Neutral Citation: [2014] IEHC 205

**THE HIGH COURT**

**[2013 No. 279 S]**

**BETWEEN**

**RONAN MCNAMEE AND JACQUELINE MCNAMEE**

**PLAINTIFFS**

**AND**

**ESTHERFIELD LIMITED AND HICKEY'S PHARMACY LIMITED**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Barrett delivered on the 1st day of April, 2014**

1. This is an application for summary judgment brought by the plaintiffs, Mr. and Ms. McNamee, in respect of rent that they claim is owed to them jointly and severally by Estherfield Limited, the first named defendant, and Hickey's Pharmacy Limited, the second named defendant, under a lease and license arrangement pursuant to which Hickey's Pharmacy Limited operates a pharmacy on the plaintiffs' premises at the junction of Grafton Street and Duke Street in Dublin City.

**Facts**

2. By Indenture of Lease dated 26th March, 1992, Dublin City Properties Limited, as landlord, and Spellbound Limited, as tenant, entered into a 35-year lease in respect of the premises referred to above. The plaintiffs acquired the premises from Dublin City Properties Limited on 28th January, 2003. The second-named defendant is currently in occupation of, and operates a pharmacy on, the premises. By virtue of the lease and a subsequent licence entered into between the plaintiffs, Spellbound Limited and the defendants, on 3rd April, 2003, the defendants are jointly and severally liable for rents owing under the lease. Certain rents not having been paid, the plaintiffs have commenced the instant proceedings. The defendants have raised a number of defences to the claim and contend that this is a matter that ought to be remitted to plenary hearing. In essence, the defences raised are as follows: first, the defendants dispute the amounts claimed; second, the defendants contend that an allegedly unauthorised development by the plaintiffs at a premises that does not adjoin the demised premises will adversely affect the business operated at the demised premises; and third, they dispute that they can be found liable in these proceedings for amounts of rent that became owing after the notice of motion grounding these proceedings issued.

3. Based on the evidence contained in the pleadings, the court finds that the various amounts sought by the plaintiffs by way of outstanding rent are correctly accounted for. That means of the three defences raised to these summary proceedings, only those as to planning and the recovery of post-notice of motion sums survive for consideration.

**The planning law issue**

4. The hurdle that must be surmounted by the defendants as regards obtaining leave to defend at plenary hearing is a low one. As Hardiman J. stated in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 at 623:-

> *"In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

5. In *Harrisrange Limited v. Michael Duncan* [2003] 4 I.R. 1 at 7, McKechnie J. summarised the principles that he considered to be relevant when a court approaches the issue of whether to grant summary judgment or leave to defend, *viz*:-

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
>
> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case ...*
>
> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff...*
>
> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
>
> *(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;*
>
> *(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible? '...*
>
> *(viii) the test is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*
>
> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
>
> *(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or*

*has reason to doubt whether he has a genuine cause of action;*

*(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;*

*(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person 's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."*

6. In the present case, the planning law issue raised by the defendants is more in the nature of a cross-claim or counterclaim, rather than a defence to the summary proceedings. What is the court to do in a case where a defendant raises a cross-claim in defence to a motion for summary judgment? The classic precedent in this regard is the Supreme Court decision in *Prendergast v. Biddle* (Unreported, Supreme Court, 31st July, 1957), the principles identified therein having been recently amplified upon in *Moohan v. S & R Motors (Donegal) Limited* [2008] 3 I.R. 650. In that later case, Clarke J. summarises the approach to be adopted by a court where a defendant raises a cross-claim as follows at 656:-

*"(a) ...In order for the asserted cross-claim to amount to a defence as such, it must arguably give rise to a set off in equity and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendant's case, it would not be inequitable to allow the asserted set off;*

*(b) if and to the extent that a prima facie case for such a set off arises, the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an entire proportion of) the claim ...*

*(c) if the cross-claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in Prendergast v. Biddle..."*

7. Clarke J. concluded in *Moohan* that a set-off was available there, the default position being that a party is entitled to a set-off in equity in relation to any cross claim arising out of the same contract. In the present case, the court finds that no such set-off is available. The cross-claim in these proceedings is concerned with a matter that has nothing to do with the rents owing under the lease. Taking the defendants' case at its height, even if a claim in respect of a purportedly unauthorised development at a property owned by the plaintiffs but not adjoining the demised premises was entirely successful, this is a matter so unconnected to the issue of rent owing under the lease pertaining to the demised premises as not to yield any right of set-off in equity. This is not a case where, as in *Moohan*, a single construction contract has yielded a claim for monies due and a counterclaim for defective works. In truth, the court struggles to see that there is any substantive connection between the issue of the rents claimed by the plaintiffs and the planning issue raised by the defendants except for the somewhat tenuous connection that the various relevant properties are ultimately in common ownership. The cross-claim here amounts to an entirely independent claim and that, per Clarke J. in *Moohan*, has the result that judgment should be entered on the plaintiffs' claim with the question as to whether execution ought to be stayed falling to be determined by reference to the principles set out in *Prendergast*. In that earlier case, Kingsmill Moore J., at 7, stated that:-

*"If... the Defendant, while admitting that he has no direct defence to the claim, puts forward a plausible counterclaim a difficult problem must arise. Though the necessary evidence to support the claim is already before the Court and judgment on the claim can be given at once, there must usually be delay in formulating the counterclaim in a pleading, in preparing the evidence to support it at a hearing (if it be contested), and in waiting for a trial. On the one hand it may be as/red why a Plaintiff with a proved and perhaps uncontested claim should wait for judgment or execution of a judgment on his claim because the Defendant asserts a plausible but improved [unproved?] and contested counterclaim. On the other hand it may equally be asked why a Defendant should be required to pay the Plaintiff's demand when he asserts and may be able to prove that the Plaintiff owes him a larger amount. To such questions there can be no hard and fast answer. It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counterclaim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties."*

8. The starting-point of Kingsmill Moore J's observations is that a defendant has a plausible counterclaim. It is not at all clear that in the present case the defendants in fact have a plausible counterclaim. Certainly there is little evidence on affidavit to assist the court as to the strength of the counterclaim and there is no evidence to suggest that it would succeed. Nor is there any attempt to quantify the loss alleged. Indeed, it might perhaps be contended that the counterclaim raised in these proceedings is nothing more than a last-ditch effort on the part of the defendants to construct a defence that is adequate to satisfy the low hurdle identified in *Aer Rianta* and *Harrisrange* for remittal of summary proceedings to plenary hearing. However, the court considers that even the low hurdle identified in *Aer Rianta* and *Harrisrange* has not been satisfied. Moreover, even if the defendants' counterclaim was plausible, the court does not consider that the *Prendergast* principles require that any entitlement of the plaintiffs to recover the outstanding rent monies be postponed until the conclusion of plenary proceedings in which the substance and strength of an as yet barely formulated counterclaim of uncertain plausibility is tested.

**Claims for rents arising after proceedings commenced**

9. The defendants have disputed that they can be found liable in these proceedings for amounts of rent that became owing after the notice of motion grounding these proceedings issued. A consideration of the recent jurisprudence of the court, in particular the decision of Clarke J. in *Dublin Docklands Development Authority v. Jermyn Street Limited and Black Tie Limited* [2010] IEHC 217 and O'Neill J. in *Quarryvale Two Limited and Quarryvale Three Limited v. Stephen Beere and Graeme Beere* [2012] IEHC 546 indicates that the defendants are mistaken in this contention.

10. In *Jermyn Street*, the Dublin Docklands Development Authority brought proceedings seeking to recover rent and other charges against Jermyn Street and in relation to the guarantee of that rent and other charges against Black Tie. With regard to the Authority's claim in respect of continuing, and rising, arrears of rent and other charges, the defendants claimed, much as the defendants in this case, that it is not permissible to maintain a claim in respect of ongoing rent or charges in summary proceedings. Writing in this regard Clarke J. stated, at 12, that:-

*"The basis for that contention is that it is said that each failure to pay rent (or indeed other charges) as they fall due, gives rise to a separate cause of action. Thus, it is argued, sums due in respect of rent which have not arisen as of the time of issuing of proceedings relate to causes of action not then extant such that the same cannot be maintained in the same proceedings. It was accepted on behalf of Jermyn Street that ....continuing interest can be claimed in*

*summary summons proceedings where the interest is provided for and ascertainable under the terms of the relevant contract or is fixed by statute. It is clear, therefore, that continuing interest can be claimed even though that interest accrues after the date when a summary summons is issued. It seems to me that there is no reason in principle why continuing rent cannot be claimed on the same basis."*

11. In *Quarryvale*, O'Neill J. approved the reasoning in *Jermyn Street* and allowed a claim for amounts additional to those contained in the original summary summons, stating, at paras. 23 and 24, that:-

*"The additional claims sought to be made in these proceedings are so closely associated with the original claims made in the summary summons that it makes complete sense, both in terms of procedural efficiency and the avoidance of unnecessary cost, to have these claims dealt with in the one set of proceedings. Indeed, the converse, namely that as each quarter of rent and/or services charges fell due and into arrears, afresh set of proceedings was required, offends any sensible notion of procedural efficiency and would lead to much greater and unnecessary cost in making these types of claims.*

*...I am quite satisfied that within the summary summons procedure, where serial or sequential claims arise out of circumstances similar to and closely associated with the causes of action raised in the endorsement of claim on the summary summons, additional claims can be the subject matter of the application for liberty to enter final judgment if such additional claims are appropriately set out and supported by affidavit evidence. Needless to say, these additional claims could only be for liquidated sums."*

12. This Court respectfully agrees with the reasoning adopted respectively by Clarke J. and O'Neill J. in the *Jermyn Street* and *Quarryvale* cases. To borrow from the phraseology of O'Neill J., the claims for post-notice of motion arrears made in the instant proceedings clearly arise out of circumstances similar to and closely associated with the causes of action raised in the endorsement of claim on the summary summons: what is being sought is simply more rent owing under the same lease and licence arrangements. In terms of procedural efficiency and the avoidance of unnecessary cost, it would be absurd if the court was to hold that only rent owing at the time of issuance of these proceedings could be claimed and that the commencement, hearing and determination of fresh proceedings in which precisely the same issues as have arisen before this Court would need to take place before later- owing rents could be recovered by the plaintiffs.

**Conclusion**

13. For the reasons stated above, the court does not consider that these summary proceedings should be referred to plenary hearing and grants judgment to the plaintiffs for the amount sought, being €557,780.93 plus interest and costs.