

**THE HIGH COURT
CHANCERY**

[2020] IEHC 536
[2020 No. 6367P]

BETWEEN

MUHAMMAD SABIR HAFEEZ

PLAINTIFF

AND

CPM CONSULTING LIMITED

DEFENDANT

JUDGMENT of Mr Justice David Keane delivered on the 28th October 2020

Introduction

1. This is an interlocutory injunction application in a landlord and tenant dispute over a commercial premises in Mullingar, County Westmeath.
2. The plaintiff, Muhammad Sabir Hafeez, is a businessman who resides in Castleknock, County Dublin.
3. On 20 December 2017, Mr Hafeez entered an agreement ('the lease') to lease a premises comprising the ground floor restaurant and part of the rear of the first floor ('the restaurant premises') at 26 Oliver Plunkett Street, Mullingar from John Wylie and Ann Wylie, who were then the owners of that building. Since then, Mr Hafeez has been operating a takeaway restaurant named 'Chicken Hut' there.
4. The defendant, CPM Consulting Limited ('CPM'), is an Irish registered company. On 26 February 2019, CPM purchased the building, including the restaurant premises, from Havbell DAC ('Havbell'), which then owned it, for €450,000. Havbell had acquired the mortgage on the property in 2015 and had appointed a receiver to the property on 18 June 2018, just less than six months after Mr Hafeez entered the lease with the Wylies. CPM purchased the building with the benefit of, and subject to, the lease.
5. Ciaran Moynihan is a director of CPM. He and his wife own the property at 28 Oliver Plunkett Street, which is next door to No. 26, and their family residence is at the rear of No. 28.
6. At about 10.30 a.m. on 14 September 2020, CPM re-entered the restaurant premises and took possession of them, asserting that the lease is forfeit. That event led to the issue of these proceedings.

Procedural History

7. A plenary summons issued on 15 September 2020. In the general indorsement of claim, Mr Hafeez seeks an order for possession of the restaurant premises; declarations that a notice to him to quit dated 21 March 2020 or any other such notice to him is invalid and that he is entitled to peaceful possession of the restaurant premises under the lease; in the alternative, an order granting him relief from the forfeiture of the restaurant premises; damages for breach of contract, breach of covenant, trespass, nuisance, unlawful interference with contractual relations and causing loss by unlawful means; and, finally, all necessary accounts and inquiries.

8. On the same day, Mr Hafeez applied to me *ex parte* for various reliefs, principal among which was an interim injunction directing CPM to deliver up possession of the restaurant premises to him immediately. That application was made by way of an *ex parte* docket, grounded on an affidavit of Mr Hafeez, sworn on that date. Contrary to what was later averred by Mr Hafeez, I did not refuse to hear that application. Rather, I ruled that, based on the evidence presented, Mr Hafeez had failed to establish the necessary urgency either to obtain interim *ex parte* relief or to be granted leave to effect short service of a motion seeking interlocutory relief in the same terms. I did indicate that if, in seeking to issue a motion in the Central Office in the usual way, Mr Hafeez was unable to obtain an early return date, I would certainly hear an application for one.
9. It transpired that Mr Hafeez could not obtain an early return date for his motion from the Central Office, no doubt because of the pressure on court time caused by the measures necessary to address the Covid-19 pandemic. However, he did not then apply for one. Instead, for reasons that have not been explained, Mr Hafeez renewed his application for interim *ex parte* relief, this time before Reynolds J, on 21 September 2020. Correctly concluding that it had been my intention that Mr Hafeez should get an early return date for an interlocutory application, Reynolds J granted Mr Hafeez liberty to effect short service of a motion returnable for 24 September.
10. A motion duly issued on behalf of Mr Hafeez on 21 September. On the same date, Mr Wylie swore an affidavit on behalf of Mr Hafeez.
11. On 22 September, an appearance was entered on behalf of CPM and, on 23 September, Mr Moynihan swore an affidavit on behalf of CPM in opposition to the motion.
12. When the motion came before the court on 24 September, Mr Hafeez sought an adjournment to enable him to consider the contents of Mr Moynihan's affidavit. Counsel for CPM informed the court that it, too, would like an early hearing as it had lined up a new tenant for the restaurant premises and would like to grant a new lease. On the understanding that the status quo was to continue pending the determination of the interlocutory injunction application, Reynolds J adjourned it to 5 October.
13. Mr Hafeez swore a second affidavit on 30 September. Jinal Jitenbhai Madhawani, who lives in Lucan, County Dublin, and describes himself as an employee of Chicken Hut, swore an affidavit on behalf of Mr Hafeez on the same date, as did Usman Hameed, who lives in Drogheda, County Louth, and describes himself as a manager of Kayla Fast Foods (*sic*), trading as Chicken Hut.
14. When the matter came back before the court on 5 October, Reynolds J fixed 9 October for the hearing of the application. I heard the application on that date.

The present application

15. Mr Hafeez seeks five separate interlocutory injunctions against CPM, together with an interlocutory order granting him relief against the forfeiture of the lease, pending further order. The injunctions he seeks are to: (a) restrain CPM from undertaking any works to

the restaurant premises; (b) require it to permit him to re-enter the restaurant premises and resume business there; (c) require it to deliver up vacant possession of the restaurant premises to him; (d) require it to provide him with the keys of the restaurant premises; and (e) restrain it from interfering with the operation of his business at the restaurant premises.

16. CPM opposes that application and joins issue with Mr Hafeez on all of his underlying claims.
17. When the motion came on for hearing, Mr Hafeez had not yet delivered a statement of claim. In the absence of a properly particularised claim, it is necessary to attempt to identify the issues that he seeks to have tried (and, thus, that form the basis of his injunction application) from the contents of the indorsement of claim on the plenary summons; the averments contained in the affidavits that have been exchanged; and the written and oral submissions of the parties.

The lease

18. The lease between the parties is exhibited to the first affidavit of Mr Hafeez. It covers the permitted user of the restaurant premises as a restaurant for a ten-year term between 20 December 2017 and 19 December 2027. The rent is €35,000 a year for the first two years; €37,500 for the next two years; €40,000 for the fifth year; and €44,000 a year for the remaining five years. The annual rent is to be paid in monthly instalments in advance and, in addition, there is to be a deposit of one month's rent. Payment of rent was to commence on 1 March 2018. Mr Hafeez is entitled to break the lease after the expiration of five years from its commencement on the provision of six months' notice in writing.
19. Under clause 2 of the lease, Mr Hafeez agreed, among other things, in substance the following:
 - (i) To pay the reserved rent without deduction at the times, and in the manner, provided for in the lease (Clause 2(a)(i)).
 - (ii) Not to part with or share the possession of the premises, or permit any other person or company to occupy it, without first obtaining the landlord's written consent. (Clause 2(b)).
 - (iii) Not to use the restaurant premises or permit it to be used for any purpose other than as a restaurant or in any manner inconsistent with that purpose (Clause 2(j)).
 - (iv) To refund the landlord a proportionate percentage of the premium on the insurance of the building against fire – and other risks reasonably deemed desirable to insure against by the landlord – and not to do, or permit anything to be done, that may make that policy of insurance void or voidable (Clauses 2(a)(ii) and 2(l)).
 - (v) To take out his own employers and public liability insurance on the property and provide the landlord with evidence of that policy and confirmation that it is paid up to date (Clause 2(a)(ii)).

- (vi) To indemnify the landlord against any claims made by any employee, licensee or invitee arising out of the premises and to effect and have in force a proper public liability insurance cover sufficient to satisfy the landlord that the insurance is adequate to cover the indemnity (Clause 2(v)).
20. Under clause 3 of the lease, CPM agreed, among other things, in essence the following:
- (i) To permit the tenant to peaceably hold the restaurant premises during the term of the lease without disturbance, as long as the tenant pays the rent and abides by the other terms of the lease (Clause 3(a)).
21. Under clause 4 of the lease, the parties agreed, among other things, the following:
- ‘That in the event of the rent reserved or any part thereof being in arrear for seven days after becoming due (whether formally demanded or not) or if there by (*sic*) any breach or non-performance or non-observance by the tenant of any of the provisions herein contained or if the tenant shall become bankrupt or make any composition with his creditors or shall suffer execution to be levied upon the premises ... the landlord shall be entitled to re-enter upon the demised premises whereupon the tenancy shall determine but without prejudice to any claim which the landlord may have against the tenant in respect of any antecedent breach of the tenants covenants or stipulations herein contained.’ (Clause 4(a))

The test for an interlocutory injunction

22. The proper approach to an application for an interlocutory injunction was recently restated in *Merck Sharp & Dohme Corp v Clonmel Healthcare Ltd* [2019] IESC 65 (Unreported, Supreme Court (O’Donnell J; Clarke CJ, McKechnie, Dunne and O’Malley JJ concurring), 31 July 2019) (*‘Merck’*).
23. The general principles remain those identified by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL) (at 407-9) and approved by the Supreme Court in *Campus Oil v Minister for Industry (No. 2)* [1983] 1 IR 88 (O’Higgins CJ and Griffin J, Hederman J concurring) (*‘the Campus Oil principles’*).
24. In summary, those principles are that the applicant must establish that: (1) there is a serious issue to be tried on the applicant’s entitlement to a permanent injunction; (2) the balance of convenience favours the grant of interlocutory relief, which requires, but is not limited to, a consideration of whether damages would be an adequate and effective remedy for an applicant who fails to obtain interlocutory relief but later succeeds in the action at trial and, if not, whether the applicant’s undertaking to pay damages would be an adequate and effective remedy for a respondent against whom interlocutory injunctive relief is granted but whose defence to the action succeeds at trial. While Lord Diplock’s speech in *American Cyanamid* was ambiguous on whether the adequacy of damages was a consideration antecedent to, or part of, that of the balance of convenience, the judgment of O’Donnell J in *Merck* (at para. 35) has now clarified that it is preferable to

consider adequacy of damages as part of the balance of convenience, thus emphasising the flexibility of the remedy.

25. Where a mandatory injunction is sought, such as where an applicant seeks an injunction directing a landlord in occupation to deliver up possession of a property to a tenant formerly in occupation, the *Campus Oil* principles are subject to the significant refinement that an applicant must establish at least a strong case, likely to succeed at the hearing of the action, and not merely surmount the lower threshold of establishing a serious question to be tried; *Maha Lingam v Health Service Executive* [2005] IESC 89, [2006] 17 ELR 137 (*per* Fennelly J at 140). Mr Hafeez accepts – correctly, in my view – that the strong case test is the one that he must meet in order to obtain the relief that he seeks in the present application.
26. In *Merck*, O'Donnell J pointed out that it would be an error to treat the *Campus Oil* principles as akin to statutory rules (at para. 34), before later outlining the steps that might usefully be followed in considering an interlocutory injunction application (at para. 64):
 - (1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted;
 - (2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the *American Cyanamid* and *Campus Oil* approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;
 - (3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;
 - (4) The most important element in that balance is, in most cases, the question of adequacy of damages;
 - (5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;
 - (6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages

awarded will not be a precise and perfect remedy. In such cases, it *may* be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial;

- (7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;
- (8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined.'

27. Finally, in approaching the test I must apply to the evidence that I have attempted to summarise, I am conscious of Lord Diplock's admonition in *American Cyanamid* (at 407):

'It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial.'

The issues that Mr Hafeez seeks to have tried

28. In the written submissions made on his behalf, Mr Hafeez identifies three issues that he seeks to have tried and on which he contends he has established a strong case. In logical sequence, they are as follows:

- (a) that the purported forfeiture of the lease is invalid;
- (b) that, even if valid, the forfeiture of the lease by re-entry for non-payment of rent has since been waived by the acceptance of rent, and
- (c) that, even if the forfeiture is valid and has not been waived, Mr Hafeez is entitled to an order granting him relief against it.

i. Invalid forfeiture of the lease

29. While there is a significant dispute between the parties concerning the nature and extent of the failure by Mr Hafeez to pay rent in accordance with the terms of the lease, he acknowledges that, when re-entry of the restaurant premises was effected on 14 September 2020, the rent had been in arrears for more than seven days.
30. Although, in advancing his claim to relief from forfeiture elsewhere in his written submissions, Mr Hafeez acknowledges that CPM was thus entitled to exercise its right to re-enter the premises and determine the lease under clause 4(a) of the lease, he contends that no such right can be lawfully exercised without first serving a notice of

forfeiture in accordance with the requirements of s. 14 of the Conveyancing Act 1881 ('the Act of 1881').

31. Mr Hafeez argues that this follows, by implication, from the decision in *F. G. Sweeney Ltd v Powerscourt Shopping Centre Ltd* [1984] IR 501. In that case, Carroll J found that the forfeiture of a commercial lease for non-payment of rent by peaceable re-entry where a notice under s. 14 of the Act of 1881 had been served was valid. Mr Hafeez submits that it follows that Carroll J was holding, as an unstated corollary, that forfeiture of a commercial lease for non-payment of rent by peaceable re-entry where a s. 14 notice has not been served is invalid. According to Mr Hafeez, this is so notwithstanding the express words of s. 14(8) of the Act of 1881, whereby that section 'does not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.'
32. In short, Mr Hafeez contends that, in *Sweeney*, Carroll J was introducing a new common law requirement – from which commercial actors cannot contract out in commercial leases – that a landlord must serve a s. 14 notice on a tenant in a non-payment of rent case. In support of that contention, Mr Hafeez cites the decision of Laffoy J in *Savill v Byrne* [2012] IEHC 415 (Unreported, High Court, 19 October 2012) as authority for the proposed that service of a valid s. 14 notice is a condition precedent to lawful forfeiture by re-entry, although *Savill* was not a rent arrears case.
33. The difficulty this argument faces is that it disregards the law directly on point. In the subsequent case of *Re Erris Investments Ltd* [1991] ILRM 377 at 381, Carroll J plainly stated: 'Forfeiture for non-payment of rent is not governed by the Conveyancing Acts 1881 and 1892, so a s. 14 notice is not required.' *Re Erris Investments Ltd* was followed by White J in *Rayan Restaurant Ltd v Kean* [2012] IEHC 29, (Unreported, High Court, 17 January 2012) and, most recently, by Reynolds J in *Jason Investments Unltd. Co. v C & S Jewellery Ltd.* [2020] IEHC 230, (Unreported, High Court, 27 February 2020). The Chancery Division of the Northern Ireland High Court (Burgess J) reached the same conclusion in *Shah Din & Sons Ltd v Dargan Properties Management Ltd* [2012] NI Ch 34, adopting the statement of the law in J. C. W. Wylie, *Irish Land Law* (4th edn, Bloomsbury Professional) that: 'The 1881 and 1892 Acts do not cover forfeiture or re-entry for non-payment of rents.' That is the view still maintained by that author in J.C.W. Wylie, *Landlord and Tenant Law*, (3rd edn, Bloomsbury Professional) (at para. 24.09) when he states:

'At common law the rule was that the landlord had to make a formal demand for the rent before he could invoke a right of re-entry, but this is usually dispensed with by express provision in the re-entry clause – by words such as "whether formally demanded or not". Otherwise, there are no procedural restrictions such as exist for forfeiture in other cases under the Conveyancing Act 1881' (footnotes omitted)
34. As described earlier, clause 4(a) of the lease in this case does dispense with the common law rule by expressly including the words 'whether formally demanded or not'.

35. As a further argument on the invalidity of the forfeiture of the lease, Mr Hafeez points to the earlier service upon him by CPM of a notice to quit. That notice is dated 21 March 2020 and was served under cover of a letter sent by registered post on the same date. The terse recital 'breach by the tenant' as the reason for termination in that notice might well have raised a serious question on the enforceability of any right of re-entry exercised in purported compliance with the requirements of s. 14(1) of the Act of 1881, rather than in reliance upon the terms of clause 4(a) of the lease, if that had happened. However, it is very difficult to see how the re-entry and forfeiture later effected on 15 September 2020 in reliance upon clause 4(a) of the lease could be said to be governed by the March notice to quit and, thus, how it could be said to have been rendered unenforceable by the asserted failure of that notice to comply with the requirements of that statute.
36. In the course of oral argument, it was submitted on behalf of Mr Hafeez that the forfeiture is also invalid because the re-entry was not peaceable in that, since CPM did not have a key, a lock on the door of the restaurant premises must have been forced. While I do not doubt that, in that limited sense, CPM's re-entry may have been forcible, it is difficult to see how it was not peaceable. In the edition of his *Landlord and Tenant Law* already cited, Professor Wylie suggests (at para 24.18) that, for the purpose of the Forcible Entry Acts, 'forcible entry' entails entry that is effected against physical resistance or that causes more than minimal damage to the property, or both. I know of no contrary authority and none was cited. There is no evidence before me of anything more than minimal damage to the restaurant premises by, at most, breaking – and, presumably, immediately afterwards repairing – a lock.
- ii. Waiver of forfeiture*
37. While there is a conflict of evidence between the parties on the broader issue of the payment of rent under the terms of the lease (to which I will return later in this judgment), it is common case that Mr Hafeez made seven separate rent payments of €2,916.66 each to CPM on 22 and 29 April, 2 and 22 July, 6 and 28 August, and 23 September of this year.
38. Mr Hafeez contends that those payments brought his rent payments up to date and that, in accepting them without demur, CPM waived its right to forfeit the lease. In particular, Mr Hafeez relies upon his solicitors' statement in an email sent on 23 September 2020 that, if the payment he made to CPM on that date was not immediately returned, they would treat it as rent received by CPM in accordance with the terms of the lease.
39. The position of CPM is that, making full allowance for those payments, each of which was made late in breach of the terms of the lease, the rent remains in arrears and that, in accepting those payments, to which it was entitled as *mesne* profits, CPM never waived its right to forfeit the lease. CPM refrained from taking any steps between April and September to re-enter the property only because, upon the enactment of the Emergency Measures in the Public Interest (Covid-19) Act 2020 ('the Act of 2020') on 27 March 2020, an issue immediately arose about whether the prohibition under s. 5(7) of that Act of 'all proposed evictions in all tenancies in the State, including those not covered by the

[Residential Tenancies Act 2004]' during the operation of the Act of 2020 was so broadly drafted as to extend to commercial tenancies, such as the lease of the restaurant premises. The Act of 2020 was in operation for an initial emergency period of three months. That emergency period was then twice extended: first, to 20 July 2020 by the Emergency Measures in the Public Interest (Covid-19) Act 2020 (Section 4) Order 2020 (S.I. No. 224/2020); and second, to 1 August 2020 by the Emergency Measures in the Public Interest (Covid-19) Act 2020 (Section 4) (No. 2) Order 2020 (S.I. No. 254/2020). The issue became moot when s. 5(7) of the Act of 2002 was repealed by s. 13(b) of the Residential Tenancies and Valuation Act 2020, which was enacted on 1 August 2020. Moreover, CPM argue, since Mr Hafeez expressly invoked that legislation as preventing forfeiture in legal correspondence at the time, he cannot now be heard to argue that the forbearance of CPM during that period amounted either to waiver of its right of forfeiture or to culpable delay entitling Mr Hafeez to relief against the re-entry and forfeiture that it effected on 14 September.

40. In advancing the argument that the acceptance of these payments amounts to a waiver of the right to forfeiture, Mr Hafeez relies on the following passage from the decision of Andrews LJ for the Northern Ireland Court of Appeal in *McIlvenny v McKeever* [1931] NI 161 (172):

'Dealing first with the defence of waiver, it is well recognised that Courts of law have always leant against forfeiture. (Per Lord Mansfield in *Goodright d. Walter v. Davids 2 Cowp.* 803, 805). They have, accordingly, readily held that an alleged forfeiture has been waived if the lessor, with full knowledge of the breach of covenant or condition relied upon, has by some positive unequivocal act recognised the continued existence of the tenancy at a period subsequent to such breach. Acceptance of rent accruing due after the forfeiture, an action for same, and even an unqualified demand for such rent, have been held to constitute such waiver, notwithstanding the lessor's protest that he was acting without prejudice to his right to insist on a prior forfeiture. *Davenport v. The Queen* (1877) 3 A.C. 115'

(footnotes reinserted in text)

41. However, as Mr Hafeez acknowledges in the written submissions made on his behalf, the judgment of Andrews LJ immediately goes on to identify two qualifications or exceptions to the general proposition (at 172-173):

'The first is that when once a landlord has definitely exercised his option of relying upon the forfeiture and has shown a final and unequivocal determination to take advantage of it by instituting proceedings in ejectment, no subsequent act, whether receipt of rent or otherwise, will be held to operate a waiver. *Evans v. Enever* [1920] 2 KB 315, and *Civil Service Cooperative Society, Ltd. v. McGrigor's Trustee* [1923] 2 Ch 347, may be referred to as two recent authorities in which this principle was fully recognised and applied.

The second is that where the breach is, as in the present case, of a continuing character, waiver of the forfeiture up to a particular day cannot be relied upon as a defence to an action for ejectment in respect of a subsequent breach. The reason for this is simply that, as there is a continually recurring cause of forfeiture, a new right arises each day that the breach continues, and the landlord's waiver of a prior right cannot prejudice him or preclude him from taking advantage of a new and subsequent right. It has further been held—and this is material on the facts of the present case—that the mere acceptance of rent which becomes due pending a notice to repair is no waiver of a subsequent forfeiture occasioned by non-compliance with such notice. *Doe d. Rankin v. Brindley 4 B. & Ad. 84*, *Doe d. Baker v. Jones* 5 Ex. 498, 505, and *Penton v. Barnett* [1989] 1 QB 276, decided that in the case of a continuing breach a second notice need not be given in respect of non-repair existing after the expiration of the time specified in the notice, for the breaches during the latter period are the same as those in respect of which the notice was given.'

(footnotes reinserted in text)

42. Thus, having regard to the first exception or qualification, to succeed in his waiver argument Mr Hafeez must establish that the re-entry of the restaurant premises for arrears of rent on 14 September 2020 under clause 4(a) of the lease was not a final and unequivocal demonstration that CPM was exercising the option to forfeit the lease, directly equivalent to – if not more final and unequivocal than – the institution of proceedings in ejectment. And, having regard to the second exception or qualification, Mr Hafeez must establish that his acknowledged breach of the requirement to pay the rent as it fell due under the lease is not a breach of a continuing character; that is, that the payment of 23 September 2020 brought the payment of rent up to date.
43. Andrews LJ went on to acknowledge a third exception or qualification (at 186-7). It is that provided by s 43 of Deasy's Act (the Landlord and Tenant Law Amendment (Ireland) Act 1860), which states:

'Where any lease made after the commencement of this Act shall contain or imply any condition, covenant or agreement to be observed or performed on the part of the tenant, no act hereafter done or suffered by the landlord shall be deemed to be a dispensation with such condition, covenant or agreement or a waiver of the benefit of the same in respect of any breach thereof, unless such dispensation or waiver shall be signified by the landlord or his authorized agent in writing under his hand.'
44. In *Crofter Properties Ltd v Genport Ltd* (Unreported, High Court, 15 March 1996), McCracken J rejected the view – expressed by Pallets CB during argument in *Foott v Benn* (1884) 18 ILTR 90 – that s. 43 applies only to the general waiver of a covenant (or condition) and not to the waiver of any particular breach of a covenant (or condition), holding (at p. 41) that the words 'any breach thereof' are quite clear and can only

reasonably be interpreted as meaning that there cannot be a waiver of any specific breach unless that waiver is signified by the landlord in writing.

iii. Relief from forfeiture

45. It is settled law that, even in non-payment of rent cases that fall outside the statutory power to grant relief against forfeiture contained in s. 14(2) of the Act of 1881, there is a wider equitable jurisdiction to grant such relief.
46. Mr Hafeez relies specifically on the decision of the Supreme Court in *Whipp v Mackey* [1927] IR 372. Although the agreement in that case employed the terms 'landlord' and 'tenant', Kennedy CJ found it to be (at 382), on its true construction, a fifteen-year licence to moor eel tanks to Friar's Island in the River Shannon, part of certain lands at Fort Henry, County Tipperary, for an annual fee (referred to in the agreement as a 'rent'), payable half-yearly. The licence included a term that, should the tenant commit any breach of it, the landlord could then terminate it on one week's notice in writing. Mr Mackey entered the licence agreement as tenant on 10 May 1919. Mr Whipp purchased the lands, with the benefit of the landlord's interest in the licence agreement, on 8 September 1920. On 31 December 1923, Mr Whipp gave written notice of termination on the basis that there had been a failure to pay the yearly rent of £12 10s for each of the preceding three years. At trial, evidence was tendered that Mr Mackey had been unable to use the eel fisheries during that three-year period due to violent intimidation by government forces during the War of Independence. Nonetheless, Mr Mackey later paid the amount then due, £37 10s, by cheque, under cover of a letter of 6 February 1924. As the dispute between the parties dragged on past that point, Mr Mackey tendered further rental payments that Mr Whipp refused to accept. On 23 October 1924, Mr Whipp issued a writ, seeking a declaration that the agreement and the licence it conferred had been lawfully determined. There was no issue concerning Mr Mackey's conduct in the performance of the licence agreement, other than his acknowledged failure, later rectified, to pay the rental (or licence) fee due for the period concerned.
47. Kennedy CJ quickly concluded that the licence agreement had been lawfully determined due to Mr Mackey's breach of it, so that that the only real question in the case was whether Mr Mackey was entitled to equitable relief from the consequences of that breach. Having surveyed the authorities on the wider equitable power to grant relief from forfeiture, outside the narrow confines of relief against forfeiture for non-payment of rent under a lease and the statutory limitations upon that specific relief, the Chief Justice set out the following lucid analysis (at 385-6):

'The granting or refusal of equitable relief against forfeiture is a matter for the exercise of a judicial discretion. Clearly, a very strong case should be made to bring about the refusal of relief where the forfeiture depended only on the non-payment of a sum of money on a specified date. That it may be refused in certain such cases is shown by cases of failure to pay calls on shares in companies, but in these cases interest on the amount of the delayed payment may not be a complete compensation for the delay and its consequences. It has been said also that regard

will be had to the conduct of the debtor. Generally speaking, however, where the forfeiture is only for securing payment, and where there is no injury from the delay in payment, or only such injury that payment of a sum for interest and—if needs be—costs will be a full compensation for it, the equitable relief will not be refused. Is there anything in the conduct of the defendant here which should make this case the exception? I think not. If there is no answer of a strictly acceptable kind in law to the failure to pay on the named day there is an explanation which would, I think, have fallen on receptive ears in Chancery in the days when equity afforded a refuge from the tyranny of law. Mackey was, during a substantial part of the time covered by the rent, forcibly dispossessed of his fishery, and without a use for his licence. Relying on his deprivation and loss, he tarried in payment while he (as it is said in *Cary 1, Anon.*) "intreated a respite at the hands of" the plaintiff. Mr. Phelps calls this a "flagrant breach of agreement" by "wilful abstention from paying for three years." I do not think that under the dyarchy of law and equity we must regard the postponing of payment in the circumstances I have mentioned as conduct which should influence the Court to deny Mackey the relief he seeks.'

48. Borrowing from the summary of this analysis set out in para 24.20 of Wylie, *Landlord and Tenant Law*, already cited, Mr Hafeez argues that, because CPM re-entered the restaurant premises in reliance upon clause 4(a) of the lease and because Mr Moynihan avers at paragraph 10 of his first affidavit on behalf of CPM that the breach of the lease agreement that was the subject of the notice to quit of 21 March 2020 was the non-payment of rent, the following principles (and only those principles) must apply:
- '(a) the relief is a matter for exercise of judicial discretion; (b) a very strong case should made for the refusal where the forfeiture is based solely on non-payment of a sum of money; (c) where the forfeiture is only to secure payment of that money, and no injury has resulted from the delay in payment or only such injury as payment of interest, plus costs, would be full compensation, the equitable relief will not be refused.'
49. However, as I read the relevant passage from the judgment of Kennedy CJ, there is no suggestion that regard should not, or must not, be had to the broader conduct of the person seeking relief against forfeiture in considering whether to grant that equitable relief. Rather, the Chief Justice was saying that, in a case where the only issue of conduct raised is a failure to make payment, then if compensation is provided in the form of the amount of that payment, plus interest, together with costs (where applicable), relief from forfeiture will not be refused. As we shall see, this is not a case in which the only issue of conduct raised in opposing that relief is failure to make payment, nor is it a case in which it is accepted that proper compensation has been provided for that failure.
50. On the question of relief against forfeiture, CPM relies principally on the following passages from the decision of Gilligan J in *Campus & Stadium Ireland Development Ltd v Dublin Waterworld Ltd* [2006] IEHC 200, (Unreported, High Court, 21 March 2006):

'Wylie, *Irish Land Law*, 3rd ed. (Butterworths Ltd., 1997) at p. 950 provides a brief summary of the law in relation to relief against forfeiture in the following terms:

"[A]nd the court has a general discretion to grant whatever relief it thinks fit in the light of the parties' conduct and all the other circumstances of the case. There are no fixed rules for the exercise of this discretion which is administered by the courts on general equitable principles".

It is clear in my view from a perusal of the various authorities which have been opened to me on this aspect that the courts in general strive not to place rules or restrictions on the exercise of judicial discretion in relation to relief against forfeiture.'

51. And, later, after consideration of a number of the leading English authorities:

'I also have regard to the view expressed obiter by Murphy J. in *Cue Club Limited and Others v. Navaro Limited* (Unreported, Supreme Court, 23rd October, 1996) wherein he stated:

"The nature of the discretion exercised by the Courts of Equity in granting relief against forfeiture is hardly applicable or applicable to the same extent, at any rate where the Court is dealing with substantial commercial transactions in which the lessor and lessee are on equal terms".

I take the overall view that in order to exercise my discretion fairly, I must take into account the conduct of the parties, the wilfulness of any breach by the tenant, the general circumstances particular to the issue, the nature of the commercial transaction the subject matter of the lease, whether the essentials of the bargain can be secured, the value of the property, the extent of equality between the parties, the future prospects for their relationship, the fact that even in cases of wilful breaches it is not necessary to find an exceptional case before granting relief against forfeiture and then apply general equitable principles in reaching a conclusion.'

52. The last paragraph in the foregoing extract was cited with approval by White J in *Rayan Restaurant*, already cited (at paras 74 and 75); Burgess J in *Shah Din & Sons*, already cited (at para [20]), and, most recently, by Reynolds J in *Jason Investments*, already cited (at para 31).

The evidence

53. The issues that I have just identified can only be fully argued and properly determined at trial. Nonetheless, I must next seek to summarise the evidence adduced on affidavit, not in an attempt to resolve any of the large number of conflicts of fact that the affidavits reveal, since that is not my function on an interlocutory injunction application, but simply to consider the significance of that evidence and of those conflicts for the purpose of the 'strong case' test I must apply.

i. Rent

54. In the affidavit that Mr Hafeez swore on 15 September 2020 to ground both his application for interim *ex parte* relief and, latterly, the present application for interlocutory relief, he avers broadly as follows.
55. He enjoyed a good relationship with his landlords, John and Ann Wylie, from his entry into the lease in December 2017 until March 2019, when CPM acquired their interest in the property from the receiver. He had regularly paid his rent later than the date stipulated in the lease and the Wylies took no issue with that. CPM's insistence that the rent be paid on time in accordance with the terms of the lease was thus a departure from that prior working arrangement. Mr Hafeez was shocked to receive a notice to quit on 21 March 2020, although he acknowledges that, by his own estimation, two months' rent was then outstanding. He paid part of the outstanding rent on 22 April 2020 and, what he describes as, the balance on 29 April 2020. He did not pay the rent due for May until 2 July 2020. He paid the rent for June on 22 July; the rent for July on 6 August; and the rent for August on 28 August 2020. Thus, by his own account, he had consistently failed to pay the rent as it fell due, had been irregular in his payments, and had been more than seven days in arrears of payment when CPM re-entered the property on 14 September 2020.
56. In his affidavit, Mr Wylie avers that, although the lease stipulates the payment of rent monthly in advance, Mr Hafeez rarely did so but always paid that rent before the end of each month. Mr Wylie considers Mr Hafeez to have been an exemplary tenant.
57. In his replying affidavit on behalf of CPM, Mr Moynihan avers as follows. There has been a consistent pattern of late payment of rent by Mr Hafeez from February 2019, when CPM acquired the building. CPM never received from Mr Hafeez the apportionment of the monthly rent for February 2019 that it had agreed with the receiver through whom it purchased the building. After that, the rent – payable monthly in advance under the lease – was continuously in arrears as follows:

<i>Rental Period</i>	<i>Payment Date</i>
2019	2019
March	4 April
April	23 April
May	24 May
June	19 June
July	17 July

August	20 August
September	19 September
October	4 November
November	8 November
December	30 December
2020	2020
January	23 March
February	1 April
March	22 April
April	29 April
May	2 July
June	22 July
July	6 August
August	28 August

58. Thus, there were difficulties with the payment of rent from the moment CPM assumed ownership of the property in February 2019. In support of that contention, Mr Moynihan exhibits a letter that his solicitors wrote to Mr Hafeez on 16 July 2019 complaining that arrears of rent had become a continuing problem and threatening service of a notice to quit.
59. Mr Moynihan exhibits a letter that CPM wrote to Mr Hafeez on 20 February 2020, advising him that the rent was being reviewed from €35,000 a year to €37,000 a year with effect from 1 March 2020. The meaning and significance of that correspondence is not clear to me because the lease contains what *Wylie, Landlord and Tenant Law*, already cited, describes (at para 11.37) as a simple 'escalator' scheme, rather than a rent review clause. Having established that it is to run from 20 December 2017 to 19 December 2027, the lease provides for a fixed escalation without provision for review, whereby the rent will rise from €35,000 a year for years 1 & 2 to €37,500 a year for years 3 & 4. In Professor Wylie's view, such simple escalator schemes falls outside the scope of s. 132(3) of the Land and Conveyancing Law Reform Act 2009 and, thus, outside the scope of the rule of construction for rent review clauses that it contains. The letter, therefore, might represent a concession whereby CPM waived the increased rent for the months of January

and February 2020. Alternatively, it might be an acknowledgment that, since special condition 5(e) of the lease stipulates that 'rental payment shall commence on the 1st March 2018', years 3 & 4 of the lease should be construed as commencing on 1 March 2020, rather than on 20 December 2019. Of course, insofar as it may be necessary to resolve any question of the proper construction of the lease or the letter, that will be a matter for the trial of the action.

60. On each of the four occasions on which Mr Moynihan met with Mr Hafeez in person to discuss rent arrears and rent payments under the lease, he had to make the necessary arrangements some days in advance, as Mr Hafeez had to travel from Dublin to the restaurant premises in Mullingar specifically for that purpose. One such meeting took place on 1 March last. At that meeting Mr Moynihan advised Mr Hafeez that the rent was three months in arrears. Mr Hafeez asked for a rent reduction; advised Mr Moynihan that his wife was in hospital and that he was ill and facing bankruptcy; and assured Mr Moynihan that the rent arrears would be paid by the following Tuesday (3 March).
61. When no such payment was received, CPM served a notice to quit on 21 March 2020. In light of the enactment of the Act of 2020 on 27 March 2020 and the contention of Mr Hafeez's solicitors in a letter dated 2 April 2020 that any forfeiture and re-entry would be in breach of that Act, CPM took no further steps until September.
62. When CPM re-entered the restaurant premises on 14 September 2020, the arrears of rent were as follows. First, the monthly rent of €3,125 for September had not been paid in advance of the beginning of that month in accordance with the terms of the lease. Second, the irregular and late rental payments that had been made to cover the six month period running from March to August had been paid at the former rate applicable for years 1 & 2 (€2,916.66) of the lease, rather than at the current rate for years 3 & 4 (€3,125), leaving an additional shortfall of €1,250.04 (being the monthly increase of €208.34 multiplied by six). Thus, according to CPM, there were then aggregate rent arrears in the sum of €4,375.04. It is not clear whether CPM is, by omission, waiving its claim to whatever portion of the rent for the month of February 2019 it had agreed with the receiver that it was entitled to.
63. CPM acquired its interest in the building (including the restaurant premises) from a receiver appointed by a mortgagee on 18 June 2018. Thus, Mr Hafeez was only a tenant of John Wylie and Ann Wylie in any real – as opposed to artificial, legal – sense for just less than six months and, under the lease, his rental payments to those landlords did not commence until 1 March 2018.
64. In 2010, as the owners of the adjacent property at No. 28 Oliver Plunkett Street, Mr Moynihan and his wife successfully appealed to An Bord Pleanála against a declaration of Westmeath County Council that works carried out on the building by the Wylies were exempted development. Mr Moynihan exhibits an unsigned copy of the decision of An Bord Pleanála, dated 8 June 2010. Mr Moynihan's company, CPM, bought the building, formerly owned by John and Ann Wylie, out of receivership. For those reason, Mr Wylie

cannot be considered an objective or disinterested witness in the present dispute between CPM and Mr Hafeez.

65. In his second affidavit, sworn on 30 September 2020, Mr Hafeez avers broadly as follows. Mr Wylie was his landlord for all practical intents and purposes until CPM purchased the building in February 2019, despite the appointment of a receiver over their interest in the property in June 2018. Nonetheless, Mr Hafeez paid the rent for November and December 2018 and January 2019 to the receiver. In seeking to evidence those payments, Mr Hafeez exhibits, among other documents, a copy extract from what is described on its face as an AIB Outgoing Payments Log for a bank account held in the name of a company called Kyla Fastfood Ltd. That copy extract appears to show an additional payment equivalent to one month's rent from that company to the receiver on 17 August 2018.
66. Until Mr Hafeez read Mr Moynihan's first affidavit, he had not been aware that CPM was claiming that he owed it rent for the month of February 2019. He denies that claim. What occurred was that Mr Wylie agreed to set off Mr Hafeez's deposit against his rent for February 2019. Neither Mr Hafeez nor Mr Wylie explain the lawful basis upon which that could have been done after the appointment of a receiver over Mr Wylie's interest in the building, including his interest in the lease, or how it could have been done lawfully during the ten-year term of the lease, which requires both the payment of a deposit and the payment of a monthly rental.
67. Neither Mr Hafeez nor any of the staff of the restaurant premises ever received CPM's letter of 20 February 2020 and Mr Hafeez does not accept that it was ever sent to him. Mr Hafeez does not explain how he could have been unaware of the simple escalator scheme that is included as an express term in the lease and that provides for an increased annual rent of €37,500 in years 3 & 4.
68. Mr Hafeez did meet Mr Moynihan concerning the rent on the restaurant premises, but believes that the meeting took place in late April or early May, rather than on 1 March, because he recalls that both men wore facemasks at it. Thus, Mr Hafeez appears to accept that there could have been no issue in Mullingar concerning the Covid-19 pandemic on 1 March 2020. That would make sense, as I believe I may take judicial notice that the government announced its decision to direct the closure of schools, colleges and childcare facilities on 12 March; its request for the immediate closure of all pubs, including hotel bars, on 15 March; and its decision to direct that cafes and restaurants should limit themselves to takeaways and deliveries on 24 March. Against that background, Mr Hafeez has not made clear how he came to be three – or, by his own account, two - months in arrears of rent on 21 March 2020 due, as he contends, to the difficulty that the Covid-19 pandemic caused to his business.
69. Mr Hafeez did not tell Mr Moynihan at their meeting that he was facing bankruptcy but, rather, informed him in a joking manner that he would go bankrupt if he had to pay an annual rent of more than €30,000 in attempting to negotiate a rent reduction. Mr Hafeez was not then, and is not now, facing personal bankruptcy.

70. Mr Hafeez electronically transferred the rent that he contends was due for September 2020 on 23 September 2020. It was incumbent on CPM to keep Mr Hafeez and his solicitors apprised of the amount of his rent arrears and, despite requests, it did not do so. It was also incumbent on CPM to implement or trigger (in some unspecified way) the automatic annual rent increase stipulated in the lease for years 3 & 4 of his tenancy and it failed to do so. CPM waived its entitlement to the full amount of the monthly rent due in years 3 & 4 of the lease by not returning any of the payments in a lesser amount than Mr Hafeez has made at irregular intervals since April of this year. Thus, Mr Hafeez's position is that there are no arrears of rent under the lease agreement.
71. In his second affidavit, also sworn on 30 September 2020, Mr Moynihan responds broadly as follows. Not only did he meet with Mr Hafeez on 1 March 2020, as he had previously averred, but he had also met with him before that on 13 February and went on to meet with him again on 13 March – on each occasion about rent arrears. Mr Moynihan exhibits what he avers are contemporaneous diary entries in respect of each of those three meetings. The two men may have been wearing face masks during the meeting on 13 March.
72. Concerning Mr Hafeez's assertion that neither he nor any of the staff of the restaurant premises ever received CPM's letter of 20 February 2020 and his suggestion that no such letter was ever sent, Mr Moynihan exhibits the An Post registered post receipt and an extract from the An Post Track and Trace Database, which records successful delivery of that letter on 25 February 2020 and identifies the recipient as 'S HAFEEZ'.
- ii. Use of restaurant premises for another purpose*
73. In correspondence from its solicitors, dated 8 April 2020, CPM alleged that Mr Hafeez had been sleeping overnight in the property in breach of the lease, the building's planning permission, and the conditions of an applicable insurance policy.
74. Through his solicitors, Mr Hafeez replied on 17 April 2020 that there was 'no overnight sleeping occurring at the premises'. Beyond averring to that denial, Mr Hafeez did not directly address the allegation in his grounding affidavit. According to Mr Wylie's affidavit, sworn on behalf of Mr Hafeez after his application for interim *ex parte* relief had been refused, Mr Hafeez did not use, or permit the use of, the restaurant premises as a residential premises while Mr Wylie was landlord. However, Mr Wylie was aware that, from time to time, security staff slept on the premises to protect it from damage by the patrons of a casino, located above the restaurant premises in the building.
75. In his first affidavit, Mr Moynihan has this to say on the issue. His family home is behind No. 28 at the rear of the building and he has often witnessed people smoking at the rear windows of the restaurant premises very early in the morning, at around 6 a.m. Between 9 and 17 April, he witnessed two males, unknown to him, bringing large roll-along suitcases to and from the property. Upon re-entering the restaurant premises on 14 September, he discovered that part of it had been converted into residential accommodation. Photographs of the interior of the restaurant premises taken at that

time are exhibited, showing a bed and, elsewhere, a mattress, each with sheets, a duvet and a pillow, as well as a washing machine, shower and toilet. Twelve separate cctv surveillance cameras were installed there. The suggestion that the restaurant premises would require the presence overnight of security staff is implausible. There are no concerns about the *bona fides* of John Bagnall, the tenant who runs the casino upstairs. In any event, the casino has been shut since March, due to the pandemic. CPM had declared in good faith to its insurer for the purpose of its building insurance policy that no one lives in the property, in reliance on the terms of the lease and an assurance given to Mr Moynihan by Mr Hafeez in early 2020.

76. In his second affidavit, Mr Hafeez responds as follows. No one took a roll-along suitcase into or out of the premises in April 2020. He installed a washing machine, shower, sink and toilet in the upstairs area between December 2017 and 2018. Those facilities would have been evident to CPM during their inspection of the restaurant premises when purchasing the building in February 2019. The toilet was installed so that female staff would not have to use the bathroom in the staff area or the restaurant bathroom downstairs. The toilet does not function. The washing machine was installed so that staff uniforms could be washed. The shower was installed for the purpose of staff hygiene. The bathroom in the staff room was for staff use.
77. Mr Hafeez continues that the restaurant premises experienced problems with anti-social behaviour by patrons of the casino, including smoking and urination at the shared entrance to the casino and restaurant premises on the first floor of the building. He complained several times to Mr Wiley and once, later to Mr Moynihan, as landlords of the building, and he also complained to Mr Bagnall, as the operator of the casino, but nothing was done. As the casino was open between 10 p.m. and 5 a.m. from Thursday to Sunday, he decided that it was necessary to have someone stay overnight at those times to monitor the cctv cameras. The restaurant premises was open seven days a week between 2 p.m. and 2 a.m. Thus, the restaurant staff member who was responsible for closing up the restaurant premises on a night when the casino was open would be required to remain on the premises overnight to carry out that task. None of the restaurant staff have stayed on the premises overnight since March, when the casino suspended trading due to the pandemic.
78. There is nothing surprising about having twelve security cameras and overnight security in the restaurant premises. Mr Hafeez operates two other takeaway restaurants, one in Dublin and one in Drogheda. He controls each of those premises as a director of Kyla Fastfood Limited. There have been four thefts at the Drogheda premises in the last fifteen years.
79. In his affidavit, Mr Madhawani, deposes as follows. He has been an employee of Chicken Hut, working in the restaurant premises, for the last two years. It is not true that persons have been residing in the restaurant premises. While colleagues of his stayed overnight occasionally, none of them paid Mr Hafeez to stay there. He and his colleagues stayed overnight to monitor the cctv cameras and prevent anti-social behaviour outside

the premises. He had to ask patrons of the casino not to engage in anti-social behaviour. No one ever brought suitcases to the premises. No one stayed on the premises after the casino suspended trading in March. No single staff member ever stayed in the restaurant premises more than one night a week. All staff members had their own separate residential accommodation. Mr Madhawani lives in Lucan, County Dublin.

80. Mr Hameed avers to the following effect. He has been a manager with Kayla (sic) Fast Foods trading as Chicken Hut for ten years and has worked at all three of its outlets. While working at the restaurant premises, he never saw anyone residing there. Staff would stay overnight on occasion to prevent anti-social behaviour by casino patrons. He resides in Drogheda, County Louth, and sometimes would stay overnight in the restaurant premises when he was too tired to drive home at the end of a shift.
81. In his second affidavit, Mr Moynihan rejects as nonsensical the explanation offered that the residential facilities evident in part of the restaurant premises were created or exist solely for the purposes of staff hygiene, staff laundry and overnight staff monitoring of anti-social behaviour outside the restaurant premises.

iii. Failure to maintain public liability insurance on the restaurant premises

82. Through its solicitors, CPM wrote to Mr Hafeez on 26 August 2020, informing him that a personal injuries claim had been made against it arising from an alleged incident at the restaurant premises on 25 January 2020 and requesting that he provide a copy of his insurance policy by return.
83. In his first affidavit, Mr Moynihan avers that Mr Hafeez later provided him with an insurance document, a copy of which he exhibits. That document is an Allianz plc Business Policy Number DN SME 8145432. The insured is Kyla Fast Food, trading as Chicken Hut, of 26 Oliver Plunkett Street, Mullingar, County Westmeath. The business that is insured is described as a fast food takeaway with no seating. The risks covered are referred to as public liability, material damage and product liability. The period of the insurance is 20 February 2020 to 19 February 2021. The document records that the proposer – Kyla fast food t/a Chicken Hut – has confirmed that it is either the legal owner of the building or responsible for insuring it under a lease agreement.
84. According to Mr Moynihan, Mr Hafeez confirmed to him orally that he did not hold insurance for the period during which the alleged incident at the restaurant premises occurred. CPM is also concerned that Mr Hafeez may have parted with possession of the property, or occupation of the property, to the entity Kyla fast food t/a Chicken Hut without its written consent.
85. In his second affidavit, Mr Hafeez responds in this way. He has maintained insurance on the restaurant premises since he went into occupation of it but accepts that his insurer disputes that insurance cover was in place between 15 March 2019 and 14 March 2020, because there is a dispute concerning the payment of the relevant premium. Mr Hafeez's solicitors have advised him that he has no liability in respect of the personal injuries claim

arising from an incident at the restaurant premises on 25 January 2020. Those solicitors sent the CCTV recording of the incident to CPM's solicitors on 18 September 2020. Mr Hafeez is willing to offer CPM his personal indemnity against any and all damages and legal costs to which the person concerned may be found entitled.

86. Mr Hafeez is a director of Kyla Fastfood t/a Chicken Hut. For reasons that he does not explain, he felt that it would be more prudent for that entity to hold the public liability insurance policy on the restaurant premises. Mr Hafeez does not explain how that arrangement is to be reconciled with the terms of the lease. Mr Hafeez exhibits a single page summary of the information on Kyla Fastfood t/a Chicken Hut available on a particular commercial website for companies searches. He does not exhibit any of that information, such as the certificate of incorporation of that company, its annual accounts or returns or its credit report. Hence, Mr Hafeez has made no information available concerning that company's shareholders, other directors (if any), assets, liabilities, profits, losses or creditworthiness at any time since its incorporation on 18 November 2014.

iv. Investment in the restaurant premises by Mr Hafeez

87. In his first affidavit, Mr Hafeez avers that he has spent €220,000 in works on the restaurant premises. Mr Wylie avers that, while he was a landlord, Mr Hafeez did expend significant monies, renovating and modernising the restaurant. Mr Wylie gave Mr Hafeez a three-month rent free period at the commencement of the lease in recognition of the necessity for those works, which carried over into the fourth month of the lease when Mr Hafeez had begun to pay rent. Mr Wylie does not know the exact value of the works, the purpose of which was to create a staff area on the first floor, but is not surprised by the figure of €220,000. Thus, Mr Hafeez contends that, at the commencement of the ten-year lease period, he received an agreed three-month rent holiday from Mr Wylie to the value of €8,750, in consideration of works that he then carried out to the value of €220,000.
88. In his first affidavit on behalf of CPM, Mr Moynihan avers that it is a stranger to Mr Hafeez's expenditure on the property.
89. In his second affidavit, Mr Hafeez provides some further detail of the expenditure of €220,000 on the restaurant premises. The works involved the refurbishment of the dine-in area and the kitchen, the acquisition and installation of a \$40,000 pizza oven, and the construction of an upstairs staff area. Mr Hafeez acknowledges that it will be difficult, if not impossible, for the court at trial to assess the value of those works, as he paid for them in cash. He does not explain why that was so, or why no proper records were kept of that expenditure.
90. As vouching documentation for those works, Mr Hafeez exhibits an unindexed bundle of papers. That bundle includes a number of bank statements for a joint account held by Mrs Najma Hafeez and Mrs Faiza Hafeez Baqir (who, it must be presumed, are each related to Mr Hafeez), covering transactions on that account during the period from 18

August 2017 to 13 July 2018. Handwritten ticks have been placed beside certain withdrawals that are signified only by transaction numbers. Mr Hafeez avers, without further explanation, that those withdrawals on that account were used to pay for the works. The withdrawals ticked amount in the aggregate to a figure that is only a small fraction of €220,000.

91. The bundle also includes photographs of the exterior and interior of the restaurant premises and an assortment of quotations, invoices and estimates that are said to be associated with the works. Taken together those invoices, quotations and estimates fall far short of the figure of €220,000. It is difficult to understand why Mr Hafeez or, if it be the case, Kyla Fastfood Limited would not have kept appropriate records of that expenditure for proper accounting purposes. However, insofar as it may be necessary to form a concluded view on the amount expended by Mr Hafeez on works to the restaurant premises, that will be a matter for evidence and determination at trial.

v. *Unauthorised occupation of the restaurant premises by a third party*

92. In his first affidavit, Mr Moynihan avers that he is very concerned that Mr Hafeez has sublet the restaurant premises. Mr Moynihan exhibits a photograph showing a large sign, stating 'Under New Management', in the front window of the restaurant that has been in place since 21 March 2020.
93. In his second affidavit, Mr Hafeez acknowledges that the sign was placed in the window but avers that this was merely a business ploy designed to bring in new customers at a time when the business was struggling due to the Covid-19 restrictions. Mr Hafeez continues that there was also a high turnover of staff in the restaurant premises, which he attributes to the hostility of CPM's staff. In his second affidavit, Mr Moynihan avers that CPM has no staff.
94. Mr Hafeez goes on to aver that he has always retained control of the restaurant premises.
95. As already described, under clause 2(b) of the lease, Mr Hafeez agreed not to part with or share possession of the restaurant premises, and not to permit any other person or company to occupy them without the landlord's consent.
96. In his second affidavit, Mr Hafeez avers that he is a director of a company named Kyla Fastfood Limited, which trades as Chicken Hut ('the company'), and that the company carried on the takeaway business from the restaurant premises while he was the occupier of it. Yet, in his grounding affidavit, Mr Hafeez avers that he carried on the business for several years, without mentioning the company.
97. In his grounding affidavit, Mr Hafeez avers that he has two employees in the restaurant premises. In his second affidavit, he refers to them as his two staff members. Yet, Mr Madhawani avers that he worked in the restaurant premises as an employee of 'Chicken Hut'. Mr Hameed avers that he is a manager with a company called Kayla Fast Foods (sic) trading as Chicken Hut and has worked at all three Chicken Hut outlets in Ireland.

Confusingly, in his second affidavit, Mr Hafeez avers not once but twice that he – not the company - currently operates two other takeaway restaurants, one in Dublin and one in Drogheda and that he, not the company, is struggling to pay overheads, including staff wages and electricity for those premises.

98. In his grounding affidavit, Mr Hafeez avers to the rental payments that he made to CPM on various dates in 2020. The copy entries from an 'AIB Outgoing Payments Log' that he exhibits in support of that claim record that those payments came from a bank account held in the name of the company.
 99. The disputed public liability insurance policy for the restaurant premises covering the years 15 March 2019 to 14 March 2020 and the equivalent policy for the year 20 February 2020 to 19 February 2021, exhibited to Mr Hafeez's second affidavit, record the insured party as 'Kyla Fast Food' and 'Kyla fast food t/a Chicken Hut' respectively, and not as Mr Hafeez.
 100. The vast preponderance of the assortment of quotations, invoices and estimates that Mr Hafeez exhibits to his second affidavit to support his claim that he carried out works to the restaurant premises to the value of €220,000 for which he paid in cash, are addressed to either 'Kyla Fast Food Ltd t/a Chicken Hut' or 'Chicken Hut'.
 101. It is perfectly understandable that, in casual conversation, a person who operates a business through a private limited company should nonetheless refer to it as his or her business. Indeed, in his first affidavit, Mr Moynihan refers in error to personally taking ownership of the building in February 2019 when it is quite clear from the evidence as a whole that CPM did so. But there is a difference between a casual conversation and an application to the High Court. And, as I believe I have just demonstrated, more is in question here than a single isolated error in an affidavit.
- vi. *The code of conduct between landlords and tenants for commercial rents*
102. In that part of Mr Hafeez's written legal submissions directed to the argument that he has a strong case for an order granting him relief from forfeiture of the lease, significant reliance is placed on a document that was prepared by the Department of Business, Enterprise and Innovation and is titled *Code of Conduct between Landlords and Tenants for Commercial Rents*. The document was published on 1 October last, more than two weeks after CPM re-entered the restaurant premises on 14 September and these proceedings issued on 15 September.
 103. Mr Hafeez acknowledges that, as the document confirms at paragraph 1, it represents a voluntary code with no statutory basis that does not change any underlying legal relationship or commercial lease contract between any landlord and tenant. Nonetheless, he argues that, in weighing the equities on his application for relief against forfeiture, the court is entitled to consider, as one of the factors in the balance, the extent to which each of the parties has, or has not, acted in compliance with the code. For its part, CPM submits that the code and its contents are of no relevance to the case.

104. On this question, I share the view expressed by Gilligan J in *Campus & Stadium Ireland Development Ltd*, already cited, that the courts in general strive not to place rules or restrictions on the exercise of the judicial discretion to grant or withhold relief against forfeiture, allowing for the observation of Murphy J in *Cue Club Limited*, already cited, that the discretion to grant relief is less likely to apply, or likely to apply with less force, to commercial transactions where the lessor and lessee are on equal terms. The terms of the Code of Conduct may or may not be found to constitute a general circumstance particular to this case, relevant to the exercise of the court's discretion, on whatever facts are ultimately established at trial.
105. However, it is not yet clear how the terms of the Code of Conduct, if found to apply, add to or subtract from the case that each of the parties seeks to make. So, for example, although paragraph 21 of the Code of Conduct, upon which Mr Hafeez specifically relies, states that landlords 'should provide concessions where they reasonably can', that is only after the same paragraph states that tenants seeking concessions 'should be clear with their landlords about why this is needed, explaining their request by providing financial information about their business and the specific business unit that is the subject of the Landlord and Tenant relationship', and before it goes on to state that tenants 'should meet their contractual rent and service charge obligations where they reasonably can'.
106. Moreover, the Code of Conduct is expressed to apply to all commercial tenancies that have been seriously negatively impacted by the Covid-19 crisis (at paragraph 10). Thus, Mr Hafeez might be expected to provide some cogent financial information about the turnover or profitability of the restaurant premises before and after the emergence of the Covid-19 crisis to establish the extent of that impact and, hence, the applicability of the Code. On the evidence before me, he has not yet done so.
107. As far as I can gather, Mr Hafeez's emphasis on the importance of the Code of Conduct is predicated on, what he contends, is the incontrovertible proposition that the code applies and that, as tenant, he has complied with it, whereas, as landlord, CPM has not. For the purpose of the present application, I will observe only that I consider that proposition, whether true or false, to be far from self-evident.

vi. *Future prospects for relations between the parties*

108. In his first affidavit, Mr Moynihan avers that it has come to his attention that, on 21 June 2006, Mr Hafeez was convicted on a plea of guilty in Dublin District Court of fourteen separate charges of acting as an auditor of company when not qualified to do so, contrary to s. 187(1) of the Companies Act 1990. Mr Hafeez was fined a total of €4,000 and directed to pay €1,000 towards the cost of the prosecution. Five further offences of auditing a company of which he was an officer, contrary to s. 187(2) of that Act, were taken into consideration.
109. In the same affidavit, Mr Moynihan goes on to aver that he has learned of two separate judgment mortgages registered by the Collector General of the Revenue Commissioners

on 3 August 2017 and 24 February 2020 against each of two different properties owned by Mr Hafeez in Castleknock, County Dublin.

110. In his second affidavit, Mr Hafeez avers that the reference to his previous conviction serves no purpose other than to scandalise the court and has no bearing on the present application.
111. Later in the same affidavit, Mr Hafeez avers that the judgment mortgages registered by the Collector General against his properties resulted from his failure to pay V.A.T. His relevant liability was one of €60,000 and he entered into an arrangement with the Revenue Commissioners to repay it in instalments of approximately €2,000 or €3,000 each month, with the result that the debt currently stands at approximately €30,000.
112. In his second affidavit, Mr Moynihan avers to his belief that Mr Hafeez's history with the Office of the Director of Corporate Enforcement and his history with the Revenue Commissioners are matters that he would wish to take into consideration were Mr Hafeez to seek to negotiate a commercial tenancy with him now and that, in consequence, they are matters that the court must be entitled to take into consideration in considering the appropriate exercise of its equitable jurisdiction to grant relief against forfeiture.

vii. Male fides

113. In his first affidavit, Mr Moynihan avers that, as was plainly stated to Reynolds J when the present application was mentioned before her on 24 September, CPM has found a fresh tenant for the restaurant premises and is anxious to re-let the property.
114. In his second affidavit, Mr Hafeez avers in response that this establishes that the forfeiture of his lease was not effected *bona fide* but has been deployed as a means of obtaining a better tenant.
115. For my part, it seems to me that this assertion merely begs the fundamental question that will have to be determined by the trial judge in this case. If Mr Hafeez has been in persistent breach of the lease agreement as CPM contends, then it is entitled to forfeit the lease and to seek a new (or 'better') tenant who will honour a new lease. If Mr Hafeez has not been in breach of the lease, or has only been in breach of it in some technical or trivial way that has been already remedied, then not only will the forfeiture not stand but its occurrence in those circumstances may well corroborate what is so far the bare assertion that Mr Hafeez has been wrongly denied his rights merely to permit CPM to install someone it considers to be a better tenant.

A strong arguable case?

116. Mr Hafeez submits that he has established a strong arguable case that the forfeiture of his lease of the restaurant premises was invalid; that, even if it is valid, it has been waived; and, even if it is valid and has not been waived, he is entitled to relief against it. Having considered the relevant arguments as carefully as I am able, I have come to the following conclusions.

i. Invalid forfeiture

117. For the reasons set out at paragraphs 33 to 36 of this judgment, Mr Hafeez has failed to satisfy me that he has a strong case that the forfeiture of the lease was invalid.

ii. Waiver of forfeiture

118. Nor has Mr Hafeez succeeded in establishing a strong case that, by its conduct in not refusing or returning the various payments that he (or the company) made between April and September, CPM has waived the forfeiture of the lease.

119. While the law leans in favour of waiver, that proposition is subject to three significant qualifications or exceptions, each of which, it is strongly arguable, arise in the circumstances of the present case. The first is that the peaceable re-entry of the restaurant premises by CPM on 14 September was a final and unequivocal demonstration that it was exercising the forfeiture option under clause 4(a) of the lease agreement. The second is that the breach of the lease that gave rise to its forfeiture – namely, the persistence of arrears of rent for more than seven days after becoming due – is a continuing breach, given the strength of the competing evidence and arguments on whether the payment of 23 September brought the rent up to date or merely reduced the arrears. And the third is that, by operation of s. 43 of Deasy's Act, the acceptance of those payments, including the payment of 23 September cannot be deemed to be a waiver of that breach because no such waiver (as distinct from a mere acknowledgment of receipt of payment) was signified in writing by, or on behalf of, CPM, as landlord.

120. In addition, I cannot accept that a strong case for waiver or acquiescence has been established by reference to the lapse of time between the service of a notice to quit on 21 March and the peaceable re-entry of the premises on 14 September, given the uncertainty created by the enactment of s. 5(7) of the Act of 2020 and the reliance that Mr Hafeez sought to place on that provision prior to its repeal on 1 August in correspondence with CPM.

iii. Relief from forfeiture

121. I have already indicated my conclusion that it is strongly arguable that the 23 September payment did not amount to full or proper compensation for the persistent failure by Mr Hafeez to pay the monthly rental fixed under the lease agreement as it fell due. More fundamentally, I have already explained the basis upon which I do not accept that the judgment of Kennedy CJ in *Whipp v Mackey*, already cited, is authority for the proposition that, in a forfeiture for non-payment of rent case where full compensation is later provided, regard cannot be had to the broader conduct of the party seeking relief against forfeiture in considering the exercise of the equitable jurisdiction to grant or withhold it.

122. On the contrary, I am satisfied that there is a very strong argument to be made that the exercise of that equitable discretion is unconstrained by any such artificial or technical rule, requiring the court instead to take into account the conduct of the parties, the

wilfulness of any breach by the tenant, the general circumstances particular to the issue, the nature of the commercial transaction the subject matter of the lease, whether the essentials of the bargain can be secured, the value of the property, the extent of equality between the parties, the future prospects for their relationship, the fact that even in cases of wilful breach it is not necessary to find an exceptional case before granting relief against forfeiture and, finally, the application of general equitable principles.

123. That being so, and having regard to the various controversies described at length in the preceding section of this judgment, I have no hesitation in concluding that, on the present state of the evidence, Mr Hafeez has failed to establish a strong arguable case for equitable relief against forfeiture.

The balance of convenience or least risk of injustice

124. As Collins J explained in *Betty Martin Financial Services Ltd v EBS DAC* [2019] IECA 327, (Unreported, Court of Appeal, 18 December 2019) (at para. 34):

'Allowing that establishing a serious issue to be tried is a necessary (but not sufficient) condition to the grant of an injunction (at least where that issue, if established at trial, would provide a basis for a permanent injunction), the decision to grant or refuse thereafter becomes a matter of overall assessment of where the balance of justice lies, though with particular (and, in many cases, decisive) weight being given to the adequacy of damages within that overall assessment. That is not to imply that the outcome is or ought to be a matter of impression or intuition. As the decision in *Merck Sharp & Dohme Corporation v Clonmel Healthcare Limited* concretely illustrates, a decision to grant or refuse an interlocutory injunction is a judicial decision, deriving from a structured and careful assessment of the relevant considerations that is (or at least ought to be) reasoned and capable of review. However, there are likely to be multiple considerations to be weighed in the balance, pointing in different directions, none of which are likely to be decisive in itself.'

125. Lest I am wrong about the failure of Mr Hafeez to establish a strong arguable case and bearing in mind the strictures just quoted, I now propose to follow the steps suggested by the Supreme Court in *Merck*.
126. First, it seems to me that, if Mr Hafeez does succeed at trial, an order granting him relief against forfeiture – broadly equivalent to a permanent injunction – might well be granted, requiring CPM to permit him to resume occupation of the premises under the lease.
127. Second, while I do not overlook the fact that the grant or refusal of the interlocutory relief at issue may well have some tactical significance in the present commercial dispute between the parties, I have no reason to believe the case will not go to trial. However, Mr Hafeez acknowledges, rightly in my view, that this is in substance an application for a mandatory injunction to which the strong arguable case test must apply. And, as I have already explained, Mr Hafeez has failed to meet that test.

128. Third, if I were satisfied that there is a strong arguable case to be tried (although I am not) and that it is likely to be tried (as I have no reason to doubt), I would next have to consider the balance of convenience and the balance of justice. And fourth, as the most important element in that balance is the question of the adequacy of damages, it is to that question that I next must turn as part of that consideration.
129. If injunctions are refused but Mr Hafeez succeeds at trial, would an award of damages be an adequate remedy for the loss caused to him during the intervening period? Similarly, if injunctions are granted against CPM but Mr Hafeez fails at trial, would the payment of damages – on foot of the undertaking to do so that Hafeez avers he is willing to provide – be an adequate remedy for the effects on CPM of injunctions wrongly imposed upon it?
130. That brings me to the fifth consideration, which is the necessity for robust scepticism about the inadequacy of damages as a remedy where breach of contract is claimed in a commercial case. This is, of course, just such a case. Nonetheless, Mr Hafeez argues that damages would not be an adequate remedy for the unlawful conduct he alleges for two reasons: first, because it will be difficult for the court to assess the value to him in damages of the works he has carried out on the restaurant premises because he paid for those works in cash; and second, because the court should endeavour to preserve his property rights in the lease of the restaurant premises and the goodwill of the business he has operated there, rather than hold out the prospect of compensation in the form of damages for any reduction in the value of those rights.
131. The first of those reasons is, in effect, an invocation of the sixth consideration, which is the requirement to take into account the extent of any anticipated difficulty in the calculation and assessment of damages, rendering it unlikely that an award of damages could be a precise and perfect remedy. In this instance, Mr Hafeez seeks to rely on an asserted difficulty of his own making by arguing this his failure (or that of the company) to keep records of the payments that he (or the company) elected to make in cash for works that he (or the company) carried out to the restaurant premises makes the calculation or assessment of the level of damages necessary to compensate him (or the company) for those works difficult to carry out, with the result that he should be granted injunctive relief instead. I will confine myself to observing that I do not find that to be a convincing argument.
132. The second reason raises an issue that was succinctly described in the following way by Clarke J in *Allied Irish Banks plc v Diamond* [2012] 3 IR 549 (at 589-590):

'The courts have always been anxious to guard property rights in the context of interlocutory injunctions; see for example *Metro International v Independent News* [2005] IEHC 309, [2006] 1 ILRM 414. The reason for that is clear. Even though there may be a sense in which it may be possible to measure the value of property lost, declining to enforce property rights on the basis that the party who has lost his property can be compensated in damages would amount to a form of implicit compulsory acquisition. If someone could take over my house and avoid an injunction on the basis that my house can readily be valued and he is in a position

to pay compensation to that value (even together with any consequential losses), then it would follow that the person would be entitled, in substance, to compulsorily acquire my house. The mere fact that it may, therefore, be possible to put a value on property rights lost does not, of itself, mean that damages are necessarily an adequate remedy for the party concerned is entitled to its property rights instead of their value.'

133. In *Diamond* (at 590), Clarke J concluded that there would be an element of irremediable loss to the plaintiff bank's property rights (in the form of the wrongful exploitation of its intellectual property and the existing goodwill in its business), should it be refused an interlocutory injunction but succeed at trial. The existence of those rights was not in dispute in that case; the question was whether they were being infringed. Here, of course, Mr Hafeez complains of irremediable loss to his property rights in the form of the failure to restore his commercial tenancy. But the continuing existence of that tenancy is the fundamental matter in dispute. As for any suggestion of damage to the goodwill of the business (if such a claim is being advanced), I cannot be satisfied that any such goodwill belongs to Mr Hafeez, rather than the company. Indeed, given Mr Hafeez's acknowledgment that he placed a sign in the window of the restaurant premises on 21 March last, stating that the business is 'Under New Management', I cannot be satisfied that any such goodwill exists.
134. Turning to the position of CPM on the question of damages, its property rights are also directly in issue, as it is the owner of the freehold of the building, including the restaurant premises. The mere fact that it may be possible to put a value on those property rights, through the calculation of any unpaid rent and of the liability resulting from any failure by Mr Hafeez to indemnify it against public liability claims, does not mean that damages are necessarily an adequate remedy, since CPM is entitled to its property rights instead of their value.
135. While Mr Hafeez offers the usual undertaking to pay damages, should he obtain injunctive relief and fail in his action at trial, and supplements it with the offer of undertakings to do various things that he is, or was, required to do under the lease in any event, such as pay the rent on time, indemnify CPM against public liability claims, and not use the restaurant premises as overnight accommodation, he has provided none of the detail concerning his underlying means and income necessary to allow me to assess whether those undertakings have any realistic value. I have already noted Mr Hafeez's complete failure to distinguish between his income and means, on the one hand, and those of the company, on the other, to which I would now add that he has also completely failed to disclose his income and means or – although they are not directly relevant – those of the company.
136. To take just one example of the fog of confusion that Mr Hafeez has created, at paragraph 49 of his second affidavit, he solemnly avers that he is in a position to discharge any award of damages against him as his other restaurants are operating successfully. Two paragraphs later, he solemnly avers that he is struggling to pay the overheads, including

staff wages and electricity, for the other two takeaway restaurants he operates. Earlier, at paragraph 42, he avers that the restaurant premises is part of the collection of three takeaway restaurants that he owns, before immediately going on to state that he controls each premises as a director of the company. In those circumstances, I cannot be satisfied that the personal undertakings that Mr Hafeez offers are anything more than a pro forma compliance with the usual requirement of the type that O'Sullivan J found to be fundamentally lacking in *Martin v An Bord Pleanála* [2002] IEHC 82, (Unreported, High Court, 24 July 2002) (at para 81).

137. For balance, I must also note that I have been provided with no meaningful evidence that would allow me to assess the ability of CPM to pay damages to Mr Hafeez, should he succeed against it at trial. In the course of argument, counsel for CPM relied on its ownership of the building as establishing its ability to pay, but was obliged to concede that he could not say whether CPM's interest in the building is encumbered. Just as I have not been shown any returns or accounts for the company with which Mr Hafeez is associated, nor have I seen any returns or accounts for CPM.

138. I turn next to the broader question of the balance of convenience. In the course of argument, counsel for Mr Hafeez submitted that a factor that tilts the balance of convenience decisively in favour of granting the injunctions that he seeks is the preservation of the status quo. That submission was made in apparent reliance on the oft-quoted dictum of McCracken J in *B & S Ltd v Irish Auto Trader Ltd* [1995] 2 IR 142 (at 145):

'It is normally a counsel of prudence, though not a fixed rule, that if all other matters are equally balanced, the court should preserve the status quo.'

139. I perceive two difficulties with that submission. The first is the identification of the point in time at which the status quo should be preserved. After all, the status quo immediately preceding the issue of the plenary summons in this case on 15 September was that, having re-entered the restaurant premises on 14 September, CPM was in occupation of those premises and the lease was forfeit. Obviously, by implication, Mr Hafeez is suggesting that I should endeavour to preserve the status quo before those events occurred or, as his counsel put it, 'the status quo of the lease'. Why that should be so, either in principle or in practice, is not immediately obvious and was not explained.

140. The second and more fundamental difficulty is that, in my judgment, all other matters are not equally balanced. I refer here to the conclusion I have already reached that Mr Hafeez has failed to make out a strong arguable case.

141. It should not be necessary to reiterate that, in dealing with the present interlocutory application, I am not purporting to finally decide any of the legal or factual issues in controversy between the parties in the action. As Hardiman J observed in *Dunne v Dun Laoghaire-Rathdown County Council* [2003] 1 IR 567 (at 581), on a full hearing the evidence may be different and more ample and the law will be debated at greater length.

Conclusion

142. I conclude as follows.

- (a) On the evidence before me and in the submissions so far made, Mr Hafeez has failed to satisfy me that he has a strong arguable case that the forfeiture of the lease of the restaurant premises was invalid; that, if valid, it was waived; or that, if valid and not waived, he is nonetheless entitled to relief against it.
- (b) While acknowledging the need for robust scepticism, I am not satisfied that an award of damages would be an adequate remedy for the loss caused to Mr Hafeez if he is refused injunctions but later succeeds at trial. However, still less am I satisfied that damages would be an adequate remedy for the loss caused to CPM if injunctions are granted against it but the claims against it fail at trial.
- (g) Overall and for the reasons I have outlined, I find that the balance of convenience or balance of justice lies against the grant of the interlocutory injunctions sought.

143. It follows that the injunctions sought as reliefs at paragraphs 1 to 5 inclusive of the notice of motion must be refused. For the avoidance of doubt, I do not accept that the relief sought at paragraph 6 – an order granting relief against forfeiture – is an appropriate order to consider on an interlocutory application. If I am wrong about that, I am certainly quite satisfied that no such order is warranted on the evidence and argument so far advanced in this case.

Final matters

144. On 24 March 2020, the Chief Justice and Presidents of each court jurisdiction issued a joint statement recording their agreement that, in light of the COVID-19 pandemic and the need to minimise the exposure of persons using the courts to unnecessary risk, the default position until further notice is that written judgments are to be delivered electronically and posted as soon as possible on the Courts Service website. The statement continues:

'The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made where appropriate.'

145. Thus, I direct the parties to correspond with each other to strive for agreement on any issue arising from this judgment, including the issue of costs. In the event of any disagreement, short written submissions should be filed in the Central Office of the High Court within 14 days, to enable the court to adjudicate upon it.

Appearances

Maura McNally SC for the plaintiff/applicant, with Anthony M Slein BL, instructed by Abbott, Solicitors.

Dermot F Sheehan BL for the defendant/respondent, instructed by Moynihan & Co, Solicitors.