[2020] IEHC 52

THE HIGH COURT

[2012 No. 843 P]

BETWEEN

RICHARD WALSH, MORGAN O'BRIEN, DECLAN FIELD AND DAVID BRADY

PLAINTIFFS

AND

JOE KEARNEY

DEFENDANT

JUDGMENT of Mr. Justice Quinn delivered on the 11th day of February, 2020

1. The plaintiffs are businessmen who own a building at No. 56 MacCurtain Street, Cork, having acquired the long leasehold interest on 19th April 2005. By a lease dated 5th June, 2006, they leased the ground floor of the building to the defendant for a term of 25 years from 1st June, 2005.

2. In reliance on arrears of rent, the plaintiffs effected a peaceable re-entry of the ground floor on 2nd December, 2009. The plaintiffs claim that the condition of the building at the time when they re-entered it was such as to necessitate extensive repair works to be undertaken. They claim also that the condition of the premises was caused by alterations made by the defendant to the ground floor without their prior consent. They claim damages in respect of the costs of repair incurred by them and other costs including loss of rental income until the building was fit to be re-let in July, 2010.

3. The defendant claims that the plaintiffs had consented to the works he undertook and denies that his works had the effect claimed by the plaintiffs or were the cause of the cost which the plaintiffs incurred in their remedial works after re-entry. He counterclaims for the value of chattels which he claims were his property and were on the premises at the time of the re-entry and which the plaintiffs wrongfully failed to return to him. He also counterclaimed for the costs of the works undertaken by him but that element of the counterclaim was not pursued at the trial.

Chronology

4. On 19th April, 2005 the plaintiffs purchased the long leasehold interest in the building for €1.5million. One of the plaintiffs, David Brady had previously carried on business from a portion of the premises.

5. When the plaintiffs purchased the building the ground floor had been trading as a bar known as the Agora Bar.

6. The first floor had been occupied as office space and the second floor as an apartment. The first and second floors have been the subject of refurbishment works from time to time, but the issues giving rise to these proceedings relate to works undertaken at the ground floor level.

7. The plaintiffs granted possession of the premises to the defendant as of 1st June, 2005. They also agreed to transfer to him the Ordinary Seven Day Publicans On Licence attached to the ground floor.

8. The plaintiffs agreed that the defendant could convert the Agora Bar into an off licence/wine shop which he was planning to open, to be known as the Naked Grape.

The Lease

9. The lease of the premises was executed on 5th June, 2006. The term was 25 years from 1st June, 2005. The initial yearly rent was €40,000, increasing by €5,000 per annum for each of the first five years, and rent reviews every five years thereafter.

10. In many respects the terms of the lease were standard in that it included covenants for the payment of rent, insurance premiums, to discharge outgoings and to comply with relevant enactments and fire requirements. It included covenants concerning maintenance and repair of the building, prohibiting alterations without consent, prohibiting change of use, assignment or underletting without prior consent, prohibiting obstruction of doorways windows or other openings, covenants requiring compliance with planning acts and covenants indemnifying the landlord in respect of any claims arising from the state of repair or condition of the building.

Tenant's covenants

11. A number of the clauses in the lease are of central importance to the determination of these proceedings.

12. Clause 3.3 concerns "*enactments*" and provides as follows:

> *"At all times during the said term to observe and comply in all respects with the provisions and requirements of any and every enactment for the time being in force or any orders or regulation thereunder for the time being in force or any orders or regulation thereunder for the time being in force ..."*

13. Clause 3.4 provided as follows:

> *"At all times during the said term to comply with all the recommendations or requirements or the appropriate Authority whether notified or directed to the Landlord or the Tenant in relation to fire precautions and to indemnify the landlord against any costs or expenses in complying with any such requirement or recommendation ..."*

14. Clause 3.6 provided as follows:

> *"To keep clean and tidy and to repair and keep in good order, repair and condition from time to time and at all times during the term hereby created the interior of the demised premises …"*

15. Clause 3.12 concerned alterations and modifications and provided as follows: -

> *"Not to erect or suffer to be erected any buildings or erections on the demised premises save as here in before provided nor without the previous consent in writing of the Landlord to cut alter maim or injure or permit to be cut altered maimed or injured any of the ceilings roofs walls floors or timbers of the demised*

premises or alter or change or permit to be altered or changed the plan elevation or architectural decorations thereof or alter any of the Landlord's fixtures fittings and appliances in and about the demised premises or make or permit to be made any external alterations or additions whatsoever."

16. Clause 3.18 provides as follows:

> *"Not to use or permit the demised premises or any part thereof to be used for any purpose other than as an Off Licence and Shop and for no other purpose save with the Landlord's written consent which consent shall not be unreasonably refused."*

17. Clause 3.20 provides as follows:

> *"Not to assign transfer or underlet or part with the possession or occupation of the demised premised or any part thereof or suffer any person to occupy the demised premises or any part thereof as a licensee but so that notwithstanding the foregoing the landlord shall not unreasonably withhold its consent to an assignment of the entire or underletting of the entire or part of the demised premises subject to the following provisions as such then as may be appropriate [namely requirements regarding information and costs and appropriate covenants of the part of an under lessee]."*

18. Clause 3.30 contained provisions regarding the "yielding up" obligations of the tenant at expiry of the term as follows:

> *"At the expiration or sooner determination of the said term quietly to yield up the demised premises together with all the landlords fixtures and all other fixtures and fastenings that now or which during the said term shall be affixed or fastened thereto (except Tenant's or trade fixtures), in such good and substantial repair and condition as shall be in accordance with the covenants on the part of the tenant herein contained …"*

19. Clause 5 provided that in the event of rent becoming overdue for fourteen days or in the event of breaches of covenant on the tenant's part or certain other events then it would be lawful for the landlord to enter the premises and repossess same without prejudice to any right of action or remedy in respect of any antecedent breach.

The 2005 Works

20. After taking possession in 2005 the defendant undertook the works necessary to convert the Agora Bar to an off licence known as the Naked Grape from which he then traded.

21. The plaintiffs consented to these works and no complaint is made relating to them in the proceedings. The defendant sought in the proceedings to suggest that the problems encountered by the plaintiffs were attributable to the condition of the building pre-June 2005, although he did not before these proceedings make any complaint about the condition of the building as of the time he was granted possession.

The 2007 Works

22. The plaintiffs say that in early 2007 they learned that the defendant had undertaken further works to the ground floor. The plaintiffs' evidence was that the first they became aware of the works when their attention was drawn to them by the owner of another business on the street who had seen a skip outside the premises.

23. The effect of the works was to convert the premises back into a bar. It is said that this included a reconfiguration of the layout of the ground floor including the removal of a kitchen at the rear to make space for a seating and music area, the removal of fire exit corridors and the relocation of toilet areas. The premises was then reopened as a bar known as "The Flux Bar". I shall return later to the details of these works.

24. In early 2008, a firm of architects whose offices were on the first floor complained that the floor had subsided. The true extent of the settlement is considered later but it caused the plaintiffs to investigate the matter and engage an engineer to survey the building and identify remedial works required.

25. On 23 November, 2009, the plaintiffs' engineer, Mr. Nugent, inspected the premises and identified the settlement of the flooring complained of by the architects.

26. On 2 December, 2009, the plaintiffs effected a peaceable re-entry. They found the ground floor abandoned, and the electricity discontinued, the account having been unpaid, and found unopened letters on the floor. Rates and water rates were also unpaid.

Circuit Court proceedings

27. By October 2009, the defendant had fallen in to rental arrears and on 20 October, 2009, the plaintiff commenced ejectment proceedings in the Circuit Court. In these proceedings, the plaintiffs claimed that the defendant failed to observe the covenants and conditions in the lease in the following particular respects: -

    (1) Failed to comply with the requirements of relevant enactments and to do such works as may be required for such purpose.

    (2) Failed to pay outgoings and rates.

    (3) Performed alterations to the premises amounting to substantial works without the prior consent of the plaintiffs.

    (4) Failed to keep the premises clean and tidy and to keep them in good order, repair and condition.

    (5) Failed to renew and keep up the licence on the premises.

    (6) Failed to yield up the premises in good and substantial repair and condition.

28. During the currency of the Circuit Court proceedings a request was made by the plaintiffs that the defendant consent to unlimited jurisdiction in the Circuit Court. This request was declined.

29. On 31 March, 2011, an order was made by the Circuit Court granting the plaintiffs judgment in the sum of €16,000.34 and costs in respect of arrears of rent.

These proceedings

30. These proceedings were commenced on 27 January, 2012. The plaintiffs claimed damages for breach of the covenants in the lease, in an amount totalling €83,879.00. This was subsequently revised downwards to a sum of €63,928.00, reflecting certain allowances in respect of rent and rates.

31. The defendant denies failure to observe the covenants and conditions in the lease. In his counterclaim, he originally claimed sums totalling €149,437.00 being the value of contents of the premises wrongfully withheld by the plaintiffs, and further sums totalling €201,000.00 in respect of costs of refurbishing the premises by works which he says were made with the consent of the plaintiffs.

32. In relation to the 2007 works this Court is required to determine whether they caused the plaintiffs to incur the amount of the costs claimed by them and whether the plaintiffs had consented to the works as the defendant claims.

33. Evidence was given by each of the plaintiffs and by the defendant and by engineers retained by each side, and by the contractor retained by the defendant, Mr. David Hanlon, who is also a person who the defendant says he had put in possession of the premises for the purpose of trading the Flux Bar.

34. There were extensive contradictory versions of the extent of the works undertaken. In the absence of a properly documented structural survey of the premises as of the commencement of the lease term, it is difficult to be definitive as to the scale of the works and their effect. The nearest such information available to the court was the evidence of the engineers retained by the respective parties to which I shall turn firstly.

The plaintiff's engineer: Mr. Paul Nugent

35. Mr. Nugent inspected the property on 23 November, 2009 and produced a report in December, 2009. The relevant extracts from his report are as follows: -

> *"The property is a mature structure with external walls of a solid masonry construction. Upper floor construction appears to consist of timber flooring on timber floor joists, on load bearing masonry walls. The premises appear to have been substantially refurbished in the recent past, with first floor areas in particular undergoing completely refurbishment in 2005. Drawings forwarded to us in this regard would appear to indicate that upgrading of ground floor accommodation may have been undertaken at a similar date.*
>
> *We understand from our client that further alterations have been undertaken to the ground floor area, in the more recent past i.e. in the last 12-month period. From inspection of the ground floor accommodation, it would appear that a number of internal walls toward the rear of the property have been removed to facilitate the layout of new toilet accommodation. A protected corridor indicated on Fire Safety*

Certificate drawing previously referenced also appears to have been removed (refer attached copy of ground floor layout plan indicating location of extent of internal walls which appear to have been removed). An air handling system also appears to have been added as part of these recent ground floor alterations.

Description of Defects

Substantial movement/settlement was noted to the first floor structure on the date of inspection. Movements noted were to the rear of the first floor area, with settlement most pronounced at the location of the partition dividing Office Unit 1 from the tearoom/toilet area to the rear of Office Unit 2 (refer attached First Floor Layout plan).

Settlements in the order of some 25mm were noted in the floor structure along the line of this partition, with most severe movement adjacent to the entrance door from the common escape stairwell to office unit 1. Associated settlement cracking was noted to the partition of this location, notably at the joint of partition and ceiling. Flooring in the tearoom/toilet area would also appear to have settled and are off level (Refer attached photographs).

From inspection of the ground floor area, it would appear that the affected first floor structure is immediately over the area of the ground floor accommodation which, as previously noted, has recently had alterations undertaken.

The floor structure in this area was examined on the date of inspection, with a single ope being made in the ground floor ceiling (Refer Photograph attached). Floor structure at the location where ope was made is consistent of 225 x 50mm timber floor joists, at 300mm centres. Joists appeared to have a clear span of some 6.2 metres. It is unclear whether the internal walls removed as part of the ground floor alterations previously provided internal support to the first floor over, however, we would note that the floor structure exposed on the date of inspection would not be capable of carrying imposed loading over the clear span of 6.2 metres which currently exists. We would also note that the ceiling mounted air handling unit is located immediately under the area of the first floor where settlement of the structure is most pronounced.

… the fire escapes indicated in the Ground Floor licensed premises area appeared to have been significantly altered by the changes made on the ground floor area.

Conclusion and Recommendation

We are of the opinion that significant movement to the rear section of the first floor structure has occurred/is occurring. The existing floor structure,

judged by the limited opening up works undertaken, does not have adequate structural capacity to safely carry applied loading over the existing clear floor span. In this regard we would recommend the following…"

36. The report continued by identifying a requirement for propping of floor structures, strengthening of floor structures, and steel frameworks and that the approval of the fire officer be sought for the existing layout.

37. In his evidence before the court, Mr. Nugent said that it appeared to him that the toilet walls which were previously providing support to the beam supporting the floor above were now gone. He said that it was unlikely to be a coincidence that the floor settlement occurred and appeared following the 2007 works.

38. It was put to Mr. Nugent in cross-examination that the defendant's engineer, Mr. Ryan, would say that the deflection and settlement which occurred on the first floor occurred over a longer period and, therefore, could not have been attributable to the 2007 works. Mr. Nugent said that this was simply not possible.

Defendant's engineer: Mr. Jim Ryan

39. Mr. Ryan inspected the property in early 2010 and delivered his report on 26 February, 2010. In his report, he made the following observations: -

"It is clear that vital supports to the first floor have been removed. The stud walls of the architectural practice on the first floor have settled. There is no dispute to this.

The holes in the ceiling on the ground floor show that the original joists are still in place and that they span north south. They are spliced over a timber runner which runs east west some 3 metres or so from the rear wall. This timber runner is inadequate as a support beam. Deflection was inevitable. The lack of use of the first floor heretofore would have contributed to this deflection not being detected.

It is clear that this runner was originally on top of a support wall, or a series of support pieces orientated east – west. The north – south joists were cut to sit on this east – west structure, and the runner was the means of transferring the load from the joists to the wall. That is the only plausible case for such a runner to be there.

Joe Kearney employed Dave Hanlon to carry out the alteration works for him in 2006 . Dave Hanlon has advised Joda that the partitions he removed were simple stud partitions consisting of 12mm of plasterboard either side of light studs. It took less than an hour to demolish the walls. These partitions were built up to a fire ceiling. The fire ceiling was below an older ceiling. Thus the studwork was not built to support the runner under the joists. There were steel columns, robust supports within the studs to prop the runner.

It would therefore seem that during alteration works in the past to install the toilets and kitchen, the original supports to this runner were removed.

Culpability

The builder who installed the toilets and kitchen is primarily culpable for removing a load bearing structure. His stud walls for the toilet and kitchen would have put back material support but only enough for deflection not to be evident.

Joe Kearney's builder has a minor responsibility in that he should have checked the structure of the floor over the partitions he was demolishing. However, in view of the nature of the studwork he removed and the fact that it was only taken to a lower ceiling, there is a case to be made that what he did appeared sensible and therefore his culpability would be low." [emphasis added]

40. Mr. Ryan went on to comment on estimates of costs which had been given originally by Mr. Nugent at circa €30,000.00, expressing his view that works to include making good the ceiling and relevant declaration could be done for under €5,000.00.

41. In evidence before the court, Mr. Ryan indicated that a timber beam which had been supporting the floor above and whose original purpose was to support that floor was now missing. He said that it seemed to him that that must have been removed by *"an irresponsible contractor*". Mr. Ryan said that based on the instructions he had received, the defendant had not undertaken any works which affected the ceiling of the ground floor and, therefore, these works could not have contributed to the deflection of settlement now occurring. He said that if as part of the 2007 works any support had been taken from below the floor of the first floor, it would have collapsed immediately and not caused the gradual settlement which has been the subject of the complaint.

42. Mr. Ryan also indicated that it seemed to him that the toilet walls had been constructed only to the level of the fire ceiling of the ground floor and, therefore, cannot have been a support to the floor above.

43. Critically, Mr. Ryan acknowledged in his evidence that the works must have been carried out by a person who is not familiar with the structure of the building and, therefore, not familiar with the potential effects to the floors above. In this regard, the defendant conceded in his evidence that the 2007 works were not designed or supervised by any competent professional or expert.

Other evidence of 2007 works

44. The evidence given by the plaintiffs themselves related principally to what they found after the re-entry of the premises, and they were somewhat reliant on the evidence of Mr. Nugent as to the works actually carried out. Of the plaintiffs, the person most familiar with the building itself was Mr. Brady, who had traded from there before purchasing the property in partnership with his co-plaintiffs. In his evidence, he confirmed that the

plaintiffs had no concern about the works undertaken by the defendant after he entered the premises in 2005. Alterations to facilitate the opening and trading of the Naked Grape had been completed by the first half of 2006.

45. Each of the plaintiffs confirmed that they had no difficulty with the works undertaken in 2005 and 2006 as it had always been agreed that such works as were necessary to establish the Naked Grape would be appropriate and were not structural in nature.

46. Mr. Field gave evidence that the works undertaken in 2007 amounted to the removal of the shopfront of the Naked Grape and removal of the wall at the centre of the ground floor and the eventual relocation of the toilet areas to prepare a seating/music area to the rear.

47. Photographs, architect's drawings and other illustrations were put into evidence, by both parties. Most of these were not agreed as regards their true provenance and dating, and they were of limited assistance to the court. Nor were any drawings, plans or specifications for the 2007 works exhibited to the court, if indeed such ever existed. The defendant produced a letter dated 20 June, 2007, post-dating the 2007 works, from a William O'Connor Architectural Services, referring to a drawing and stating that *"the proposed works on the attached drawing did not involve the removal of any structural elements of the existing building*." Mr O'Connor was not called to give evidence and the defendant himself conceded that no construction professional or expert advised on or supervised the works as they were performed.

48. The defendant gave evidence that he had not done the works himself but had contracted Mr. David Hanlon, the person who, together with a partner, ultimately took over the trade of the Flux Bar. He said that all of the work was done within a period of approximately one and a half days and that it had amounted to no more than a clear out and a movement of certain partition walls, and that it was not structural work such as could have affected the floor above.

49. The most coherent evidence as to the works was that of the engineers. Whilst they expressed different views as to the "culpability", as Mr. O'Neill put it, for the condition of the property at the time of the re-entry, even Mr. O'Neill acknowledged that the 2007 works, were undertaken by an "irresponsible contractor" and that "vital supports" had been removed. Although he sought to suggest that earlier works may have caused the problem, he did not contradict Mr. Nugent's opinion that the affected first floor area structure was immediately over the ground floor accommodation which had recently been altered and that it was "unlikely to be a coincidence" that the floor sagging occurred when the supports were removed as part of the 2007 works.

50. On the balance of all the evidence I have concluded that the settlement or "*sagging*" of the first floor complained of by the architects at that level can only have been caused by the works undertaken by the defendant in early 2007 and that this necessitated the remedial work done by the plaintiffs. Even if it could not be definitively established that the walls of the toilets which were moved were themselves concrete or masonry I am

persuaded that such a radical alteration of the layout of the ground floor caused the deflection of the floor above and necessitated the works which were undertaken by the plaintiffs following the re-entry.

51. I shall return later to the question of whether the full quantum of costs of which the plaintiffs seek reimbursement are properly attributable to these works.

Consent for the 2007 works

52. It is common case that consent was not given in writing, such as would comply with the provisions of clause 3.12 of the lease.

53. The defendant gave evidence of meeting Mr. Richard Walsh at the Metropole Hotel in November, 2006. He informed Mr. Walsh that trade at the Naked Grape was unsatisfactory and therefore he wished to convert the ground floor back into a bar and music venue.

54. The evidence given by the defendant was that Mr. Walsh had indicated that he was open to such alterations being made but he would first need to see the plans and specifications and consult with his partners.

55. The defendant initially claimed in his evidence the consent was given in the course of a telephone conversation with Mr. Walsh on Christmas Eve 2006. Mr. Walsh swore that no such conversation occurred and said that if there had been such a call on Christmas Eve when he was spending time with his family he would have recalled the interruption.

56. Mr. Walsh also gave evidence of the November meeting at the Metropole Hotel. He said that he was approached by the defendant who had certain ideas in relation to the business. He said that the defendant said he wished to alter the layout of the ground floor which would at least reduce the size of the Naked Grape, or close it, and reinstate the premises to a public house.

57. Mr. Walsh said that he had responded that if the defendant submitted drawings and other information such as specifications, he would consult his partners about the matter.

58. Mr. Walsh gave evidence that he had also indicated that he would need details of the scope of work and needed to know that appropriate and competent professionals were engaged. Mr. Walsh said that no such information was ever submitted and no consent had been given either in writing or orally.

59. The other plaintiffs Mr. O'Brien, Mr. Field and Mr. Brady each confirmed that they had not given their consent.

60. Having heard the evidence of the defendant and the plaintiffs I have concluded that even if Mr. Walsh indicated to the defendant that an application for consent would be considered, no consent was given. Accordingly, the 2007 works were in breach of clause 3.12 of the lease. This finding informs the approach to be taken to other aspects of the case, in that it illustrates the willingness of the defendant to proceed with the 2007 works

in breach of his contractual obligation to, at the very least, obtain consent before doing such works.

61. To the extent that there could have remained any doubt as to the exact cause of the floor settlement, the defendant at the very least placed himself in a position where a failure to obtain consent to the 2007 works, in clear breach of Clause 3.12, exposed him to the risk of liability for the consequences of the state of the building after the works.

Other considerations

62. This is not an equity case in which the general conduct of the parties towards each other would inform the court in the exercise of discretion. However, there are a number of features of the manner in which the defendant conducted himself which reveal to the court that over a period of time the defendant regarded himself as no longer bound by the clear contractual obligations contained in the lease without having obtained consent, waiver or agreement to a variation or a surrender of the lease or otherwise being released from those contractual obligations, and acted accordingly. These features include the following.

Proposed assignment to Mr. Hanlon

63. By the time the ejectment proceedings were commenced in October 2009 the defendant was in arrears of rent to the extent of €27,118.

64. It appears that from time to time during the term of the lease the defendant was dependent to some measure on sourcing payments from Mr. Hanlon, whom he had permitted to become an operator of at least part of the ground floor premises. The defendant claimed that somehow Mr. Hanlon was responsible for rent arrears. He claimed also that he had proposed to the plaintiffs that they consent to an assignment of the lease of the ground floor to Mr. Hanlon. He did not go so far as to assert that such an assignment had been consented to, only stating that he never received a reply to his request for such consent.

65. There is no doubt that no assignment of the lease was ever consented to. The significance of this issue is that it revealed an attitude on the part of the defendant that he could over time regard himself as no longer bound by all of the terms and covenants of the lease, and could somehow "transfer" responsibility for compliance to Mr. Hanlon.

Seven-Day Publican's Licence

66. By the time the plaintiffs effected the re-entry in December, 2009 the licence had expired. Again it appears from the evidence given by the defendant that he had regarded this as no longer his responsibility. Mr. Hanlon had been operating the Flux Bar and the evidence also showed that later in 2009 further modifications had been made to the premises and it was now trading as "Snoopies Bar and Nightclub".

67. The defendant submitted that the lease contained no express provision obliging him to maintain the intoxicating liqueur licence. The plaintiffs invoke clause 3.3, which was an obligation on the part of the tenant "*to observe and comply in all respects with the provisions and requirements of any and every enactment for the time being in force*".

There was some debate as to whether the absence of an express covenant relating to the licence meant that the defendant was under no obligation in this regard.

68. Clearly, the Licencing Acts are an "*enactment*" for the purposes of Clause 3.3 and I accept the submission of the plaintiffs that clause 3.3 conferred an obligation to comply with the Acts. Quite apart from that contractual obligation, the defendant was the person in possession of the premises pursuant to the terms of the lease. He was responsible for the trade on the ground floor and was therefore required to maintain a licence under the Licensing Acts.

69. The defendant submitted that he could have applied for a renewal of the licence up to twelve months after the expiry of the last licence and was, he claimed, taken by surprise by the re-entry. He submitted that were it not for this intervention there was no reason why he would not have secured renewal of the licence if requested to do so. That did not absolve the defendant from the obligation to keep the licence current.

70. During the hearing, there was some discussion concerning the contents of a letter dated 11 July, 2007, from Messrs Cantwell Keogh & Associates regarding the fire safety certificate application, arising from an inspection undertaken by Messrs Cantwell Keogh & Associates on 10 July, 2007.

71. In their report, they confirmed that, in their opinion, the layout of the bar was in substantial compliance with the Building Regulations, 1997 except for two issues, namely: -

    (1) The front and rear exit doors which needed to have a clear width of at least 950mm but only had a width of 900mm; and

    (2) The external rear steps needed to be widened.

    The defendant conceded in evidence that these matters had not been addressed. He said, however, that he believed that he was in compliance and also expressed the view that because the issues regarding the exit doors and the external rear steps were outside the area leased to him, they were not matters with which he needed to concern himself.

72. At the heart of the defendant's submission regarding the license was his assertion that long before the re-entry the trade of the ground floor was being performed by Mr. Hanlon as the Flux Bar. He said that at this time, he had been in open discussions with the plaintiffs regarding the potential for assignment to Mr. Hanlon. He insisted that the plaintiffs had never refused consent to an assignment to Mr. Hanlon and were aware that Mr. Hanlon was trading from the premises. In circumstances where the plaintiffs never consented to an assignment to Mr. Hanlon, Clause 3.3 remained binding on the defendant and he breached this contractual obligation.

Abandonment

73. Evidence was given by a Mr. Roy Gavin that in the summer of 2009, he was asked by Mr. Hanlon to work in the Flux Bar which at this stage had a dancefloor at the back. He

accepted the offer and he started employment in October. He said that in preparation for the Cork Jazz Festival, the name was changed to “Snoopy’s Nightclub”. Mr. Gavin said that he never met the defendant and as far as he could see, Mr. Hanlon was acting as the licensee of the property.

74. Mr. Gavin said that after the Jazz Festival, the premises deteriorated generally and was being treated by Mr. Hanlon and his associates as a form of “*party house”.*

75. Mr. Gavin said that in the middle of November, the premises was closed for business. At that stage, the Electricity Supply Board had cut off the supply for non-payment, having tried unsuccessfully to gain access.

76. Whilst there was some question about the accuracy of some aspects of the evidence of this witness, the significance of his evidence, as far as it went, was the fact that Mr. Gavin had never met the defendant. This fact was not contradicted and was consistent with the conclusion that, before Mr. Gavin came to work at the premises, the defendant had, in effect, put Mr. Hanlon in possession of the trading premises, thereby abandoning possession of the premises and his own contractual obligations. I have come to the conclusion that this again evidenced that the defendant had, without any formal release or surrender, regarded himself as free to disregard his obligations under the lease.

Particulars of damage claimed

77. I now turn to the evidence which was given in respect of the particulars of damage which the plaintiffs say flow directly from the alterations to the building made in breach of Clause 3.12. These were originally particularised in para. 9 of the statement of claim in an amount totalling €83,879 but reduced subsequently to revised particulars totalling €63,928.09. The third named plaintiff, Mr. Field, gave evidence to prove the individual items and supporting documents and I shall consider each of them under the headings below: -

1) Replacement of locks – €279.50.

   This cost was clearly incurred as a necessary consequence of the validly effected re-entry and will be allowed in full.

2) Repair of alarm – €326.88.

   This charge related to a call out fee and replacements of battery and reconnections made on 9 February 2010 and clearly flows as a consequence of the re-entry.

3) Replacement of fire alarms – €78.32.

   This appears to relate to a further call out on 15 February 2010 when a faulty battery was replaced. It is not obvious to the court that this arose as a direct consequence of the defendant’s actions and therefore this item is disallowed.

4) New Fire Certificate Application – €1,996.50.

This relates to the invoice of Messrs Cantwell Keogh and Associates, chartered fire and safety consulting engineers, and relates to their professional fee for the application for a new fire safety certificate. This clearly arises as a consequence of the defendant's actions and will be allowed in full.

5) Design of new support structure – €907.50.

This relates to the professional fees of Paul Nugent, consultant engineer, for his site attendances and meetings and design of the new support structure and preparation of specification. Again, it arises as a consequence of the defendant's actions and will be allowed in full.

6) Extra replacement of Fire Extinguishers – €338.80.

During the course of the evidence a discrepancy arose in the calculations on the invoice of AJ Fire Extinguishers, and the claim was reduced to €300. I shall allow that amount as clearly it related to necessary works.

7) Building Works to Property – €13,915.

In respect of this item there appears to have been some measure of engagement between the engineers, and correspondence between the parties as to the scope and cost of the repair works. Mr. Nugent had articulated the cost originally at €30,000, which Mr. Ryan advised was excessive. Further engagement took place between the parties and it was acknowledged by Mr. Nugent that his original estimate was an "order of magnitude" estimate based on preliminary inspections. The plaintiffs obtained a quote from a contractor, Brian Curran, which was for a total sum of €26,177.02.
Mr. Ryan had obtained a quote from an alternative contractor, Summerhill Construction Limited, in the sum of €7,900 for the works excluding VAT plus an additional item of €1,500 for "*additional slab sealing in the area".*
Ultimately, the plaintiffs reduced the amount of works which Mr. Nugent had indicated should be undertaken, thereby reducing by almost one half Mr. Curran's total charge to a sum of €13,915. Having done this, the plaintiffs were under no obligation to engage with the contractor from whom the defendant had obtained a quote, and this court does not regard the amount ultimately incurred to be excessive. Accordingly, this amount is allowed in full.

8) Opening works for inspection of property – €729.00

A quote had been obtained from Mr. Curran for the total sum of €930. This appears only to be a quote in respect of opening up and inspection works, with some charge associated with removal of rubbish and a skip. There is no evidence that this amount was actually discharged and I shall disallow it.

9) Fire exit works – €4,029.25

This relates to the fee of Shandon Iron Works, and related to the supply and fit of galvanised stairs with handrails and sundry additional items. Again this appears to have been properly incurred and it will be allowed in full.

10) Engineer's fee – €726

This appears to duplicate with the amount of €907.50 referred to at (5) above and is disallowed.

11) Legal fees in respect of Circuit Court licencing application – €7,609.59

This relates to the professional fees of Messrs J.W. O'Donovan solicitors and counsel David O'Dwyer BL, for a licencing application concerning the premises including such items as court fees. It includes outlays of €2,003.09 These items have been properly incurred as a consequence of the defendant's failure to comply with Clause 3.3 of the lease (enactments) and I allow it in full.

12) Loss of rental income (six months) December 2009 to May 2010 – €32,470

This amount was calculated by reference to the contracted rent for the year in which the re-entry occurred, namely year five, where the annual rent was €65,000. It was argued on behalf of the defendants that case law supports the proposition that following a forfeiture, the only amount which could be pursued would be a rent equivalent to mesne rates reflecting market rent (*O'Reilly v Gleeson* [1975] IR 258 and *Edward Lee & Co (1974) Ltd v N1 Property Developments Ltd* [2013] IEHC 162). Mr. O'Sullivan of Barry Auctioneers was called by the defendant and gave evidence that an appropriate market rent for the ground floor at the time was €23,000 per annum. As regards the level of rent, this claim is not in the nature of mesne rates for overholding, but is a claim for breach of contract to pay the contracted rent. I am not persuaded that the rent should only be recoverable by reference to mesne rates or a market rent, and I shall allow this claim at the contracted rent, so that the plaintiffs will be put in the position they would be in had the breach not occurred.

The defendant also submitted that because works were only put out to tender in May 2010 and completed by July 2010 the repairs could have been completed at a much earlier date and would have taken only a matter of days.

I accept the submission of the defendant that the works could have been completed earlier than July 2010 and that the plaintiffs could have placed the property on the market earlier. Taking every aspect into account, I shall allow one half of the amount claimed in respect of rent, which is one quarter of the then prevailing annual rent, namely €16,250.

13) Repairs to refrigeration condensers – €522.00

This claim is based on an invoice from, Coolflow Limited, "*Beer Cooling Systems, Cold Rooms, Ice makers Etc."* The invoice relates to "*relocation*" of beer cooler condensing units. No evidence was given as to the connection between this cost and the actions of the defendant in breach of the lease and accordingly this item is disallowed.

78. The total amount accordingly which should be allowed in respect of the particulars of damage referred to is €45,614.22.

Counter claim

79. The defendant counter claimed under two headings: -

1) Damages for detinue and/or conversion totalling €149,427.

2) Reimbursement of cost of building works which he claims were undertaken with the consent of the plaintiffs, €201,990.23.

80. The claim in respect of works undertaken was withdrawn at the hearing. It has a residual significance in that its quantum is inconsistent with the defendant's assertion that the 2007 works were inconsequential and could not have had the effects on the structure of the building contended for by the plaintiffs.

81. In the counter claim it is alleged that on 2 December, 2009, the plaintiffs took possession of the premises and of the defendant's chattels. The defendant claims that on numerous occasions he had requested the plaintiffs to return the chattels and that the plaintiff has wrongfully failed to do so.

82. A Scots schedule was produced at the hearing identifying differences between the parties in relation to each category of item claimed in terms of whether or not they were located at the premises at the date of the re-entry, and in some cases items still available for collection, and the different views of the respective parties as to the value of the items concerned.

83. The aggregate value of the items subject to this counter claim, based on the invoiced costs of the goods to the defendant was €149,427, although that was reduced at the hearing.

84. On 16 December, 2009, the defendant's solicitors, Messrs Daly Derham Donnelly, wrote to the plaintiff's solicitors, J.W. O'Donovan. In this letter they acknowledged a letter received from Messrs O'Donovan enclosing a Stock List and stated: -

"Your clients are well aware that the person in possession of this premises and the person who was operating the business was Mr. David Hanlon and they should ensure that they send a copy of the Stock List to Mr. Hanlon, as the stock referred to therein is the stock of Mr. Hanlon".

Messrs Daly Derham Donnelly continued by referring to lease agreements "*in place with Lombard & Ulster, the Bank of Scotland Ireland and the Friends First*" for certain contents, listed in that letter. They continued: -

> *"These contents were originally leased by our client and the responsibility of these Leases were taken over by David Hanlon, they are all subject to Lease Agreements and accordingly there is retention of title in favour of the Loan Institutions and accordingly you might please confirm a time and date that is suitable for our client to call and collect the items so that they can be returned to their rightful owners".*

85. This led to protracted correspondence between the respective solicitors which related both to the question of contents of the premises and to the plaintiff's complaints regarding the condition of the property at the time of re-entry.

86. In further correspondence through 2010, Messrs Daly Derham Donnelly continued to protest that their client had not received the return of the contents. Ultimately arising from this correspondence and further exchanges a meeting took place on 22 June, 2011, at the business premises of the third named plaintiff, Mr. Field, ESI Technologies, attended by the defendant and Mr. Field.

87. The defendant claimed in evidence that he had attended on that occasion for the purpose of taking possession of items which were his property but that when he was shown a number of them, they appeared to be in very poor condition. Photographs were exhibited to the court showing a small number of items, principally a number of stools. Although these were undoubtedly in a much deteriorated condition, there was no conclusive evidence even by photographs, as to the condition of these items at the time of the re-entry.

88. The defendant insisted that when he attended it became clear that the relevant goods were not all available for collection and that those that were made available even for inspection were not in a fit and proper condition.

89. The evidence of Mr. Field was that when the defendant attended at his premises he attended in a motor car only and without any equipment or capacity to remove the relevant chattels. He said that the defendant had indicated that he would return later to remove the relevant property but never did so.

90. Having considered the evidence of Mr Field and the defendant as to the meeting at ESI on 22 June, 2011. I have concluded that on that day no meaningful effort was made by the defendant to secure release of his chattels.

91. The essential ingredients of the tort of detinue are proof of ownership, demand for release of the chattels and a refusal of such release. In this case, the correspondence suggests that there was some delay on the part of the plaintiffs in confirming to the defendant that he could remove chattels. However, the correspondence also reveals that the defendant's solicitor was on the one hand claiming that the defendant had leased a number of the

items yet, on the other hand, was claiming that responsibility for the leases had been taken over by Mr. Hanlon. It was also suggested in the first such letter that stock left at the premises was owned by Mr. Hanlon. This ambiguity in the defendant's attitude towards the contents of the premises is reflective of his ambivalence, to put it at its lowest, towards his contractual obligations under the lease itself. Of direct relevance in this regard is that at the very least six weeks before the re-entry, the defendant had abandoned possession of the ground floor without regard to his contractual obligations. No evidence was adduced, or submissions made that he had sought to negotiate a surrender of the lease to secure a release of his obligations or that he had sought to make and then been refused any orderly arrangements in relation to the contents, whether they were owned by himself or third parties.

92. This court cannot speculate as to the terms the plaintiffs may have imposed on a surrender, even if they been willing to accept a surrender. However, in circumstances where the defendant abandoned possession of the premises without either a surrender or any orderly communication with the plaintiffs, he cannot later assert that the plaintiffs acted unlawfully in relation to the contents. If the defendant had sought to make an orderly departure from the premises by agreement with the plaintiffs, it would have been a matter for him to ensure that appropriate arrangements, including removal of chattels if necessary, were in place and this he failed to do.

93. I shall therefore, dismiss the counter claim.

94. I shall order that the defendant pay to the plaintiffs damages for breach of contract in the amount of €45,614.22.