

THE HIGH COURT

[2022] IEHC 476

[Record No. 2020/7625 P]

BETWEEN

DUNNES STORES UNLIMITED COMPANY

AND

CAMGILL PROPERTY A SÉ LIMITED

PLAINTIFFS

AND

DAFORA UNLIMITED COMPANY

FIRST NAMED DEFENDANT

AND

CORAJIO UNLIMITED COMPANY

T/A AS MR. PRICE BRANDED BARGAINS

SECOND NAMED DEFENDANT

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 15th day of July 2022.

1. This ruling relates to the orders to be made on foot of a substantive judgment which I gave on 3rd June, 2022: see [2022] IEHC 342. The parties corresponded extensively in this regard in an effort to agree the orders; when agreement could not be

achieved, I convened a hearing at which counsel for both sides made submissions as to the appropriate orders.

2. The plaintiffs sought at the hearing of the substantive matter to enforce restrictive covenants in a lease ('the Unit 4 lease') which prevented the defendants from selling "food, food products or groceries" from a retail unit at Barrow Valley Retail Park, Sleaty Road, Carlow. The essential issue between the parties concerned whether or not the defendants – trading as 'Mr. Price' – were entitled to sell "groceries" which extended beyond "food or food products". This in turn involved the tendering of evidence, expert and otherwise, as to what exactly was comprised in the term "groceries".

3. In the event, at the end of a very lengthy judgment, I concluded that "groceries" was not synonymous with "food or food products", and extended beyond those terms to include a range of non-food items. I attempted to provide some guidance as to what, in the context of the lease, could appropriately be classified as "groceries": in this regard see paras. 186 and 188 of the judgment in particular.

4. Both sides have prepared draft orders which they consider contain appropriate orders which reflect the terms of the judgment. The plaintiffs have sought a wide range of orders which have been set out at para. 1-7 of the reliefs in the statement of claim which seek enforcement of the restrictive covenants in general terms. The defendants have eschewed this approach, and drafted the substantive order to reflect the findings of the court summarised at para. 188 of the judgment.

5. I noted in the course of the judgment that, at the hearing, the defendants accepted that the restrictive covenants applied to their unit; the real dispute between the parties was whether or not the defendants had been in breach of the lease of Unit 4 in selling items which should properly be regarded as "groceries". Pursuant to an order of 18th

January, 2021, (Reynolds J), the issue of liability only was to be determined at the hearing before me, with any issue as to an account of profits as sought by the plaintiffs to await the outcome.

6. In one sense, it seems somewhat unnecessary to grant wide-ranging orders prohibiting breach of restrictive covenants when all that was at issue between the parties was as to what constituted a breach, rather than any general consideration of whether the restrictive covenants are binding. On the other hand, the inevitable conclusion from the court's findings is that the defendants were in fact in breach of the restrictive covenants, and certainly that a continuation by Mr. Price of the sale of non-food groceries would be in contravention of those findings.

7. As the reader of the substantive judgment will appreciate, it is not possible to compose a comprehensive all-embracing definition of what constitutes "groceries". Perceptions of what is comprised in the term have changed over the years. Items which have yet to be invented or which are not yet on the market may give rise to difficulty as to whether they are "groceries" for the purpose of the lease between the parties. There is therefore a risk that if I make a general order enforcing the restrictive covenants – which I have found the defendants have breached – any future *bona fide* dispute between the plaintiffs and Mr. Price as to whether an item constitutes "groceries" could result in an application by the plaintiffs for attachment and sequestration of the defendants' assets on the basis that the defendants have disobeyed an order enforcing the restrictive covenants, when in fact the defendants accept that they are bound by those covenants, but do not accept that they have breached them. It might well be doubtful in such a scenario as to whether an application for attachment and sequestration, as opposed to an application more akin to the present proceedings, would be warranted.

8. I propose to deal with the matter in the following manner. As the effect of my findings as to the meaning of the word “groceries” means that the defendants were in breach of the provisions of Clause (20) of the Second Schedule of their lease, I will make an order in terms of para. 2 of the reliefs sought in the statement of claim. It does not seem to me that orders in terms of paras. 1 or 3-7 are necessary. I will make orders which reflect the findings at para. 188 of my judgment.

9. In relation to ancillary orders, I am satisfied that the plaintiffs are entitled to the costs of the action to date, to include all reserved costs or costs in the cause, including the costs of the interlocutory injunction to which I refer at paras. 20-26 of the substantive judgment. I will order that execution on foot of the order for costs be stayed for a period of twenty-eight days next following the perfection of this Court’s order and, in the event of any appeal to the Court of Appeal being filed in that period, that the stay continue in force pending the determination of the appeal.

10. To be clear, the substantive orders which I shall make are as follows:

- An injunction prohibiting the second named defendant, its servants, agents, assignees or nominees, in its capacity as successor in title to the leasehold interest in Unit 4, Barrow Valley Retail Park, Sleaty Road, Carlow and as a tenant, sub-tenant, occupier or trader within the shopping centre, from using or permitting the use of its unit in breach of the provisions of Clause (20) of the Second Schedule of the Indenture of Lease dated 12th July, 2007, as between Redhill Properties Limited as Lessor, of the first part, and Stephen Murphy as lessee, of the second part (the ‘Unit 4 Lease’) and specifically prohibiting it from offering for sale and/or selling food, food products or groceries contrary to the provisions of Clause 20 of the Second Schedule of the Unit 4 lease

and/or the corresponding provisions as agreed and/or covenanted to by to by the first named defendant's predecessor in title in the lease, deed or document pursuant to which the second named defendant occupies its unit in the retail estate;

- a declaration that the term "groceries" in the Unit 4 Lease extends beyond food or food products;
- a declaration that "groceries" in the Unit 4 Lease includes "non-durable consumable household items which are purchased frequently";
- a declaration that "non-durable consumable household items which are purchased frequently" includes healthcare products; household healthcare products; household and cleaning products; pet care and pet food; bathroom toiletries; hair care products; oral care products and other toiletries; detergents; washing powder; cleaning products and materials; shower gels; deodorants; shampoos; cosmetics; toothbrushes; toothpaste; kitchen towel and toilet rolls.

11. The terms of the costs order and the stay on same will be as set out above. I have adjourned the matter to the Chancery list for directions as to how the quantum module – if any – in the matter should proceed. I will give the parties liberty to apply in the event of any particular or unforeseen difficulty with my order.