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COMMERCIAL RENTS AND COVID-19

The COVID-19 pandemic has presented major challenges for commercial tenancies where businesses may have been forced to close entirely and/or operate under considerably different trading conditions, such that they find themselves unable to pay their rent.

The High Court decision in [Oysters Shuckers Ltd t/a Klaw v Architecture Manufacture Support \(EU\) Ltd & Anor \[2020\] IEHC 527](#) highlights the hurdles a commercial tenant may have to overcome when seeking an injunction to prevent its landlord from taking possession for non-payment of rent, whether as a result of the COVID-19 pandemic or otherwise. The judgment also raises certain points of legal interest in relation to commercial tenancies generally.

Of particular note is the application in this judgment of the principles established by the Supreme Court in [Merck Sharp & Dohme Corporation v Clonmel Healthcare \[2019\] IESC 65](#) (“**Merck**”) to injunctions related to property disputes. You can read more about the *Merck* case in our previous briefing [here](#).

Background

The dispute in this case related to Klaw restaurant, operated by Oysters Shuckers Limited (“**Klaw**”) which stopped paying rent on its premises in Temple Bar after the pandemic forced it to close in March 2020. In May, the landlord demanded that Klaw deliver up vacant possession and intimated that they would re-enter, disable any alarm and change the locks on 8 June.

On 5 June, Klaw applied for an interim injunction on an *ex parte* basis, temporarily preventing the landlord from obtaining possession of its premises, which was granted largely due to the prohibition on evictions in place at the time under the Emergency Measures in the Public Interest (Covid-19) Act 2020. By the time the

For further information on any of the issues discussed in this article please contact:



John O’Riordan
Partner, Litigation
DD: + 353 (0)1 673 1792
john.oriordan@dilloneustace.ie



Rachel Turner
Partner, Litigation
DD: + 353 (0)1 673 1845
rachel.turner@dilloneustace.ie

hearing of the interlocutory application took place, that act was no longer in force and the application was determined in line with the normal principles governing interlocutory applications.

Arguments

The landlord claimed that it was entitled to vacant possession of the premises on the basis that Klaw had failed to discharge its rent since March and that it was overholding the premises since its 2016 lease had expired. The issue in relation to the 2016 lease formed part of a broader commercial dispute between the parties as to whether a new lease executed in 2018 was legally binding. Further, the landlord regarded it as significant that Klaw was not seeking relief against forfeiture and intimated that this was because they would have been required to discharge the arrears of rent as a pre-condition.

Klaw argued that it was entitled to remain in possession of the premises under the terms of the 2016 lease, which it said had not yet expired. In effect, the injunction sought by Klaw was to stop the landlord from taking possession of the premises until their broader commercial dispute could be heard. Klaw also argued that it could be entitled to a rent suspension on the basis that the lease had been “*partially frustrated*” by the pandemic which prevented it from being able to pay its rent.

Injunction Test

In deciding whether to grant the injunction, the court followed the framework laid out in *Merck*:

Permanent Injunction

The first factor to be considered was whether a permanent injunction would be likely to be granted if Klaw were to succeed at trial. The judge believed that this would be the case and on that basis it was necessary to apply the same test at interlocutory stage.

Fair Issue to be Tried

Noting it could not determine the factual matters in dispute at the interlocutory stage, the court was satisfied that Klaw had established there was a fair question to be tried in relation to the 2018 lease. Of note is the fact that the judge did not regard the clear failure to pay rent as meaning there was not a fair issue to be tried, as the “*core issue*” was the validity of the 2018 lease.

Balance of Convenience / Balance of Justice

Having established there was a fair issue to be tried, the court was then required by *Merck* to decide if the balance of convenience/balance of justice lay in favour of granting the injunction.

The court highlighted previous cases in which the courts were unwilling to grant an injunction where the tenant had stopped paying rent for a prolonged amount of time, particularly where that tenant had ceased trading. However, it noted that non-payment of rent does not automatically preclude a tenant from obtaining an injunction, but would weigh heavily against the court's decision to grant one. Here, it found no basis on which it could be argued Klaw was not obliged to pay the rent and noted that Klaw had failed to make any proposal to discharge the arrears.

In *Merck* it was established that the most important element in determining where the balance of convenience lies between the parties in granting an interlocutory injunction is whether damages would be an adequate remedy. The court found Klaw had failed to show that it would suffer irreparable harm or that it could not be adequately compensated by damages if the injunction was not granted. Lastly, it was noted that Klaw was clearly not in a financial position to substantiate the undertaking as to damages which it would be required to give if the injunction were granted.

Judgment

Taking all of the above factors into account, the court, whilst expressing its “*considerable sympathy*” for Klaw, refused to grant the injunction. It rejected Klaw's argument that there had been a partial frustration of the lease, affecting only the rental obligation. With regard to the rent suspension provisions of the lease, it found that these applied only to circumstances where the premises was damaged by an insured risk such that it was unfit for occupation. As the definition of “*insured risk*” did not include a global pandemic, it did not apply to these circumstances. Although the court was not ultimately asked to determine the forfeiture point, it noted the difficulty with Klaw making this argument in the context of the current case where the lease itself was in dispute.

Comment

The courts are undoubtedly sympathetic to businesses that have been negatively impacted by the COVID-19 pandemic. However, the peculiar circumstances of the pandemic will not override fundamental contractual requirements such as the obligation to pay rent, nor the legal tests that apply to injunction applications. It would be interesting to know if the outcome would have been different had arrears of rent been the only issue between the parties and had Klaw made a realistic attempt to reach an agreement with its landlord in advance of the

application. Ultimately, the courts will not ask a landlord to subsidise or underwrite the future trading prospects and prosperity of a tenant, while in the meantime being deprived of the use of its premises and the opportunity to attract another tenant.

If you require advice in relation to the matters covered in this briefing please contact a member of our [Commercial Litigation Team](#).

DILLON EUSTACE

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

Tower 49, 12 East 49th Street, New York, NY10017, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

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