

THE HIGH COURT

[2015 No. 1840 S.]

BETWEEN

BELGARD TALLAGHT NOMINEES ONE LIMITED (IN RECEIVERSHIP), BELGARD TALLAGHT NOMINEES TWO LIMITED (IN RECEIVERSHIP), BELGARD TALLAGHT NOMINEES THREE LIMITED (IN RECEIVERSHIP), BELGARD TALLAGHT NOMINEES FOUR LIMITED (IN RECEIVERSHIP), BELGARD TALLAGHT NOMINEES FIVE LIMITED (IN RECEIVERSHIP), AND BELGARD TALLAGHT NOMINEES SIX LIMITED (IN RECEIVERSHIP)

PLAINTIFFS

AND

PATRICK (OTHERWISE PAT) MCDONAGH

DEFENDENT

JUDGMENT of Mr. Justice Eagar delivered on the 20th day of October, 2017

1. This is a judgment on an application by the plaintiffs for summary judgment against the defendant in the sum of €156,172.58 together with further contractual interest commencing on the 15th of April, 2016 and any on the day on which judgment is entered at the rate of €7.33 per day.
2. The notice of motion dated the 10th of May, 2016 is grounded on the affidavit of Shane McCarthy, a chartered accountant who says that he is the receiver and manager appointed over certain properties owned by the plaintiffs at Belgard Square West, Tallaght, Dublin 24.
3. He says that the plaintiffs claim is for the sum of €106,750.00, being arrears of rent due and owing by the defendant to the plaintiffs under the terms of a lease of Unit 3A, Belgard Square West, Tallaght, Dublin 24. The lease is dated the 15th of December, 2005 and was made between BSW Retail Unit No. 3 Ltd. (herein 'BSW') of the first part, Shelgard Management Ltd. of the second part and the defendant of the third part. He referred to the lease.
4. The lease was for a term of twenty-five years commencing on the 15th of December, 2005 and it reserved an initial rent of €61,000.00 per annum which is payable quarterly in advance on the first days of January, April, July and October during the term. The rent is subject to an upwards only review every five years but the same has not been reviewed since the lease was granted.
5. Mr. McCarthy says that the last payment made by the defendant to the plaintiff in respect of rent was a payment of €7,625.00 made in respect of rent and accumulated arrears on or about the 11th of December, 2013. The arrears due in respect of the period ending on the 31st of December, 2013 amounting to €108,444.69 was subsequently written off.
6. However, the next quarterly instalment which is due on the 1st of January, 2014 was not paid and no rent has been received since so that when these proceedings were commenced on the 28th of September, 2015 seven quarterly payments of €15,250.00 amounting in total to €106,750.00 were due and owing by the defendant to the plaintiffs.
7. Since these proceedings were issued three further quarterly instalments of rent each of €15,250.00 have fallen due, the first on the 1st of October, 2015, the second on the 1st of January, 2016, the third on the 1st of April, 2016. None of these instalments have been paid so that as of the date of swearing the amount owed by the defendant to the plaintiffs in respect of arrears of rent is €152,500.00.
8. He states that under the terms of the lease, the lessee covenanted to pay interest on any rent that remained unpaid for more than seven days after falling due at the interest rate as defined therein. On the 22nd of September, 2015 the interest amounted to €2,282.49 and in relation to the period of 29th of September, 2015 to the 14th of April, 2016 the sum of €1,390.09 was due.
9. Mr. McCarthy said that as of the date of his swearing the affidavit the sum of €156,172.58 is due and owing by the defendant to the plaintiffs. Interest continues to accrue on the sum of €152,500.00 currently at a rate of €7.33 per day and in the event of the plaintiff in either being granted summary judgment by the court, it is the plaintiff's intention to seek judgment in respect of any further instalments of rent which have fallen due and remain unpaid at the date together with contractual interest calculated back to the date on which judgment is entered.
10. He says that at the date on which the lease was granted, BSW was the beneficial owner of the lessee's interest under a superior lease of lands including the demised premises dated the 6th of September, 2005 which said lease had been granted by South Dublin County Council to Shelgard Development Ltd. as trustee for BSW. He said that after the BSW had granted the lease to the defendant, it joined with the legal owner of the leasehold interest granted by the superior lease (Shelgard Developments Ltd.) to grant a sublease of property which included the demised premises to the plaintiffs. The term of this sublease is 990 years from the 15th of December, 2005 and the leasehold interest thus created is held by the plaintiffs' subject to and with the benefit of the lease. The court notes that no issue was taken in relation to the plaintiffs' title in this matter.
11. He said that all of the interest of Anglo Irish Bank Corporation plc under the mortgage became vested in Beltany Property Finance Ltd. by virtue of a loan sale deed and dated the 28th of March, 2014 and a deed of transfer dated the 23rd of May, 2014.
12. Mr. McCarthy said that the plaintiffs defaulted in their obligations under the mortgage and by way of a deed of appointment dated the 22nd of April, 2015 which was made supplemental to the mortgage and pursuant to the powers contained therein he was appointed to be the receiver and manager over the properties in respect of which the said mortgage had been granted to Anglo Irish Bank Corporation plc including the plaintiffs interest in the reversion expectant on the determination of the lease.
13. He says that pursuant to the powers in that behalf contained in the mortgage he is entitled as receiver and manager to bring and prosecute these proceedings in the name of the plaintiffs with the view to collecting the rent payable by the defendant to the plaintiffs under the lease and interest thereon. No case has been made by the defendant that Mr. McCarthy's appointment and entitlement to bring and prosecute these proceedings has been raised by the defendant. He finally says that he believes that the defendant has no *bona fide* or arguable defence to the plaintiffs claim.

14. Exhibit A of the affidavit of Shane McCarthy is the lease for retail Unit No. 3A Belgard Square West made between BSW Retail Unit No. 3 Ltd., Shelgard Management Ltd. and Pat McDonagh (trading as Pappa Johns Pizza Takeaway). The court will consider the terms of this lease which are central to the issue of whether or not the defendant has an arguable defence.

15. Exhibit SMC3 of the affidavit of Shane McCarthy provides a map of the demised premises, together with a further plan of the development at Belgard Square West, together with the photographs of the development. The building is adjacent to Cookstown Way which is the main entrance to Tallaght Hospital and in the centre of the new town of Tallaght. It is also adjacent to the Square Shopping Centre, to the Civic Theatre, to the Dublin Arts Centre as well as to Maldron Hotel and the Plaza Hotel both on the Main Tallaght Road.

16. In response to the affidavit of Shane McCarthy, the affidavit of Patrick McDonagh sworn the 18th of July, 2016, in which he states that he is a company director of Ballybrit Business Park.

17. He says that he contends that the plaintiff fundamentally breached the terms of the lease between the parties such that he enjoys a counterclaim for damages for the period running from the 1st of January, 2014 to the 16th of April, 2014 equal to or greater than the rent due for this period, and was entitled to terminate the lease on the 6th of April, 2014 without further liability. He says that he entered into a lease on the 15th of December, 2005 in respect of retail unit 3A situated on the ground floor of the buildings owned and operated by the plaintiffs and their predecessors in title for a period of 25 years.

18. He says that whilst there was no provision for the termination of the lease on notice, the lessor and management company then Shelgard Management Ltd. covenanted expressly in the following terms at Clause 3 of the Fifth Schedule to the lease:-

"Subject to payment by the LESSEE of the lessee's proportion of the service charge pursuant to Clause 1.2 of the Second Schedule hereto and subject also (where relevant) to the availability of commodities and labour (and provided that the lessor or the management company shall use all reasonable endeavours to obtain same) the lessor or the management company hereby conveyance to use all reasonable endeavours to provide or make available or procure the provision of making available of the building services and the common area services in accordance with the principles of good estate management provided that in performing its obligations herein under the lessor and management company shall be entitled as its discretion to employ agents, contractors, or such other parties as the lessor or the management company made from time to time deem fit."

19. He says that common area services were defined in the Third Schedule, Part 1 section b of the lease and included the provision of the protection for the common areas and security.

20. Mr. McDonagh in his affidavit then swears that in the immediate years after 2005, trading from the premises was difficult. In particular, the Belgard Centre common areas were not appropriately managed or supervised, with the results that a large number of anti-social and criminal behaviour occurred. This radically affected the commercial viability of the businesses operating from the premises. He says that this is evidenced by email correspondence which he received in June 2007 referring to minutes of a meeting held with a number of commercial operators in the units in May 2007 which evidences the dissatisfaction with the level of security and monitoring of the site. He said between May 2010 and April 2012 the premises were sublet to a franchise Rian Roets. However, it was unable to operate from the site as a consequence of the poor management of the complex and surrendered their sublease by agreement on the 8th of April, 2012.

21. He says thereafter Supermac, a company of which he has a direct and principal shareholding operated from the premises. He says that in the following months running from the 8th of April, 2012 to the 30th of September, 2012 the premises traded at a loss of €18,188.00 before the payment of service charge and rent. He said the loss was principally attributable to the failure on the part of the plaintiff to discharge its obligations to adequately monitor and secure the common areas around the premises. Anti-social and criminal behaviour drastically affected business.

22. As of October, 2012 there were arrears of rent in the sum of €15,250.00 and service charges in the sum of €5,392.00 reflecting the fact that the plaintiffs had failed to discharge their obligations under the lease to provide appropriate protection and security and/or to manage the residential lettings on the site appropriately. He says that on the 8th of November, 2012 Damien Ryan the property manager for his business operations and those of Supermacs Ireland Ltd. met with the letting agents for the plaintiffs, now Niall Curley of Savills. In the course of that meeting the obvious difficulties with trading from the premises were raised and immediately following the meeting on the 9th of November, 2012 Damien Ryan wrote on his behalf and on behalf of Supermacs Ltd to Niall Curley of Savills. In the course of that correspondence, Damien Ryan outlined in detail the vandalism, assaults on members of staff and the supply of drugs dropped from the windows of the residential units above retail Unit 3A and in the vicinity of Unit 3A. He also enclosed a profit and loss account of the retail outlet from April to September 2012.

23. He concluded his correspondence in the following terms:-

"In summary, Supermacs Ireland Ltd. operates over 100 restaurants throughout Ireland. The environment within which we operate at Belgard Square is unlike any other across the country. This is a highly dangerous area both day and night. We respectfully request that you engage with us to discuss vacating this unit.

The matter of course is a cause of concern accordingly I would appreciate hearing from you at the earliest possible opportunity."

24. Mr. McDonagh in his affidavit stated that Savills replied by correspondence dated the 23rd of November, 2012 acknowledging the trading difficulties from the premises and agreed to reduce the rent on the premises by 50% to the 31st of December, 2013 on the basis that the rent was paid quarterly in advance. There followed a further exchange, in which Damien Ryan again drew attention to the problems arising and requested a greater rent reduction. This request was refused although the rent for June 2011 was written off.

25. He said that when paying the service charge for 2013 and the fourth quarterly payment of 2013, Damien Ryan in correspondence continued to raise very significant and ongoing difficulties being experienced by staff and customers. He quotes from a letter from Damien Ryan:-

"Dear Sinead,

Please find enclosed cheque in the sum of €7,625.00 being rent due on the above property for Q.4 2013 at the agreed

discounted rent of 50%.

You might bring to the landlord's attention the need for increased security in the area. Recently there have been acts of assault and vandalism inflicted on our staff and property. This matter is serious and should be addressed by the landlord.

If you have any queries, please contact the undersigned.

Yours sincerely,

Damien Ryan"

26. He said despite the fact that deficiencies in good estate management of the common areas was consistently brought to the attention of the plaintiffs, the position continued unchanged and in 2013 Marks & Spencer's and Supervalu vacated their rental units which only served to exacerbate the difficulties being experienced at the location. He said that on the 10th of January, 2014, Damien Ryan communicated with the representatives of the management company requesting information as to what steps had been taken to better secure the area after Supervalu had vacated their premises and the additional security which had been provided had been removed (this Court's emphasis).

27. Mr. McDonagh says that on the 20th of January, 2014 and on the 31st of January, 2014 Damien Ryan received replies from Peter Shields of the management company advising that the security provider had been changed and that the management company noted an improvement as a consequence. He also advised it was open to Supermacs to retain its own security (this Court's emphasis).

28. He said that by letter dated the 4th of February, 2014 Damien Ryan wrote a letter entitled "without prejudice" to DTZ the new letting agents for the premises, in which he advised that the position of the premises had not improved and that having regard *inter alia* to his obligation and that of Supermacs to protect its employees he was giving notice of his intention to vacate the premises in two months. He said:-

"I am hereby putting you on notice of Supermacs intention to vacate the above property within the next two months. This is a regrettable decision and not one that has been arrived at lightly. I have previously advised you and your predecessor Niall Curley of Savills of our difficulties, however, there has been no discernible improvement in the circumstances."

He said that in the course of March, 2014 Damien Ryan attempted to reach a negotiated settlement for the vacating of the premises and the termination of the lease with representatives for the plaintiffs, but it was not possible to secure a meeting for this purpose. He said on the 4th of April, 2014 Ballagh solicitors acting for the plaintiffs wrote to Mr. McDonagh requesting payment of €123,694.69 in arrears and €2,295.32 in service charge.

29. He says that on the 6th of April, 2014 both Supermacs and he simultaneously vacated the premises. He referred to a letter which Damien Ryan had sent to Sinead O'Connor of DTZ agents for the plaintiffs:-

"As you are aware we requested a meeting with our landlord's representative Mr. Cooney of CFI over a fortnight ago. However, we are advised that Mr. Cooney was not available to meet until this week. On numerous occasions we have highlighted to you and your predecessor Niall Curley of Savills our concerns regarding health and safety matters at Belgard Square. As outlined in previous correspondence there have been incidences of assault, theft and vandalism against members of our staff. Four staff members handed in their notice in the space of one week due to the ongoing difficulties.

The matter has gone from bad to worse which has left us with no option but to vacate the premises. Consequently, we close the business as on from Monday 6th of April, 2014.

We await hearing from you as to when Mr. Cooney and yourself are available to meet us."

In August 2014, DTZ wrote to him advising him that the plaintiffs had written off the rent from 2011 to 2013 but was claiming rent for the period running from January 2014 onwards which at that point amounted to €46,164.40. He said that as he had made his position clear that he had terminated the lease in April 2014 he did not reply to that correspondence.

30. He says in conclusion that the factual history of the matter discloses that the plaintiffs failed to discharge their obligations to provide appropriate protection and security of the common areas as required by the lease and this being a persisting failure, this constitutes a fundamental breach of a term of the lease. In the circumstances he says that and has been advised that any claim for rent arising between January 2014 and April 2014 is lawfully met by a claim of damages for breach of covenant, though so closely aligned to the claim being advanced as to justify equitable set off, in the refusal of any order for judgment in relation to that period.

31. He further states that no rent can be lawfully due from the periods on the 6th of April onwards as the lease at that point had been terminated secondary to the plaintiffs' fundamental breach of condition under the lease. He says that he believes that he has a *bona fide* defence to the claim being advanced.

32. The second affidavit of Shane McCarthy was sworn on the 18th of October, 2016. In this affidavit he says that the defendant asserts that the plaintiffs have failed to discharge their obligation under the defendant's lease to provide appropriate protection and security in respect of the common areas of the development within which his unit is comprised. He contends that this provides him with an arguable defence to the plaintiffs claim for two reasons:-

(1) He asserts that he is entitled to maintain a cross claim against the plaintiffs for the loss and damage which he alleged he has suffered in consequence and this cross claim gives rise to an equitable right of set off.

(2) He asserts that he was entitled to and did in fact elect to treat the plaintiffs' alleged fundamental breach of the terms of the lease as a repudiation of same and to accept such repudiation.

33. Mr. McCarthy states that he believes that these propositions are based on fundamental misconceptions about the plaintiffs' obligation under the lease and do not establish that the defendant has an arguable defence to the plaintiffs claim. He says that he believes:-

(a) The plaintiffs are not under any contractual obligation to provide the services which the defendant asserts they failed

to provide.

(b) The lease prescribes a procedure to be followed by the defendant if he contends that the plaintiffs have failed to provide services which they are obliged to provide and precludes the remedies which the defendant now seeks to assert.

(c) The defendant's complaints relate to anti-social and violent behaviour occurring outside of the common areas of the development and have nothing to do with the plaintiffs' management of the common areas.

34. Mr. McCarthy's affidavit then considers the plaintiffs' obligations and he says that under the terms of the lease the plaintiffs covenant with the defendant to provide:-

"the common areas services as therein defined in accordance with the principles of good estate management [and he refers to Clause 3 of the Fifth Schedule] the term the common areas services is defined in Clause 1.15 of the Lease as meaning "the services, functions and obligations in relation to the principal common areas to be provided by the management company which as specified in Section B of Part 1 of the Third Schedule."

35. He says that a cursory inspection of Section B of Part 1 of the Third Schedule establishes that there are certain management and maintenance services which the plaintiffs are obliged to provide and certain services they are entitled in their discretion to provide. He says for example Clause 3 of the relevant part requires the plaintiffs to maintain, repair and renew the principal common areas. Likewise, there is an obligation to maintain, repair and renew the security alarm, the fire alarm, the firefighting equipment and surveillance control systems which are common to certain specified areas of the development.

36. He says however there is no obligation in providing either static or mobile security though the plaintiffs are undoubtedly entitled to provide same and if they do to recover the costs thereof as part of the service charge. In this regard Clause 15 authorises the provision of such further or other services or amenities as a management company deems desirable or necessary.

37. He says that unless the defendant can establish that the plaintiffs were at all times and remain contractually obliged to provide the level of security which he says is required, there is no legal basis for the cross claim which has been indicated, nor is there any basis for asserting that the failure to provide these services constitutes a fundamental breach of contract. It is clear from the terms of the lease that the defendant cannot clear this hurdle.

38. He says there is a second difficulty, even if the defendant could identify some step which the plaintiffs were obliged to take but had not taken (for example the repair or replacement of a security alarm or a CCTV camera). His remedy in respect of same is circumscribed by Clause 3.2 of the Fifth Schedule which is in the following terms:-

"The lessor or the management company shall not be liable to the lessee in respect of any loss, injury or damage which the lessee shall sustain as a result of the failure of the lessor or the management company to procure the provision of the building services or the failure of any member of the lessor or the management company staff properly to carry out his duties unless the lessee, shall notify the lessor or the management company in writing specifying the failure for which the lessee complains and the lessor or the management company shall after the expiration of fourteen days from the receipt of the said notice continue to neglect to procure the provision of the building services or the common areas services in respect of which notice has been given by the lessee in which event the lessee's sole remedy should be an action to compel the lessor or the management company to do so."

39. He says that the effect of this provision is that the defendant as lessee is entitled to seek damages for a failure to provide any of the common areas services and that the only action which it can obtain is an action seeking specific performance of the relevant covenant on the part of the plaintiffs or the management company. Even then, such an action can only be brought after the expiration of fourteen days, with the service of written notice served by the defendant to the plaintiffs. He said that no such notice had ever been served by the defendant nor has he brought proceedings seeking to compel the plaintiffs to provide specific performance.

40. Mr. McCarthy said that all of the foregoing is moot since the anti-social behaviour and criminal activity which occurred has nothing to do with the plaintiffs or the management company. He referred to the plan which shows the location of the defendant's premises. As can be seen from this plan of the property, the defendant's unit fronts onto the public footpath. There is no public access to the common areas to the rear of the unit and he does not believe that any of the defendant's allegations relate to criminal or anti-social conduct in the common area. He refers to an aerial view printed from Google Earth, which shows the area behind the defendant's unit. This is an enclosed grassed area with water features and is a private amenity for the premises within the development.

41. He says that there is a pedestrian walkway which divides the development but this is some distance to the south of the defendant's unit. This area is in effect a pedestrianised street with commercial premises at ground floor level. It seems clear that anything happening on this part of the development could not directly affect the defendant's business.

42. Mr. McCarthy says that it seemed clear that the anti-social activities which the defendant describes in which he said interfered with his business to the extent that same was not viable occur on the wide public footpath in front of his unit. This is a public area which is in the charge of South Dublin County Council, in respect of which the plaintiffs have no responsibility.

43. He also referred to a letter from South Dublin County Council dated the 29th of September, 2016 confirming that the path is in its charge. He says that the reality is that the defendant's difficulties are systematic of wider problems in the locality and are not matters over which the plaintiffs have any control. He said that it is evident that the anti-social and criminal activity about which the defendant complains is not occurring within the common areas of the plaintiffs' development, secondly the plaintiffs are not (and have never been) obliged to provide the level of security which the defendant asserts they ought to provide, and that the failure to provide such security could not therefore constitute a breach of contract, and thirdly even if there had been an obligation on the part of the plaintiff to provide such security the defendant has contracted out of any remedy other than an action seeking specific performance of that obligation. He says that the defendant has not demonstrated that he has an arguable or *bona fide* defence to the plaintiffs claim.

44. In response to Shane McCarthy's second affidavit Alice Samuel swore an affidavit on the 9th of November, 2016 and asserts and says that she was a manager with Supermac's Ireland Ltd based at Ballybrit Business Park. She said the management of the retail unit was extremely difficult for the entire period in trading until its closure. There were difficulties with deliveries away from the premises which are not relevant to these proceedings. However, there was also considerable anti-social behaviour in the immediate vicinity of

the premises and the common areas of the complex. In her view, the absence of a security presence on site contributed greatly to these difficulties.

45. She said that no steps ever appear to have been taken by the plaintiffs or their agents to check the drug trafficking that was taking place from the residential premises above the retail unit. Drugs were being dropped from the windows of apartments above the retail unit and where therefore attracting drug users to the premises.

46. The anti-social behaviour included parties soiling the premises whilst intoxicated, either with drink or drugs, and threatening staff. It was extremely difficult to keep staff. She said that she had a higher counter installed at the service desk in order to provide a barrier as between staff and potential customers, but this did not improve matters greatly. She said that the trading conditions from this retail unit were very difficult and the plaintiffs' despite being repeatedly advised of the inadequate security presence on site failed to take any constructive steps to deal with the matter.

47. On the 30th of November, 2016 Patrick McDonagh swore a second affidavit. He said that he fully accepted Mr. McCarthy's position that the plaintiffs could never be responsible for anti-social behaviour and criminal activity perpetrated on his staff at locations remote from the retail unit at issue when delivering food to houses remote from the retail unit. However, the substance of his opposition to this application is that the plaintiffs failed to discharge the most basic security requirements consistent with good estate management that would have greatly improved the situation. There was no comprehensive CCTV camera system in operation, none to track the unlawful activity and in particular the drug trafficking from premises on site. He accepted that the footpath immediately outside the retail unit was not within the curtilage of the complex owned by the plaintiffs. Much of the disturbance there was caused by interaction with people resident in the apartment complex and the fact that unchecked drug drops above the retail unit were taking place. He says that he finds it difficult to accept that appropriate security arrangements would not have improved matters greatly.

48. The third affidavit and fourth affidavit of Shane McCarthy dealt with the arrears which had been due from the defendant to the plaintiff and in this regard Mr. McCarthy says that the total sum owing by the defendant to the plaintiffs would be the sum of €236,748.85.

Discussion

49. Patrick McDonagh the defendant is a very successful business man. He developed an Irish fast food restaurant chain. The chain consists of a total of 106 restaurants spread throughout Ireland.

50. In 2005, Unit 3A Belgard Square West was a big development of retail and residential premises in the heart of the Tallaght village which boasts proximity to the square shopping centre, Tallaght hospital and the Luas railway station. The tenants were Supervalu, McCabe's Pharmacy, West Coast Coffee, Sherry Fitzgerald and Boyle Sports.

51. However, all of the premises were clearly enticed to develop their business in an area which promised some profit from a newly developed town centre in Tallaght. However, the collapse of the economy hit employment in Tallaght and it is interesting to note that on the 12th June, 2007 at a meeting organised by Supervalu to discuss the very serious issues which had arisen, the defendant who exhibits the minutes of this meeting did not attend nor were Supermacs/Papa Johns represented. Complaints were that there was no visible presence of security, that on the public streets there were anti-social behaviour including windows being used by men and women to urinate against, selling drugs, injecting drugs, drinking and making a nuisance. The defendant in his first affidavit indicated that in the period in 2012 the premises was trading at a substantial loss and this loss was principally attributable to anti-social and criminal behaviour which he says was attributable to the failure in the plaintiff to discharge obligations.

52. There is no suggestion on the part of the defendant that the Garda Síochána were involved or were notified of this anti-social behaviour.

53. The question that one must look at is whether or not there is any defence being raised.

Has a defence been established?

54. The jurisprudence in respect of the establishment of a defence in respect of an application for summary judgment is well known. In the *Aer Rianta CP2 v. Ryanair Ltd.* [2001] 4 I.R. 607, the Supreme Court stated that the defendant's hurdle on a motion such as this was a low one and that the jurisdiction to grant summary judgment was to be used with great care. It is 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 there was a fair or reasonable probability of the defendant having a real or a *bona fide* defence. This was not the same thing as a defence which would probably succeed or even if a defence whose success was not improbable. Was it clear that the defendant had no case? Although the main judgment is given by McGuinness J., Hedigan J. stated "in my view, the fundamental questions to be posed on an application such as this remains: is it very clear that the defendant has no case? Is there no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

55. In *Harrisgrange Ltd. v. Michael Duncan* [2003] 4 I.R. at page 1, McKechnie J. sets out a summary of the present position:

"(i) the power to grant summary judgment should be exercised with discernible caution;

(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;

(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;

(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;

(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result;

(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

The key issue in the court's view is to be found in the lease dated the 16th of December, 2005. Part 1 of the lease contains the definition section. The following is noted:

"1.4 The apartment common areas means the internal parts of the apartment area not demised or intended to be demised or exclusively serving the apartment area (including entrance lobbies, steps, halls, staircases, passages, corridors, lifts, lift shafts, stairwells, landings, storage areas and roof space forming part of the building and shall include (but not by way of exception) the doors, the door furniture and the door frames, window frames and window furniture, door glass and the windows, stairs, lifts and such like which are used in common by the owners or occupiers of the apartment area save where the same shall have been demised by the lessor.

1.13 The common areas mean those parts of the estate not demised or intended to be demised including passages, corridors, lifts, lift shafts, stairwells, landings, storage areas and roof space forming part of the building which are used in common by two or more of the owners and/or occupiers of the apartments, the retail units, the leisure unit, the crèche and the car park but shall not include any of the apartment common areas.

1.14 The common areas service charge means costs and expenses properly and reasonably incurred by the management company in or about the provision of common area services.

1.15 The common area services means the services, functions and obligations in relation to the principal common areas to be provided by the management company which are specified in section B of part 1 of the third schedule."

56. The next section is the first schedule part 2 which describes the demised premises as retail unit number 3A situated on the lower ground level of the building.

57. The court notes that in the course of 2012 a number of shops which had leased premises closed their premises mainly as a result it appears of losses being incurred but also because of the difficulties in the area. The court is satisfied that there was no obligation on the lessors to provide security to the lessees and in this case to the defendant's premises. It is quite clear that in this day and age businesses which are well organised and profitably run provide their own security and generally have closed circuit cameras.

57. It is clear to this Court that the defendant was losing not profiting in the Tallaght area in 2012 but despite making efforts to terminate his lease, he did not pay the rent which was agreed. It also appears to this Court that although the plaintiff complains of the antisocial behaviour which he says made it difficult for him to maintain staff, there is no mention of him reporting any of these matters to An Garda Síochána in particular with regard to the sale, supply and distribution of drugs which he says took place.

58. Counsel on behalf of the defendant quoted from the decision of *Chartered Trust Plc v. Davies* [1997] 2 EGLR 83. This related to a business which in the words of Henry L.J. "Miss Davies (who had some business, but little retail experience) wished to start a 'niche' specialist shop, selling puzzles and executive toys."

59. In the course of the argument before the court counsel on behalf of the tenant emphasised that the nature of the grant to a large measure depended upon proper management of the shopping mall and the common parts. The court held that:

"Proper management might, in appropriate cases, require the provisions of security, whether men or cameras, to police the mall. Here it may be that determined use of the rule-making powers to preserve the shared rights of way over the common parts would have sufficed. Instead the landlords did nothing."

60. This Court is satisfied that this was not a shopping mall but a series of businesses around a development and there is no doubt that the judgment of the Court of Appeal was influenced by the lack of experience of the defendant and that it was a shopping mall. Counsel also referred to the decision of Clarke J. in *Parol Ltd. and Carroll Village (Retail Management Services Ltd.) v. Friends First Pension Funds Ltd. and Superquinn* [2010] IEHC 498.

61. In that case Clarke J. in outlining the law stated that:

"It would seem, therefore, that it is far from sufficient for a lessee to establish some breach of covenant on the part of the landlord in order that the lessee concerned should have an entitlement to repudiate the lease."

He then quotes from Henry L.J. and he said:

"Taking the judgment in *Chartered Trust* as a whole it is clear that the actions of the landlord relied on as being a basis for a repudiation on the part of a lessee require to be such as are culpable and sufficiently serious to prevent the lessee from carrying on business in the ordinary way in which it might have been contemplated."

He continued:

"It seemed to me that the overall position can be relatively simply stated. A landlord who either fails to comply with the landlord's obligations under a lease or acts otherwise in a manner to a sufficient extent so as to substantially prevent a lessee from using the lessee's premises in the manner contemplated by the lease in question, renders the lease open to being regarded as having been repudiated by the landlord concerned."

62. The court is satisfied that the terms of the lease required the lessor to provide proper management of the common areas. However, the common areas do not include the street nor the persons who are on the street and how they behave.

63. The court is satisfied that this is reasonably clear and the court is satisfied that no defence of any kind appears to have been established by the defendant. In those circumstances the court will make an order granting summary judgment in the amount of €236,748.85.