

THE HIGH COURT

[2021] IEHC 211  
[2020/6301 P]

BETWEEN

FOOT LOCKER RETAIL IRELAND LIMITED

PLAINTIFF

AND

PERCY NOMINEES LIMITED

DEFENDANT

**JUDGMENT of Mr. Justice Brian O'Moore delivered on the 26th day of March, 2021.**

1. The Plaintiff ('Foot Locker') is a well known sportswear and footwear retailer. It operates seven outlets in Ireland. One of these stores is located at the top of Grafton Street in Dublin. It leases the premises from the Defendant ('Percy'). Percy is an investment company associated with the equally well known firm of Davy Stockbrokers.

2. The Covid-19 pandemic struck Ireland in March 2020. On St Patrick's Day 2020 Foot Locker closed all its Irish stores. At paragraph 12 of the Statement of Claim, Foot Locker pleads:-

"In or about 17 March 2020, the Plaintiff, in accordance with Public Health advice concerning the spread of the Covid-19 pandemic, took the exceptional action of closing its stores throughout Ireland, for the safety of staff, customers and suppliers, including the [Grafton Street store]."

3. The Statement of Claim recites the subsequent measures put in place by the Government from the 24th of March 2020 onwards; while these measures have varied over time, Foot Locker claims that they have lead to "an unprecedented and dramatic collapse in the pre-existing level of footfall in Grafton Street." Foot Locker makes the claim that the lease between the parties has been frustrated, and seeks both a declaration to that effect and, more particularly, a declaration that it has no liability for rent from the 24th of March 2020 onwards or some portion of that period.

4. Unsurprisingly, the Defence and Counterclaim of Percy denies much of the claim pleaded by Foot Locker.

5. Percy now seeks discovery from Foot Locker. Four categories are in dispute. I will deal with each of these in turn, though the decision on Category 5 significantly influences the decision on Category 6. Before considering each category, I should make the point that there was no great dispute on the well settled principles governing the question of when and to what extent discovery is to be ordered.

*Category 4.*

6. This category covers:-

"All documents that record or evidence the decision making process engaged in by the Plaintiff and its rationale, in closing its stores in Ireland on or about 17 March 2020."

7. Foot Locker has agreed to make discovery of documents relating to the decision in respect of the Grafton Street store alone.
8. The decision to close all Irish stores on the 17th of March 2020 is pleaded in the plainest terms by Foot Locker. Not only is the fact of the decision to close all stores described in the Statement of Claim, but Foot Locker has also pleaded the reasons for such closure. This plea is denied at paragraph 14.1 of the Defence and Counterclaim. This discovery is therefore relevant to the dispute between the parties, and its relevance arises directly from the manner in which Foot Locker has chosen to plead its case. The discovery is necessary, in that without it Percy cannot realistically be expected to contest the plea at paragraph 12 of the Statement of Claim. As to proportionality, in his affidavit resisting the motion Foot Locker's solicitor (Kieran Kelly) says:-

"Discovery of this category of documentation pertaining to every store within Ireland is likely to be burdensome and disproportionate having regard to its probative value to a plea of frustration concerning the [Grafton Street] Lease."

9. This evidence is nowhere near enough to establish that the discovery should be refused on the grounds that it would be disproportionate or oppressive. Firstly, Mr. Kelly himself appears uncertain about what may be involved in making this discovery. Secondly, the level of detail provided is very low indeed. At the very least, one would expect that some detail would have been given about the amount of documents involved, the number of custodians of documents to be consulted, and the expense of the discovery; Costello J. in *IBRC & Anor. v. Fingleton* [2015] IEHC 296. Even if I were satisfied that the making of discovery in respect of Category 4 as sought would be burdensome, I would have still been disposed to grant it as the burden arises directly from the way that Foot Locker has chosen to plead its case; Clarke C.J. in *Tobin v. Minister for Defence* [2019] IESC 57.
10. I will therefore order that Foot Locker make discovery in the terms of Category 4 as sought by Percy.

#### *Category 5*

11. Percy seeks:-

"The lease as between the Plaintiff and its landlord in respect of each of the premises from which the Plaintiff operates in Ireland, and all documents that record or evidence:

- (a) the discharge of rent by the Plaintiff in respect of its stores in Ireland from 1 January 2020 to date; and
- (b) correspondence as between the Plaintiff and its landlords concerning the discharge of rent by the Plaintiff in respect of its stores in Ireland from 1 January 2020 to date."

12. Foot Locker will make discovery of an amended form of this category; the proposed amendment will limit the discovery to category 5(a). Foot Locker argues that only the

Grafton St. store is relevant for the purpose of these proceedings, and that any documentation discovered in respect of these other stores would contain confidential information.

13. Percy argues that the documents in respect of the other stores will show if Foot Locker “conducted itself in a uniform manner in respect of all leases [...] in the context of Covid-19 and associated restrictions”. I am not won over by this approach. Whatever about the plea concerning the closure of the Foot Locker stores on the 17th of March 2020, the essence of the balance of the claim is that the operation of the Grafton Street shop made no commercial sense while the Covid-19 restrictions remain in place. The correspondence which I directed be exchanged between the parties has put beyond any doubt exactly what case Foot Locker is making. The position of the other stores is therefore of marginal (if any) relevance to the claim made by Foot Locker in this action. While Percy may well like to make a point that other leases have not been stated by Foot Locker to have been frustrated, the chances are that these other arrangements have features that distinguish them from the Grafton Street operation. Certainly, Percy has not even attempted to establish in evidence that the circumstances of the other outlets are so similar to Grafton Street that any failure on the part of Foot Locker to behave “in a uniform manner” can be deployed against it. I would be very surprised if the trial judge were to treat this sort of potential similar fact evidence as being of any real assistance in deciding the matters actually in issue in this case.
14. For these reasons alone, I will confine this category in the way proposed by Foot Locker. However, I am all the more inclined to do so given that the documentation discovered in respect of the other stores will probably involve information confidential to the other landlords. That this confidentiality will be breached in order to allow Percy to obtain documents of the most tangential relevance (if it has any at all) is something that I have to take into account; *Clarke J. in Telefonica O2 Ireland Ltd. v. Commission for Communications Regulation* [2011] IEHC 265.

#### *Category 6*

15. As sought, this category reads:-

“All documents that record or evidence:

- (a) The Plaintiff’s volume of trade, including trade online, from 1 January 2019 to date; and
- (b) The Plaintiff’s revenue from 1 January 2019 to date; and
- (c) The Plaintiff’s accounts, including management accounts, from 1 January 2019 to date.”

16. Foot Locker proposes this alternative formulation:-

“(a) the Plaintiff’s volume of trade from the Grafton Street Premises including the Plaintiff’s trade online, from 1st January 2019 to date;

(b) the Plaintiff's revenue from the Grafton Street premises from 1st January 2019 to date." [Original Emphasis]

17. In his affidavit grounding Percy's motion, its solicitor (Mr. Gavin Simons) summarises the two reasons why this discovery is required. He again puts forward the need to interrogate whether Foot Locker has acted in a uniform or consistent way with its landlords. For the reasons I have set out in respect of Category 5, I do not feel that discovery in respect of the other six stores is justified for this reason. Mr. Simons then relies on Percy's belief that Foot Locker has put its entire financial position in question in this action. In fact, that is not the case. While I have no doubt that the Percy side genuinely felt that Foot Locker was making the case that it simply could not pay the rent, that is not actually the claim being made. This category of discovery is not justified on either ground upon which Percy relies.

18. I will therefore order discovery of this category in the form proposed by Foot Locker.

#### *Category 9*

19. I will not direct this category of discovery as sought. What Foot Locker means by commercial impossibility is made plain by the position taken by counsel for Foot Locker at the hearing of this motion, and the correspondence which took place afterwards. In any event, I am surprised at the idea that it is appropriate to look for discovery in order to have a term explained.

20. Inasmuch as other documents are sought in respect of this category, Foot Locker claims that they are already covered by the discovery to be made under categories 4, 6 and 8. Percy's response is to say that there may be other documents (such as memos of meetings) which do not fall within the other categories. In any event, Percy says, "it makes no odds to [Foot Locker] if it is required to make discovery in respect of category 9" since it will have collated the documents in respect of the other categories. This last argument is a poor one. To persuade me that this further category should be ordered, I must be satisfied that there is a purpose in so doing.

21. I agree that the other relevant categories are tightly drawn, and it is therefore likely that certain documents (such as notes of meetings or emails between executives) will not be discovered though they are relevant and necessary to the defence of this action. I will therefore order a reformulated category:-

"All documents evidencing or recording the commercial impossibility of the Plaintiff's operation of the Demised Premises from the 24th of March 2020 onwards."

#### *The Next Steps*

22. I will list this motion for 10:30am on the 13th of April 2021 to deal with the time within which discovery is to be made, to deal with the costs of the motion, and to address any further matters which the parties may wish to raise. Given that I have reformulated

Category 9 without reference to the parties, though I have stayed within the confines of the category as sought, I will also deal with any variations to my proposal that the parties may wish to suggest.