Neutral Citation [2010] IEHC 535

THE HIGH COURT

[2010 No. 83 SP]

IN THE MATTER OF THE CONSTRUCTION OF A LEASE DATED 18th DECEMBER, 2002 IN RESPECT OF SUITE ONE, THE AVENUE, BEACON COURT, SANDYFORT, DUBLIN 18.

BETWEEN

BEACON COURT (SANDYFORD MANAGEMENT) LIMITED

PLAINTIFF

AND

DENNIS CLEARY AND SUSAN CLEARY

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 20th day of July, 2010.

1. The proceedings

1.1 These proceedings raise a net point of construction of a lease dated 18th December, 2002 made between Taleside Developments Limited (the Lessor) of the first part, the plaintiff of the second part, and the defendants of the third part (the lease), whereby a commercial unit in the development referred to in the lease as "The Park" situate at Beacon Court, Sandyford, Dublin 18 was demised by the Lessor to the defendants for the term of 225 years from 1st January, 2001. I think it useful to outline the pertinent provisions of the lease before identifying the question of construction raised and the dispute which has arisen between the parties.

2. The lease

2.1 The operative clause in the lease is Clause 5 wherein what is referred to as "the Demised Unit" was demised to the defendants, who are referred to as "the Lessee", and wherein there was reserved unto the Lessor –

> (a) a nominal yearly rent,
>
> (b) on demand "such sums as become payable pursuant to the provisions of Clause 5.2 and 5.3 hereof",
>
> (c) on demand "such sums as become payable pursuant to the provisions of Clause 9.6 hereof", and
>
> (d) on demand other costs, charges, expenses and such like which are specified.

Clause 5.2 is headed "Percentage contribution to Insurance Premium" and provides that the Lessee is to pay "the Tenant's Proportion of the Insurance Premium" by way of further or Additional Rent". Clause 5.3 provides:

"Percentage Contribution to Service Charge

> To pay yearly and so in proportion for any part of a year by way of further or other Additional Rent the tenant's proportion (sic) of the Service Charge".

Curiously, although such sums as might become payable pursuant to the provisions of Clause 9.6 of the lease are reserved in the reddendum, they are not expressed to be reserved as "additional rents" and are not subject to the later provision which provides –

"additional rents or contributions referred to at sub-clause 5.2 and 5.3 (being hereinafter referred to as 'the Additional Rents') to be recoverable at the discretion of the Lessor and/or the Management Company in the same manner as the Rent hereby reserved".

2.2 The definitions clause of the lease is Clause 1 and the definitions therein are introduced in terms that in the lease and in the schedules thereto "(save where the context otherwise requires or implies)" the words and expressions defined should have the meaning set out. The "Service Charge" is defined in Clause 1.18 and no issue is raised in relation to that definition. In Clause 1.20 the expression "Tenant's Proportion" is defined as meaning –

> "… a due proportion of the Service Charge and the Insurance Premium equal to the ratio which the net internal floor area of the Demised Unit bears to the aggregate net internal floor area of the buildings constructed upon the Park and which is estimated at the date of this lease to be ……% (*to be confirmed*)."

2.3 The definitions are followed by a number of clauses, including the provisions which are set out below and which I will refer to as Clause 2.5 hereafter, which come under the heading of "definitions". I consider that layout peculiarity to be of no significance. In any event, the provisions are:

> "2.5 If at any time during the Term as often as the same shall happen: –
>
> 2.6 The Park is increased or decreased on a permanent basis; and/or
>
> 2.6.1 By reason of changes in the Park or the experience gained in managing the Park the Lessor's Surveyor in his absolute discretion considers it just and equitable to do so; and/or
>
> 2.6.2 If some other event occurs as a result of which the percentages referred to in Clause 5.2 or 5.3 of these

presents or either of them are or is no longer appropriate to the property;

then the percentages referred to in clauses 5.2 and 5.3 of these presents shall be varied to such percentages as the Lessor's Surveyor, acting as an expert, shall in his discretion determine to be just and equitable having regard to the altered or prevailing circumstances and the said determination of the Lessor's Surveyors (sic) shall as to the amount of such variation and as to when it shall take effect be final and binding on the Lessee.

2.4 The provision which the Court has been asked to construe, Clause 9.6, is to be found in Clause 9 which contains various provisos, for example provisions in relation to dispute resolution, service of notices and such like. Clause 9.6 is preceded by Clause 9.5 which provides that, notwithstanding that, when the lease was created, the Park was being developed in accordance with a plan and scheme of development for which planning permission had been obtained, the Lessor should not be obliged to carry out or complete the plan or scheme of development and might abandon, vary or alter the same and generally deal with the Park or any part thereof without regard to any such plan or scheme of development. As a matter of fact, when the defendants bought into the Park, it was being developed as an office, industrial/warehouse estate. Subsequently, however, planning permission was obtained for development of a multi-storey block used as a hospital, a multi-storey block of consultants' suites in a private clinic, and a multi-storey block comprising a hotel wing and a private apartments wing. Clause 9.6 provides:

"Right to vary contribution
That in the event of The Park or any part thereof being altered added to or extended, reduced or re-developed or otherwise varied the Service Charge and the Lessee's proportion thereof as provided at Clause 5.3 herein together with the Lessee's contribution to the insurance premium and the rates referred to at Clause 5.2 and 5.4 herein shall at the discretion of the Lessor and/or the Management Company be adjusted in such manner as shall be just and equitable."

2.5 In Clause 6, which contains the Lessee's covenants, the Lessee covenants to pay to the Management Company, that is to say, the plaintiff, "the Additional Rents at the times and in the manner specified" (Clause 6.1(b)).

2.6 While there is no evidence of this before the Court, I am proceeding on the assumption that the leases of all of the units in the Park are essentially in the same form.

3. The dispute

3.1 The factual evidence before the Court is scant. The special summons is grounded on an affidavit of Charlie Ginty sworn on 5th February, 2010. Mr. Ginty is a director of the plaintiff. The replying affidavit was sworn by the first defendant on 25th March, 2010. In it he averred that the defendant represent the interest of the Beacon Court Occupiers' Association (the Association), which is made up of nineteen owner/tenants of units comprised in Beacon Court Business Park.

3.2 Relying on the outline written submissions submitted on behalf of the plaintiff, it appears that the dispute underlying these proceedings goes back to September 2006 when the plaintiff gave notice to the defendants of a change of the method of the calculation of the liability of owner lessees of units in the Park for the service charge. The objections of the Association to the change in the method of calculation were set out in a letter dated 21st April, 2009 from its solicitors, Amorys, to CBRE, the plaintiff's managing agents. The plaintiff was invited to bring proceedings to have the lease construed. These proceedings were initiated on 5th February, 2010.

3.3 The nub of the dispute between the parties, as I understand it, is that the plaintiff contends that it has an entitlement under Clause 9.6 of the lease to alter the method of the calculation of a lessee's liability for the service charge in relation to his take provided the result is just and equitable, whereas the position of the defendants and the Association is that the service charge contribution must be calculated on the basis of the methodology reflected in the definition of "Tenant's Proportion" in Clause 1.20 of the lease. The manner in which Clause 1.20 was applied before September 2006 in relation to the defendants' unit requires clarification. First, the fact that the percentage was left blank in the lease did not cause any difficulty and, as I understand it, the relevant percentage was agreed between the parties. Secondly, instead of being determined by reference to a net internal floor area metric, it was actually determined by reference to a gross internal area metric. The defendants had no problem with that departure from the explicit terms of the lease.

3.4 The defendants' complaint is that the change in the method of calculation introduced a "footprint" formula, which, as I understand it, is based on the ratio of the ground floor of the building of which the unit forms part to the aggregate of the ground floors of all of the buildings in the Park. The first defendant has averred that the revised method of apportionment "favours most of the owners/tenants of taller buildings within the Park, and most particularly the owners/tenants of the hospital, the hotel and the apartments situate within the Park, because those premises consist of multi-storey buildings with a footprint that is small relative to their floor area". A table is exhibited in the affidavit of the first defendant which illustrates that, in relation to the proposed budget for 2009 of €1,477,647, the owners of units in blocks A, B, D, H and U, being the blocks occupied or predominantly occupied by members of the Association excluding Beacon Clinic, would be liable for €548,207.05 if their contribution was calculated on a gross internal area basis, whereas they would be liable for €919,835.25, a difference of plus 67.81%, if their liability was calculated on a "footprint" basis.

4. The question

4.1 The question of construction as set out in the endorsement of claim in the special summons is as follows:

> "Is the Plaintiff correct in interpreting Clause 9.6 of the Lease to mean that, where the Park (as defined in the Lease) or any part thereof has been altered, added, extended, reduced or redeveloped or otherwise varied, it has a general power to adjust the service charge percentage subject to such adjustments being just and equitable?"

That formulation of the issue of construction is very general. As I understand it, the issue is whether the Lessor/plaintiff is entitled to adjust the service charge percentage on the basis of a method of calculation other than the method of calculation reflected in Clause 1.20 as applied by agreement of the parties (the gross internal area metric). That is the question which I propose to address.

4.2 The defendants contend that, in any event, the change of methodology which the plaintiff seeks to enforce, the "footprint" formula, would give rise to liability on their part which is not just and equitable as required by Clause 9.6. However, it is common case that whether they are right or wrong on that point does not arise on these proceedings but is for another day.

5. Submissions

5.1 The Court has had the benefit of written and oral submissions on behalf of both parties. I do not consider it necessary to outline them.

6. The law
6.1 Both sides referred the Court to the modern principles of construction of contractual documents as summarised by Lord Hoffmann in *ICS Limited v. West Bromwich BS* [1998] 1 W.L.R. 896, as applied by the House of Lords in *BCCI v. Ali* [2002] 1 AC 251. Those principles were accepted by the Supreme Court in *Analog Devices v. Zurich Insurance Company* [2005] 1 I.R. 274 (cf. judgment of Geoghegan J. at p. 280). That case concerned the construction of a policy of insurance. I do not consider it necessary to outline the modern principles, but I would suggest that the manner of their application is determined by the nature of the contractual document. In this case, the Court is concerned with a commercial lease.

6.2 Counsel for the defendants submitted that the lease must be construed as a whole, referring to a passage in Halsbury's Laws of England (4^{th} Ed., 2007 Reissue, Volume 13 at para. 175). That is undoubtedly the correct approach.

6.3 Counsel for the defendants also submitted that, if there is an ambiguity in the lease, or if it is capable of more than one interpretation, then, in accordance with the principle of *contra proferentem*, the lease should be construed against the Lessor/plaintiff. It was submitted by counsel for the plaintiff that that principle does not come into play because there is no ambiguity in the lease.

7. Conclusions
7.1 Clause 9.6 of the lease is operable only in the events specified: that the Park is altered, added to, extended, reduced or redeveloped or otherwise varied. The development of the Park was varied after the lease was granted and, accordingly, Clause 9.6 has become operable. As regards the defendants' liability for the service charge, Clause 9.6 envisages that liability being varied in two respects: the service charge itself may be varied; and the "Lessee's proportion" of it may be varied. Counsel for the defendants, properly in my view, made no issue in relation to the reference to "the Lessee's proportion" in Clause 9.6, rather than to "the tenant's proportion" as referred to in Clause 5.3 and Clause 1.20. Clause 9.6 mandates that the adjustment which is to be made when the Lessor or the plaintiff invokes it is to be at the discretion of the Lessor or the plaintiff, but subject to the overriding requirement that the adjustment shall be "in such manner as shall be just and equitable". In my view, Clause 9.6 is broad enough to encompass a variation of the methodology used in calculating the "Lessee's proportion" of the service charge from that which had hitherto been employed in accordance with the lease. However, the result of the determination of the "Lessee's proportion" in accordance with the varied methodology must be just and equitable.

7.2 That construction of Clause 9.6 does not give rise to any inconsistency or ambiguity when one looks at the lease as a whole. Clause 1.20, which recognises that a lessee's proportion is to be determined by using a particular methodology, governs the determination of such proportion until such time as the Lessor or the plaintiff is entitled to, and does, invoke either Clause 2.5 or Clause 9.6.

7.3 A comparison of Clause 2.5 and Clause 9.6 suggests that the former may be designed to address less drastic variations than the latter. The Lessor or the plaintiff is entitled to invoke Clause 2.6 if the Park is increased or decreased on a permanent basis, or if for some reason the percentage agreed between the Lessor and the defendants at the outset is no longer appropriate. A number of situations are indicated in Clause 2.5 in which the percentage might no longer be appropriate, for instance, a permanent increase or decrease in the Park, or changes in the Park or the experience gained in managing the Park. As regards the service charge, what Clause 2.5 permits is a variation in the percentage which forms the basis of the defendants' liability. The reference to "percentages" in Clause 2.5 may mean that, unlike Clause 9.6, it is not open to the construction that the discretion provided for in Clause 2.5 extends to varying the methodology of calculation of the percentage of the service charge for which the defendants are liable. Whether that is the case or not is immaterial, because it is Clause 9.6 which the plaintiff has invoked. Whether it is or is not does not pinpoint an inconsistency or ambiguity in the lease, because the lease as a whole is open to the construction that the two provisions are dealing with different situations. In any event, whichever provision is invoked, the outcome must be "just and equitable".

7.4 Despite the fact that it is not introduced by a proviso such as "notwithstanding anything herein contained", or "without prejudice to anything herein contained", in my view, the broad scope of Clause 9.6 is not in any way attenuated by the existence of Clause 1.20. As I have recorded, Clause 1.20 is part of the definition clause and the definition contained in it applies "save where the context otherwise requires or implies". The context requires that Clause 9.6 should be read independently of Clause 1.20.

7.5 It was submitted on behalf of the defendants that the lease contains no covenant or provision on the part of the defendants to pay a proportion of the service charge adjusted in accordance with Clause 9.6. There is no doubt that there are drafting peculiarities in the lease, and, in particular, from the commencement of the reddendum to the end of Clause 5 (the location of Clauses 5.2, 5.3 and 5.4, which one would have expected to find in Clause 6, being obvious examples) and in relating that part of the lease to Clause 6.1. Nonetheless, I have no doubt that it is proper to construe the lease as imposing on the defendants a liability to pay a proportion of the service charge properly determined in accordance with Clause 9.6.

8. Order
8.1 Having regard to the observations I have made earlier as to the manner in which the question for determination by the Court has been formulated, if the parties wish, I will hear further submissions as to the precise form of order to be made.