

THE HIGH COURT

[RECORD No. 2005 1335 P.]

BETWEEN

COSMOLINE TRADING LIMITED

PLAINTIFF

AND

D.H. BURKE AND SON LIMITED AND D.H.B. HOLDINGS LIMITED

DEFENDANTS

Judgment of Mr Justice Finnegan delivered on the 14th day of June 2007

1. Following on the judgment delivered herein on the 8th day of February 2006 this matter was again listed before me for the purposes of assessing compensation to the plaintiff the relief *in rem* claimed having been refused. The plaintiff claims compensation under the following headings:

1. Capital value of the plaintiff's business.
2. Loss of profits.
3. Interest on each of the sums aforesaid.

2. The defendants claim that there should be set off against the award to the plaintiff a number of benefits received by the plaintiff and these are as follows –

1. Agreed value to the plaintiff of the surrender of premises held by it under lease from the defendants at Boyle and Drumshanbo and agreed between the parties at €200,000.
2. Rent in respect of premises at Roscommon forgiven €40,623.
3. Allowance paid by the defendants' builder to the plaintiff to secure early possession of the plaintiff's premises at Abbey Trinity €55,000.
4. Use of the defendants Intoxicating Liquor Licence from 2003 to date.

Relevant dates

3. On the 1st January 2003 the plaintiff vacated approximately one half of the premises which it held under lease at Abbey Trinity and continued to trade from the remaining half until March 2004. Thereafter the plaintiff traded from alternative premises provided rent free by the defendants, the Bontex premises, until the 5th February 2005 when it ceased trading. The parties undertook these steps in the belief that an agreement existed between them but I have held that there was no concluded agreement. By letter dated 2nd November 2004 the defendants contended that the lease of the Abbey Trinity premises had been surrendered. This letter was replied to by the plaintiff on the 22nd November 2004 denying that there had been any such surrender. Having regard to this correspondence and the date upon which the plaintiff vacated the Bontex premises provided by the defendants I propose taking as the date upon which the negotiations between the parties finally terminated the 1st January 2005. At that date the plaintiff's premises had been demolished and re-development of the site had been substantially completed.

Value of business

4. On behalf of the plaintiff, Peter Lundy of CB Richard Ellis, gave evidence that a supermarket business will normally sell at a multiple of fifteen to twenty times gross weekly turnover for leasehold premises. The factors which will dictate the multiple include competition in the area, the condition of the building, the rent payable and the ability to generate profit. The rent payable up to the review date under the plaintiff's lease, the 24th November 2002, was €189,538.90. In the witnesses opinion on review the rent would be increased to €260,000. The appropriate multiple of gross weekly turnover in his opinion is 16.9.

5. Linda Boyle of DTZ Sherry Fitzgerald on behalf of the defendants gave evidence that the appropriate multiple for leasehold premises is ten to fifteen times gross weekly turnover. In her opinion the appropriate multiple in respect of the plaintiff's premises is much closer to 10. Relevant to forming that opinion is the existence of competition. Tuam Shopping Centre had a supermarket of some 20,000 square feet under construction in 2003. Lidl had since opened a supermarket of 16,000 square feet within one half kilometres. Tesco had since opened a supermarket of 40,000 square feet within three quarters of a kilometre. Supervalu had since opened a supermarket of 20,000 square feet in the town. Two large car parks adjacent to the premises had been closed and were no longer available. There are only twelve dedicated car parking spaces available for the premises. As to location she referred to Crest Annual Shopping Centre Productivity Review of May 2006 in which the overall shopping centre rank order for the Tuam Shopping Centre was forty sixth place out of fifty and was deemed to offer the least return on rent invested and second least return on service charge compared with footfall estimates within the centre. That centre was also ranked forty seventh out of fifty in respect of highest occupancy rates. Tuam Shopping Centre is a new modern purpose built shopping centre with better profiles and an adjoining multistorey car park. The rent payable by the plaintiff was due for review on the 4th November 2002 and in her opinion the reviewed rent would be €190,000 to €200,000 per annum. If it were a modern building the rent would be €260,000 per annum.

6. As it is not possible to reconcile the evidence of these experts I propose to take it that a leasehold supermarket would achieve between ten and twenty times its gross weekly turnover. In determining where on this scale to place the plaintiff's leasehold premises I take into account the following –

1. The nature of the premises.

Neither valuer had an opportunity of viewing the premises as they had been demolished but photographs of the premises as they existed prior to demolition were available to the court and to the valuation witnesses. Further a schedule of the condition of the premises at the date the plaintiff took possession of the same in 1997 was available. I have regard to the photographs and to that schedule. The premises were single storey with a two storey section to the rear with offices at the upper level. There were twelve car parking spaces. The premises prior to the plaintiff taking possession of the same were a retail furniture premises. The structure, apart from some extensions, is not modern. The lease contains a repairing

covenant which will be relatively onerous having regard to the age and condition of the building.

2. Car parking adjacent to the premises at two locations has now been built upon. There is a multistorey car park adjoining the premises but which is part of a new development which contains a supermarket of 20,000 square feet and which is more likely to attract customers to that supermarket.

3. The construction of a new modern supermarket with adjacent multistorey car parking within the same development represents competition which would adversely affect a supermarket business carried on in the plaintiff's premises.

4. Since 1st January 2003 a number of supermarkets in addition to that in the adjoining development have opened – Lidl, Supervalu and Tesco. All of these represent competition to the plaintiff's business. An astute purchaser on 1st January 2005 would have been aware, I am satisfied, of the existence or if not completed the proposal for some of these developments and this would affect the value of the plaintiff's business adversely.

5. To some extent the plaintiff's turnover for the latter part of the year 2002 was adversely affected by disruption caused by the closure of adjacent car parks and construction traffic.

7. Having regard to the foregoing I find that the appropriate multiple of gross weekly turnover to be applied in valuing the plaintiff's premises as at 1st January 2005 is 12.5. The gross weekly turnover for the year 2002 is agreed at €98,500. Having regard to increased competition between 1st January 2003 and 1st January 2005 I am not satisfied that the gross weekly turnover at 1st January 2005 would have increased beyond that at 1st January 2003 had the plaintiff continued to trade from the Abbey Trinity premises. Accordingly the value of the plaintiff's business at 1st January 2005 was €1,231,250.

8. I accept the evidence of Mr Murray, the accountant, that the plaintiff could expect by investing that sum to earn a return of 5% to 6% per annum and accordingly I award the plaintiff simple interest at the rate of 6% on the sum aforesaid from the 1st January 2005 to date of payment.

9. I take the 1st January 2005 as the appropriate date upon which to calculate compensation as all that transpired between the parties in advance of that date was by agreement between them in anticipation of reaching agreement. The possibility that an agreement might not be reached was not considered and there was no agreement or indeed discussion as to what should happen in that event. All that transpired between the two dates was considered by the parties to be for their mutual benefit.

Loss of profits

10. In addition to compensation for the loss of its business, the plaintiff claims loss of profits. However I am satisfied that loss of profits are not be recoverable as the plaintiff will recover the value of its business at 1st January 2005 with interest thereon. To award loss of profits in addition would amount to a double benefit giving to the plaintiff the value of its business on 1st January 2005 together with interest thereon and in addition to that the profits which it could earn had it continued to trade. The plaintiff vacated its premises on the 1st January 2003 after which by agreement with the defendants it partially vacated and thereafter completely vacated its premises at Abbey Trinity and never returned. From the 1st January 2003 while trading from part of its original premises and thereafter from the Bontex premises the plaintiff made profits. By agreement no rent was to be paid either in respect of its occupation of part of its original premises or of the Bontex premises. I do not consider that any deduction from the compensation should be made on this account as the plaintiff's moving its business was at the request of the defendants and for the purpose of facilitating the defendants' development. Outside these proceedings the defendants made a claim for rent but in assessing compensation I have done so on the basis that no rent is payable after the 1st January 2003.

Credit to the defendants for benefits received

11. As part of the arrangements between the plaintiff and the defendants the plaintiff surrendered its premises at Boyle and Drumshanbo held under lease from the defendants. It is agreed between the parties' valuers that the benefit of this to the plaintiff is €200,000. Again as part of the arrangements between the parties rent in respect of premises at Roscommon held by the plaintiff under lease from the defendants was foregone by the defendants in the amount of €40,323. The plaintiff received €55,000?? from the defendants' builder in consideration of moving from Abbey Trinity premises to the Bontex premises to facilitate the more rapid completion of the defendants' development. I am satisfied that these three sums should be deducted from the amount of compensation payable. Finally the plaintiff was afforded the use of an intoxicating liquor licence for use at its premises at Circular Road, Tuam, which premises traded as an off-licence. The off-licence made a net profit on the evidence of the plaintiff's accountant, Declan Murray, as follows –

2003	€35,021
2004	€7,496
2005	€15,557
2006 (nine months)	€11,741
Total	€69,815

12. While I have no evidence as to the amount of value of the licence on an annual basis, I am satisfied that some allowance must be made for the use of the same, and I propose to allow a deduction from the compensation awarded at €10,000 under this heading.

Summary

13. By way of compensation I award the plaintiff the sum of €1,231,250 together with simple interest thereon at 6% per annum from the 1st January 2005 to date of payment. The defendants are entitled to credit against the sum so calculated for the following amounts –

Surrender premises at Boyle and Drumshanbo	€200,000
Rent foregone in respect of Roscommon	€40,323
Allowance by defendants' builder	€55,000
Benefit of use of off-licence	€10,000
Total	€305,323

