Neutral Citation Number: [2005] IEHC 201

THE HIGH COURT
COMMERCIAL

2005 No. 1466 P

BETWEEN

CAMPUS AND STADIUM IRELAND DEVELOPMENT LIMITED

PLAINTIFF

AND
DUBLIN WATERWORLD LIMITED

DEFENDANT

Judgment delivered by Mr. Justice Kelly on the 3rd day of June, 2005

The Property
1. The property the subject of these proceedings is known as the National Aquatic Centre, situate at Abbottstown, County Dublin. It is owned by the plaintiff. The shareholding of the plaintiff is held as to 25% by the Taoiseach, 25% by the Minister for Finance and 50% by the Minister for Arts, Sports and Tourism.

2. The National Aquatic Centre cost €62 million to develop.

3. It was opened on 10th March, 2003.

4. The plaintiff let the facility to the defendant on what is described in the evidence as a 'commercial basis'. It did so by a lease dated 30th April, 2003. The lease has a term of 30 years. That lease is competently drafted and comprehensive. Regardless of how well a lease is drafted, however, it will be of little benefit to a landlord if the tenant is not an entity of substance.

The Tenant
5. The tenant in this case is the defendant. It is a limited company with its registered office at Caherweesheen, Ballyard, Tralee, County Kerry. Its accounts for the year ending 31st December, 2003 (the year the lease was created) show it as having an authorised and paid-up capital of just €127. It had no fixed assets. It had no current assets that year, save for a sum of €12,243 due to it from a company called Dublin Waterworld Management Limited, which is its own 100% owned subsidiary. It is nothing short of astonishing that a valuable premises such as the one in suit could have been let to the defendant. But it was, with entirely predictable results which have now, unfortunately, come to pass.

The Tenant's Behaviour
6. Since going into occupation of the property in March, 2003, the defendant has paid nothing at all save a single sum of €67,191.33 in respect of insurance. Not a single cent has been paid by way of rent, and that is not in dispute. That failure to discharge the basic obligation of any tenant long antedated the problem with the roof of the premises which occurred in January, 2005. Much has been made by the Defendant of this roof defect in an attempt to explain or indeed excuse its default.

7. Leaving aside a sum in excess of €10 million which is allegedly due by the defendant in respect of VAT liabilities, there was up to the end of last year, a sum well in excess of €1 million outstanding in respect of liabilities owed by the defendant to the plaintiff, principally that of rent. This figure does not take into account the rent due from January, 2005 to date.

8. The defendant was obliged to provide security for its obligations to a limited extent. That it did. It has however proved to be entirely inadequate. The failure to make the payments due to the plaintiff has resulted in that security being called by the plaintiff. It was not discharged on demand but during the course of the hearing before me on Wednesday last a fax from Anglo-Irish Bank Corporation as of 1.43 p.m. that day, demonstrated that funds to a total of €761,842 had been transferred to the plaintiff's account. The net effect of that payment is twofold. First, the plaintiff no longer has the security of the guarantee since it is now exhausted. The guarantee fund has been used in discharge of the defendant's basic obligation to pay its rent. Secondly, even with the exhaustion of that fund there is still an admitted sum of the order of €300,000 at least due by the defendant to the plaintiff. No proposal has been forthcoming as to the due discharge of that amount.

9. Quite apart from that sum, the plaintiff alleges that the defendant is also indebted to it in a sum of in excess of €10 million in respect of VAT payable on the lease. The defendant contends that it has no such liability.

10. A number of other shortcomings on the part of the defendant have been identified by the plaintiff including failure to deliver audited accounts. These were needed in order to place the plaintiff in a position to assess the portion of the rent due which would represent 10% of the defendant's profit for the years 2003 or 2004. There is also an alleged failure to set up and contribute to a sinking fund; a failure to take steps to agree with the plaintiff the terms of a capital maintenance programme and a failure to pay insurance rent.

The Plaintiff's Response
11. Given the defendant's conduct and in particular its failure to pay any rent, it is hardly surprising that the plaintiff decided to take action. What is surprising is the length of time that elapsed before the plaintiff decided to do so. In the course of an affidavit which was sworn by the chief executive of the plaintiff, which sought to transfer this case into the Commercial List, he said:

> *"The NAC is a very valuable premises upon which there has been a great deal of expenditure. The property is of national importance in terms of the part it is designed to play in international and national sporting events as well as being a vital facility intended for community use."*

12. With that state of affairs one would have expected that a defendant in possession of such valuable premises, who had paid no rent since going into occupation in March, 2003, might have had action taken against it in a much shorter timeframe than that which occurred. That is not intended to be, nor indeed could it be, any criticism of the lawyers acting on behalf of the plaintiff because they have acted with commendable efficiency and excellent despatch since instructed to do so.

13. On 18th March, 2005, a forfeiture notice under s. 14 of the Conveyancing and Law of Property Act, 1881 was served by the plaintiff on the defendant. It set out a whole series of alleged breaches on the part of the defendant of its obligations pursuant to the lease of 30th April, 2003. They included:

a) the failure to pay any rent;

b) the failure to deliver audited accounts;

c) the failure to pay insurance rent;

d) the failure to contribute to the sinking fund;

e) the failure to agree with the plaintiff the terms of a capital maintenance programme;

f) the failure to pay the VAT payable on the grant of the lease;

g) the failure to operate the premises itself;

h) the operation of the premises by Dublin Waterworld Management Limited despite the covenant against alienation;

i) the failure to manage the premises in a good and efficient manner;

j) the failure to continue to employ the approved manager;

k) the announcement of price increases for ticket prices above the Consumer Price Index without obtaining the consent of the plaintiff.

14. The notice gave a period of 28 days within which those breaches ought to be remedied. In default of their remedy the lease was to be forfeited by the plaintiff and possession demanded.

15. The forfeiture notice was not complied with within the 28 days and accordingly, on 26th April, 2005 the present proceedings were commenced. They seek possession of the premises.

16. The statement of claim was delivered three days later. Meanwhile the plaintiff served a notice of motion seeking to transfer the case into the commercial list. On the 12th May 2005 I heard that motion and made an order transferring the case into this list. On that application the defendant intimated that it might seek to issue a motion seeking a stay of the proceedings. In such event I directed that it be served so as to make it returnable for hearing on the 30th May 2005. In default of the issue of such a motion the defendant was directed to deliver a defence on or before the 29th May 2005.

The Application

17. In fact the defendant did bring a motion seeking a stay and it was heard by me on the 1st June 2005.

18. The defendant seeks an order pursuant to s. 5 of the Arbitration Act, 1980 staying the proceedings. It also seeks an order suspending and/or prohibiting any act on the part of the plaintiff on foot of the forfeiture notice. In the alternative it seeks an order granting the defendant relief against the forfeiture subject to such conditions as to the court might appear right and proper.

19. The defendant relies upon two clauses in the lease in support of its application. They are clauses 9 and 10. Clause 9 is headed "Expert Determination". It provides that every dispute between the landlord and the tenant concerning compliance by the tenant with its obligations under the lease concerning the repair and maintenance of the premises shall be referred to the determination of a single architect who is described as the expert. The clause then goes on to provide for the appointment of the expert and what he is to do upon appointment. He must make his decision on the disputes submitted to him with a period of three months or such extended time as the parties may agree.

20. Clause 10 is headed "Arbitration". It provides that any dispute or question arising between the parties in relation to the provisions of the agreement save as provided for in clause 9, schedule 2, and schedule 10 shall be referred to the arbitrator by whose decision the parties shall be bound. It expressly provides that a reference to an arbitrator is to be deemed to be a submission to arbitration within the meaning of the Arbitration Acts. The arbitrator is obliged to use his best endeavours to give his decision in no more than 28 days from the day the matter is referred to him.

21. The defendant contends that all of the matters described in the forfeiture notice and indeed other alleged breaches identified subsequent to its service fall within the ambit of clauses 9 and 10 and ought therefore to be referred to the expert or the arbitrator and the instant proceedings stayed in their totality.

22. The defendant contends that both clauses 9 and 10 are "arbitration agreements" for the purposes of s. 5 of the Arbitration Act, 1980. Alternatively if clause 9 is not an arbitration agreement nonetheless it is an agreement to refer the disputes covered by it to a form of alternative dispute resolution. It is said that the court in its inherent jurisdiction has power to stay proceedings to enable the expert to adjudicate as envisaged under clause 9.

Clause 10

23. In my view there can be no doubt but that clause 10 of the lease is an arbitration agreement within the meaning of that term as contained in the Arbitration Act, 1980. Section 2 of that Act defines arbitration agreement as meaning:

> *"An agreement in writing to submit to arbitration present or future differences capable of settlement by arbitration."*

24. Clause 10 clearly falls within that description. Indeed the parties expressly provided that a reference of disputes covered under clause 10 should be regarded as a submission to arbitration under the legislation. There can therefore be no doubt that clause 10 of the lease falls to be dealt with under the provisions of the Arbitration Act, 1980.

Clause 9

25. In my view it is equally certain that clause 9 does not so fall. There the parties chose what it is described as 'expert determination' rather than 'arbitration'. Nowhere in clause 9 does the term arbitration appear. It is not an agreement to submit to arbitration. Rather it is an agreement to submit a dispute to an expert. The juxtaposition of clauses 9 and 10 suggest that the parties very clearly and with their eyes wide open decided that certain disputes would be arbitrable whereas others would be the subject of an expert determination which would not be governed by the Arbitration Acts. That in my view is the clear intention of the parties to be gleaned from the provisions of clauses 9 and 10 of the lease.

26. It follows therefore that disputes which fall within the scope of clause 10 fall within the provisions of the Act whilst those which fall to be dealt with under clause 9 do not.

Inherent Jurisdiction
27. Notwithstanding the fact that clause 9 disputes are not subject to s. 5 of the Act nonetheless the court has power in its inherent jurisdiction to grant a stay in respect of an action brought in breach of an agreed method of resolving disputes by some method other than litigation. Both sides accept that that inherent power is identified in the decision of the House of Lords *in Channel Tunnel Group Limited v. Balfour Beatty Construction Limited* [1993] I ALL E.R. 664.

28. The difference of course is that a stay under s. 5 is mandatory (unless of course the court is satisfied that the arbitration agreement is null and void, inoperative or incapable or being performed or that there is not in fact any dispute between the parties). The granting of a stay under the inherent jurisdiction is discretionary.

The Disputes
29. It is necessary to identify the species of dispute which is covered by clauses 9 and 10.

30. Clause 9 deals exclusively with disputes concerning compliance by the defendant with its obligations concerning repair and maintenance of the demised premises. Clause 10 deals with any dispute or question arising between the parties in relation to the provisions of the agreement save as provided for in clause 9 schedule 2 and schedule 10. Schedule 2 deals with the rent and obligations in relation thereto. It provides for the determination of disputes but in a non arbitral setting. Schedule 10 deals with the calculation of the sinking fund and contains its own inbuilt arbitration agreement concerning any dispute with respect to the amount of the increased sinking fund payment or the construction or effect of that clause. Turning therefore to the issues which have been canvassed in the affidavits the following are my conclusions in respect thereto.

1. Non payment of rent
31. Having regard to what is contained in the affidavits and the concessions made in court I am quite satisfied that there is in fact no dispute between the parties but that the defendant has been and continues to be in breach of its obligations to pay rent and other specified sums. There is therefore not in fact any dispute between the parties which would justify this Court making an order under s. 5 of the Act in respect of the non-payment of rent. It follows therefore that I refuse to grant any stay in respect of that part of the plaintiff's claim which deals with the defendants obligations to pay rent and the insurance rental.

2. V.A.T
32. I am satisfied that there is a dispute between the parties concerning the liability of the defendant for the VAT on the execution of the lease. That is a matter which falls within the provisions of clause 10 and insofar as the plaintiffs proceedings seek to rely on or recover that sum they will be stayed so as to allow the issue to be referred to arbitration as provided for in the lease.

3. Paragraphs 13, 14 ,15, 16 and 17 of the Statement of Claim
33. Insofar as the matters canvassed in these paras. of the statement of claim are concerned I am not satisfied on the evidence that there is in fact any dispute which falls to be referred to arbitration under clause 10 of the lease. In this regard it is for example accepted that management functions at the aquatic centre are not being carried out by the defendant but rather by a company called Dublin Waterworld Management Limited. It is also accepted that the general manager approved of by the plaintiff is no longer in the defendant's employment. It follows therefore that I refuse to grant a stay in respect of the matters dealt with in those paragraphs.

4. Repair and Maintenance
34. I have come to the conclusion that there are disputes in existence as between the parties in this regard to the defendant's maintenance and repair obligations. It is not appropriate that I should express any view on the merits of those disputes as evidenced in the material before the court. The only question which then arises is as to whether I should exercise my discretion to stay the plaintiffs claim insofar as complaint is made in respect thereof so as to enable the procedure envisaged at clause 9 of the lease to be followed. I have come to the conclusion that I should.

35. It appears to me that in general the courts approach should be that where commercial enterprises negotiating at arms length decide on a particular procedure to resolve disputes between them then a court ought to be slow to permit them to ignore or depart from those procedures. The parties here have decided to resort to a chosen form of resolution of their commercial differences. They did so with their eyes open. They should be required to adhere to that in the interests of the orderly regulation of their relationship and their disputes. Accordingly I stay any part of the plaintiffs' proceedings which deal with the alleged failure on the part of the defendant to adhere to its obligations of repair and maintenance under the lease.

36. The bulk if not all of these allegations covering the failure to repair and maintain arose subsequent to the service of the forfeiture notice.

Conclusion
37. It follows therefore that the dispute in respect of the defendant's liability for VAT will be referred to arbitration under clause 10 of the lease and disputes in respect of repair and maintenance will be referred to the expert for determination under clause 9. The plaintiffs' proceedings are stayed insofar as any relief is claimed under those headings. Insofar as the balance of the plaintiffs claim is concerned the stay is refused.

38. I am mindful of the fact the both clause 9 and clause 10 contain their own timescale. I would expect strict adherence to that. It seems to me that that is highly desirable in the interest of an expeditious resolution of this most unsatisfactory situation.

39. I will hear counsel as to the precise form of the order and the consequential directions that fall to be given.