The works meant that the Property required new planning permission and fire safety certificates, which have not been obtained by the Defendant.
- d) The licence has terminated but the Defendant refuses to vacate the Property;
- e) Her unlawful actions have violated the Plaintiff's proprietary rights, caused serious damage to the Property and continue to pose a risk of further damage and fire;
- f) The Plaintiff requires interlocutory relief pending trial to protect the Property and its proprietary rights;

4. In brief, the Defendant argues that the agreement is a lease, not a licence. She accepts that she is using the Property to provide accommodation for Ukrainian refugees. She does not suggest that the works were authorised by the Plaintiff but explains that the modifications were required to deal with urgently needed repairs and to facilitate the urgent use of the Property for refugee accommodation. She seems to regard at least some of those works as enhancements and also says that such modifications can be reversed without detrimental impact to the Property. She says that the work is fully certified from a fire safety perspective and that the Property is fully insured. She also says that she took up occupation and invested substantial sums in the Property on the basis that she was to be permitted to buy the Property.

5. There has been a fire at the Property. Fortunately, nobody was injured and damage to property was limited. Both parties blame the other for the circumstances which led to the fire.

### **The Current Application**

6. The Plaintiff's notice of motion, dated 17 May 2023, seeks interim injunctions pending determination of proceedings directing the Defendant, her servants or agents to

vacate the Property and restraining Defendants from accessing the Property or interfering with Plaintiff's enjoyment of the Property pending trial.

### **The Plaintiff's Case**

7. Whereas the Defendant very much relies on the advertising and precontractual negotiation, including a signed Heads of Terms signed on behalf of both parties, which predated the formal signed agreement, the Plaintiff essentially relies on the terms of the final document and argues that all such evidence of pre-contractual advertising, representation or negotiations is inadmissible to determine the intentions of the contracting parties. The

Plaintiff's affidavits aver that:

- a. The Plaintiff owns Maldua House, a Clifden guesthouse, and entered into a licence agreement with the Defendant, a businessperson, to allow her to operate the guesthouse business from it.
- b. The Defendant has carried out extensive works in breach of the agreement, including structural and electrical works which have resulted in a fire and severely damaged the Property. Mandatory fire safety certification and planning permissions have not been maintained or updated as required following such work.
- c. The Licence has terminated but the Defendant has refused to vacate. The Defendant's actions violate the Plaintiff's proprietary rights, have caused serious damage and pose a serious current and future risk of further damage and fire. The Plaintiff seeks injunctive relief and damages at trial but also requires interlocutory injunctive relief to protect the Property.

8. The terms of the agreement which the Defendant has allegedly breached or which the Plaintiff seeks to invoke include the following:

- Clause 1.32 & 5.18 define the Property's permitted user as a guesthouse and prohibit its use for any other purpose without the Plaintiff's prior written consent (and neither side contends that such consent was sought or granted).
- Clause 5.1.2 required the Defendant to pay or reimburse the Plaintiff the insurance premium payable throughout the licence period.
- Clause 5.5.1 & 5.5.2 required the Defendant to repair and maintain the Property and its furniture, fixtures and fittings.
- Clause 5.6 required the Defendant to keep and maintain the Property in good decorative order and condition at all times.
- Clause 5.13.1 in which the Defendant covenanted "As an absolute prohibition, not to erect any new buildings or structures on the Licensed Property nor make any alterations or additions whatsoever to the exterior or to the interior of the Licensed Property save for the Refurbishment Works".
- Clause 8.2 provides for a right to re-enter, terminating the licence, if the license fee, insurance premium etc. should be unpaid for 5 working days after becoming payable.
- Clause 8.4 obliges the Defendant to vacate and deliver up possession immediately on termination of the licence for any reason.
- Clause 3.2.2 to 3.2.4 stipulate the Defendant's awareness of the nature and effect of the agreement, which had been explained to and understood by her, that she had taken independent legal advice or had been advised and afforded the opportunity to do so and that she was bound by the agreement.

### **Alleged Breaches of the agreement**

9. Mr. Tarpey, a director of the Plaintiff, inspected the Property in late August 2022 and noticed that the Defendant had stopped using it as a guesthouse and had started using it as accommodation for refugees, in breach of the permitted user. Furniture had been removed and replaced with bunk beds.

10. Mr. Tarpey confirms that the simple accommodation of refugees would have been acceptable on its own, but that, rather than keep the original layout and structure of the Property, which he characterised as a luxury guesthouse with spacious accommodation, the Defendant tried to house as many people as possible. The Defendant had undertaken reconfiguration works to alter the structure and layout of the Property to house as many people as possible. Such works, which Mr. Tarpey described as “a complete and substandard remodelling of the Property”, included putting up walls, removing, dividing or altering existing bedrooms and an en suite, a kitchen a games room and also building new rooms. Mr Tarpey also asserts (at paragraph 19 of his affidavit) that the Defendant had breached clause 5.3.2 of the agreement by increasing the risk of occurrence of the insured risks (due to the alterations in the Property and the increased numbers of people accommodated thereat).

11. The Plaintiff has exhibited extensive photographic evidence showing the (interior and exterior) condition of the Property both before the agreement was entered into and after the Defendant’s alterations. Such photographic evidence appears to confirm that substantial works were carried out both inside and outside the Property, fundamentally modifying the Property. Such works were not permitted under the agreement save with the Plaintiff’s permission (and there is no suggestion that such permission was sought or granted). The photographs appear consistent with the allegation of change of use and raise concerns as to the quality of the finish and, more significantly, as to fire safety and electrical wiring.

**12.** Mr. Tarpey said that the electrical work carried out by the Plaintiff's representatives was shoddy and dangerously done. Mr. Tarpey also averred that the Defendant repainted many rooms, repainted the outside of property a different colour and that the Property was severely damaged and generally in an absolutely horrendous condition as a result of the Defendant's unauthorised actions.

**13.** Mr Tarpey. learnt, in the course of an inspection of property on 10 January 2023, that a fire had recently broken out in the Property. Evidence of fire damage can be seen on photographs of the walls and roof.

**14.** Mr. Tarpey also says that in breach of the agreement the Defendant cleared furniture, fixtures and fittings (including some valuable contents) which were then sold second hand in Clifden. It is also averred that the Defendant replaced beds and other furniture with bunk beds. There is a dispute as to whether the Defendant was entitled to dispose of such contents which the Court does not need to resolve for the purposes of the present application. However, there appears to be no dispute about the replacement of beds with bunk beds so as to increase the occupancy capacity nor about the fact that the Defendant built new walls in kitchen and hallway and bungalow.

**15.** Mr. Tarpey says that the Defendant had failed to reimburse the Plaintiff the shortfall of insurance cover and had failed to pay the cost of repairing damage caused up to the amount of the insurance excess and that she failed to make insurance payments as required by the agreement. However, the Defendant denied this and there appeared to be confusion as to what payments were due and what triggered the payment obligation. Mr. Tarpey also said that the Defendant had failed to provide key-holder information as required by the agreement but there was no difficulty in providing such information from the Defendant's perspective.

**16.** In pre-action correspondence, the Plaintiff's solicitors notified the Defendant of the alleged breaches asserting an entitlement to terminate and demanding vacant possession. The Defendant's solicitors asserted that their client was entitled to remain in possession, characterising the agreement as a lease, not a licence. The Plaintiff says that this response was itself a fundamental breach or a repudiatory breach.

**17.** The Plaintiff relies on the language of the written agreement between the parties in support of its argument that the agreement constituted a licence rather than a lease. In particular, the Plaintiff's notes that:

- a) The document styles itself as a licence and the terminology repeatedly used throughout the document to describe the parties and their entitlement is consistent with a licence rather than a lease.
- b) The licence is expressed and acknowledged to be personal only - it may not be assigned, transferred, sublicensed, charged or otherwise disposed of.
- c) The agreement stipulates that nothing therein shall create any relationship of landlord and tenant.

### **The Defendant's Case**

**18.** The Defendant accepts that the Property is now being used for refugee accommodation. However, she disputes the Plaintiff's description of the Property's original condition. She says that parts of the Property and their décor were originally in a good condition but that other parts were far less so, arguing that some changes were urgent and necessary enhancements to deal with repairs to the electrical, sewage and heating system in particular. She says these were repairs which would have been required in any event as well as additional modifications to allow for the accommodation of the refugees and her family's needs and that changes such as the new partition walls were readily reversible if required.



**19.** The Defendant says that the Plaintiff's terms constituted an attempt by the Plaintiff to contract out of its statutory obligations. She argued that the agreement between the parties was for a lease coupled with an option to purchase; the Defendant enjoyed exclusive possession and the parties were in reality in a landlord and tenant relationship. The Defendant relies on pre-contractual advertising and negotiations, and communications between the parties after the agreement was entered into in support of her contention that at all times the parties envisaged that they were entering into a tenancy rather than a licence. In support of her contention as to the true characterisation of the relationship, the Defendant relies on the negotiations leading to the formal agreement. The Property was advertised on the Plaintiff's behalf as being for sale or lease. There appears to be no dispute in fact in respect of these communications and the Plaintiff must be deemed to be aware of and bound by the actions of its estate agent.

**20.** The Defendant placed particular reliance on the Heads of Terms which, unlike the formal agreement ultimately signed by the parties, used terminology suggesting that both parties envisaged entering into a lease with an option to purchase. (Against this, the Plaintiff argues that the Heads of Terms were superseded by the formal agreement which record the terms ultimately agreed by the parties. The Heads of Terms were also stipulated to be "Without Prejudice" and "Subject to contract/Contract Denied").

**Basis of Occupation**

**21.** It is undisputed that the Plaintiff and her family have been in residence on the Property since 1 December 2022. There is a dispute as to the basis for such occupation. The Heads of Terms signed on that date clearly envisaged a lease incorporating an option to purchase being drawn up and executed by the parties and the Plaintiff says that that was the basis on which she moved in and started to carry out repairs. Mr. Tarpey says that it was not agreed that the Defendant should take up residence on the Property until final documentation

had been agreed and executed and rent was being paid and that the Defendant was only offered limited access in the intervening period in order to carry out refurbishment and other works prior to commencement of the new agreement. The Defendant disputes this and it is neither necessary nor possible for the Court to resolve that issue on an interlocutory application, save to observe that - in the absence of testimony from the estate agent who actually engaged with the Defendant on the Plaintiff's behalf - the Plaintiff has failed to advance an arguable case on this point (the basis on which the Plaintiff moved in) for the purposes of the current application.

**22.** There was a dispute between the parties as to whether the Defendant enjoyed exclusive possession. The executed agreement expressly stipulated that full and exclusive occupation and possession remained with the Plaintiff subject only to the licensed rights granted under the agreement. However, that stipulation appears inconsistent with other provisions of the agreement, and the factual matrix which clearly suggested a mutual intention that the Defendant and her family should reside in the bungalow which formed part of the premises and operate the guesthouse. The Court considers that there is a strong argument that, notwithstanding the terms of the agreement and the occasional visits or inspections relied upon by the Plaintiff, the parties intended that the Defendant should enjoy exclusive possession and that she did in fact do so from approximately 1 December 2021.

### **Nondisclosure**

**23.** The Defendant criticised the Plaintiff's failure to exhibit key documentation including the Heads of Terms, the Plaintiff's advertisement which led to the agreement between the parties and communications (particularly text messages between the parties) which in her view evidenced an intention on the parties that there should be a lease rather than a licence. The Court appreciates why the Defendant considers that documentation such as the Heads of

Terms should have been exhibited by the grounding affidavit, however, the non-disclosure (if any) was not so egregious as to impact on the determination of this motion. The Plaintiff doubtless considered that such material was not relevant given that the relationship was documented in the signed agreement. It can point to authorities to support its position.

Furthermore, the application was not made *ex parte*. The Defendant had ample opportunity to exhibit the documentation and has duly done so, resolving that issue for present purposes.

There was never any likelihood that the Court would be misled.

### **Defendant's Replying Affidavit sworn 14 June 2023**

**24.** The Defendant's evidence, much of which was disputed by the Plaintiff, was that she responded to the advertisement of the Plaintiff's premises as a lease coupled with an option to buy the Property which constituted a bed and breakfast and a house. The opportunity appealed to her because she has young children (with special needs) and the Property offered her an attractive opportunity to work from home while being available to her family – she and her husband did not view the transaction as simply a business venture or licence.

**25.** She accepts that parts of property had been refurbished to a high standard but says that other parts, including the sewage, water and heating systems had not been used or maintained and had stopped working, requiring urgent work and investment on her part. She says that within the first month, the boiler oil supply and water system had stopped working and that testing by a plumber revealed that the water was poisonous and that there were rodents in the water. Problems with the electrics were also identified. Extensive work was required to maintain, repair or replace an underground oil pipe, boilers, a dishwasher and oven and the water system and its filters requiring substantial expenditure by the Defendant (with a dispute between the parties as to the Plaintiff's obligation to contribute to such costs).

**26.** The Defendant avers that an offer that she would purchase the Property for €910,000 was accepted and says that she signed the Heads of Terms on the basis of the representation from the Plaintiff's estate agent that it was "a document that covered us for the interim as the landlord had problems preparing the lease...". The Defendant says that the Plaintiff argued that the Defendant should pay some of the major repair costs on the basis that the landlord was not going to incur such expenditure when he was selling the Property to the Defendant. The Defendant claims to have incurred such expenditure on the basis of this "promise" from the landlord and to her detriment.

**27.** The Defendant acknowledges that on 21 February 2022, approximately two months after she had taken possession, she received the document which used the terms "licensee" and "licensor" for the first time. She notes that the covering e-mail referred to the document as a lease. She says that neither she nor her husband had much experience with legal documents and that they could not afford to engage a solicitor, so they simply signed the document. (The Plaintiff submitted that it is significant that the Defendant does not deny signing or agreeing to the document nor does she claim any lack of awareness of its terms).

**28.** The Defendant also explains how, in July 2022, she was asked to provide emergency accommodation for Ukrainian refugees. She was asked by the relevant Government Department to buy bunk beds to enable families to share rooms. She wanted to help as much as possible, offering up her children's bedrooms for what she understood to be a temporary arrangement for six months. She accommodated 36 Ukrainian refugees, the same number she could host as a bed and breakfast.

**29.** She explained the rationale for the introduction of stud walls and similar modifications, saying that they could be reversed and the Property could be returned to its original condition as and when required. She also says that the external structures were temporary, not affixed to outside of the Property and could easily be removed. She does not

accept that the Property is overloaded, stating that 12 bedrooms and 36 people were accommodated in accordance with government guidelines.

**30.** She says that they undertook electrical work in January 2023 (which was so extensive that it required moving the Ukrainians out) because she was told that the electrics were extremely unsafe and that work had been done by landlord with unregistered electricians. The Defendant replaced fire equipment and installed a new fire system costing €25,000. She asserts that the damage due to the subsequent fire would have been greater but for the fire safety system which the Defendant installed. She also states that following the fire, the Defendant undertook further work to both parts of property to meet safety standards, including the installation, testing and certification of 4 new electricity boards at a substantial cost to the Defendant. She states that the Property now has full safety certification (from Safe Electric) unlike when she took occupation.

**31.** She rejects the Plaintiff's claim that the works by her caused the fire. She claims that the fire was caused by the existing electrical work which in her view rendered the premises defective and unfit for habitation prior to her taking possession. No documentation was exhibited to substantiate the Defendant's averments as to the work carried out or its costs or as to the condition of the previous electrical and fire safety systems or as to the cause of the fire and only limited documentation was exhibited to confirm that the premises were currently fully certified from a fire safety perspective.

**32.** She says that the Plaintiff's photographs gave a misleading impression of the condition of the Property and exhibits alternative recent photographs which are set to give a more accurate reflection of the current condition of the Property.

### **Second Affidavit of Mr Tarpey**

**33.** Mr. Tarpey's Second Affidavit responded on behalf of the Plaintiff, reiterating averments in his first affidavit and asserting that the Plaintiff was never in exclusive

possession. He asserts that access was granted prior to final documents being agreed for purpose of refurbishment and that when he visited the Property on 25 December 2021, he was shocked to find that the Defendant was living there even though it had been agreed that she would not move into the Property until a licence was signed. He says that the Defendant was not there on that date and when he subsequently spoke to her she initially denied moving in in December before admitting that she had done so. She agreed to pay rent from the date she moved in and the parties agreed that the licence would commence from 1 December 2021. He reiterates the Plaintiff's claim that the Property had previously been refurbished to an extremely high standard. He disputes the claim that sewage, heating and water systems were not working properly and references works undertaken in 2015. He acknowledges an issue with a boiler at the end of December 2021 but characterises it as a minor issue capable of repair. Having lived on the Property for 9 years he also takes issue with the criticism of the original electrical work stating that most work had been carried out by Kevin Keogh, an ESB certified electrician (who also appears to have been used by the Defendant, rendering rather curious each party's criticism of the other's electrical contractors) and says that any issue regarding the Defendant's entitlement to reimbursement of costs from the landlord are irrelevant to the current application. In any event, he notes that the Defendant could have pursued matter but had not done so – her affidavit was the first reference to the matter since the original communications in respect of the issue.

**34.** Mr. Tarpey also argues that the Heads of Terms have no bearing on the parties' obligations – it was expressly headed "Subject to Contract/Contract Denied" and headed "Without Prejudice". Mr. Tarpey observes that the Plaintiff was not even a party to that document (although this observation seems extremely artificial since Mr Tarpey personally signed the document, even though it styled him as "Owner/Landlord"). He says that the discussions about sale of Property were inconclusive and ended without agreement having

been reached (and the Court notes that no documentary evidence of an agreement to buy the Property has been exhibited).

**35.** He notes that operating a guesthouse suited the Defendant and her family and that it was not simply a commercial transaction from her perspective but reiterates that from the Plaintiff's perspective the licence was a commercial contract permitting the operation of a business. The bungalow occupied by the Plaintiff's family is physically connected to the rest, rather than being a separate property.

**36.** Mr. Tarpey says that the express terms of the agreement override the reference in the emails and texts relied upon by the Defendant. He notes that a key email relied upon by the Plaintiff was from the estate agent rather than from the Plaintiff but the relevance of this distinction is unclear in circumstances in which the agent was representing the Plaintiff. However, Mr Tarpey notes that the email from the Plaintiff's solicitor to the (Plaintiff's) estate agent dated 19 April 2022 referenced the "proposed licence" and was very clear about the nature of the agreement. (While that was an internal email between the Plaintiff's representatives, the estate agent's email to the Defendant enclosing the agreement on 21 February 2022 expressly recommended that she should get her solicitor to review the agreement). Mr. Tarpey also noted that the Defendant did seek and secure an amendment to a provision of the agreement (relating to a prohibition on signage) which showed that she had no difficulty reading and understanding the agreement.

**37.** Mr. Tarpey rejects the Defendant's claim that she could not afford a solicitor, stating that she held herself out as an experienced businessperson and that she indicated to the estate agent that she could obtain advice from a friend who was a retired solicitor.

**38.** Mr. Tarpey described the Defendant's desire to house refugees as commendable but stated that it did not excuse her multiple breaches of the agreement; he noted that her

affidavit had answered some, but not all, of the breaches and that she had admitted to having carried out unauthorised modifications such as the stud wall. He also noted the absence of documentary evidence from the Defendant to support some of her assertions, such as County Council requirements which supposedly justified some of the changes. He also took issue with the validity of other proffered justifications and stated that in any event she still required advance approvals for modifications.

**39.** He states that the Plaintiff was not specifically complaining that the Property was overloaded but rather that the Defendant had clearly breached the permitted use. While noting that the Property was currently accommodating only 36 refugees, he states that the Plaintiff had more than 50 people at times and observes that there would be more stress on a guesthouse with smaller numbers of occupants. He reiterates the concern that fire safety certification had been invalidated due to her actions and criticises the Plaintiff's failure to exhibit documentary evidence of the current fire safety certification.

**40.** The Defendant's first supplemental affidavit generally rejected Mr. Tarpey's averments. She states that, contrary to Mr. Tarpey's averments, the Plaintiff and its representatives knew she was in occupation of the Property since 1 December 2021 and that she had been in exclusive possession since 1 December 2021, that there were no representatives of the Plaintiff staying on the property and the Defendant was responsible for repairs. She says that the agreement between the parties was that the Defendant's family would live in the bungalow and run the larger part as a B&B as advertised. She also notes that Mr. Tarpey was present on premises for several hours in first month he and witnessed the fact that her family living there, meeting her children.

**41.** The Defendant also clarifies the fact that they have never had more than 44 refugees on the Property. She states that with 19 bedrooms, 5 electric boards and immense water tanks this is perfectly comfortable and cannot be said to be overcrowded. She says that the



premises are perfectly safe following the fire as a result of the expenditure incurred. The ESB disconnected the electricity following the fire and would not reconnect unless until new electric safety certificates were completed and authorised by Safe Electric (the entity responsible for the regulation of the activities of all electrical contractors in the Republic of Ireland) and she exhibits certain fire certification documentation and an engineer's report.

**42.** The Defendant's second supplemental affidavit exhibits text messages between the parties referring to the signed agreement as a lease. (The Court notes that it appears from those messages that the Defendant did not sign the requested documents with regard to the purchase of the Property).

### **Engineers' Reports**

**43.** The Plaintiff's engineer's report describes the extent of the unauthorised modifications to the Property, criticises the quality of the work undertaken on behalf of the Defendant and suggests that the fire was caused by an electrical fault. The Plaintiff appears to rely on the report as establishing that the fire was caused by the Defendant's actions, but this is not clear from the report itself. The Defendant's engineer's report is to the opposite effect in many respects. Neither engineer swore an affidavit to exhibit their own report or to confirm the independence of their testimony and it is not clear that the reports confine themselves to expert evidence within the scope of the authors' expertise.

**44.** The Court places limited reliance on either report in respect of issues such as the cause of the fire. The production of an engineer's report as an exhibit to another witness's affidavit may be permissible in the context of an urgent interlocutory application or where the matters covered by the report are not seriously in issue. However, some matters covered in the two engineers' reports would need to be dealt with more forensically and

comprehensively before the Court could rely on them as authoritative and independent expert evidence on major issues. The Court did not consider that either report provided a sufficient basis to make any assumptions as to the cause of the fire. That issue could only be resolved at plenary hearing in any event, and the Court would not consider that either side had advanced an arguable case on that issue for the purpose of the current application.

45. That said, the reports could be relied upon for observational evidence as to the condition of the Property following the alterations and after the fire and there was no doubt that there were significant modifications to the Property. It also appears that both experts considered that parts of the premises were unauthorised developments as a result of the modifications and changes of use because they required but did not have planning permission. Some of these issues appeared relatively minor (the designation of a room as a prayer room apparently constituted a change of use requiring planning permission) whereas others were less so. The Plaintiff's engineer also stated that the modifications were unauthorised developments in the absence of a disability access certificate and an updated fire safety certificate.

### **Fire Safety**

46. The Defendant's engineer asserted that fire safety requirements had been met by the time of its inspection. The Defendant asserted that the Property did have up-to-date certification and that the ESB was satisfied that its requirements were being met but the Defendant exhibited minimal documentary evidence to substantiate its position on this important issue.

### **Adequacy of Damages & of Convenience**

47. The evidence does not establish significant arrears currently outstanding under the agreement. The Defendant has confirmed her commitment to pay all sums due promptly (including in respect of insurance) and to comply with other contractual

requirements such as provision of keyholder information. The Defendant has also undertaken to the Court that no further material modifications will be carried out without the Plaintiff's permission.

- 48.** In terms of the adequacy of damage and the balance of convenience, the Plaintiff's evidence was that the Defendant had already severely damaged the Property by carrying out unlawful works. There were serious concerns regarding the quality of those works and the

Plaintiff was concerned that the Defendant would continue to alter the Property's condition and layout, a serious breach of the Plaintiff's proprietary rights. The Plaintiff also noted that, as owner, it was legally responsible for the Property. Some of the Defendant's alterations required planning permission or updated fire safety certificates which had not been obtained, resulting in multiple unauthorised developments. The Defendant's conduct had exposed (and continued to expose) the Plaintiff (and Mr. Tarpey personally) to the risk of prosecution.

- 49.** The Plaintiff emphasised the following safety concerns:

- (a) The absence of fire safety certificates (although limited documentation has subsequently been exhibited);
- (b) The fire safety concerns raised by the Plaintiff's engineer (although the Defendant's engineer seems to consider that the fire safety concerns have now been addressed)
- (c) The fact that work was not done by professionals (the Defendant disputes this and maintains that it was the pre-existing wiring and electrical work on the Property which was substandard. In any event both parties used the same contractor);
- (d) The fact that there had already been a fire on the premises as a result of the Defendants works, suggesting a serious risk of another fire. (As

noted above the Defendant denies this and attributes the fire to the inadequacy of the pre-existing electrical work and the evidence was inconclusive in respect of that issue consisting of assertions and assumptions rather than the detailed forensic analysis which would be necessary to reach any safe assumption on such an important issue).

50. The Plaintiff argued that in the absence of up-to-date certification there was not only a risk of serious damage to the Property; the Defendant's actions posed a danger to the lives of residents of the Property. The Plaintiff contended that damages would not be an adequate remedy and the balance of convenience accordingly favoured the relief sought.
51. The Defendant argued that an undertaking as to damages would not adequately compensate her and her family for the loss of the accommodation and noted that she had offered an undertaking to the Plaintiff (which was characterised during submissions as an undertaking to the court) that no further works would be carried out pending resolution of this matter. She also noted the huge impact on her and her family which would be caused by the loss of income if they were forced to withdraw or cancel her ongoing State contract.

### **The Law**

52. The applicable legal principles are uncontroversial. The parties are agreed that it is neither necessary nor appropriate for the Court to adjudicate the merits on an injunction application and that the Plaintiff must show a strong case that is likely to succeed at trial. (*Maha Lingham v. Health Service Executive* [2006] 17 E.L.R. 137) The Court's assessment should determine whether, on the basis of the asserted facts for which credible evidence is presented, the Plaintiff has a strong arguable case (*AIB Plc v. Diamond* [2012] 3I.R. 549).

The Defendant also cited *Campus Oil Ltd v. Minister for Industry and Energy (No. 2)* [1983] IR 88 and Kirwan, *Injunctions: Law and Practice*, 3<sup>rd</sup> ed, (2020, Round Hall).

**53.** The Plaintiff acknowledged that, by virtue of section 14 of the Conveyancing Act 1881, if the agreement constituted a lease then the Plaintiff would not be able to exercise a right of re-entry or forfeiture until a forfeiture notice had been served, unless the breaches were so serious as to constitute repudiation. The present application primarily proceeded on the basis of the Plaintiff's contention that the agreement was a licence rather than a lease but the Plaintiff also cited *Hong Kong Fir Shipping Company v. Kawasaki* [1962] 2 Q.B.26, *Parol Ltd v. Friends First Pension Funds Ltd & Ors* [2010] IEHC 498 and *West Park Investments Ltd and Another v. Leisureworld Ltd and Another* [2012] IEHC 343 in support of the proposition that a sufficiently serious breach of a tenancy could entitle the other party to treat a lease as repudiated. However, while the applicability of the doctrine was affirmed in the two Irish cases referred to it is notable that the breach was not deemed sufficiently serious in either to justify termination.

**54.** In support of its contention that the agreement constituted a licence, the Plaintiff relied on the express terms of the executed document, noting the Courts' emphasis (in decisions such as *Irish Shell and B.P. Ltd. v. John Costello Limited* [1981] ILRM 66 ("*Irish Shell*") on examining the actual words of the agreement to ascertain the parties objective intentions. The Plaintiff also noted the parallels between the language in the executed agreement and provisions which had been identified as signifying that particular agreements were licences rather than leases in cases such as *Governors of the National Maternity Hospital v. McGouran* [1994] 1 ILRM 521 ("*McGouran*") and *Esso Ireland Ltd. V. Nine One One Retail Limited* [2013] IEHC 514 ("*Esso Ireland*"). However, those particular cases concerned situations which were more typically associated with licences rather than leases, such as a licence to operate a café/hairdresser within a hospital in *McGouran* rather than the

present case. Furthermore, as appears from the oft cited *dicta* of Mr. Justice Griffin at p. 13  
14 of *Irish Shell*:

“Although a document may be described as a licence it does not necessarily follow that, merely on that account, it is to be regarded as amounting only to a licence in law. Whether the transaction is a licence or a tenancy “does not depend on the label which is put on it. It depends on the nature of the transaction itself; see *Addiscombe Garden Estates Ltd v. Crabbe* [1958] 1 QB 513). Broadly speaking we have to see whether it is a personal privilege given to a person (in which case it is a licence), or whether it grants an interest in land (in which case it is a tenancy). At one time it used to be thought that exclusive possession was a decisive factor. But that is not so. It depends on broader considerations altogether. Primarily on whether it is personal in its nature or not” - per Lord Denning, MR in *Shell-Mex v. Manchester Garages* [1971] 1 WLR 612 at p.615, One must look at the transaction as a whole and at any indication that one finds in the terms of the contract between the two parties to find whether in fact it is intended to create a relationship of landlord and tenant or that of licensor and licensee – *ibid* per Buckley L.J. at p.618; *Gatien Motor Co v. Continental Oil* 1979 IR 406”.

**55.** Significantly, the majority judgment concluded that, when examining the transaction as a whole and notwithstanding language in the agreement to the contrary (using the terminology of a licence and eschewing the term “rent”) the agreement was intended to constitute a lease rather than a licence. While the Court is satisfied that the Plaintiff has made out a strong case to the effect that the agreement was a licence, the Defendant would certainly have a basis to revisit that issue at trial. A final determination of this issue at trial would require the sort of detailed analysis contained, for example, at pages 16 – 18 of the *Irish Shell* decision.

**56.** Likewise, although in *Esso Ireland*, Mr. Justice McGovern noted a provision disavowing the existence of a landlord tenant relationship he also observed that;

“while that does not, of course, establish that there was no landlord and tenant relationship, the evidence in this case does not establish that the attributes of the tenancy agreement existed.

The court should be slow to look behind the clear terms negotiated by the parties at arms’ length and in circumstances where each was legally represented.”

**57.** Accordingly, those authorities show that the language of the agreements is not necessarily determinative, but they also emphasise that the court should be slow to look behind the clear terms negotiated by the parties particularly if they were both legally represented (which was not the position in this case). The Plaintiff relied on *Kenny Homes & Co v. Leonard* [1998] 6 JIC 1802 (“*Kenny Homes*”) as authority for the proposition that the Defendant was fixed with notice of and bound by the terms of the document which she had signed and also cited *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 W. L.R. 896 and *The Law Society of Ireland v. The Motor Insurers’ Bureau of Ireland* [2017] IESC 31 as authority for the proposition that evidence of pre-contractual negotiation is generally not admissible to determine the intention of parties to an agreement. *Wogan’s (Drogheda) Ltd and Anor v. Hill Samuel (Ireland) Ltd* [1993] 1 IR 157 was cited as authority for the proposition that it is generally not legitimate to look to the parties’ conduct after an agreement was entered into for the purposes of interpreting any such agreement. **58.** The Defendant relied upon the refusal of an interlocutory injunction in *Dublin Corporation v. Burke* [2001] IESC 81. In that case Geoghegan J. was “extremely doubtful” that there would ever be a *prima facie* case for an injunction where there was evidence of a tenancy – the injunction was refused on the basis that “a solid property right might effectively be lost by the grant of an injunction.”

59. Likewise in *Barnaton Investments Ltd v. O'Leary & Anor* [2004] IEHC 155, Peart J. refused an interlocutory judgment which would have required a Defendant to vacate a business premises because damages would be an adequate remedy for the Plaintiff/landlord and the balance of convenience favoured allowing the Defendant to continue to trade pending trial.

60. The Defendant relied on Wylie, *Irish Landlord and Tenant Law*, 4th ed., (2022, Bloomsbury) at 2.38 in respect of the concept of exclusive possession:

“One of the problems is that the concept of ‘possession’ in this context, as in other contexts, tends to be an elusive one. It is clear that a person may be entitled to occupation of some form in relation to land that does not amount in law to possession, i.e. the legal possession of the land remains with the owner who grants the occupational rights and it is he, not the occupier, who can maintain an action for trespass or nuisance in the event of interference by a third party. Such is the traditional view of the covenants and easement arrangements so common in Ireland. It is also clear that many ‘licence’ arrangements have this characteristic of conferring occupation rights rather than possession. Furthermore, the occupation in question may be exclusive in the sense that the owner of the land has agreed that sole occupation is to be given to the occupier, but again this again does not necessarily amount to possession, still less to exclusive possession. Thus lodgers, hotel residents, servants and the like, whatever their contractual rights as against the land owner, do not have tenancies. What appears to be missing in cases such as these is right of the occupier ‘to call the place their own’ - the land occupied remains under the ‘control’ of the grantor of the occupational rights. A tenant, on the other hand, has exclusive possession in the sense that he is in control of the demised premises and can keep the landlord out so long as the tenancy lasts.”

### **Conclusion**

62. The evidence shows that this was not a residential tenancy since the Property was primarily used as a business. Although the Plaintiff's case was primarily advanced on the basis the agreement was a licence, the Plaintiff submitted in the alternative that if the agreement was deemed to have been a lease the Defendant's breaches were so egregious as to constitute repudiation. While this is certainly arguable, there are significant factual differences between the parties about the impact of the modifications. The most recent evidence from the Defendant suggests a significantly less deleterious impact than the picture presented by the Plaintiff's affidavits. Given the statutory protection afforded to leases, a



careful assessment of the totality of the evidence would be required before a Court could conclude that a tenancy had been repudiated. In view of the conflicts of evidence in this case, the Court is not in a position to conclude that the Plaintiff has established a strong case for repudiation in the event that the agreement was a tenancy rather than a licence.

**63.** The Plaintiff's burden is significantly reduced if the agreement is deemed a licence, by virtue of the lack of statutory protection afforded to the Defendant in that scenario, with the issues essentially depending on a more binary application of the contractual terms. In assessing whether there was a tenancy the first issue is whether the Defendant enjoyed exclusive possession. Notwithstanding the Plaintiff's submissions to the contrary, the Court considers that the evidence tends to suggest that the Defendant did enjoy, and was intended to enjoy, exclusive possession of the Property – it is difficult to see how the agreement between the parties could have operated on any other basis. While the Plaintiff exercised rights of inspection there is a clear conflict of evidence in relation to the circumstances surrounding the exercise of those rights and the position seems analogous to *Irish Shell* (where there was exclusive possession and a tenancy notwithstanding certain inspection rights). While both parties' position remains arguable, on the basis of the affidavits it appears that it was the Defendant who had advanced the strongest case in respect of exclusive possession at present.

**64.** In terms of the central issue, whether the agreement constituted a licence or a lease, the Defendant essentially relied on her communications with the Plaintiff's representatives (including the estate agent) both before and after the Defendant entered into occupation. Those communications were generally consistent with a mutual intention to enter into a tenancy, coupled with at least the possibility of an option to purchase. The Defendant's claim to have moved into the Property and commenced repair works on that basis is plausible. Most of the communications support that conclusion and the affidavits do not suggest that the

Plaintiff ever consciously determined to offer a licence rather than a tenancy before the Defendant occupied the Property.

**65.** However, the fundamental difficulty for the Defendant is that these negotiations were expressly subject to contract. The Heads of Terms anticipated that the parties would formalise their agreement in a document and made clear that any contract was denied until such a document was agreed and executed.

**66.** The Court must look to the terms of the formal executed documentation which both parties accepted as reflecting their ultimate agreement. Nor can it normally look to subsequent correspondence to interpret the parties agreement.

**67.** In reality, the fact that the final executed document was couched as a licence rather than a tenancy may well reflect the shrewdness of the Plaintiff's solicitor rather than a deliberate decision by the Plaintiff. However, the parties at all times intended that their commitments to each other would be documented in a formal agreement. The Defendant could have rejected the proffered draft. She did not do so. She signed it subject to a small modification. That modification is only significant insofar as it shows that the Defendant read the agreement, appreciated its binding nature and generally accepted it.

**68.** A ritualistic provision in the agreement recorded the Defendant's acknowledgment that she had had the opportunity to obtain independent legal advice. More significantly, the estate agent expressly recommended to the Defendant that she should do so. The court places no great weight on the reference to possible access to legal advice from a retired lawyer - it is unclear whether or when the individual ever practised in this jurisdiction, or in what capacity, or the relevance of their expertise. In any case a casual discussion with a former lawyer could not be equated with the independent professional advice which a party would be well advised to obtain before entering a major legal commitment.

**69.** That said, the Defendant elected to sign the agreement without obtaining independent legal advice. She was a businessperson entering a significant legal agreement. If she chose to proceed, she cannot complain of the consequences. She is bound by the agreement. In those circumstances, the communications and negotiations leading up to the formal agreement must generally be regarded as inadmissible. Once both parties reduce their agreement to a formal written agreement defining their legal relationship, the circumstances in which the court may look beyond that document are limited. Any other approach could undermine the agreement which the parties had reached and documented and give rise to the considerable risk that the parties would reinterpret their original intentions with the benefit of hindsight.

**70.** For completeness it should be noted that while there were certainly discussions about a possible sale, the evidence falls short of providing a basis to conclude that any legally binding agreement was ever reached, or even that the Defendant had received the benefit of a binding option to purchase.

**71.** Based on the terms of the executed agreement, and disregarding the advertising and communications, the Plaintiff has made out a strong case that the agreement is a licence not a tenancy and that the Defendant has breached its terms, thereby terminating the licence or giving rise to a right of re-entry and termination which the Plaintiff has sought to exercise. If the agreement was a tenancy then, in view of the conflicting testimony as to the current state of the Property and on other issues, the Court would not be satisfied that the Plaintiff had made out a strong case that the agreement had been repudiated.

**72.** Of course, this is not a final determination - the merits can only be conclusively determined at trial. The evidence adduced by the Defendant does suggest possible defences to the central tenets of the Plaintiff's claim. The case has not yet been fully pleaded and there could be further evidence at trial. The current evidence could also be tested on cross-examination. Although the Plaintiff's position on the licence currently appears stronger

(by virtue of the categorical terms of the signed agreement), there are tenable counter-arguments for the existence of a tenancy (which would give the Defendant greater rights and make it more difficult for the Plaintiff to terminate the relationship). However, even if there was a tenancy, the Defendant might still be deemed to be in breach of its terms and may even be found to have repudiated it.

**73.** The Defendant's decision to proceed with wide ranging modifications to the Property without permission appears unwise. Irrespective of whether the agreement was a licence or a tenancy, she appears to have disregarded its terms and to have proceeded without sufficient attention to the Plaintiff's rights or her obligations to the Plaintiff or under planning law or other applicable regulations. While she was understandably concerned to offer accommodation to the refugees in a crisis situation, this did not entitle her to ignore her contractual or regulatory obligations.

**74.** Accordingly, the Plaintiff has presented a strong (but not necessarily unassailable) case that the agreement was a licence and that the Defendant has breached its terms in a manner which either terminated the agreement or entitled the Plaintiff to re-enter or terminate.

**75.** In weighing the appropriateness of immediate injunctive relief, the Court must consider the adequacy of damages and the balance of convenience.

**76.** While the legal consequences of past actions are matters for trial, it seems to the Court that the key issues which might require the Court's immediate intervention arise from the concerns raised concerning planning and other regulatory issues, the most important being fire safety. The Plaintiff's affidavits raised serious concerns. It would have been helpful if these had been more comprehensively addressed by the Defendant, with more extensive documentation exhibited. That said, the Defendant's engineer's report, which is more recent than the Plaintiff's, appears satisfied with the standard of the electrical repairs and also

references the steps taken by the Defendant in terms of fire safety. The work appears to have been undertaken by a contractor trusted by both sides. The Defendant has also exhibited some additional evidence in this regard and notes that the relevant regulator, the ESB, was willing to reconnect the premises on the basis of the certification provided.

**77.** In the circumstances, it would be a draconian step at this stage to require the Defendant and her family to leave the premises (which would also presumably result in the immediate eviction of the 36 refugees currently staying on the Property). The Plaintiff noted that any such order could be made subject to a stay, however if the net effect of an order subject to a stay may not be very different from directions designed to secure an early trial, as proposed by the Defendant.

**78.** The Court invited the Defendant to proffer undertakings in respect of key concerns raised by the Plaintiff, including as to fire safety and planning, and noted that in the absence of such undertakings (or in the event of a breach of such undertakings or of further unauthorised modifications or similar issues) it would be disposed to grant the orders sought by the Plaintiff. The parties ultimately agreed appropriate terms of a comprehensive set of undertakings designed to ensure compliance with the Defendant's various obligations under the agreement (with the Court determining one aspect of the terms of the proposed undertakings) and also agreed directions which were approved by the Court with a view to progressing the proceedings rapidly to discovery.

**79.** For completeness it should be noted that the Defendant's current contract for the accommodation of refugees expires in August. Unless the Plaintiff agrees otherwise, the Defendant will either need to let that agreement expire or ensure that any renewal is subject to the outcome of the current litigation.

**80.** The Court granted both parties liberty to apply, making clear that it would be open to reassessing the balance of convenience in the event of further material issues arising which

justified such reassessment and also making clear that it would be open to the Defendant to apply to the Court if, for example, issues beyond its control arose in respect of its compliance with its undertakings. The Court would have no hesitation in revisiting the issue of balance of convenience if required, and particularly if more concrete evidence was to emerge of an immediate risk to the safety of any occupants of the Property. However, the Court would expect the parties and their advisors to engage constructively to seek to resolve such issues themselves in the first instance.