Neutral Citation: [2012] IEHC 607

THE HIGH COURT

2010 3749 S

BETWEEN

NOELEEN BEHAN AND MICHAEL HENRETTY

PLAINTIFFS

AND

BEHAN'S LAND RESTORATION LIMITED

AND JOHN BEHAN

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham delivered the 6th day of June 2012

1. This matter comes before the Court by way of an application for summary judgment which application is resisted by the defendants who seek to have the matter referred to plenary hearing. At the outset it may be said that the case is a very unfortunate one bearing all the hallmarks of a family dispute. In that regard it should be noted that the first named plaintiff is the sister of the second named defendant and the second named plaintiff is the brother-in-law of the second defendant.

2. The proceedings take the form of a claim for arrears of rent which has been unpaid on foot of a lease dated the 18th December 2007, pursuant to which payment of the rent was guaranteed by the second named defendant. And really the plaintiffs say it is as simple as that – rent is due and has not been paid and they are entitled to judgment.

3. However, it is necessary to provide some context for the present proceedings. The plaintiffs are the executors of the estate of the late Josephine Behan, mother of the first named plaintiff and second named defendant who died on the 18th September 2003.

4. Prior to her death, the late Mrs. Behan had made a Will, which it must be said an elaborate one and really quite unusual in form and which unfortunately gave rise after her death to acrimonious litigation. She was the owner of lands at Punchestown, County Kildare comprising a disused quarry. In making her Will she contemplated the infilling of the quarry and by the Will she divided the proceeds received from the landfill of the lands by seven, and bequeathed the resulting one seventh share to a number of name beneficiaries. Furthermore she bequeathed the lands when fully filled in to the second named defendant.

5. I have referred to the fact that the Will resulted in acrimonious litigation. Before the litigation came to trial there were intensive and protracted negotiations which resulted in a settlement on the _____ day of _____. Ultimately, the outcome of the negotiations was the execution of the lease which is central to the present proceedings. Initially the negotiations resulted in Heads of Terms of a Lease leading to an agreement for a lease dated the 18th December 2006. It seems that the lease may have been executed at the same time as the agreement for the lease in December 2006 but that it was held in Escrow until certain permissions and consents had been obtained and was eventually delivered on 18th December 2007.

6. By virtue of the lease the plaintiffs demised the subject lands to the first named defendant for a term of twelve years. The first named defendant was required to pay an initial yearly rent of €416,667.67 payable quarterly. The second named defendant guaranteed the obligations of the first named defendant.

7. Of note is that the lease contained provisions for both upward and downward rent reviews. In the context of the present proceedings this gave rise initially to a subsidiary dispute between the parties but the plaintiffs have accepted that given the low threshold that the defendants have to meet in order to be permitted to defend the proceedings that so much of the claim as relates to the period after the scheduled rent review should go to plenary hearing. The plaintiffs also acknowledge that in so far as there is some dispute whether the rent review should have been on the 17th December 2010, as contended for by the defendants or the 17th December 2011, that they consent to the portion of the claim referable to the 17th December 2010, onwards going to plenary hearing.

8. However, so far as the element of the plaintiffs' claim is concerned, which is for arrears of rent from the date of the lease to the 17th December 2010, amounting to €604,556.50. They say that there is no semblance of a defence and in respect of this sum that they are entitled to judgment now

9. There is no real dispute between the parties as to the legal principles which apply in an application such as this for summary judgment and where the issue is whether the plaintiffs are entitled to summary judgment, or whether the matter should go to plenary hearing with the defendants being given liberty to defend. The approach to be adopted is succinctly set out in the Head Note to the Supreme Court judgment *in Aer Rianta CPT v. Ryanair Limited* [2001] 4 I.R. 607 in these terms:-

> (1) The defendants hurdle on a motion such as this was a low one and the jurisdiction to grant summary judgment was one to be used with great care.
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> (2) That it was for the Court to decide whether the defence set out in the affidavits, together with the documents exhibited therewith, was credible, or in other words whether if there was a fair or reasonable probability of the defendant having a real or *bona fide* defence. In deciding whether the defendant had a credible defence, the Court had to concentrate its attention of the matters put forward in the defence itself.
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> (3) That the fair and reasonable probability of the defendant having a real or *bona fide* defence, was not the same thing as a defence which would probably succeed, or even a defence whose success was not improbable.
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> (4) That the fundamental question to be posed on an application such as this remained; was it very clear that the

defendant had no case? Was there either no issue to be tried or only issues which were simple and easily determined? Did the defendants' affidavits fail to disclose even an arguable defence?

10. The defendant advances two bases for being given leave to defend, one going to the whole amount of the claim and one going to part only.

11. The partial defence element relates to the contention that there is a requirement for a demand to be made on the guarantor and the second named defendant says that the only demand made of him was for €312,500.25 and that there is no valid claim in these proceedings for any amount in excess of that and accordingly the claim for the amount in excess of that should go to plenary hearing, even if the second named defendant fails in his attempt to send the entirety of the claim there. I will return to this aspect.

12. So far as the more fundamental argument is concerned, the second named defendant says that the terms of the lease had been calculated by reference to the period of time it was likely to take to exhaust the capacity of the lands to take infill and that the initial rent was calculated by reference to the open market value per cubic metre of available space. He points out that the lease was negotiated when the construction industry was booming and when there was a huge demand for infill facilities but that shortly after the construction industry collapsed as the economy headed into freefall, rendering the rent levels which had been agreed completely unrealistic. He says that when the lease was negotiated there was a shared understanding that the market for infill space would not collapse and that there would be a relationship between the income that could be achieved from the infill facility and the rent to be paid in respect of it.

13. In terms of the unexpected collapse of the construction sector providing a legal basis for resisting judgment, counsel for the defendant relies on the decision of *Solle v. Butcher* [1950] 1 K.B. 671 and in particular the judgment in that case of Denning L.J., as he then was. Counsel points out that this judgment has been commented favourably by Costello J., as he then was in *O'Neill v. Regan* [1992] 1 I.R. 166 and by Kelly J. in *Irish Pensions Trust v. Central Remedial Clinic [*2006] 2 I.R. 126. In the course of his judgment Denning L.J. had commented:-

> "A contract is also liable in equity to be set-aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault."

14. The plaintiff in urging the Court to reject arguments based on *Solle v. Butcher* draws attention to the treatment of the issue of mistake in *McDermott* on contract law. At para 12.23 the author comments:-

> "In order to attract legal consequences the mistake must substantially be shared by both parties and must relate to facts as they existed at the time the contract was made. If the fact in issue was true at the time the contract was entered into, then it is irrelevant to the law of mistake. This simple proposition is clearly illustrated in two recent cases, one English and one Irish."

15. The recent cases referred to by Dr. McDermott were the cases of *Amalgamated Investments v. John Walker* [1976] 3 All ER 509 and the case of *Fitzsimons v. O'Hanlon* a decision of Budd J. reported [1999] 2 ILRM 551. In *Amalgamated Investments v. John Walker* the defendants sold a commercial property to the plaintiffs. The defendants knew that the plaintiffs intended to redevelop the property and therefore would need planning permission for it. Unknown to both parties the building had been identified by the Department of the Environment as a possible candidate for "listing" as a protected property. The parties signed a contract for sale but the very next day the building was listed, thus making it much harder for the plaintiffs to get permission to redevelop. The value of the property with no redevelopment potential was €1.5m less then the contract price. The plaintiffs sought to rescind the contract on the ground of common mistake. However in the Court of Appeal Buckley L.J., stated:-

> "That for the application of the doctrine of mistake it was necessary to show that the mistake existed at the time of the contract. Here the listing of the property had occurred one day after the contract was entered into".

Buckley L.J. commented:-

"... there was no mutual mistake as to the circumstances surrounding the contract at the time when the contract was entered into. The only mistake there was one which related to the expectation of the parties. They expected that the building would be subject only to ordinary town planning consent procedures and that expectation has been disappointed. But at the date when the contract was entered into I cannot see that there is any ground for saying that the parties were then subject to some mutual mistake of fact relating to the circumstances surrounding the contract."

16. A similar conclusion was reached by Budd J. in *Fitzsimons v. O'Hanlon*. The plaintiffs, who were cousins of the deceased, sought to extract a grant of representation in the belief that they were his next of kin. The defendants issued proceedings seeking a declaration that they were the non marital children of the deceased. If successful this would have resulted in the plaintiff's being excluded in sharing the estate. A compromise was reached under which the plaintiffs would receive a sum of £60,500 in costs in full and final settlement. At the time both parties were under the impression that the nett value of this estate was approximately €120,000. In 1997, two years later it emerged, that contrary to earlier beliefs, a sum of approximately €60,000 was on deposit with a building society in the name of the deceased. The plaintiffs issued proceedings seeking a share of this money and if necessary an order setting aside the settlement. They argued that the compromise of €60,500 amounted to a 50/50 split so they claimed that the agreement should be set-aside on the basis of a shared mistake of fact as to the size of the estate. Budd J. commented:-

"In this case the parties all *bona fide* believed that all the assets had been located and their approximate value ascertained. There was no mistake as to what assets were included in the estate at the time when the compromise was reached in consideration of which the plaintiffs withdrew their opposition to the declaration of paternity. The fact of the further fund in the building society which came to light subsequently, while an important factor, did not destroy the identity of the subject matter of the agreement as it then was when the contract was made and accordingly the contract was not void."

17. On the assumption, which I am happy to make that the decision in *Solle v. Butcher* can be relied on as a correct statement of Irish Law. In this case the proceedings that had been launched for compromise following lengthy settlement negotiations involving very experienced solicitors and counsel. I do not believe it can be suggested that there was any common mistake as to any then existing fact. It is true that the parties may have been disappointed and in the case of the defendants in particular, seriously disappointed by the downturn in the Irish economy and in particular in the construction industry. However, I cannot conceive how that could provide a basis for setting aside an agreement that both parties entered into with advice.

18. While one cannot but have sympathy for Mr. Behan for the situation in which he finds himself, there is simply no credible basis for suggesting that parties can be relieved of obligations freely entered into because an economy has experienced a downturn, even one as severe as would fit the economy of this State. It seems to me to use the language *Aer Rianta v. Ryanair* that it is very clear that the defendant has no case and that the affidavits fail to disclose even an arguable defence. In fairness to the defendant who had initially been paying the rent, that when the situation changed his reaction was seek an alleviation and to try and avoid court proceedings. It was only when those efforts failed that the defendants have had to resort to the arguments advanced in the present case.