Neutral Citation Number: 2006 IEHC 18

THE HIGH COURT

[2002 No. 7886 P]

BETWEEN

MANUEL JIMINEZ

PLAINTIFF

AND

DANIEL MORRISSEY, PATRICK J. McGRATH, MARY McGRATH AND THOMAS McGRATH

DEFENDANTS

Judgment of O'Neill J. delivered the 31st day of January, 2006.

1. In this case I delivered judgment on 18th July, 2005 in which I held that the first named defendant was liable pursuant to clause 5.4 of a lease dated 9th December, 1993, between the plaintiff and the first named defendant, in respect of the restaurant premises known as Da Pinos restaurant at the junction of Parliament St. and Cork Hill in the City of Dublin, for the repairs of a flat roof over a wash-up area at the rear of the restaurant premises. The lease in question was for a term of 33 years from the 9th December, 1993 and the initial rent was £40,000 per annum and it is now risen by virtue of reviews to £105.00 per annum. The first named defendant holds his interest in the property on foot of a lease dated 24th June, 1992, from the 2nd 3rd and 4th defendants.

2. The plaintiff's complaint is that since in or about the spring of 1994 there have been persistent leaks through the roof over the wash-up area of the restaurant resulting in water leaking onto the floor in the wash-up area, into the basement toilets beneath the wash-up area and after heavy rain, cascading down the stairs leading from the bin area into a lobby area adjacent to the wash-up area. The plaintiff's evidence was that these leaks have resulted in tiles falling off partition walls, lifting off the floor and the necessity particularly after a heavy nights rain, to place buckets here and there to catch leaks and to place cardboard on the floor to soak up the rainwater and to mop up. In all of this the plaintiff's evidence was supported by that of his wife Mrs. Iris Jimenez. It was the plaintiff's evidence that since 1995 complaints have been made by telephone and later in correspondence about these leaks to the first named defendant.

3. The first named defendant's evidence was that no complaints at all were made concerning leaks until January of 1998 when he received a phone call from Mrs. Jimenez. His evidence was that the first written complaint was received in April of 1998. He said further complaints were received in 1999 but from 1999 until 2001 no complaint whatever was made concerning leaks. He said that in May 2001 he commissioned a report from a firm of engineers and he received this report in late August 2001 and that it revealed a very poor state of repair of the roof. His evidence was that he sent this to the plaintiff and to the second, third and fourth defendants. He said that there then ensued a considerable amount of correspondence concerning who was liable for the repair of this roof. His evidence was that in 2002 he sought to use the opportunity of the development in the adjoining premises, to get the developer to carry out the necessary repair works to the flat roof over the wash-up area. To that end he said a meeting was arranged on the 31st May, 2002, between the architects/engineers representing all interested parties, to decide on the work necessary to effect a solution to the leaking problem. His evidence was and he was not contradicted in this, that the plaintiff or any representative of his did not attend this meeting.

4. In July of 2002, the developer next door went ahead with work to the flat roof which involved clearing away the vegetation that had grown there, together with silt and resurfacing the roof and putting an outlet in a wall to assist drainage. Crucially however no work was done on the flashing around the pipes and ducts which penetrate this roof. As will be seen later the leaks which persisted were by and large the result of defective flashing around these pipes and ducts.

5. I am satisfied that the reason no work was carried out to repair the defective flashings, when the work was being done to the roof in 2002 was because the permission of the plaintiff to interfere with these pipes and ducts was not available. These pipes were essential to the functioning of the restaurant, but to effect necessary repairs to the flashing it was necessary to cut these pipes above and below the roof and to insert new sections with an appropriate aid to flashings attached.

6. As a consequence of the fact that defective flashings were not replaced in this way, leaks have continued at various locations around several of these pipes and ducts.

7. An issue arises as to the seriousness of these leaks and the impact of them on the carrying on of the restaurant business.

8. I am satisfied from the evidence that leaks have existed now for several years at the locations described by Mr. McQuaid. These leaks were shown up in the hose test carried out by him in March of 2005. In addition to these there are two leaks due to two defective cowls over vents in the wash-up area. There also have been other leaks experienced. Up to 2002/2003 there was a leak from a duct which was the property of the Toscana restaurant next door but it would appear that was repaired in 2002 or 2003 resulting in that leak ceasing.

9. The resurfacing of the roof in the bin area appeared, according to the plaintiff's evidence to have stopped substantially the leak coming from that area. This is the leak which was described by the plaintiff and his wife as cascading down the steps into the lobby area.

10. I am not at all satisfied that the effects of these leaks has been as severe as is suggested by the plaintiff and Mrs. Jimenez.

11. I am unable to accept evidence of a cascade of water coming down the steps from the bin area. Even if there was no roof on this area rain would be unlikely to produce the kind of flood described by the plaintiff and Mrs. Jimenez. In any event the plaintiff's evidence suggested that this stopped substantially from 2002 onwards.

12. Insofar as there is a dispute as to when complaints were made about these leaks I prefer the evidence of the first defendant and accept that there were no complaints made until January of 1998 and that between 1999 and 2001 there were no complaints made.

13. At the time when the problem was being addressed in the Summer of 2002, it appears remarkable to me that the plaintiff failed to engage either personally or through his architect or engineer in the devising of a solution.

14. All this suggests to me that the problem was not nearly as bad as is now suggested. It is common case that the leaking problem was only there after rain. Thus in dry weather, which in the city of Dublin is the norm, there would have been no problem. From this I would have been inclined to infer that in the early and mid summer of 2002 the failure of the plaintiff to have engaged in the search for a solution was in all probability due to a disinterest in the issue at that time because it was not troubling him at that time.

15. I am inclined to the view that the evidence of the plaintiff and of Mrs. Jimenez in regard to the severity of the problem is somewhat exaggerated.

16. There is no doubt that there have been several leaks through this roof and that they have been there for several years. As a consequence of these I accept that after rain, water leaks into the wash-up area and onto the floor and it runs down pipes into the staff toilets in the basement area and also that it invades the lobby area.

17. As a result of this continuing over several years I am satisfied that the ceilings in the wash-up area and in the basement area have been damaged by the ingress of water. I am also satisfied that the floor in the wash-up area has been damaged by this and also that there has been some damage to studded partition walls which are tiled. This damage has caused tiles to fall off these walls and to rise from the floors. Attempts have been made to replace these but these replacements have failed due to the failure of adhesion. Thus as the photographs reveal plywood has been substituted for some tiles in the floor.

18. I am satisfied that at times after heavy rain it is necessary to place a bucket or buckets in places on the floor to catch leaks and also to place cardboard on the floor to soak up rain water and to mop up.

19. The evidence suggests that these measures are necessary first thing in the morning after a nights rain.

20. I have no doubt that these experiences are and have been annoying for the plaintiff. However there has been no evidence that the function of the areas affected by the leaks has ever been disrupted or even inhibited. The areas in question are used as the wash-up area of the restaurant and the basement is used as the staff toilets and changing area.

21. There has been no evidence that on any occasion it was not possible to carry out the wash-up function. The height of the evidence in relation to functionality was the failure of a light installation due to ingress of water but no suggestion that this disrupted the wash-up on that occasion.

22. Likewise there was no evidence at all of any staff difficulties arising from the damaged condition of ceilings in the basement area.

23. This leaves me to a consideration of Mr. Gardiner's S.C.'s first submission on behalf of the first named defendant which is to the effect that clause 5.4.1 of the lease restricts the liability of the first named defendant, in respect of "poor order or condition" of the flat roof, to that which materially affects the carrying on of the business. Clause 5.4.1 reads as follows:

> *"PROVIDED THAT THIS COVENANT*
>
> > *1. Shall apply only to those parts of the estate the poor order or condition of which would materially affect the carrying on of business in the demised premises…".*

24. Mr. Gardiner submitted that the evidence of the plaintiff and his accountant Mr. Murphy established that the leaks had no affect on the commercial success of the business, that turnover and profit were unaffected, and that there was no evidence of any difficulty with customers. Similarly he submitted that there was no evidence of any other substantial interference with the carrying on of business.

25. For the plaintiff it was submitted by Mr. Dwyer S.C. that clause 5.4.1 merely required that the disrepair would materially affect the carrying on of the business. It was not restricted in its terms to interference with the commercial success or otherwise of the business. He submitted that the evidence established a gross interference with the working of the business by virtue of the necessity to devote the time and effort of personnel to coping with the water ingress from the leaks, by taking the measures described in the evidence.

26. He further submitted that insofar as there was any doubt or confusion or ambiguity in the meaning of clause 5.4.1, that it should be construed *contra preferentum* i.e. against the lessor whose lease it was, namely the first defendant.

27. I do not think there is any difficulty ascertaining the true meaning of clause 5.4.1. The meaning is clear from its express terms. In my view before a liability can attach to the first named defendant the plaintiff must show on the balance of probabilities that the poor order or disrepair "*materially affects the carrying on of business*". In this regard, in my view "*materially*" means in a substantial way.

28. Mr. O'Dywer is right that the clause is not confined to demonstrable commercial interferences but can apply generally, right across all of the activities that are involved in the carrying on of the restaurant business in these premises.

29. I have come to the conclusion that the consequences of the lease in this case do not satisfy the threshold test contained in clause 5.4.1. I have reached this conclusion because the evidence establishes to my satisfaction, in the first instance, that the commercial success of the business has not at all been affected and secondly, because none of the activities carried on in the areas affected by the leaks have been at all disrupted or affected by poor order or disrepair i.e. there was no evidence of any disruption of the activity of washing up, nor was there any evidence of staff problems in the use of their changing and toilet facilities.

30. The fact that the problem is an annoying one for the plaintiff and perhaps his staff, and I have no doubt that it is, in my view is insufficient to satisfy the test in 5.4.1.

31. I have reached this conclusion on the basis of the assumption upon which the plaintiff has preceded in this case as outlined in Mr. Dwyer's submissions, namely that the rectifying of the leaks in the roof will be accomplished by or at the behest of the first named defendant within a reasonable time.

32. The conclusion thus reached above would be sufficient to dispose of these proceedings, however it is appropriate that I express an opinion on the other issues ventilated.

33. It is clear from the evidence of Mr. Tennyson and Mr. O'Malley the engineer and quantity surveyor respectively called on behalf of the plaintiff and the evidence of Mr. McQuaid and Mr. O'Regan the engineer and quantity surveyor respectively called for the first named defendant that an entirely different approach is adopted by both sides to the works necessary to repair the damage caused in the premises by the leaks.

34. It was Mr. Tennyson's evidence that it was necessary to strip back the wash-up area and the basement area to its structural shell removing all timber partitions, ceilings and floors and all electrical works and to replace all of these. In addition it was his opinion

that the services of an architect, a mechanical and an electrical engineer and a conservation architect were necessary.

35. It was conceded at the close of the case by the plaintiff that the services of a conservation architect were not necessary.

36. Mr. McQuaid takes an entirely different approach and said that what is required is to remove the ceilings in the wash-up area and the basement area, inspect for damage to the joists, where necessary if the strength of joists has been compromised by wet or dry rot to cut out and replace the effected parts, to treat with an appropriate spray the affected areas and then to fit new plaster board and re-plaster. Insofar as the floor in the wash-up area is concerned he recommends a similar approach and he recommends the replacement of the surface timber in this floor and re-tiling.

37. Insofar as the walls are concerned he recommends the removal of the top layer of tiles to inspect for water damage in studded partitions and where any is found the removal of affected timbers and re-plastering and re-tiling. Otherwise he recommends the replacement of any tiles that have become loose, including the complete re-tiling of the solid structure wall which is the back wall of the main structure.

38. The cost of the works to be carried out in accordance with the scheme recommended by Mr. Tennyson would be in the order of €175,000 whereas the cost of the works recommended by Mr. McQuaid would be €23,304.

39. It was Mr. Tennyson's evidence that for the purposes of the scheme recommended by him, the works, if they were carried out by a competent builder would take three weeks to complete and that it would be necessary to shut down the restaurant for that period. Mr. McQuaid was of the view that with co-operation from the plaintiff, the works to accomplish his scheme could be done on a night shift basis so as to avoid any closure of the restaurant.

40. I prefer the evidence of Mr. McQuaid and of Mr. O'Regan, the first named defendant's quantity surveyor. It is clear that considerable portions of the wash-up area and the basement area are not damaged by the leaks and it would seem to me that the total gutting of these areas as recommended by Mr. Tennyson for the purpose of putting these areas into an appropriate state of repair, is somewhat excessive. In my view Mr. McQuaid's approach is sensible and will in all probability remedy the disrepair and bring the areas affected to an appropriate state of repair and is the one which would be much more likely to be adopted by a prudent lessor or lessee with an interest in premises of this kind similar to that of either the plaintiff or defendant.

41. I am also satisfied that having regard to the nature of the work to be done as recommended by Mr. McQuaid that it can be done, with the full co-operation, of course, of the plaintiff and his staff, on a night shift basis so as to avoid any closure of the restaurant.

42. If therefore required to award damages, which for the reasons above set out does not arise in this case, I would be disposed to award the sum of €23,304 in respect of the cost of carrying out repairs to the wash-up and basement areas occasioned by the leaks identified by Mr. McQuaid in his hose test carried out in March 2005.

43. It was urged upon me by Mr. Gardner that if damages were to be awarded under the above heading that they should be reduced to reflect the contribution to the damage made by leaks other than those in respect of which the first named defendant is liable.

44. The ongoing leaks in respect of which the first named defendant may not have a liability, namely the two leaks resulting from defective cowls on top of ventilation pipes going into the wash-up area, result in water running down those pipes and out through the grills in the ceiling below and onto the wash-up floor. It is unlikely in my view that these leaks make any significant contribution to the ceiling or wall damage, having regard to the fact that these leaks flow directly through onto the wash-up floor and would be likely to be either caught in a bucket or absorbed by cardboard on the floor or mopped up. Hence in my view the great bulk of the damage which has to be repaired is caused in all probability by the other leaks in respect of which the first defendant is undoubtedly liable. Having regard to the foregoing I would not be inclined to make any reduction in the amount above assessed as the cost of the repairs.

45. This brings me to the final head of damage, which is essentially damages for inconvenience and discomfort for the period during which these leaks have persisted. Mr. Gardiner submitted that the correct approach to be adopted by this court is that which is set out in the judgment of the Court of Appeal in the United Kingdom in the case of *Wallace v. Manchester City Council*, Times Law Reports 23rd July, 1998, where a number of principles were enunciated by Lord Justice Morritt as governing the assessment of damages for breach of an obligation to repair, as between landlord and tenant and these are as follows:-

> *"1. The question in all cases of damage for breach of an obligation to repair was what sum would, insofar as money could place the tenant in the position he would have been if the obligation to repair had been duly preformed.*
>
> *2. The answer to that question inevitably involved a comparison of the property as it was for the period when the landlord was in breach of his obligation with what it would have been if the obligation had been performed.*
>
> *3. For periods when the tenant remained in occupation of the property and understanding the breach of obligation to repair, the loss to him requiring compensation or the loss of comfort and convenience which resulted from living in a property which was not in the state of repair it ought to have been if the landlord had preformed his obligation; (see McCoy v. Clark [1982] 13 H.L.R.A 7); (Calabar Properties Limited v. Stitcher [1984] 1 W.L.R. 287) and (C. Chiodi v. De Marney [1988] 21 H.L.R. 6).*
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> *4. If the tenant did not remain in occupation but, being entitled to do so, was forced by the landlord's failure to repair, to sell or sub-let the property, he could recover the diminution in the price or recoverable rent occasioned by the landlord's failure to perform his covenant to repair: see Calabar."*

46. It was submitted by Mr. Gardiner that this was a case where, if an award of damages was to be made at all, it was to be made under para. 3 above, having regard to the fact that the plaintiff has remained in occupation of the premises throughout the period of complaint.

47. In my view the four propositions set out by Lord Justice Morritt in the *Wallace* case form a useful basis for the assessment of damages consequent upon a breach of a covenant to repair which I would be inclined to follow.

48. In this case Mr. Gardiner submits that the damages which should be awarded under the heading of damages for inconvenience and discomfort should be of a nominal nature having regard to the level of intrusive affect of the leaks upon the carrying on of the business.

49. It is of course the case that I have already found that the consequence of the leaks fell below a threshold which activated the liability of the first named defendant. However I cannot see why this or indeed anything else would dictate a restriction of damages to nominal damages only where damages were to be awarded under this heading. In my view if damages are to be awarded under paragraph 3 above, these are essentially in the nature of general damages and should be awarded on the long established principles for the ascertainment of general damages and should be assessed so as to be appropriate compensation for the degree of discomfort or inconvenience suffered over the period during which the breach of covenant continues.

50. In this case were I to award general damages, it would be my opinion that the sum of €10,000 would be the appropriate amount to compensate the plaintiff for the annoyance and discomfort and inconvenience suffered from the time in or about probably 1996/1997 up to the present time and anticipating that the leaks will be rectified within a reasonable time from now.

51. As discussed above I have however come to the conclusion that the plaintiff has failed to establish that the consequences of the leaks are such as to materially affect the carrying on of business in the premises so as to impose a liability on the first named defendant in respect of the covenant to repair contained in clause 5. 4 of the lease and accordingly there can be no award of damages at all.