THE HIGH COURT

[2023] IEHC 539

Record No. 2022/89MCA

BETWEEN

CARLEY HAMILTON

APPLICANT

- and -

PRTB

RESPONDENT

- and -

KEVIN MCKEOWN

NOTICE PARTY

JUDGMENT of Ms. Justice Niamh Hyland delivered on 29 September 2022

Introduction

1. This decision is given in respect of three distinct motions, two being motions of the notice party of 27 March 2023 (the "landlord's first motion") and June 2023 (the "landlord's second motion"), and the third being a motion brought by the applicant ("the tenant"), Ms. Hamilton of 22 May 2023. The principal relief sought by the landlord's first motion is an Order varying the Mareva type Order of 27 July 2022 that restrained the tenant from dissipating any sum below €48,750, to below €73,041, as well as an Order pursuant to s.123(5) of the Residential Tenancies Act 2004 (the "2004

Act") varying paragraph 8.3 of the Determination Order of 14 December 2021 to reflect the sum of €73,041.00 in rent owing to the Notice Party. The landlord's second motion modifies downwards the sum sought to be restrained from dissipation to €45,000, as well as seeking an Order of garnishee attaching the sum of €45,000 and/or in the alternative an Order appointing a receiver for that amount.

2. In her motion, the tenant seeks an Order overturning the Mareva type Order made on 27 July 2022 restraining her from dissipating her share of her inheritance on the basis of non-disclosure by the landlord, as well as damages.

Background

3. The background to these proceedings is set out in my judgment of 27 July 2022. In summary the matter concerns a tenant, the applicant in these proceedings, who ceased paying rent to her landlord, and who did not observe the terms of a Notice of Termination served on 18 May 2021. Ultimately, she did not vacate the property until February 2023.The matter went to the Residential Tenancies Board (the "RTB") and there was an adjudication hearing. The adjudicator determined the tenant owed a sum of money. The decision was appealed by the tenant to the Tribunal established pursuant to s.102 and s.103 of the 2004 Act.

4. The Tribunal made a determination pursuant to s.108(1) of the 2004 Act as amended, which provides that the Tribunal shall, on completion of its hearing, make its determination in relation to the dispute and notify the RTB of that determination. The Tribunal upheld the Notice of Termination. The landlord was held to have breached his obligations and to be liable in the sum of €1,709 to the tenant. The tenant was directed to pay the sum of €25,359.50 to the landlord, being rent arrears less the amount owing by the landlord, by way of monthly instalments of €3,250 and a final instalment. In the event of default of repayment, the full sum was to become due. The tenant was directed

to continue to pay rent at the rate of €3,250 per month until the dwelling was vacated. The method of payment for the arrears was by instalment. On 9 March 2022 the RTB made a Determination Order in the terms of the determination of the Tribunal and notified it to the parties.

5. The tenant appealed against the Determination Order to this Court by way of originating Notice of Motion of 29 March 2022, grounded on an affidavit of the tenant of the same date. The appeal was limited to a challenge to the Tribunal's findings in respect of the validity of the Notice of Termination and the award of damages made in her favour arising from a breach of obligation by the landlord. There was no appeal of the outstanding amount of arrears and she did not dispute the finding that she had failed to pay rent.
6. Prior to the appeal coming on for hearing, and while the tenant was still in possession of the property and not paying any rent, the landlord brought a motion of 22 June 2022 seeking various reliefs, including relief directing that the tenant be directed to maintain the sums she would receive from her mother's estate pending the determination of the appeal and/or not dissipating the amount she would receive as part of her inheritance pending the determination of the appeal. In the motion brought by the landlord, it is contended that the tenant is the beneficiary of part of her mother's estate. It is identified that on the basis of the information that he and his solicitor have been able to glean, it appears that the tenant may be entitled to 1/6 of her mother's estate. At the hearing of this motion, solicitor and counsel appeared for the tenant but indicated they had no instructions in these motions and therefore were unable to make any argument or participate in them. However, they did provide some information about the estate of the tenant's mother through correspondence, although this correspondence was not put on affidavit.
7. Following the hearing, I made the following Order on 29 July 2022 for the reasons set out in my judgment of 27 July 2022:

"The tenant, or anyone acting on her behalf, are restrained from dissipating any amount received qua beneficiary in the estate of Elizabeth (Betty) Hamilton below the amount of €48,750 pending the determination of the within appeal and/or until such time as the rent arrears sum owed to the landlord is fully discharged and the tenant gives up possession of 8 Shelbourne Road, Ballsbridge, Dublin 4."

8. The tenant vacated the property on or around 13 February 2023. On 20 February 2023, the solicitors for the tenant came off record. The tenant's substantive appeal against the Determination Order came on for hearing on 30 March 2023. The tenant represented herself at that hearing, and has continued to so. I gave an *ex tempore* judgment on the same day refusing the appeal and affirming the Determination Order.

Garnishee/Appointment of a receiver

9. The motions before me raise two quite different, although inter-related, issues: first, whether, given new information that the tenant seeks to rely upon, the original non-dissipation Order should be set aside, and second, whether I should make a further non-dissipation Order, despite the fact that the substantive hearing has now taken place, and should make an Order of garnishee or appoint a receiver. I will deal with the landlord's application for an Order garnisheeing the debt or appointing a receiver first.

10. It is essential to emphasise that these applications arise in a public law context i.e., within the confines of a statutory scheme that governs the relationship between landlord and tenant. That scheme may be found in Part 6 of the 2004 Act as amended. Section 123 identifies the binding nature of Determination Orders and provides at s.123(2) that a Determination Order shall become binding on the parties unless an appeal is made. Here an appeal was made to the High Court. Section 123(4) provides that the determination of the High Court on such an appeal shall be final and conclusive.

11. Given that this Court has upheld the Determination Order, that Order must now be enforced as per the statutory scheme. Section 123 provides in relevant part:

> *"123.—(1) A determination order embodying the terms of an agreement referred to in section 96(1) or the determination of an adjudicator under section 97 shall become binding on the parties concerned on the order being issued to them."*

12. Section 124 is concerned with the enforcement of Determination Orders, and it provides as follows in relevant part:

> *"124.—(1) If the Board or a party mentioned in a determination order is satisfied that another party has failed to comply with one or more terms of that order, the Board or the first-mentioned party may make an application under this section to the District Court for an order under subsection (2).*
>
> *(2) On such an application and subject to section 125, the District Court shall make an order directing the party concerned (the "respondent") to comply with the term or terms concerned if it is satisfied that the respondent has failed to comply with that term or those terms, unless—*
>
> *(a) it considers there are substantial reasons (related to one or more of the matters mentioned in subsection (3)) for not making an order under this subsection, or*
>
> *(b) the respondent shows to the satisfaction of the court that one of the matters specified in subsection (3) applies in relation to the determination order.*
>
> *(3) The matters mentioned in subsection (2) are—*

(a) a requirement of procedural fairness was not complied with in the relevant proceedings under this Part,

(b) a material consideration was not taken account of in those proceedings or account was taken in those proceedings of a consideration that was not material,

(c) a manifestly erroneous decision in relation to a legal issue was made in those proceedings,

(d) the determination made by the adjudicator or the Tribunal, as the case may be, on the evidence before the adjudicator or Tribunal, was manifestly erroneous."

13. The existence of the statutory regime in this regard was acknowledged by the landlord in the first motion. At paragraph 16 of his affidavit sworn 22 March 2023, he avers that if the appellant continues to ignore her indebtedness to him, it will be necessary to take enforcement proceedings pursuant to the 2004 Act in the District Court and he will again incur further legal costs. Paragraph 2 of the relief sought in that motion is an Order pursuant to s.123(5) directing the Residential Tenancies Tribunal to vary paragraph 8.3 of the Determination Order so as to acknowledge the additional rent now due because of the further overholding by the tenant without paying rent.
14. In those circumstances, it is somewhat difficult to understand why the landlord sought reliefs in the second motion that would effectively circumvent the existing statutory regime for enforcement. By seeking the second and third reliefs, i.e. an Order of garnishee attaching the sum of €45,000 owed pursuant to the Determination Order and/or the appointment of a receiver for the purposes of receiving a sum from the tenant's mother's

estate to discharge a portion of the sum due and owing, the landlord is seeking to avoid the necessity to go to the District Court to enforce the Determination Order (at least in relation to part of the sum owing i.e. €45,000). The mere fact that the tenant has an entitlement to a sum of money from her mother's estate cannot ground an entitlement on the part of the landlord to skip the enforcement steps set out in the 2004 Act and to seek to recover the sum claimed by private law remedies. That would, for example, obviate the right of the tenant to seek to invoke the (limited) jurisdiction of the District Court to revisit the Determination Order under s.124(3).

15. Insofar as the application for an Order of garnishee is concerned, the case law cited by the landlord in his written legal submissions makes it clear that the debt must be in existence at the time of the application for a garnishee Order:

> *"The debt must be due at the time of the application for a garnishee order, see Webb v Stenton (1883) 11 Q.B.D. 518. In Kier Regional Ltd v City & General (Holborn) Ltd [2019] B.L.R. 90 Colson J. stated as follows:*
>
> > *"The fundamental requirement, before any final third party order can be made, is that the relationship of creditor and debtor must exist between the judgment debtor and the third party respectively. There must be money due to the judgment debtor from the third party.""*

16. That appeal having been concluded, and the tenant having been unsuccessful, the Determination Order is now binding on the tenant. I therefore agree with the submission that the Determination Order is an Order for payment of money and therefore the debt is due at the time of the application for a garnishee Order. But that is not the end of the matter. As referred to above, there is a further procedural step under the Act which necessitates an application to be made to the District Court for enforcement of the Determination Order where a person does not comply. In those circumstances, were I to

make a garnishee Order, I would be ignoring the scheme prescribed by statute for the enforcement of a Determination Order and effectively permitting the landlord to circumvent the statutory requirements. I can see no legal basis for such a course and none has been suggested by the landlord.

17. Similarly, in relation to the appointment of a receiver, again, in circumstances where the District Court enforcement route has not been exhausted, it seems to me that it would be inappropriate to exercise my discretionary power to appoint a receiver where there is a statutory route that permits enforcement.

18. In summary, where there is a statutory scheme for the collection of monies owing, it is inappropriate to seek to superimpose private law remedies for the collection of the same monies so as to displace that scheme. In those circumstances I refuse reliefs two and three of the second motion.

19. In relation to the relief at paragraph 2 of the first motion i.e., an Order varying paragraph 8 to provide for the sum of €73,041 to the notice party to take full account of the rent arrears, this Order is unnecessary. If one looks at the Determination Order, it is carefully designed so that any further arrears are captured by the Order. The landlord is therefore entitled to rely upon the operation of the terms in the Determination Order and seek the full sum i.e. €73,041 through the mechanisms provided for in the Act without any further Order being made by this Court.

Application by tenant to set aside Order of 29 July

20. As identified at the start of this judgment, the landlord has sought an Order continuing the existing Order restraining the tenant from dissipating a sum below €45,000 pending payment of the rent arrears. Before dealing with that relief, I think it necessary to address the tenant's application to set aside the Order of 29 July 2022. The basis for the application is that there was a material non-disclosure by the landlord at the time the application was

made. Specifically, the tenant argues that the application for a Mareva type injunction gave the impression that there had been no interaction by her solicitor with the solicitor for the landlord, and that this lack of interaction was used to justify the argument that there was no intention to use the monies that were owing to her from her mother's estate to satisfy the debt to the landlord. In fact, she argues that there had been significant interaction and the failure to identify same was misleading. Her approach is informed by the material she obtained when she sought her file from her former solicitor.

21. That file includes a number of documents that contain without prejudice material, including communications between counsel aimed at seeking to settle the proceedings. It also includes an email of 27 May from the tenant's solicitors to the landlord's solicitors that identifies the terms of a settlement offer. The landlord objects strenuously both to the content of these without prejudice communications being disclosed, and to the reliance sought to be placed by the tenant on the content of those documents.

22. There is of course a distinction between disclosure of the documents themselves and the mere disclosure of the fact of without prejudice communications, without disclosure of their contents. Here, the tenant seeks to rely upon the content of the without prejudice correspondence.

23. The law in relation to the use of without prejudice material has recently been considered by Roberts J. in *QRD Development Company No.3 DAC* [2022] IEHC 498. As she notes, it is well established that privilege over without prejudice material cannot be waived unilaterally. Therefore, the attempt to waive privilege by the tenant in this case by the act of exhibiting without prejudice documents in her grounding affidavit is ineffective. There are of course other situations where documents may be disclosed, despite being the subject of without prejudice privilege as identified by Roberts J. in *QRD*. None of those exceptions apply in the instant case.

24. The purpose of the tenant's reliance upon the material at this point in time is to support her application for a discharge of the Order of 29 July 2022 and in support of her application for damages. In my view, the tenant has failed to identify the existence of grounds that would justify waiving the without prejudice privilege and permitting reliance upon the material she seeks to deploy. There is a very good reason for maintaining privilege over such material, namely, to facilitate settlement of disputes between the parties, as discussed by Roberts J. in *QRD*:

> *"2. The without prejudice rule is founded partly in public policy and partly in the agreement of the parties. The fundamental rationale for without prejudice privilege is to encourage parties so far as possible to settle their disputes without resort to litigation. The rule is designed to support the policy of encouraging parties to negotiate and to discuss the relative strengths and weaknesses of their cases with candour, secure in the knowledge that any concession made in the without prejudice discussions cannot be used against them in the course of the proceedings. If litigants could not explore these matters on a without prejudice basis the potential for settlement and compromise would be greatly undermined.* "

25. Accordingly, I refuse to permit the application by the tenant to rely upon the without prejudice material, including communications between counsel and counsel and communications between the parties' respective solicitors. In those circumstances, the criticism she makes of the landlord's legal team to the effect that they initially failed to detail the extent of without prejudice communications – and the affidavit of Michael Connellan, counsel, sworn 13 June 2023, dealing with this issue – is not one that requires to be resolved.

26. However, there is a separate issue, being whether I should permit the tenant to rely upon

the failure to disclose the existence of without prejudice negotiations as opposed to the contents of same. The protection of without prejudice communications is aimed at promoting settlements by guaranteeing non-disclosure of the contents of the negotiations (see paragraph 10-296 of McGrath's, Evidence (3rd Ed. 2020). The rule protects the content of negotiations rather than the fact of the existence of negotiations. Disclosing the fact of without prejudice negotiations without referring to their content does not have the same negative effect on settlement negotiations as disclosing the content, as the parties may still interact safe in the knowledge that their interactions will be protected.

27. Accordingly, I am satisfied that the tenant is entitled to refer to the fact of the negotiations, and to advance the argument that the existence of same (though not the contents) ought to have been disclosed to the Court when seeking the Mareva type relief. Equally, I am satisfied that, contrary to the understanding of the legal team of the landlord as averred to in the affidavit of Mr. Connellan sworn 10 May 2023, the landlord was not precluded by the without prejudice rule from referring to the fact that there had been settlement discussions between the parties through their legal representatives.

28. Given that conclusion, I must consider whether the landlord acted contrary to his duty to put all relevant facts before the Court by failing to refer to the fact of the without prejudice negotiations. To decide that, it is necessary to consider the terms of the evidence that was put before the Court during the hearing of the motions the subject of this decision. In the affidavit of Mr. John Connellan, solicitor, sworn 22 June 2022, grounding the motion for the Mareva type Order restraining dissipation of the assets, he exhibited a copy of his letter of 9 May 2022 to Hatstone Solicitors, who were at the time the solicitors on record for the applicant.

29. The letter of 9 May 2022 contains the following paragraphs:

> *"We understand that your client is a beneficiary in the Estate of her late Mother,*

> *Elizabeth (Betty) Hamilton and that the main asset of the estate 16 Gilford Terrace, Sandymount is now sale agreed. We have instructions to seek undertakings/assurances from your office/client, that sufficient sums will be retained and preserved from the proceeds of sale to meet any potential legal costs Order that might be made against your client. We are prepared to afford you a period of 7 days within which to confirm that you or your client will undertake to preserve such sum in respect of rent and separate sum, to be agreed between our offices, in respect of any potential costs orders.*
>
> *In the event that such an undertaking or assurance is not provided within the time prescribed herein, we will seek Court relief in that regard. We respectfully submit that the factual matrix supports such an application and your client does not gainsay the sum/rent that is due but simply refuses to pay same."*

30. At paragraph 5 of his affidavit he averred as follows:

> "*I say and believe that I sent a further letter to the now solicitor for the Applicant seeking additional information and the Applicant's solicitor indicated that he would revert within three days in relation to same. I say that to date he has not replied to that letter*".

31. He exhibits that letter, being a letter of 14 June 2022 from Mr. Connellan, where he notes that there had been no reply to the letter of 9 May 2022 and informed Hatstone Solicitors that the landlord's motion had been made returnable to 27 June 2022.

32. In his affidavit grounding the motion sworn 22 June 2022, the landlord also exhibited the letter of 9 May 2022 and averred that his solicitors had not received a response to the letter. In relation to the letter of 14 June 2022, he refers to an email reply from Setanta solicitors (who were at that stage acting for the tenant in place of Hatstone solicitors) of 15 June 2022 saying they would revert by 17 June but that no response was received.

33. I think it is fair to say that the evidence provided in 2022 conveyed the impression that the tenant and her legal team had failed to engage at all with the concerns of the landlord. However, the evidence presented an incomplete picture in circumstances where there had in fact been considerable interaction between the legal teams, albeit on a without prejudice basis. The problems in this respect were compounded by the fact that the tenant's own legal team neither filed any affidavits nor made any submissions at the hearing of the motion on the basis that they did not have instructions from their client. I will return to the significance of that below.

34. Returning to the hearing of the motion in 2022, on the basis of the evidence before the Court, counsel for the landlord argued that the tenant had not responded to requests to engage in relation to the payment of the outstanding rent from the proceedings of her mother's estate and that an inference ought to be drawn that she would not use the monies when they became available to discharge the rent arrears and that the injunctive relief was necessary in those circumstances. In other words, that evidence was intended to go towards the part of the test in *O'Mahony v Horgan* [1995] 2 IR 411 to the effect that the plaintiff should give some grounds for believing that there is a risk of the assets being removed or dissipated. Of course, it was not the only evidence deployed in that respect: the landlord also relied upon the failure of the tenant to pay her rent for 15 months, her refusal to vacate the property despite the non-payment of rent and her challenges to the decisions of the adjudication officer and the Tribunal on unmeritorious grounds.

35. In considering the obligations on a party to make disclosure when seeking a Mareva type of Order, one starts with the obligation identified in the *Horgan* case i.e., that the plaintiff should make full and frank disclosure of all material matters in his knowledge which are material for the judge to know. In *Bambrick v Cobley* [2005} IEHC 43, Clarke J. made some useful observations on the approach a court ought to take when considering an

allegation that a party failed to make adequate disclosure when looking for a Mareva type Order. In relation to what was material, he quoted Lord O'Hagan L.C. in *Atkin v Moran* [1871] IR 6 EQ 79 as follows: *"the party applying is not to make himself the judge whether a particular fact is material or not. If it is such as might in any way affect the mind of the Court, it is its duty to bring it forward"*. Clarke J. identifies that the test by reference to which materiality should be judged is one of whether objectively speaking the facts could reasonably be regarded as material with materiality not judged in an excessive manner.

36. It must be remembered that in most cases where Mareva type relief is sought, the application will be made on an *ex parte* basis, and therefore the duty to disclose is particularly acute. Not unreasonably, counsel for the landlord made the submission in the course of oral argument in response to the tenant's application that if there was a point to be made in this respect, he would have expected the tenant's legal team to make the point. It is true that the tenant was represented by solicitor and counsel and therefore the duty is considerably less acute, as the solicitors for the landlord were entitled to assume that any relevant facts favourable to the tenant would be identified by her legal team. However, although heavy reliance was placed upon that distinction in the instant case, I am not satisfied that it is a complete answer to the point made by the tenant. No replying affidavit was filed on behalf of the tenant. The Order of 29 July 2022 contains the following paragraph: "*And Counsel for the appellant informing the court that they had not received instructions from their client in relation to the motion before the court and could not make submissions in relation to same*".

37. Counsel were therefore aware on the day of the hearing in 2022 that the tenant was effectively in the same position as a person who was unrepresented. Nonetheless, no submissions were made averting to the existence of without prejudice negotiations.

38. I should pause at this point to address the complaints made by the tenant about her legal

team. A detailed affidavit was sworn by her on 28 March 2023 in response to the landlord's first motion, where she identifies the way in which she believes her own legal team failed to represent her adequately. Those submissions were repeated at the hearing and in the written legal submissions she submitted. Those solicitors came off record on 20 February 2023. I cannot consider the tenant's complaints about her former solicitors in the context of this application. This judgment is limited to a consideration of her complaints in relation to the conduct of the landlord and his legal representatives and cannot address the tenant's complaints about the conduct of her own solicitors. She has indicated that she intends to make a complaint to the Law Society. Where a client wishes to complain about the service they received from their former solicitor, this is an appropriate course of action.

39. However, the stance taken by the tenant's solicitors at the hearing is relevant to this extent: it meant that although this was not an *ex parte* hearing, the landlord and his legal team were obliged to take particular care to ensure the Court was given all relevant information, since the landlord's application was no longer being substantively defended.

40. Undoubtedly, her failure to engage was prayed in aid by the landlord. At paragraph 38 of my judgment, I observe as follows:

> *"The relevant circumstances here give cause for concern in respect of the tenant's behaviour to date. She has failed to discharge her rent for 15 months. She has not made any payment, even a lesser amount than that owing. She has not paid any arrears. She remains in the property and has given no indication as to when she will vacate the property. No instructions were provided by the tenant to her legal team in respect of these motions. She has refused to provide an undertaking to preserve sums when requested to do so. In those circumstances, I am satisfied there is a real concern as to whether she would use her inheritance to pay the outstanding rent or whether she might seek to avoid doing so."*

41. Given the landlord's evidence before the Court, and the stance of the tenant's legal team on the day of the hearing, in my view the landlord's legal team should at that stage have alerted the Court to the fact of without prejudice negotiations to avoid the Court proceeding on the basis – as I did – that there had been no response at all on the part of the tenant in respect of the requests for a commitment in relation to the monies forthcoming from her mother's estate.

Consequences of omission

42. Given my conclusion that the fact of the existence of without prejudice settlement negotiations should have been conveyed by the landlord in the context of the application being made, I must now consider the consequences of such an omission. The tenant urges me to discharge the interim Order and argues that no further interlocutory Order ought to be made. I am also faced with an application by the landlord to vary the Order by virtue of his second motion. Moreover, the factual context has now radically changed since a decision has now been given in the statutory appeal and the original purpose of the Order was to ensure monies were not dissipated pending the decision of this Court on the appeal.

43. In *Bambrick*, Clarke J. relied on *Lloyds Bowmaker Ltd. v Britannia Arrow Holdings Ltd.* [1988] 3 All ER 178 in relation to the steps a court should take where there has been a failure to disclose:

> *"I find it a cumbrous procedure that the court should be bound, instead of itself granting a fresh injunction, to discharge the existing injunction and stay the discharge until a fresh application is made, possibly in another court, and the court which is asked to discharge the injunction should not simply, as a matter of discretion in an appropriate case, refuse to discharge it if it feels that it would be appropriate to grant a fresh injunction. That leads me to think that there is a discretion in the court on an application for discharge."*

44. Clarke J. went on to observe that the Court has a discretion in cases where failure to disclose has been established to refuse to grant the interlocutory injunction and to discharge the already granted interim injunction but is not necessarily obliged to do so.

45. In considering the criteria which the Court should apply in the exercise of the discretion, Clarke J. observed that the following factors were the ones most likely to weigh heavily with the Court:

> *"1. The materiality of the facts not disclosed.*
>
> *2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless, significantly culpable in failing to disclose.*
>
> *3. The overall circumstances of the case which lead to the application in the first place."*

46. Considering the materiality of those facts first, had the fact of those negotiations been disclosed, I think it fair to say that the landlord would have had a more difficult task in persuading me that I should infer an intention to seek to evade payment of the outstanding rent such as to justify restraining access to any monies from her mother's estate. Knowing of the existence of settlement negotiations would have meant that it could not be said that the tenant had not engaged at all in relation to the proceeds of her mother's estate.

47. However, as noted above, there were other factors that might have persuaded me to make the Order of 29 July 2022 even if I had known of the existence of settlement negotiations i.e. the tenant's longstanding failure to pay the rent, the amount of rent owing, the absence of any challenge to the outstanding debt and the tenant's failure to vacate. Moreover,

because the negotiations were privileged, I would simply have had the bare knowledge of the fact of negotiations and not their content. Knowing of the existence of negotiations would not have altered the factual situation that presented itself in July 2022: the tenant would at some point in the future be in receipt of monies from her mother's estate, and was not prepared to give any undertaking in relation to the use of those monies to pay a debt which she did not contest. All these factors lead me to conclude that the information not disclosed was material but not highly material or determinative.

48. Separately, in relation to the culpability of the failure to disclose – asserted vehemently by the tenant – I am satisfied that this was an innocent omission. At paragraph 7 of the affidavit of John Connellan, solicitor, sworn 10 May 2023, he avers that:

> "*It was my very clear understanding and interpretation that "without prejudice" communications as between a firm of solicitors and another firm of solicitors could not and ought not be identified or referred to within proceedings in the absence of mutual agreement as between the two firms of solicitors. It was not my understanding that same ought to have been mentioned in the context of the proceedings that were before the Court*"

49. At paragraph 8 he says that it was never his intention to misrepresent or mislead the Court or anyone else in relation to the proceedings and that it was his genuinely held belief that he ought not to mention without prejudice communications in the context of the proceedings in the absence of agreement with the firm.

50. I am satisfied having considered this affidavit involved that there was certainly no intention to mislead the Court and it was an inadvertent mistake, based on a belief as to the law on the disclosure of without prejudice communications.

51. In summary, I am of the view that the landlord ought to have disclosed the fact of the without prejudice communications but that the failure was on the lesser end of the scale

of non-disclosure breaches, in particular given (a) the fact that the tenant was represented, albeit at the hearing no submissions were made on her behalf, and (b) that the apparent non-engagement by the tenant was only one factor amongst a number that justified the making of the Order. For that reason, I do not consider it appropriate to grant the relief sought by the tenant i.e., discharging the Order. In any case, because the circumstances have now changed as outlined above, the Order in any case requires to be revisited and a fresh Order made. The omission by the landlord is not of such gravity that it ought to be treating as precluding the making of a varied Order at this point on the basis of new evidence. Nonetheless, the landlord's failure must be marked in some way.

52. In those circumstances, it seems to me that the appropriate way to do so is to vary the costs Order made following the grant of the injunction. That costs Order awarded the costs of the motion to the landlord in total. The landlord has filed an affidavit of 22 March 2023 averring that the costs have been adjudicated at €43,807.79. Under s.169 of the Legal Services Regulation Act 2015 I am entitled to consider the way in which the parties have conducted the proceedings in making a costs Order. There is no preclusion in the Act on the Court revisiting a costs Order in particular circumstances. It seems to me that in the circumstances of this case, that may be the appropriate response to the non-disclosure. However, I am conscious that this particular approach was not raised during the course of the hearing either by the parties or by the Court.

53. Accordingly, I will permit the parties to make written submissions if they wish on my proposed course of action i.e. to vary the Order of 29 July 2022 such that rather than the landlord being entitled to the full costs of the motion, he will be entitled to 50% of the costs only. The parties have **one week** to provide written submissions through the registrar from the date of delivery of this judgment, to be no more than 1,5000 words, which should only deal with the proposed variation of the costs Order as identified above, and should

not deal with any other aspect of this judgment. In the absence of any submissions by either party on this point, an Order varying the Order of 29 July 2022 to that effect will be made.

Landlord's application to vary Order

54. I turn now to the landlord's application for a revised interlocutory Order. The existing Order restrains the tenant from dissipating any amount received *qua* beneficiary in her mother's estate below the amount of €48,750. The landlord has sought to continue that Order in the revised amount of €45,000 pending such time as the full rent arrears sum of €73,041 is discharged in full by the appellant. In fact, by the first motion, the landlord sought to restrain the tenant from dissipating any amount below €75,000 but that was reduced to €45,000 in the second motion.
55. As identified above, a number of events have taken place since the Order of 29 July 2022. The statutory appeal has been determined. The amount of money due and owing to the tenant from her mother's estate has been clarified. By a letter of 16 May 2023, Corcoran and Co. Solicitors identified that she is entitled to inherit €68,136.86. The solicitors for her mother's estate describe the amount of €48,750 as being "effectively frozen until the determination of the case" by Order of 29 July 2022.
56. Because the appeal has now been determined, the role of this Court is arguably at an end. Nonetheless, the Order sought by the landlord would have continuing legal effects despite the determination of the appeal. Therefore, if I make the Order sought, I could not do so under the jurisdiction I exercised in July 2022 i.e., the jurisdiction under the Judicature Act 1877 to make interlocutory orders pending the determination of the proceedings. The appeal having been determined, the interlocutory aspect of this case is at an end.
57. Accordingly, the question arises as to the jurisdiction of the High Court to make the Order sought in the circumstances of this case. Helpfully, the law as to the jurisdiction of the

High Court to make orders with continuing effect even after a substantive decision has been recently addressed by Simons J. in the decision of *O'Keefe v. Commissioner of An Garda Siochana* [2023] IEHC 489, albeit in the context of judicial review as opposed to the present context i.e. a statutory appeal. Nonetheless, the principles identified therein make it clear that the inherent jurisdiction of the High Court includes a power to make orders that remain in place beyond the final determination of the proceedings, including pending resolution of discrete matters by an inferior court, in this case the District Court. That is demonstrated by the following extract from *O'Keefe*:

> *"Counsel on behalf of the applicant referred to the judgment of the Supreme Court in Tormey v. Ireland [1985] I.R. 289, [1985] I.L.R.M. 375. It was submitted that this judgment stands as authority for the proposition that where jurisdiction over a particular matter has been conferred on the District Court, the High Court's jurisdiction is ousted. With respect, the position in respect of the allocation of jurisdiction is more nuanced. The Supreme Court in Tormey v. Ireland emphasised that the High Court retains jurisdiction by way of judicial review:*
>
> > *"If, in exercise of its powers under Article 34, s. 3, sub-s. 4, Parliament commits certain matters or questions to the jurisdiction of the District Court or of the Circuit Court, the functions of hearing and determining those matters and questions may, expressly or by necessary implication, be given exclusively to those courts. But that does not mean that those matters and questions are put outside the original jurisdiction of the High Court. The inter-relation of Article 34, s. 3, sub-s. 1 and Article 34, s. 3, sub-s. 4 has the effect that, while the District Court or the Circuit Court may be given sole jurisdiction to hear and determine a*

particular matter or question, the full original jurisdiction of the High Court can be invoked so as to ensure that justice will be done in that matter or question. In this context the original jurisdiction of the High Court is exercisable in one or other of two ways. If there has not been a statutory devolution of jurisdiction on a local and limited basis to a court such as the District Court or the Circuit Court, the High Court will hear and determine the matter or question, without any qualitative or quantitative limitation of jurisdiction. On the other hand, if there has been such a devolution on an exclusive basis, the High Court will not hear and determine the matter or question, but its full jurisdiction is there to be invoked – in proceedings such as habeas corpus, certiorari, prohibition, mandamus, quo warranto, injunction or a declaratory action – so as to ensure that the hearing and determination will be in accordance with law. Save to the extent required by the terms of the Constitution itself, no justiciable matter or question may be excluded from the range of the original jurisdiction of the High Court.""

58. Here, I am satisfied that I have the jurisdiction to make an Order that certain sums be retained for the purposes of satisfying any District Court Order that may ultimately be made enforcing the Determination Order. It should be recalled in this regard that that the Determination Order has legal effect and the tenant has an obligation under s.123(1) to comply with it. The role of the District Court is to make an Order directing compliance with the Order where a person is refusing to comply with a binding Determination Order subject to its entitlement not to direct compliance in the circumstances identified in s.124(2) and (3). I am satisfied that in an appropriate case this Court has jurisdiction to make an Order that continues its effects after the proceedings

before it have been determined, including up to the point where another court is likely to be seized of the matter or disposes of the matter if seized. A court should only exercise such a jurisdiction where it is satisfied that it is in the interests of justice that such an Order be made.

59. Here, the justification for the Order being sought is that the tenant is unlikely to ensure that she has assets sufficient to meet any Order that the District Court may make to enforce the Determination Order, given her previous failure to pay the rent, her decision to remain on in the property without paying rent, the absence of any challenge to the rent owing either before the Tribunal or this Court, and most significantly, her failure to give any undertaking to this Court or any indication that she would either discharge the rent owing or retain the monies pending any process before the District Court.

60. The landlord emphasises the amount of money owing, both in unpaid rent and in legal costs, as well as the financial impact on him of her failures in this respect. In the affidavit sworn 22 March 2023 to ground the first motion, the landlord averred as follows:

> *"… I am seriously concerned that when the inheritance sum becomes payable to the appellant, any sum above the currently restrained figure of 48, 750 will be put beyond the reach of this deponent.* (paragraph 14)
>
> …
>
> *"From the appellant's conduct to date, I do not believe she has any intention of meeting her financial obligations towards this deponent and she will dissipate any inheritance sum she receives without her being restrained from doing so by this Honourable Court".* (paragraph 16)

61. No evidence to the contrary has been put before the Court by the tenant. The failure of the tenant to provide any reassurance in relation to the rent owing is an important factor when considering the overall balance of justice. No monies have been paid towards the

outstanding rent, and nor has the tenant made any offer in that respect. The tenant has sworn two affidavits, being an affidavit of 28 March 2023 in response to the first motion, and a grounding affidavit to her motion of 22 May 2023. She provided written legal submissions as well making oral submissions to the Court on a number of occasions. It is striking that at no stage did she provide any undertakings in respect of retaining monies that she will receive from her mother's estate pending the outcome of the District Court enforcement proceedings. Nor has she identified any other source of payment of the monies outstanding. In this respect I should emphasise again that three different bodies – the adjudication officer, the Tribunal and the High Court - have all considered the claim for outstanding rent and made findings against the tenant. The Determination Order that obliges her to pay the outstanding rent is binding and she has failed to comply with it. She has given no reason for her non-compliance. The landlord is obliged under the statutory scheme to go to the District Court to ensure compliance with the Determination Order. In those circumstances it seems to me that an intention not to use the monies to pay off the debt owing and/or an intention to dissipate the monies to avoid them being used for the payment of rent arrears has been sufficiently established by the landlord.

62. In those circumstances, I am persuaded that in the interests of justice, I ought to make an Order restraining the tenant from disposing of the sum of €45,000 pending the satisfaction of any Order of the District Court or any Order of the Circuit Court should an appeal be lodged.

Conclusion

63. For the reasons set out in this judgment, I make the following Order:

> *"Carly Hamilton, and any person with notice of the making of this Order, are restrained from dissipating any amount received by Ms. Hamilton qua beneficiary in the estate of Elizabeth (Betty) Hamilton below the amount of €45,000 pending*

the satisfaction of an Order of the District Court (and in the event of an appeal, the satisfaction of an Order of the Circuit Court) directing Ms. Hamilton to comply with the Determination Order of the Tribunal or the refusal of any such application for compliance to the District Court (and in the event of an appeal, the Circuit Court) until such time as no less than €45,000 of the rent arrears sum owed to the landlord is discharged. For the avoidance of doubt, persons are free to make any payments to Ms. Hamilton qua beneficiary in the estate of Elizabeth (Betty) Hamilton provided the amount of 45,000 is retained pursuant to the terms of this Order. Ms. Hamilton has liberty to apply to vary the Order if an application for enforcement is not made to the District Court within six weeks of the date of perfection of this Order."