APPROVED **[2024] IEHC 355**

THE HIGH COURT

[Record No. H.P.2024.0000172]

BETWEEN

LINDAT LIMITED

PLAINTIFF

AND

THE PW PLAZA CAFÉ BAR LIMITED

DEFENDANT

JUDGMENT of Mr Justice Nolan delivered on the 18th day of June, 2024

Introduction

1. The Plaintiff is a company which was originally part of Harcourt Developments Group, which is a large property company. However, in 2023, the ownership of the shares of the company changed. It owns a public house known as the Donaghmede Inn at Grange, Baldoyle, Dublin 13, part of the Donaghmede Shopping Centre and is its landlord.

2. The Defendant is a company which presently holds the licence and is still part of the Harcourt Development Group.

3. In September of 2020, the Plaintiff entered into a lease with the Defendant, in the middle of the COVID19 pandemic.

4. On the 19th of July 2023, a new company Marisola Ltd, took ownership of the shares of the Plaintiff and acquired its interest in the lease. On the 8th of August 2023, it served a Notice of Forfeiture on the Defendant, in circumstances where there were significant arrears of rent, service charges and insurance premiums, totalling €441,948.44.

5. The Defendant says that the Notice of Forfeiture is invalid due to one of two side letters, the second of which, dated the 23rd of September 2020, the day after the signing of the lease, suspended the payment of any monies until the public house had been refurbished and was up and trading.

6. Further, acting on that and other representations, the Defendant says it expended monies in excess of €255,000, upgrading the premises and therefore the Plaintiff is estopped from claiming the rent, rates and charges and from seeking possession, since the Forfeiture Notice is invalid. It says that it was and still is willing to pay the rent, once the Plaintiff permits it to open, something it has prevented up to now.

7. These proceedings seek the return of the 7-day licence which is in the hands of the Defendant and without which, the Plaintiff cannot lease the premises to a new tenant.

Background

8. On the 22nd of September 2020, a lease was granted by the Plaintiff in respect of the premises for a term of 10 years at a market rent of € 80,000 per annum. The lease was entered into in unusual circumstances, in that on the 15th of March 2020, public houses in the State were requested to close due to COVID-19. They remained closed for almost 2 years.

9. On the 9th of July 2020, a liquidator was appointed to Donaghmede Inns Limited, the former tenant of the public house. The affidavits say that the then directors of Lindat Limited were concerned that the liquidator might sell the licence to allow a third party to extinguish it pursuant of Section 18(2) of the Intoxicating Liquor Act 2000. At the time, as noted above, the Plaintiff was part of the Harcourt Developments Group, and in preference to taking the licence in its own name, it was decided that another Harcourt Developments company, the Defendant, should take the lease. The Defendant paid the liquidator of the former tenant €30,000 for the licence and fittings on the same day that the lease was executed.

10. In September 2020, the Premises was vacant and in need of total updating and refurbishment but was not able to trade until all COVID19 restrictions had been lifted. For much of the periods of lockdown, no construction activity was possible, but if there was no lease in place, the licence would lapse if not renewed annually by the 30th of September.

11. To avoid that possibility, on the 22nd of September 2020, the Plaintiff granted the lease to the Defendant. The rent recited in the lease was the independently verified market rent for the Premises in "*shell and core*" state.

12. Clause 5.18 of the lease suspended the rent during COVID19 restrictions, so a side letter ("the First Side Letter") was written by the Plaintiff to the Defendant, which stated that the rent would be abated for the first two years. This First Side Letter, together with the lease, were furnished to the Plaintiff's lenders, EPF, whose consent was needed. It agreed to both the lease and the contents of the First Side Letter.

13. However, the very next day, the 23rd of September 2020, the Plaintiff wrote another letter ("the Second Side Letter"). In the context of this dispute, I think it is worth setting it out in full.

> *" LINDAT LIMITED (hereinafter referred to as "The landlord"*
>
> *18/19 Harcourt Street*

Dublin 2

To: The PW Plaza Café Bar Limited ("the Tenant")

18/18 Harcourt Street

Dublin 2

Re: Unit 1, Donaghmede Shopping Centre, Grange Road, Dublin 13 (the "Demised Unit")

Lease of even date made between (1) Lindat Limited (hereinafter called "the Landlord") of the First P (2) The PW Plaza Café Bar Limited of the Second Part ("the Lease")

Dated 23 day of Sept, 20

Dear sirs

This side letter is supplemental to the Lease.

Save where the context otherwise requires, capitalized terms not defined in this letter shall have the same meaning as assigned to them in the Lease.

In consideration of you the Tenant entering the lease, we confirm that notwithstanding the terms of the Lease, the following is agreed;

1. *The Payments and Outgoings to include rent, service charge, Insurance and all other outgoing payable by the tenant under the lease shall commence when the fit-out works are complete and the premises has commenced trading.*
2. *The Rent Payable in the Lease for the first year and 2nd year following the commencement of trade shall be abated to €40,000 plus VAT being 50% of the Initial Rent reserved in the Lease. The abated Rent payable is to be paid in accordance with the terms of the Lease to the intent that each quarterly payment*

under the Lease in the first and the second year of the Term is abated by 50% to €10,000 plus VAT.

The landlord may assign the benefit of this agreement or may mortgage it or charge it to banks or other financial institutions. The landlord will also be at liberty to grant steps in rights with respect to its interest in this agreement to banks or other financial institutions. The Tenant will join in and be party to any such agreement required by such banks or financial institutions full.

In all other respects the Lease is confirmed."

14. There are a number of things to note about this letter. The first is that the registered offices of the landlord are the same as that of the tenant, which is not such a surprise seeing as they are part of the same group. The second is that the two letters share much of the same language including the word "*consideration*", with the date written in by hand. Finally, this was an incredibly generous offer. Notwithstanding the contents of the lease, and the contents of the First Side Letter, this Second Side Letter waived the obligation to pay rent, service charges, insurance and all other outgoings. Further, even after the business started to trade there was to be a 50% cut in the initial rent reserved in the lease.

15. In the context of the obligations on the part of the Plaintiff, as it was then owned by Harcourt Developments Group, to seek the approval of their lender, EPF, this was a most surprising letter. It would seem to have been the intent to bind parties who may purchase the shares in the Plaintiff in the future.

16. In December of 2021, EPF discovered the Second Side Letter. On the 13th of February 2023, the lenders appointed receivers over the whole of the Donaghmede Shopping Centre, including the public house. In March 2023, the Defendant sought to open the premises for trade after the refurbishment.

17. In July of 2023, the shares of Lindat were acquired by Marisola Limited and new directors were appointed. From that point on it was no longer part of the Harcourt Developments Group of companies, nor indeed was the rest of the shopping centre.

18. On the 8th of August 2023, the Plaintiff served a Notice of Forfeiture on the Defendant pursuant to section 14 of the Conveyancing Act, 1881 and gave it 21 days to remedy its breach of covenant and pay the arrears of rent then due and owing in the sum of €199,226.30. While the Forfeiture Notice was silent as to how the arrears were calculated, it is common case that it was on the basis of the First Side Letter. On the same day it served a letter demanding the arrears of service charge in the sum of €234,935.17 and insurance for €7,786.97, which were due and owing on that date, again, giving it 21 days to pay those sums. In total the sums due and owning was said to be €441,948.44.

19. On the 29th of August 2023, the Plaintiff re-entered and took possession of the premises using a master key, pursuant to Clause 5.1 of the lease, and the next day requested the Defendant to assign, transfer and deliver the publican's licences and restaurant certificates in respect of the demised premises. It got no response.

20. While the parties entered into significant table tennis type correspondence, no application was made by the Defendant for an injunction to prevent the Plaintiff obtaining possession.

21. On the 21st of September 2023, the Plaintiff notified Dublin Metropolitan District Court of its intention to apply to transfer the license into its name, returnable on the 28th of September 2023, but unbeknownst to it, the next day on the 22nd of September, the Defendant had applied through the Revenue Commissioners for the renewal of the license in its name. Then, on the 2nd of October 2023, the license was duly issued to the Defendant through the offices of the Revenue Commissioners. But on the 23rd of November 2023, the District Court certified that the Plaintiff was entitled to receive the license in respect of the premises.

22. On the 10th of January 2024, the Plaintiff sent a final warning letter demanding return of license and two days later, these proceedings were issued seeking interim and interlocutory relief.

The Plaintiff's Case

23. The Plaintiff's case is that the lease was validly forfeited and determined in August 2023, in circumstances where the Defendant was in significant arrears of rent, charge and insurance premiums, totalling €441,948.44. The Defendant is required pursuant to its obligations under the lease to yield up, or to use the language of the covenant "*assign transfer and deliver up*" (clause 3.39), the publicans license and restaurant certificate to the landlord. It has no legal right to retain the licence because its tenancy is at an end. This means that the Plaintiff cannot re-let the premises, thereby depriving it of its property rights, as well as causing it significant ongoing financial loss.

24. Mr. Doherty SC for the Plaintiff, says that what is unusual about this case, is that while the tenant threatened to bring an application to challenge the retaking of possession, it did not do so and in fact it has never brought any proceedings to challenge the forfeiture.

25. It took the benefit of the licence, even though that licence should attach to the lowest remaining interest in the property, being that of the landlord. The Plaintiff has a prospective tenant who wants to take over the premises under a new lease, but the premises has been rendered sterile by virtue of the Defendant's retention of the physical licence, there can only ever be one physical copy of the licence at any one time. So, without the licence, the premises is unusable.

26. It fundamentally disputes the Second Side Letter and to reference the wording of O'Donnell J. (as he then was) in *Merck Sharp & Dohme v. Clonmel Healthcare Limited* [2020]

2 IR 1, a "*strong case that it is likely to succeed, at the hearing of the action"* has been established and that the Second Side Letter is not valid or binding. The two parties were not at arm's length. They were, in essence, the same parties. They were representing two separate legal entities, but the same individuals were involved in deciding unilaterally, to agree the concession. It is done in a context where they are aware that not only it was not supported by consideration but that the lender, EPF, whose consent was required for it to be valid, would never give consent. The Defendant was aware that this was not a valid and effective agreement.

27. The Plaintiff questions whether any monies were spent, namely €255,000, but concedes that some monies were spent.

28. On the issue of consideration, Mr. Doherty says that there could have been no consideration since any consideration was for entering into the lease, bearing in mind the abatement and the COVID19 circumstances had already been taken on board (*Riordan -v- Carroll* [1996] 2 I.L.R.M. 263). This was a corporate gift within group and no more than that, because there is no actual evidence of any independent decision being taken by the directors of the tenant to ask for this. So the only party who gave it was a party who knew that the lender would not have approved.

29. In relation to the estoppel arguments, he relies upon *ICC Bank PLC -v- Verling* [1995] 1 I.L.R.M. 123*, Re N17 Electrics* [2012] 4 I.R. 634 and *Fennell -v- Gilroy* [2022] IECA 258 and in particular the Court of Appeal statement that *""In general, a borrower/mortgagor cannot confer upon another a greater right than he himself possesses or has power to grant."*

30. In those circumstances it would be unjust to deprive the Plaintiff of the licence pending a trial, and giving back the licence pending a trial is "*the most just solution*", in accordance with *Merck*. Therefore, the Defendant is simply holding the Plaintiff to ransom by wrongfully keeping the licence.

31. While it has other arguments to make in regard to unconscionable bargaining and Section 238 of the Companies Act 2014, as well as what happened in the District Court about the renewal of the licence, its main case is as set out above.

32. In regard to the balance of justice, he says the least risk of injustice rests in granting the relief, not only because the Defendant has done nothing to advance its position that the forfeiture was invalid, but because it has adopted a course of action which effectively immunises itself against the negative consequences of losing. It is a company that has never traded or turned a profit.

33. On the other hand, if the order is made at this interlocutory stage and the Defendant is proved to be correct in its defense, the Plaintiff certainly is a mark since it owns multiple shopping centers and has been able to finance the purchase of those shopping centers without recourse to borrowing.

The Defandant's Case

34. The Defendant says the Plaintiff does not come to court with clean hands. He is seeking equitable relief but is bound by all the equitable maxims. It seeks the protection of the court by way of promissory estoppel as a shield but not a sword. It says that at all material times, the Plaintiff knew it was going to refurbish the premises at a cost and indeed requested it to do more.

35. The appointment of Aramark meant that the Plaintiff was able to ensure that the premises was refurbished to its specification, at a time that no public house was trading. This is further evidence of promissory estoppel or alternatively a representation. That representation being, albeit implied, that the defendant would be permitted to trade. All these matters are for the trial.

36. The Second Side Letter allowed the Defendant the opportunity to update and refit the premises at whatever pace was possible during such uncertain times. There was nothing unusual about a rent-free period being granted to a tenant which is obliged to fit out the premises. There is no question of any unconscionable bargain or bestowing any unfair benefit or advantage on the Defendant, pursuant to Section 238 of the Companies Act 2014 or otherwise.

37. Once the lender found out about the Second Side Letter, it could have claimed that the lease was void, but it didn't. In fact, it did the opposite by allowing the Defendant invest over €255,000 in refitting the premises, something which if the order is made, will unjustly benefit the Plaintiff. In December of 2021, EPF discovered the contents of the Second Side Letter. The Defendant says that this gives rises to an estoppel. This had the same effect as the Second Side Letter from which the lender should not be let resile from.

38. Mr Mooney SC says that since the Defendant never had actual possession of the premises in the sense of trading from it, the essence of a public house, during the periods of lockdown due to COVID19, the premises lay empty. EPF appointed Aramark to manage Donaghmede Shopping Centre on its behalf in December 2021. In mid-2022, the Defendant informed Aramark that it intended updating and refitting the Premises, which was entirely consistent with the Second Side Letter. Aramark proceeded to indicate what the Plaintiff's landlord requirements were, and thereby represented that there was consent to the works. The Defendant says that the Plaintiff never complied with its express and implied covenant for the Defendant's peaceful and quiet enjoyment of the premises, in which case, no claim for rent could arise. A stalemate arose, and despite inquiries by the Defendant, no substantive response was received from Aramark or the receivers.

39. Once the new owners became involved, there was no contact from the Plaintiff. It ought to have been aware that the demand for rent was wholly groundless as the Defendant had not

been in occupation, had been carrying out works with its active consent, had the benefit of Clause 5.18 of the Lease and of the Second Side Letter. As the rent demanded was groundless, no Notice of Forfeiture based on it, could be of any force or effect.

40. The Plaintiff failed to inform Dublin City Council, pursuant to Section 32 of the Local Government Reform Act 2014 of the change of rateable occupier and failed to seek the licence until the 10th of January 2024.

41. It should be noted that Mr. Mooney made little of the Second Side Letter and how it came into existence in his oral submissions, relying mainly on the issue of estoppel. The Defendant denies that there is any case to meet in regard to lack of consideration, unconscionable bargain or section 238 of the Companies Act 2014.

42. In relation to the core argument, Mr Mooney relies on *Dunne v Dún Laoghaire-Rathdown County Council* [2003] 1 I.R. 567, *Ferris v Ward* [1998] 2 I.R. 194 and *RAS Medical Limited v RCSI* [2019] 1 IR 63, the latter in regard to the argument that the affidavits should separate fact from argument and speculation. In regard to the forfeiture matter he places importance on the decision of O'Hanlon J. in *Bank of Ireland v Lady Lisa Ireland Ltd* [1992] 1 IR 404 at 408 where he stated

> "*Where a landlord proposes to forfeit a lease in reliance on a proviso in the lease giving a right of re-entry for non-payment of rent or breach of other covenant in the lease, it has been held that the "re-entry" involved may only be effected in one of two ways—either by physical re-entry, or by the issue and service of proceedings for recovery of possession of the premises…In the present case it was submitted that the notice served on behalf of the lessor was a "final and positive act treating a breach of covenant by the lessee as constituting a forfeiture" within the meaning of the expression as used by Collins. I conclude that the notice served on the lessee in the present case was not an effective exercise of the power of re-entry for non-payment of rent referred to in the*

lease. This need not be fatal to the plaintiff's case if the procedure followed thereafter was effective of itself to forfeit the lease and set in motion a valid claim for an order of possession."

43. Here, the Plaintiff could not "*physically re-enter*" the Premises, as the Defendant was never in occupation. Any such purported "*re-entry*" could be retracted at any time.

The Law

44. The law relating to the injunctive principles are well set out by O'Donnell J. (as he then was) in in *Merck Sharp & Dohme v. Clonmel Healthcare Limited* [2020] 2 IR 1. I do not intend to set them out. Suffice to say the Plaintiff accepts that it must set out a strong case that it is likely to succeed at a full trial of the action, since it is seeking a mandatory order in regard to the licence or in accordance with *Maha Lingam*, which has been consistently endorsed in the authorities since "*at least that it has a strong case that it is likely to succeed at the hearing of the action*" (See also Clarke CJ. in *AIB v Diamond* [2012] 3 I.R. 549).

Discussion and Decision

45. I am troubled by the creation of the Second Side Letter. Mr. Power stated openly that the Second Side Letter was not sent to EPF, as the then directors of the Plaintiff were aware that no approval would be given, and that the lender wished to dispose of its loan and charge. In those circumstance, the directors of the Defendant and the Plaintiff, who were the same people, decided that while the Second Side Letter could not bind the lender, it would bind the Plaintiff, the Defendant and third parties.

46. While it will be a matter at the plenary hearing, what the legal effect of the letter is, it seems to me that it came into existence by subterfuge. It seems to be an attempt to bind any

new owners of the shares of the Plaintiff with an agreement not to seek rent, rates or other charges for an indefinite period, in circumstances where, it is common case, the permission of the lender was required under the loan agreement. It seems to me that this cannot be correct. It would reward the Defendant for a clandestine act. This is something that I must bear in mind when exercising any equitable remedy.

47. It was notable that Mr. Mooney stirred away from any significant discussion relating to the creation and effect of the Second Side Letter, relying instead on estoppel arguments. Therefore, I find that arguments in the written submissions surrounding the effectiveness of the Second Side Letter do not stand up to scrutiny and are not persuasive. It cannot be the case that a party is bound by an agreement in correspondence which it knows it does not have the power to exercise and that that agreement can bind the Plaintiff, the Defendant or third parties, who are unaware of the circumstances of its creation. The Second Side Letter was in my view an attempt to circumscribe the rights of the new owners of the shares of the Plaintiff, as Mr. Power averred to in his third affidavit.

48. Further it seems clear to me, that there was no consideration. The only possible consideration could have been the consideration referred to in the First Side Letter, which was the consideration of the tenant entering into the lease that the Plaintiff, notwithstanding the terms of that lease, would have provided a rent abatement for two years. That was on the 22nd of September 2020, the Second Side Letter was allegedly dated the 23rd of September 2020. That was past consideration and therefore there was no consideration, for what Mr. Doherty describes as a "*corporate gift*".

49. In regard to the submission that the Defendant was never really in possession, I cannot agree with him. Clearly the Defendant was in possession and was undertaking refurbishment works. How else could the works be done? This is to me evidence of possession.

50. In those circumstances and on balance of probabilities, at this interlocutory stage I find that there is a strong case for believing that the forfeiture was valid. I do not think that the failure to inform Dublin City Council, pursuant to Section 32 of the Local Government Reform Act 2014, of the change of rateable occupier, or the failure to seek the licence until the 10th of January 2024 or the issues around what happened or did not happen in the District Court could have any effect on the validity of the forfeiture notice, one way or the other. Either way I do not need to decide these issues at this stage since I am simply asking if there is a strong arguable case on these issues.

51. I will leave the argument in regard to unconscionable bargaining or section 238 of the Companies Act 2014, to the trial of the action. I do not believe that the Plaintiff comes to court without clean hands as has been argued.

52. I do not accept that any promissory estoppel arises from the Plaintiff permitting the Defendant to refurbish the premises. Either way, it seems to me to be at least arguable that it was part of its obligations under the lease.

53. Laffoy J. In *The Barge Inn limited v Quinn Hospitality Ireland Operations 3 Limited* [2013] IEHC 387 where she said:-

> *"As Delany remarks in the course of her brief outline of the doctrine, it is often considered in a contractual context and fuller treatment of it is to be found in leading texts in that area, citing Clark and McDermott on Contract Law (2001). Having considered both, I think it is true to say there is little divergence as to the current state of Irish law on the doctrine between the authors. McDermott lists the key ingredients of promissory estoppel as being the following:*
>
> *(a) the pre-existing legal relationship between the parties;*
>
> *(b) an unambiguous representation;*
>
> *(c) reliance by the promisee (and possible detriment);*

(d) some element of unfairness and unconscionability;

(e) that the estoppel is being used not as a cause of action, but as a defence; and

(f) that the remedy is a matter for the Court…The authors are also ad idem on the effect of the estoppel: It suspends, not extinguishes, the promissor's rights; its effect is to suspend not to give up altogether a legal right, the right to resile from the promise being available where reasonable notice is given. Applying the suspensory effect of the doctrine to the various circumstances which may arise is the most difficult aspect of the application of the doctrine."

54. In this case there clearly was a pre-existing legal relationship between the parties, but that legal relationship was made far more complicated by the change in ownership of the shares and the Plaintiff. The Second Side Letter while on the face of it, is an unambiguous representation, is one which I have found cannot be relied upon in circumstances where it came into existence without the permission of the lender. The third criteria, namely a reliance by the promisee and possible detriment, does not arise in this case, in the manner in which it does in the other leading cases on the issue. Nor do I think there is any element of unfairness or unconscionability in the manner in which the Plaintiff now seeks the return of a license, which it is entitled to, so long as the forfeiture has been valid. Since I have found that it is valid, at least at this point in the proceedings, it seems to me to follow that there is no unfairness or unconscionability. Indeed, it was an obligation under the lease. The last element is that estoppel is being used, not as a cause of action but as a defense, namely a shield but not a sword. That certainly is the case here, but it was open at all times for the Defendant to come to court of its own volition and seek injunctions to prevent, what it alleges is, an invalid forfeiture. It has chosen not to do so.

55. Neither do I accept that any of the correspondence from Aramark gives rise to a representation which creates an equitable shield or defence to the return of the licence. Indeed, when one looks at the issue of equity it seems the manner in which the Second Side Letter came into existence militates against the Defendant, because it was not open in its dealings with its lender.

56. Therefore, in conclusion on the issue as to whether the Plaintiff has shown a strong case for a mandatory order seeking the return of the licence, I find that it has.

57. However, that is not the end of the matter. I must still deal with where the justice of the case lies and as part of that analysis whether damages are an adequate remedy in accordance with the principles set out in *Merck Sharp & Dohme.*

58. I am persuaded by the arguments of the Plaintiff that, in the event it is not successful at this stage and the matter went to hearing and it won, that the Defendant would simply fold its tent and liquidate itself. After all, it has not made any payment of any description to date nor has it ever traded, as far as the accounts show. It has argued that it has expanded over €250,000 on refurbishment of the premises but there has been a remarkable lack of any actual evidence to support the payment to any third party not part of the Harcourt Developments Group. The opposite argument does not seem to hold in that the Plaintiff clearly is a mark, in the sense that it holds multiple properties without borrowings. Therefore, if the Defendant is successful at trial, it will be able to exercise the undertaking as to damages which the Plaintiff has given.

59. I find that there is a Mexican standoff with the Defendant unlawfully holding the licence to prevent the Plaintiff re-letting the premises. In those circumstance, the least risk of harm rests with granting the orders sought.

60. I shall hear the parties as to the nature of the order I shall make.