



THE COURT OF APPEAL

Court of Appeal Record No.: 2024/291
High Court Record No.: 2020/1600P
Neutral Citation No.: [2026] IECA 157

Whelan J.
Binchy J.
Pilkington J.

BETWEEN/

GRADUAL INVESTMENTS LIMITED

PLAINTIFF/RESPONDENT

- AND -

DES KENNEDY

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Binchy delivered on the 31st day of July 2026

1. I have had the benefit of reading in draft the judgement to be delivered by my learned colleague Whelan J. While I am in agreement with much of the analysis contained therein, there is one part of that analysis, and the resulting conclusion, with which, respectfully, I am unable to concur. Since the issue concerned is, in financial terms, the single biggest issue falling for determination in this appeal, I find it necessary to state very briefly the basis upon which I would have reached a different result in respect of the same.

2. The factual background giving rise to these proceedings is summarised in the judgment of Whelan J., and I gratefully adopt that summary. Likewise, I will use the same abbreviations and definitions as those appearing in the judgment of Whelan J.

3. The issue with which I find myself in disagreement with Whelan J. concerns that part of the respondent's claim against the appellant arising from breaches of the Lease by the appellant during the term of AA2. The High Court judge found that the appellant had, in failing to comply with certain of the tenant's covenants in the Lease, also failed to comply with the second proviso to AA2. It will be recalled that the second proviso to AA2 was in the following terms: -

"Provided always that:

If:

1. ...

2. Any of the covenants on the part of the Tenant whether set out in the Lease or this side letter shall not be observed or performed;

3. ...

4. ...

then and in any of the said cases, the terms of this side letter will immediately become null and void ab initio in which case the Landlord shall be entitled to pursue all monies owed under the Lease without reference to this side letter or the terms of the concession hereby granted."

4. The High Court judge found that the appellant had breached three of the tenant's covenants in the Lease. At para. 106 of his judgment, he found that the appellant had breached the covenant of the Lease whereby the tenant was required, prior to carrying out any works to the demised premises to obtain the consent of the landlord to the carrying out of any such works. The judge concluded that the effect of that breach was to render AA2 void *ab initio*. He reached a similar conclusion at para. 116 in respect of breach of the restrictive user covenant in the Lease. And finally, so far as breach of the conditions of the leasehold covenants is concerned, the Judge concluded that the failure on the part of the

appellant to pay the service charge demanded in 2016 and 2018 in full within seven days of reminders issued to the appellant also rendered AA2 void. Consequent on the foregoing conclusions, the High Court judge further concluded that the rent which the respondent had agreed to forego (pursuant to AA2) fell due for payment by the appellant to the respondent, pursuant to the second proviso of AA2, leading the Judge to award the respondent the sum of €117,991.7 under this heading.

5. In her judgment, Whelan J. concludes that the High Court judge erred in finding that the appellant had breached the leasehold covenant regarding payment of the Service Charges under the Lease, having regard to what she found were deficiencies in the notices (requiring payment of the Service Charges) served on the appellant on behalf of the respondent. I am in agreement with the analysis and conclusion reached by Whelan J. in respect of this issue.

6. However, I am unable to agree with the conclusion reached by Whelan J. in respect of the other breaches of the Lease relied upon by the respondent. While the appellant does not deny having carried out alterations to and having changed the use of a portion of the demised premises, in each case without having obtained the prior consent of the respondent, he argued that absent a notice having been served by the respondent requiring the appellant to remedy the breaches pursuant to clause 4.10 of the Lease, there could be no breach of the Lease by the appellant such as to engage the second proviso to AA2. Whelan J., with whom Pilkington J. agrees, has accepted this argument, with the result that they have allowed that portion of the appeal that relates to value of the discount in the rent provided for by AA2, the benefit of which had been received by the appellant, i.e. €117,991.7. Respectfully, for the reasons that follow, I am in disagreement with that conclusion of my colleagues regarding their interpretation of clause 4.10 of the Lease, and the conclusion that flows from that interpretation.

7. The appellant also argued that insofar his actions constituted a breach of the Lease, Mr. Birmingham's letter of March 2017 was sufficient in equity and in law to signify in writing that any breaches of the Lease in these regards had been waived. As is apparent from her judgment at para. 73, Whelan J. did not consider it necessary to reach any conclusion on the appellant's argument grounded on waiver (as least insofar as it concerned alterations to the demised premises) in light of her conclusion on the application of clause 4.10 of the Lease. Since I have arrived at a different conclusion on the interpretation and application of clause 4.10 of the Lease, I address this point briefly below.

Interpretation of Clause 4.10 of the Lease

8. The appellant argued that the non-observance or non-performance of a covenant of the Lease must be decided by reference to the Lease, and that clause 4.10 of the Lease prescribes a "*complete scheme*" for dealing with what the landlord perceives to be a breach of the same. It was argued that before the respondent could rely upon a breach of the terms of the Lease, for the purposes of the second proviso to AA2, it was necessary for the respondent to serve a notice on the appellant pursuant to clause 4.10 of the Lease, and that the respondent not having done so was precluded from relying upon the alleged breaches for the purposes of the second proviso to AA2.

9. Clause 4.10 of the Lease is located in the part of the Lease that is under the heading of: "*Tenant's Covenants*". The opening line of clause 4 states: -

"The Tenant throughout the Term HEREBY COVENANTS with the Landlord (and the Management Company as the case may be) as follows:"

There then follows a series of covenants on the part of the tenant, and at clause 4.10 it is provided that: "*Upon written notice being given by the Landlord to the Tenant of any breach of covenant*", the tenant covenants, *inter alia*, to remedy the breaches referred to in the notice

within a specified period and if the tenant fails to do so, the clause permits the landlord to enter upon the demised premises for that purpose.

10. At para. 52 of the judgment under appeal, the High Court judge considered the argument made by the appellant regarding clause 4.10. He found that clause 4.10 is simply a mechanism enabling the respondent to serve a notice upon the appellant requiring him to remedy a breach of the terms of the Lease, failing which the respondent would be entitled to enter upon the premises in order to do so. He held that the clause “*does not oblige the landlord to serve a notice in the case of such a breach: it is not an entitlement of the tenant.*”

11. Mulcahy J. further observed that in any event the express wording of the clause is that written notice is given by the landlord “*of any breach of covenant*”, thus confirming what the High Court judge described as the obvious logic that a demand to remedy a breach must be preceded by a breach.

12. The Judge also addressed another argument advanced by the appellant under this heading, and that was that for the purposes of forfeiture, a court would not permit a landlord to forfeit a lease without having afforded the tenant an opportunity to remedy a breach of covenant. In this regard the appellant had relied upon s. 14 of the Conveyancing Act, 1881. However, the Judge held, at para. 55, that even though a court might be unwilling to permit a landlord to forfeit a lease where the tenant had not been given an adequate opportunity to remedy a breach of covenant, that is not relevant to the question of whether a landlord is entitled to demand the payment of the full reserved rent, having agreed to accept a lesser sum on condition of compliance by the tenant with a leasehold covenant, where the tenant fails to comply with those covenants. He held that it is not open to the appellant to argue that the abatement agreements required the respondent to give him an opportunity to remedy a breach before they could be considered void.

13. Whelan J. has addressed these issues at paras. 60 and following in her judgment. At para. 60, she observes that the principles on construction of a contract earlier summarised in the judgment govern the construction both of the Lease and AA2. At para. 61 she observes that whether covenants 4.12 (the user covenant) and 4.13.2 (the alterations covenant) were observed or performed by the tenant falls to be determined by reference to the Lease. I fully agree with Whelan J. in this regard, and I also agree with her that AA2 does not alter, amend, suspend or vary the operation of any subclause in Part 4 of the Lease. I also agree that breach of the user or alterations covenant is therefore determined by reference primarily to the Lease, and that clause 4.10 of the Lease has not been deleted or varied in any way by AA2.

14. However, where I disagree with my colleague is in her conclusion that clause 4.10 sets out a notice procedure that must be followed by the landlord before it may rely on a breach of the Lease by the tenant for any purpose. On this basis, Whelan J. considers that in order for the respondent to rely on the second proviso to AA2, it must first serve a notice under clause 4.10 of the Lease affording the appellant the opportunity to remedy the alleged breaches. I regret that I cannot agree with her that this is required by clause 4.10 of the Lease.

15. I agree with the conclusion of the trial judge, that on a plain reading of clause 4.10, it does not oblige the landlord to serve any notice requiring the tenant to remedy a breach of the conditions of the Lease. I also agree with his observation that, in any case clause 4.10 of the Lease is predicated on there having been a breach of the terms of the Lease such as would entitle the landlord to serve a notice upon the tenant. That being the case, it follows that before the respondent could have any entitlement to serve a notice under clause 4.10 of the Lease, the appellant must already be in breach of a condition of the Lease, and the second proviso of AA2 is triggered. This provides in clear language that if any of the covenants on the part of the tenant, whether set out in the Lease or the side letter shall not be observed and

performed, then in any of the said cases, the terms of the side letter will immediately become null and void *ab initio*, in which case the landlord shall be entitled to pursue all monies owed under the Lease and without reference to the side letter or to the terms of the concession thereby granted.

16. In my view, there is no ambiguity either in clause 4.10 of the Lease or in the second proviso of AA2. Once a breach of covenant on the part of the appellant was established, the appellant lost the entitlement to the benefits conferred by AA2, and the full rent became payable *ab initio*. In my view this was an automatic consequence of the breach of leasehold covenants by the appellant, and there was no obligation on the respondent to serve a notice pursuant to clause 4.10 of the Lease, and the High Court judge was correct to so conclude.

Waiver

17. As mentioned above, as a result of her conclusion regarding the effect of clause 4.10 of the Lease, Whelan J. did not consider it necessary to reach any conclusion with regards to a further argument advanced by the appellant that the respondent had by his conduct waived his entitlement to treat AA2 as being void by reason of the appellant carrying out works to the demised premises without first having obtained the consent of the respondent. However, even if it is the case that the correspondence issued by the respondent's agent on 14th March 2017 could be said to constitute a retrospective waiver in relation to the carrying out of the works, the appellant is still faced with the difficulty that the same defence could have no application to the breach of the restrictive user clause. The High Court judge addressed this issue at para. 178: -

“As noted above, for a waiver to be effective, the party waiving its entitlement must know of the facts giving rise to the entitlement being waived. Although the plaintiff was aware at the time of the correspondence of the breach of the alterations covenant, the

only evidence is that it was not aware of the breach of the restrictive user clause until 2020, in fact, after the commencement of the proceedings. ...”

This conclusion on the evidence led the High Court judge to reject the defence of waiver so far as concerns the breach of user covenant, and I can see no error in his conclusion in this regard.

Estoppel and AA2

18. Whelan J. also concluded (at para. 100 of her judgment) that the respondent’s claim for sums due under AA2 also failed on the ground that the respondent was estopped from claiming the same by reason of its representations in correspondence in February 2016 that no further arrears of rent were due at that point in time, with the result that the appellant was induced to sign AA2 and thereafter incurred significant expenditure in carrying out alterations to the demised premises. Even assuming this to be so, however, it does not get around the fact that the appellant did not seek the consent of the respondent either to the carrying out of the alterations of the premises or to the change in the user of a portion of the same, and that in failing to do so, he breached covenants in the Lease. While Whelan J. has concluded that in order to invoke the second proviso to AA2 the respondent was first required by reason of clause 4.10 of the Lease, to afford the appellant the opportunity to remedy these breaches, for the reasons set out above, I cannot agree, and I would therefore dismiss this ground of appeal also.

19. Beyond any doubt, the result of such a conclusion, if accepted by a majority of the Court, would be harsh upon the appellant. Moreover, the amount claimed is unrelated to any loss sustained by the respondent. However, any argument that this might have constituted a penalty clause such as to be unenforceable in law was considered and expressly rejected by the High Court judge and was not pursued on appeal.