Neutral Citation No. [2015] NICh 2 | *Ref:* **DEE9448**

Judgment: approved by the Court for handing down | *Delivered:* **08/01/2015**
*(subject to editorial corrections)**

2014/111601

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between:

LUIGI SAVARESE

Plaintiff;

-and-

FRASER HOUSES (NI) LTD

Defendant.

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DEENY J

[1] This application by the plaintiff raises an interesting problem in the exercise of the judicial discretion to grant an interlocutory injunction when the essential facts are not in dispute. It arises in the following way.

[2] Luigi Savarese is the joint tenant of premises at Unit 1B, Ashbury Shopping Centre, Ashbury Avenue, Bangor, Co Down ("the Premises") on foot of a lease of 22 October 2009 between the defendant landlord Fraser Houses (NI) Ltd of the one part and Mr Savarese and one Antonino Celentano of the other part. The plaintiff believes that Mr Celentano left Northern Ireland in or about 2010 leaving the plaintiff to conduct, as his sole livelihood, a takeaway pizza establishment known as "Mama Mia Bangor" on the premises. The lease was for 10 years and the rent was £11,500 per annum.

[3] The plaintiff fell behind in the payment of rent. On 31 March 2014 Fraser Houses (NI) Ltd issued a Writ of Summons in an action against both its tenants, 2014 No: 34389, for forfeiture of the lease on foot of Clause 22.2 thereof. The Statement of Claim endorsed on the Writ of Summons alleges that rent, service and insurance charges payable under the lease were then in arrears in the sum of £30,854.95. Messrs Wilson Nesbitt entered an appearance on behalf of Mr Saverese on 11 April 2014. The matter, in the absence it would appear of any Defence on the part of the

tenants, proceeded to a hearing before Master Wells on 10 July 2014. The first defendant was present but did not have a solicitor with him. He and his fellow defendant were ordered to deliver possession of the premises to Fraser Houses (NI) Ltd within four months of service of the order. They were also ordered to pay arrears of rent in the sum of £31,079.74 and costs to be taxed in default of agreement. There was a little delay in filing the order. It was common case between the parties at the hearings before me that the date on which Mr Savarese, as now the sole occupying tenant of the premises, was obliged to deliver possession is 5 December 2014, i.e. four months after the date on which it is believed he was served with the Order of the Court. This delay was to allow Mr Saverese to re-mortgage property he owned to re-pay the arrears. In the event only one payment of £2,000 was forthcoming from him to his landlord after the Order although the court was told that he had equity in his dwelling-house.

[4] No appeal was lodged from this Order of the Master. No application to stay the Order for Possession was lodged until 15 November 2014, in Fraser Houses (N.I.) Ltd v Saverese and Celantano (2014/34389), after an adjourned ex parte hearing before this court in relation to the injunction. There is no offer before the court to pay rent and arrears. There is no suggestion that the Order of the Master was incorrectly granted. An application for a stay might have been joined to the application for an injunction in the proceedings with which I am now dealing. It appears however a futile step at this stage and as I can see no ground to grant the application I hereby refuse it.

[5] In his affidavit of 5 November Mr Savarese avers that on numerous occasions on unknown dates between 10 July and 17 October 2014 he attended the office of the landlord's agent, Neil Workman of Lambert Smith Hampton, in an attempt to come to arrangements regarding reduction in the rent and payment of any arrears within a reasonable time. He contends that Mr Workman refused that. I shall return to that in a moment.

[6] On 16 October 2014 Master Kelly made a winding up order against Luigi Savarese Limited under the provisions of the Insolvency (Northern Ireland) Order 1989 on the petition of the Department of Finance and Personnel. It seems this was on foot of persistent non-payment of rates on these premises. Following that the Insolvency Service attended the following day at the premises and served a notice on Mr Savarese. On 20 October the Insolvency Service agent returned and represented to Mr Savarese that he must cease trading immediately and remove his property. The locks on the premises were then changed. Mr Savarese was not given a new key. The following day he contacted his solicitor who in turn contacted the Insolvency Service. No doubt it was pointed out that the lease was not one enjoyed by Luigi Savarese Limited but by Mr Savarese and his co-tenant in a personal capacity. The Insolvency Service then promptly returned Mr Savarese's property to him and gave him a new set of keys. However, when Mr Savarese attempted to use these he found that the new locks to the property "had been drilled making entry impossible. I suspect that this was done by the agent" i.e. the landlord's agent.

There was then a changing of locks by both the parties before this court seeking to exclude each other which culminated in the plaintiff arriving at his premises on 30 October and being confronted by a security guard who refused to allow him entry, warned him that any attempt to gain entry would be, he said, a criminal offence and that the electricity inside had been switched off. There was then an exchange of correspondence.

[7] On 5 November 2014 the plaintiff issued a Writ of Summons and applied to the court on foot of an ex parte docket supported by his affidavit for an ex parte injunction requiring the landlord to surrender possession back to the plaintiff.

[8] I was not happy on that occasion, some days after the last physical action on the ground, that the matter was of sufficient urgency to justify the omission to serve the defendant to these proceedings. I adjourned the matter until 11 November with the direction that a Notice of Motion with the other papers should be served forthwith on the defendant company thus allowing two clear days before a hearing on 11 November. With commendable alacrity the defendant's solicitors and counsel appeared before the court with an affidavit of the day from the agent, Mr Neil Workman. Mr Paul Sullivan appeared for the plaintiff in this matter and Mr Michael McCracken for the defendant and the court is obliged to both counsel for their helpful submissions.

[9] Mr Workman put a different complexion on Mr Savarese's complaint pointing out that rent had become problematic from the beginning of 2011 and that during the tenancy of the plaintiff his office had made a total of 61 telephone calls and sent some 42 reminder letters to the plaintiff. Various proposals regarding re-mortgaging the plaintiff's home and selling an expensive motorcycle were made by him but no payments were forthcoming, save for a single payment on 4 August 2014 of £2,000. This fell short of the arrears owing which now amount to £32,367.33 i.e. almost three years rent on the premises.

[10] The contending submissions of the party are as follows, in summary. Mr Sullivan contends that this is not a case for the application of the well-known guidelines for interlocutory injunctions in the judgment of Lord Diplock in American Cyanamid Co v Ethicon Ltd [1975] AC 396. He says it is clear that the landlord's retaking of possession in advance of the date authorised by the court is unlawful. He submits that his client is entitled, therefore, as of right to an injunction re-instating him in the premises, regardless of whether an alternative remedy in damages might or might not be available. He submits that the court should vary the Order of the Master by adding to the date of 5 December a period of time equivalent to the period that Mr Savarese has been excluded from his premises as a result of the unlawful acts of the defendant landlord. He relied on Bean on Injunctions, 1st Ed., paragraph 3.18, to the effect that an interim injunction should generally be granted where there is no arguable defence.

[11] Mr McCracken was not in a position to submit that the landlord's agent's actions were lawful although he stressed that they were taken because of genuine concern that the landlord's interests were being prejudiced in the context of the non-payment of the rates by the plaintiff's company and the winding up of the related company.

[12] He sought to rely on the decisions of the Supreme Court in Coventry and others v Lawrence and others [2014] UKSC 13 and 46. He also relied on a helpful article by Dr Heather Conway: "Damages in lieu of an injunction – a shift in emphasis?" The Coventry decision is in the field of nuisance and perhaps most easily summarised for these purposes by the observations of Lord Carnwath at [239] of the first judgment of the court.

> "… I agree with Lord Neuberger and the rest of the court that the opportunity should be taken to signal a move away from the strict criteria derived from Shelfer [1895] 1 Ch 287. This is particularly relevant to two cases where an injunction would have serious consequences for third parties, such as employees of the defendant's business, or, in this case, members of the public using or enjoying the stadium. In that respect, in my view, the Court of Appeal in Watson [2009] 3 All ER 249 was wrong to hold that the judge had no power to make the order he did, and to limit public interest considerations to cases where the damage to the claimant is 'minimal'."

While paying due regard to this high authority it does seem to me that it is of limited application to this factual situation.

[13] Mr McCracken relied on the long period of time over which Mr Savarese had been in default of paying his rent. He stressed the amount of this, amounting to almost three years rent. He submitted it would be wrong to force the landlord to give up possession now when Mr Savarese was obliged to leave in any event on 5 December. He relied on the recent judgment of this court in Coutts & Company and SSE Renewables Ltd v Collins and Others [2014] NICh 24 where the court stressed that both at common law and by statute the court was left with an overall discretion. The statutory provision is Section 91 of the Judicature (Northern Ireland) Act 1978 empowering the court to grant a mandatory or other injunction "in any case where it appears to the court to be just and convenient to do so for the purpose of any proceeding before it". I may be forgiven for pointing out that that point was stressed by me in McLaughlin & Harvey Ltd v DFP [2008] NIQB 122 at [6] anticipating to some degree the remarks of Lord Hoffman in National Commercial Bank Ltd v Olint Corporation Ltd [2009] 1 WR 1405 PC. Mr McCracken sought permission to put in a further affidavit for which I granted leave.

[14] This affidavit of 12 November 2014 pointed out that Mr Savarese had had the benefit of the advice of two other firms of solicitors before he came to his present solicitors Messrs McLaughlin & Company. He was able to adduce evidence that Mr Savarese was the joint owner with his wife of a dwelling house at Bangor with an estimated value of about £140,000 and subject to a mortgage of £50,000. I surmise that this was intended to show that the plaintiff could have re-mortgaged his property to pay the money he owed to his landlord. It does also show, of course, that he may still be a mark, at least to some degree, subject to the interests of his wife, for the arrears of rent. Counsel for the landlord submitted, in effect, that it would be unfair on the landlord to put the man back into possession when he was unlikely to pay any rent for the period he was back in possession and when he owed so much already.

Conclusions

[15] The magisterial judgment of Lord Diplock in American Cyanamid Company v Ethicon Limited [1975] 1 All ER 504 relates to the granting of an interlocutory injunction "to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right … on contested facts …" : page 509A, my underlining. "In those cases where the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the High Court at the hearing of the application when an interlocutory injunction is incomplete". Again per Lord Diplock, page 509E.

[16] The same judge addressed the situation where the essential facts were not in dispute in Manchester Corporation v Connolly and Others [1970] 1 All ER 961 at 963G he said as follows:

> "If there were any arguable defence to the respondent's claim it would be necessary to consider the balance of convenience between the hazard to the health of the public which was involved in the appellants' remaining there and the hardship to the appellants involved if they were compelled to move. But if there was no possible defence to the action I agree with the Vice Chancellor that it was a misuse of the process of the court to withhold from the respondents a remedy to which they were clearly entitled while the normal stages preparatory to the trial of a genuinely contested action were being gone through with the inevitable delay. Since delay in eviction from the site was what was really sought by the appellants, to do so would have been to give the two wrongdoers the fruit of their wrongdoing, although judgment in the action would inevitably have been given against them."

[17] In the present case it clearly was unlawful for the landlord's agent, following the equally unlawful but similarly mistaken intervention by the Insolvency Service, to deprive the plaintiff of possession of the premises before the due date of 5 December. The court must not approbate parties taking the law on to their own hands and disregarding the orders of the court, albeit in a context that was not contumacious but, perhaps, understandable. Against that the granting of an order simpliciter requiring possession to be returned forthwith to Mr Savarese is likely to work injustice on the defendant landlord which has already been deprived of three years' rent and service charges. Possession simpliciter may and almost certainly would allow the plaintiff a further period of occupation during which he will again unlawfully fail to pay rent. Furthermore he may attempt to use that repossession of the premises to delay further the landlord's right, established by law in this case, to forfeit the lease and re-enter on 5 December, or a date shortly thereafter.

[18] I bear in mind the dictum of Lord Hoffman in National Commercial Bank Jamaica Limited v Olint Corportion Limited [2009] 1 WLR 1405 to the effect that in the context of interlocutory injunctions the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. Applying it to this factual situation it may be that the prejudice to the landlord in allowing repossession simpliciter would not be irremediable. He may be able to, having recovered possession, pursue Mr Savarese for the loss of rent and charges. But any proceedings involving the enforcement of the order of the court on a dwelling house which is partly owned by a spouse are likely to be time consuming and expensive and may prove fruitless ultimately.

[19] I therefore return to the exercise of the court's discretion as illustrated in cases such as Coutts and Company op. cit. and McLaughlin and Harvey Ltd v DFP op. cit. The court seeks to achieve an outcome which is just and convenient. In the instant case I therefore concluded and ordered on 18 November 2014 that the respondent landlord do return possession of the property in question to the plaintiff tenant forthwith, with any property of the plaintiff which had been moved therefrom. I further ordered that Mr Savarese was entitled to remain in possession of the property to a date at least 22 days beyond the date pursuant to the order of the Master of 5 December to make up for the time in which he had lost possession. The parties then agreed that possession would be handed back on 29 December.

[20] However, that much of the order in favour of the plaintiff was subject to his undertaking that he would deliver up the premises, on Monday 29 December 2014. Furthermore as he would now be able to trade again from the premises and was therefore liable for the rent of the same he further undertook, without prejudice to any wider liability to the landlord, to pay to the respondent the sum of £1,000 by way of part payment towards arrears of rent on or before Thursday 18 December 2014, representing approximately the rent he would owe for the period of re-possession. That date was chosen by me to allow him time to accumulate that money from the trading of the premises in case he was not otherwise possessed of it.

The court, therefore, arrived at an outcome which upheld the rule of law, it might be said, or more narrowly, that landlords must not take possession otherwise in accordance with law but did so without injustice to either party on the particular facts of this case. I undertook to provide the reasons for my decision which I now do.