Neutral Citation [2017] IEHC 98

THE HIGH COURT

[2015 No. 2034 S]

BETWEEN

KEN FENNELL AND DAVID VAN DESSEL (ACTING IN THEIR CAPACITY AS JOINT RECEIVERS OVER CERTAIN ASSETS OF DAVID COLEMAN AND MICHAEL LAVELLE)

PLAINTIFFS

AND

PAT MCDONAGH

DEFENDANT

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

1. The plaintiffs seek summary judgment in the sum of €432,917.43, this being the arrears of rent payable to the plaintiffs by the defendant on the leases up to and including 2016.

2. The plaintiffs are the joint receivers appointed on 11th October, 2013 over certain assets of David Coleman and Michael Lavelle. Included in the assets was the landlord's interest in forty leases dated 29th July, 1996 which was granted for a period of thirty-five years over forty carpark spaces in Union Quay Carpark, Union Quay, Cork.

3. Forty substantially identical indentures of lease between Union Quay Carparks Ltd. demised unto Belgrove Investment Ltd. comprising of forty carpark spaces for a term of thirty-five years. These carpark spaces were situated on the 5th Floor of the Union Quay Carpark, Union Quay, Cork.

4. On 10th April, 1997 the interest of Union Quay Carparks Ltd. in the leases became vested in David Coleman and Michael Lavelle.

5. By memorandum of agreement made on 19th December, 1997, the defendant Pat McDonagh purchased the interest of Belgrove Investment Ltd. in the said spaces.

6. Pursuant to the said leases, the defendant covenanted that the defendant would pay an annual rent in respect of the forty carpark spaces of varying amounts yearly for fifteen years in advance on the 1st November in each year. If the defendant failed to pay the rent reserve pursuant to the lease within seven days of the date prescribed, interest would accrue from the sum unpaid from the date on which it fell due.

7. It is common case between the parties that pursuant to a surrender agreement dated 29th July, 1996, the defendant was granted a "brake option" whereby he would be entitled to surrender his interest in the leases by serving not less than three months' notice in writing to the landlord prior to any of the required surrender dates being the 30th July 2006, the 30th July 2011, the 30th July 2016, the 30th July 2021 and the 30th July 2026.

8. On 27th June, 2011 the defendant gave notice of surrender to the landlords and executed deeds of surrender in respect of each of the leases.

9. The affidavit of Michael Lavelle states that in March, 2010 Mr. Coleman and Mr. Lavelle brought Circuit Court proceedings against the defendant in Galway Circuit Court in respect of arrears in the amount of €15,998.70 in relation to the leases, and that judgment in default of appearance in that amount together with costs was obtained by Mr. Coleman and Mr. Lavelle. The defendant subsequently fully satisfied the judgment in respect of arrears of rent and in respect of the brake clause. Mr. Lavelle states that both he and Mr. Coleman proceeded on the basis that the break option had clearly not been exercised, as the provisions governing the exercise of the break option of three months, as set out in the leases, had not been complied with.

10. The defendant sought to exercise his entitlement to surrender the leases by giving written notice in advance of the prescribed date of 30th July, 2016 and on this occasion the defendant gave the required three months' notice and the plaintiff accepted the surrender of the leases with effect from the 30th July, 2016.

11. The document giving slightly more than one months' notice of his intention to surrender the leases can be effective, because the relevant written agreement contains a requirement for not less than three months' prior notice in writing of the surrender.

12. This Court accepts that it is well established that parties are required to comply strictly with the conditions for the exercise of an option prescribed in a lease. In particular, parties must comply strictly with time limits for the service of notices in order for such notices to be effective.

13. Counsel for the plaintiffs cited the well-known judgment of Kenny J. in *Cassidy v. Baker* [1969] 103 ILTR 40. The court had to consider a lease which created an option requiring the tenant to give the landlord three months' notice in writing of his desire to purchase the premises. The tenant gave the landlord notice of his intention to purchase the property less than two months before the expiration of the term of the lease. The High Court held that the option to purchase had not been validly exercised as the notice given was not three months' notice in accordance with the lease. Kenny J. stated:

> *"In my view this was not a good notice. It is true that a notice such as this need not refer explicitly to 'three months' but as a general rule that any matters which by the terms of an auction are made conditions precedent to its exercise, must be reasonably strictly observed."*

14. Counsel for the plaintiffs also cited the judgment of *Vone Security Ltd. v. Cooke* [1979] I.R. 59. In this case the tenant had an option to purchase where prior notice was given to the landlords six months before the expiration of five years after the date of the lease. While the court found that the requirement of six months' notice had been compiled with Costello J. in the High Court stated:

> *"The terms of the option clause which I am considering must which I am considering must be strictly construed and that there must be an exact compliance with it before the landlord is bound by his offer to sell the property referred to in it.*

> *I therefore hold that the plaintiff validly to have exercised the option contained in the lease notice of his intention to exercise the option should have been given and that this would have been six months before the expiration of the first five year period, i.e. six months before midnight on the 16th August."*

15. Counsel also cited from Wylie, *Landlord and Tenant Law*, 3rd Ed. (Bloomsbury, 2014): "in relation to auction agreements, time limits are usually regarded as "of the essence" and this includes service of notices by the tenant or any other procedural steps to be taken in the exercise of the auction."

He also quoted from Woodfall, *Landlord and Tenant*, 6th Ed., (Sweet and Maxwell, 2016) as follows: "options are always strictly construed. This is particularly important in respect of time limits and conditions for the exercise of the option."

16. Counsel on behalf of the defendant argued that at the same time as Mr. McDonagh acquired the interest of Belgrove Investment Ltd., he also entered an agreement with Union Quay Carparks Ltd. for the management of the carpark and the term of the agreement was from the date of execution till 29th July, 2006.

17. The defendant states that he believed that the leases did not stand alone, they formed part of a larger scheme and must be considered in this context. He referred to the management agreement and said that Union Quay Carparks Ltd. was to manage the day to day operation of the car parking spaces, and a copy of that management agreement was exhibited. He avers that the leases were not stand alone arrangements but were part of a tax saving investment scheme whereby any rent to be paid was to be discharged from the income collected by the manager of the carpark. He said that because of the unsatisfactory nature by which the carpark had been operated by the manager, he himself took over management of the car park from the 6th December 2008 until he surrendered the leases. He further states that Union Quay Carparks Ltd. was dissolved, and the day to day management in operation of the carpark was taken over by a company known as Union Quay Carpark Management Ltd. He says that the company's registration office shows that Hugh McKeown and Denis Buckley were the directors of the management company, and that Michael Lavelle and David Coleman held one share of the company known as Union Quay Carparks Management Ltd. He also says that he believes on the basis of local enquiries made by the defendant's employee, that spaces are let on a reasonably long term basis to a variety of entities. He further states that he has not received any income from Union Carparks Management Ltd. since he purported to serve the deeds of surrender in 2011.

18. The Court must make a determination as to whether a *bona fide* defence has been raised by the defendants. In *First National Commercial Bank Plc v. Anglin* [1996] 1 I.R. 75, Murphy J. stated:

> "For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the bona fides of the defendant or to doubt whether the defendant has a genuine cause of action (see *Irish Dunlop Co. Ltd. v. Ralph* (1958) 95 I.L.T.R. 70).
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> In my view the test to be applied is that laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Law Rep. 21, which was referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank Plc v. Daniel* [1993] 1 W.L.R. 1453. The principle laid down in the *Banque de Paris* case is summarised in the headnote thereto in the following terms:—
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> > 'The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence.'"

19. The headnote to *Aer Rianta CPT v. Ryanair Ltd* [2001] 4 I.R. 607 reads:

> "1. That the defendant's 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 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 on 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. The fundamental questions 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 defendant's affidavits fail to disclose even an arguable defence?"

20. The second supplemental affidavit of the plaintiff joint receiver Ken Fennell states that the plaintiffs have received no income whatsoever in respect of the leases to the relevant car park spaces.

21. The company and its shareholders are separate legal entities and the courts normally cannot infer the relationship of principal or agent or beneficiary and trustee between the shareholders and the company, from the degree of control exercised by the shareholder. The onus is on the defendant in this Court's view to establish by argument either a fraudulent, illegal, or improper purpose.

22. It is clear to this Court that the defendant has not raised a bona fide defence. Even if the Court is to allow the defendant to look into the shareholding of Michael Lavelle and David Coleman in the Union Quay Carpark Management Ltd., it does not benefit him as the plaintiffs and the company are separate legal entities. It appears that at no stage did the defendant seek to take proceedings against Union Quay Management Ltd for any loss for failing to receive arrears of rent. The Court notes that in relation to the proceedings in Galway Circuit Court this defence was not raised. In the Court's view the defendant's affidavits fail to disclose an arguable defence.

23. In those circumstances the Court will accede to the notice of motion and the Court will give judgment against the defendant by way of summary judgment in the sum of €432,917.43.