Neutral Citation Number: [2008] IEHC 159

THE HIGH COURT
CIRCUIT APPEAL

2007 187CA

BETWEEN

GERARD CREGAN AND JOSEPH GRAY

PLAINTIFFS

AND
TAVIRI LIMITED

DEFENDANT

Judgment of Mr. Justice Charleton delivered on the 30th day of May, 2008.

1. The plaintiffs, who had a plan of running a restaurant, wished to buy the leasehold of a premises at 22 Castle Street, Dalkey from the defendant. The purchase has fallen through, but now the plaintiffs, as purchasers, seek the return from the defendant company, as vendor, of their deposit in the sum of €25,000.

Facts

2. The contract was negotiated as far back as November, 2005. An issue in relation to whether there was retention permission concerning the use of the premises, and an architect's certificate in that regard, delayed the signing of contracts until the 24th August, 2006. The contract records the purchase price as being €245,000 and described the premises as being held under an indenture of lease made on 1st March, 2005 between Michelle Kavanagh, the landlord, and Taviri Limited, the defendant in these proceedings, as tenant. The contract indicates that the closing date of the sale was to be 7th December, 2005, which was well before the problems in relation to planning had been sorted out. In consequence, it is argued that a completion notice could not have been served by the defendant as vendor on the plaintiffs as purchasers. As a matter of law, if a contract does not specify a closing date, a reasonable date will be implied into the contract. The time fixed for completing a contract is the closing date in law, and in equity a reasonable time may be allowed thereafter; Farrell – Irish Law of Specific Performance (Dublin, 1994) at para. 3.28.

3. Because the plaintiffs were buying a leasehold from the defendant, this transaction was subject to the consent of the landlord.

4. The original indenture of lease provided that the tenant, the defendant in this case, had covenanted with the landlord in the following terms:-

> "Not to assign sub-let part-with or share the possession of the entirety of the demised premises without the prior written consent of the landlord and if requested by the landlord without supplying a guarantor acceptable to the landlord which consent shall not be unreasonably withheld".
>
> The special conditions of sale in respect of this lease therefore provided at Clause 6:-
>
> "The sale is subject to the consent of the landlord to the assignment herein and the purchasers hereby irrevocably agree and undertake to furnish as expeditiously as possible all reasonable particulars as maybe required by the lessor to enable her consider the application for consent to assignment to herein. In the event of the consent of assignment not being forthcoming on or before [the date of closing] then this contact shall be at an end and the deposit paid on foot thereof shall be returned to the purchasers without deduction and without any claim for interest and/or compensation."

5. Another clause in the special conditions indicates that the closing date is to be seven days after the date of the consent to assignment by the landlord.

6. Under the original lease, the two directors of the defendant company had covenanted with the landlord, by way of an indemnity, to ensure the due observance of all the covenants in the lease on behalf of the defendant and to make good all losses howsoever arising by reason of any default.

7. In this case I have heard evidence from two solicitors acting on behalf of the plaintiffs and from the solicitor acting on behalf of the defendant company. All of that evidence was honest and was, in my view, genuinely helpful in assisting the court, and intended to be such. The evidence, however, added little to the correspondence to which I now turn.

8. As of July, 2006 the plaintiffs' solicitors were expressing frustration with the delay in relation to the planning documentation difficulty. That was resolved soon after and, in due course, on 3rd August, 2006 the correspondence turned to the issue of the guarantee that would have to be forthcoming in favour of the landlord under the lease if the assignment between the defendant and the plaintiffs was to be successful. To satisfy the landlord, the following documentation was requested from the plaintiffs and from their company Karan Foods Limited:-

> 1. Net statement of affairs certified by the accountants for the proposed assignees;
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> 2. Details of the proposed use of the premises by the proposed assignees;
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> 3. Bank and trade references.

9. On the 18th August, 2006 the plaintiff sought information with regard to the landlord's consent to the assignment of the lease. Shortly thereafter, on 28th August, 2006, a handwritten note of a telephone conversation with the solicitor for the defendant company was noted on a letter on the file of the plaintiffs' solicitor seeking an "up-date … on the issue of the landlord's consent". This note reads:- "31st [August] Sean Sexton, landlord will agree if his client (Louis) guarantee stays in place – reluctantly going with it if our client signs [covenant] and indemnity".

10. According to Deirdre Farrell, the solicitor dealing with the matter, this meant that the landlord of the premises would only consent to the assignment to the plaintiffs if one of the guarantors on the lease to the defendant company, namely its director Ray Murray, would stay in place and guarantee the performance of the covenants and obligations under the lease by the new lessees, namely the plaintiffs and their nominee company.

11. It would be fair to say that matters then stagnated for a fortnight. On the 19th September, 2006, the solicitors on behalf of the plaintiffs wrote to the defendant:-

> "We would also be obliged to receive an up-date on the landlord's consent and the proposed guarantee from your client, and covenant and indemnity of our client. Please furnish confirmation of the landlord's position. We note you are awaiting results of inquiries on the V.A.T. situation, and we would also be obliged to hear from you regarding our letters of 18th August, with regard to the planning documents requested and evidence of health board registration."

12. On 21st September, the defendant company's solicitors wrote to the plaintiffs seeking a closing date. The landlord's consent would, of course, have to be furnished as of the date of the closing. On the 26th September, 2006 the letter which caused the rift between the parties was written by the plaintiffs' solicitor in the following form:-

> "We have been instructed by our clients to inform you that due to the onerous covenants sought by the landlord, our clients no longer wish to proceed with this transaction. In light of the failure to obtain the landlord's consent in the normal way we are instructed that our clients consider the contract to be at an end and we would therefore be grateful if you would arrange to return the contract together with our client's deposit cheque."

13. The solicitors for the defendant company wrote back on 28th September in the following form:-

> "With great respect this is the first indication either from your clients or yourselves of 'onerous covenants' sought by the landlord. The simple fact of the matter is that the landlord has, as is the normal way, insisted on a personal guarantee when the premises are being taken in the name of a limited liability company. The only difference in this case is that she has requested one of our clients' directors to personally guarantee the due performance and observation of the covenants and conditions and in turn your clients will indemnify Mr. Murray for this matter. The landlord's consent has issued subject to the guarantees being put in place which is standard practice. In addition we would point out that by letter dated 22nd inst. you indicated 'we will revert with an up-date on closing shortly'. In relation to the alleged outstanding matters we confirm as follows:-
>
> > (1) You have been aware for some time now of confirmation of the landlord's consent and the conditions attaching thereto;
> >
> > (2) There are no V.A.T. implications arising on this transaction;
> >
> > (3) We previously informed your Mr. Turner by telephone that we had received the final grant of permission, together with the architect's opinions on compliance in the standard form; and
> >
> > (4) The contents have been valued at €75,000".
>
> As a result, a notice making time of the essence was served pursuant to the contract, and when the closing did not take place, the deposit was forfeited.

14. I accept the evidence of Deirdre Farrell and Andrew Turner, both experienced solicitors, in their account of this transaction. Whereas they have come across, as a standard clause, the notion of directors guaranteeing the performance by a company of its obligations under a lease, they have not come across an assignment of a lease whereby the landlord insists that the new lessee should have its performance guaranteed both by its directors and by the previous lessee. Sean Sexton, solicitor on behalf of the defendant company indicated, and again I accept, that he regarded this condition as unusual but that he had seen it once before in the course of his career.

15. Nobody has told me, but I assume, as I feel I am entitled to, that in making a contract for the assignment of the lease, the plaintiffs had sight of, and received advice on the obligations thereunder that they were hoping to assume.

16. It is a standard clause that protects the position of a landlord that a lessee should not assign the premises without the consent of the landlord. The phrase limiting that discretion, which "consent shall not be unreasonably withheld" is taken from s. 66(2)(a) of the Landlord and Tenant (Amendment) Act, 1980. The case law in that regard, is multifaceted and goes back to the 1930s. In essence, however, the decisions of the courts come down to the same thing; that it is unreasonable for a landlord to withhold consent where the use of the premises is to be the same or similar to that employed by the current tenant and where the investment of the landlord in property will be shown to yield the same economic return, without damage to the premises, that is proposed to be demised by assignment.

17. Consent to assignment of a lease would be unreasonably withheld where the landlord will be receiving from the new assignees the same benefit, in terms financial reward and care of the premises, as from his or her current tenants. Clause 4.15.4 of this lease provides:-

> "In granting consent to any such proposed alienation the landlord may impose such conditions as are reasonable in all the circumstances."

18. The landlord of 22 Castle Street, Dalkey found herself in August, 2006 in a position where she had a sitting tenant, namely the defendant company, which was performing all of the obligations of the lessee under the lease. That performance was guaranteed by two businessmen of standing. In order to agree to come to an assignment of the lessee's interest under the lease, the landlord insisted on one of those businessmen remaining on as guarantor of the performance by the new lessee of the obligations under the lease, as well as insisting on guarantees from the plaintiffs in respect of their nominated company. I note the evidence of Sean Sexton that he had advised his client Louis Murray not to enter into a guarantee in respect of the performance of the obligations under the lease by the new lessee. I accept that evidence.

19. The landlord however, made the request for one of the existing guarantors to the performance of the obligations under the lease to remain in place to ensure that the new lessee would continue to perform the obligations that had been fulfilled up to that point. I do not regard that as being unreasonable. I note the evidence of Andrew Turner that his clients, the plaintiffs, told him that if the business turned into a "rip roaring success", they might find difficulty in selling it on to another party after a year or so should a similar condition be imposed by the landlord on any further alienation. I accept all of this evidence from Ms. Farrell, from Mr. Turner and from Mr. Sexton as being accurate as well as honest.

Forfeiture of a Deposit

20. Condition 41(a) of the General Conditions of sale applying to the sale of this leasehold provides:

> "If the Purchaser shall fail in any material respect to comply with any of the Conditions, The Vendor (without prejudice to any rights or remedies available to him at law or in equity) shall be entitled to forfeit the deposit and to such purpose unilaterally to direct his solicitors to release same to him."

21. Even in the absence of such a condition, the law implies into any contract for the purchase of a real property interest, that where a deposit is paid to secure performance of the contract it is to be forfeited where the purchaser is unable to complete and, returned where the vendor does not complete. A deposit is paid in order to show that the purchaser is serious in entering into such a contract and to secure the performance of the bargain. The general rule is that the deposit is to be forfeited on the purchaser backing out of the contract, subject to a vendor being able to fulfil the bargain. If the purchaser is in default then the deposit is forfeit: *Soper v Arnold* [1886] A.C. 429. If a contract is subject to a condition as to fulfilment by a purchaser, then the purchaser must do everything that is reasonable and practicable to meet that condition; *Draisey v FitzPatrick* [1981] I.L.R.M. 219. If a condition requires a vendor to accomplish something prior to completion, then the vendor is subject to the same stricture, save that it can happen that if a contract provides that a condition must be fulfilled prior to conveyance, it can operate under the contract as a condition precedent without which no sale can be completed; *Crean v Drinan* [1983] I.L.R.M. 82.

22. In England, the law on the forfeiture of deposits was changed by s. 49(2) of the Law of Property Act 1925 which provides:

> "Where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit."

23. In applying that provision, the courts in England consider whether it would be fair to order that a deposit be forfeited; *O'Neill v Phillips* [1999] 1W.L.R. 1092. This brings into issue the context and background of a contract; *Omar v El-Wakil* [2001] E.W.C.A. Civ. 1090. An equitable element was thus introduced into the issue which is entirely absent from the law in Ireland.

24. I am not entitled to apply the notion of fairness to the issue as to whether the deposit should be forfeited. The parties are free in whatever bargain that they choose to make and it is for the court to uphold it. The only issue for the court is whether the contract condition as to forfeiture applies in the circumstances as they have unfolded, whereby the contract has not been completed. To some extent, the background of the agreement can be material. In looking at this issue, however, I am not entitled to renegotiate the agreement of the parties. Rather, where, as here, something that is said to be unexpected has occurred, I am only entitled to apply to the contract that construction which parties in the position of the vendor and purchaser would have accepted had the issue arisen at the time of the formation of the bargain; in other words, a reasonable and objective construction. The law of contract presumes that the parties to a contract are reasonable people and that they will accept what is reasonable with a view to fulfilling the object for which the contract was entered into. So, I ask myself, was the requirement, that a sitting tenant who wished to assign a leasehold be obliged by the landlord to stay on and guarantee the performance of the lease by the proposed assignee tenant, one that could reasonably have been expected when the parties entered into the contract, or was it outside the reasonable expectation of the parties?

Decision

25. My decision on this matter is that had the parties been confronted at the time of signing the contract with an assignment of the lease whereby the vendor was willing to guarantee to the landlord the performance by the purchaser of its conditions under the lease, subject only to an indemnity in favour of that guarantor by the new lessee, or its directors, that this issue would not have inhibited the bargain being made. Nor was the position of the landlord outside that which might reasonably have been contemplated under the contract. The reality of the position in which the landlord found herself was that she had a guaranteed economic return in respect of her premises for a period of 35 years from March, 2005. She was happy, no doubt for good reason, with the standing of the guarantors under that lease and wished one of them to remain in place when it was planned, after a period of only a number of months from the date of signing the lease, for him to step out of the position of lessee and to alienate the premises to another lessee. In those circumstances the consent of the landlord being subject to the condition mentioned, namely that one of the directors of the existing lessee should stay on as guarantor of the performance of the new obligations should the lease be transferred, was entirely reasonable. It was also a condition that might reasonably have been anticipated by the plaintiffs on their reading of the lease. In accepting the assignment of the lease subject to that condition, the proposed lessee would, in reality, be losing nothing from the terms of the bargain that they had entered into. In purchasing an assignment of a lease for 35 years, it is reasonable to objectively conclude that the plaintiffs were looking at a longer term of business than creating a success and then selling on the leasehold about a year later.

26. In the circumstances there is no basis upon which I can interfere with the contract of the parties whereby the deposit is forfeited.