Neutral Citation [2013] IEHC 602

THE HIGH COURT

[2011 No. 8119P]

BETWEEN

KILARDEN INVESTMENTS LIMITED

PLAINTIFF

AND

KIRWANS (GALWAY) LIMITED (IN VOLUNTARY LIQUIDATION), JOHN P. GREALISH AND PAUL GREALISH

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 1st day of November, 2013.

Remaining issues

1. Having delivered judgment on the substantive action on 10th May, 2013 ([2013] IEHC 224), the following issues remain to be determined:

> (a) an application by the plaintiff that the Court should revisit certain aspects of the judgment and vary the outcome; and
>
> (b) liability for the costs of the proceedings.

The Court heard submissions from counsel for each of the parties on 21st June, 2013. In dealing with those issues, the same terminology will be used as was used in the judgment.

Application to revisit

2. Following delivery of the judgment, by letter dated 15th May, 2013, the plaintiff's solicitors wrote to the solicitors on record for the second and third named defendants (the Guarantors) asserting that what was stated in para. 18 of the judgment was based on "a misunderstanding of what was agreed between the parties" and, in relation to what was stated in para. 43(e) and (f) of the judgment, "there is a simple mistake".

3. In relation to what is stated in para. 18 in relation to the actuarial report which had been handed into Court at the hearing, it was stated in the letter of 15th May, 2013 that the Court's conclusion departed from the understanding between the parties, which was that the actuarial calculation of the figures in the schedule (which I will refer to as the "Revised Schedule") which had been submitted to the Court was agreed and that it was not, therefore, necessary for the plaintiff "to call an actuary to prove the same". It was recognised in the letter that the actuarial report handed in "set out an alternative calculation which adopted a personal injuries net loss earnings approach which was wholly inappropriate". It was further stated that, in seeking to agree the actuarial calculations, it had been stated, presumably by the plaintiff's representative to the Guarantors' representatives, that the alternative calculation was simply a mistake and was to be disregarded and that the position was understood and accepted and, consequently, an actuary was not called. Unfortunately, that was not made clear to the Court.

4. The Revised Schedule furnished to the Court contained two main calculations: the first was headed "Rent to Date" (meaning to the date of the hearing, 28th February, 2013), and contained three elements designated A, B and C; and the second was headed "Future Rent", and contained two elements designated D and E. Paragraph 18 of the judgment addressed the Future Rent calculation.

5. Having accessed the DAR, I am satisfied that what happened at the hearing was as follows. In opening the case on the morning of 28th February, 2013, counsel for the plaintiff handed in a schedule which was incomplete, in that the plaintiff's solicitors had not obtained the relevant figures in relation to Future Rent from the actuary. However, counsel for the plaintiff did explain the approach which was proposed to be adopted, in that, as regards loss of Future Rent, it was the plaintiff's case that it should be a simple calculation of the loss of €5,221.40 per week into the future, thus giving the Guarantors credit for the rent of €5,000 per week payable under the new lease which had been granted by the plaintiff. When the hearing resumed in the afternoon, the actuary's report had become available and counsel for the plaintiff handed into Court the Revised Schedule, which set out the relevant figures at items D and E. Counsel for the plaintiff queried whether the Guarantors required him to call the actuary to prove the underlying actuarial calculation. That query was left hanging in the air until after 4pm, at which stage counsel for the plaintiff indicated that his understanding was that he was not required to call the actuary. The actuarial report was handed in at that stage and the Court made it clear that it wanted to understand the report.

6. When the case resumed on the following morning, 1st March, 2013, counsel for the plaintiff informed the Court that he understood that there was "agreement in relation to not going into evidence of the actuary's figures". That was not disputed by counsel for the Guarantors. Counsel for the plaintiff informed the Court that "the Court can take those figures for what they are worth". As regards the figures for Future Rent, counsel for the plaintiff referred to "the figures" and stated that he did not think that there was any dispute by his colleagues that "those are the correct capitalised figures of the loss which I claimed". He added that it was a "multiplier of somewhere in the region of 285 per pound lost going forward to 2019". He may have intended to communicate that the Court should only have regard to the figures from the actuary's report which had been inserted at D and E in the Revised Schedule and should ignore the alternative calculations, but that certainly was not communicated to the Court. Counsel for the plaintiff did offer to procure a report or have the actuary present to give evidence if there was any issue in relation to the quantification, or if the Court required assistance.

7. In para. 18 of the judgment, it is clearly recognised that the plaintiff's claim for Future Rent is the aggregate of the figures set out at D and E of the Revised Schedule handed into Court on the afternoon of 28th February, 2013. It is also recognised that that figure is based on a calculation on the actuarial report. However, the Court also referred to the two alternative calculations in the actuarial report. The gist of para. 18 is that the Court did not have faith in the reliability of the actuarial report because of what was acknowledged in the letter of 15th May, 2013 to be a calculation which was "wholly inappropriate".

8. I think it is important to point out that in para. 44 of the judgment I referred to the general observation I had made at para. 18 as to the impossibility of assessing the quantum of damages in lieu of specific performance, the reference there being to quantification of damages in respect of loss of Future Rent. It is implicit in what I said in para. 44 that I had considered whether it was appropriate to take up the offer of counsel for the plaintiff on 1st March, 2013 of procuring a report or having an actuary give evidence, but that I had concluded that neither the requirements of justice nor fairness nor common sense justified giving the plaintiff "another bite of the cherry".

9. Before addressing the matters raised by the plaintiff's solicitors in their letter of 15th May, 2013 in relation to paras. 43(e) and (f) of the judgment, it is pertinent to make the following observation in relation to the manner in which the Court treated the Revised Schedule in the judgment. In paras. 15 to 18 of the judgment, the basis of the plaintiff's quantification of the alleged loss in consequence of the Guarantors not entering into a lease with the plaintiff in terms required by Clause 7.1 of the Guarantee, by reference to the Revised Schedule is accurately explained.

10. In relation to the "Rent to Date" component in the Revised Schedule, there were two calculations on the basis of a rent of €10,220.40 per month – the first for the period from 27th March, 2011 (the date to which the plaintiff had judgment against the Guarantors) to 2nd June, 2011 (the date of surrender of the lease by the liquidator of the first defendant lessee), and the second from 3rd June, 2011 to 28th February, 2013 – and against the aggregate of those two calculations the Guarantors were given credit for the payments made by the lessee under the Current Lease, on the basis that those payments commenced on 22nd June, 2012. As set out in the judgment, the "bottom line" was €848,695.09. Arriving at that figure was a simple mathematical exercise.

11. In relation to the "Future Rent" component of the Revised Schedule, it was obviously necessary to capitalise the quantum of the loss because, of course, account had to be taken of the fact that an award of damages under this heading would envisage payment "up front" as of the date of the determination of the quantum, rather than payment over the remainder of the term of the lease which the Guarantors should have taken, which would have been just a few years short of six years from 28th February, 2013. The loss was capitalised in the Revised Schedule on the basis that the rent was €10,221.40 per month, but giving credit over the whole period for the monthly rent of €5,000 payable under the current lease.

12. In the plaintiff's solicitors' letter of 15th May, 2013, it was stated that it was "not the case", as had been asserted in para. 43(e) of the judgment, that the Revised Schedule did not take account of the possibility that s. 132 might have applied to a new lease which the Guarantors were obliged to take. Without indulging in an exercise in semantics, that was indeed the case, because, as regards the "Future Rent" component, the loss to the plaintiff was capitalised on the basis that there would have been no change in the rent payable by the Guarantors from 22nd February, 2014. It is true that the Future Rent component was broken down into two periods – the first commencing on 28th February, 2013 (the date of the hearing), and the second commencing on 22nd February, 2014 (the review date and the commencement of the reviewed rent). It is true that the approach adopted would have facilitated a simple mathematical adjustment, if the Court determined that the plaintiff would incur no loss from the review date and also considered it appropriate to make its determination on the basis of figures contained in the actuary's report which, for the reasons outlined earlier, it did not. Those figures also related to the first period.

13. Taking a broader view, in para. 43(b) and (c) of the judgment, the basis of the quantification of damages in lieu of specific performance having regard to the factual context was set out. It was made clear that the Guarantors had an obligation to specifically perform and take a lease was on foot of the notice dated 4th August, 2011 served under Clause 7.1 of the Guarantee. Accordingly, damages in lieu of specific performance were only quantifiable from 4th August, 2011 on the basis of the loss incurred by the plaintiff in consequence of the failure of the Guarantors to comply with the notice, which loss would extend to 21st February, 2019. The fundamental difficulty which the Court encountered was that it considered that the actuary's report could not be relied on, for the reasons outlined earlier, and, therefore, the Court was not in a position to quantify the loss which the plaintiff would incur in respect of loss of Future Rent. That difficulty encapsulated the entire claim for loss of Future Rent and it is no answer to say that the Court could have awarded damages for loss in respect of Future Rent up to 21st February, 2014, having regard to the state of the evidence.

14. What the Court did was to award damages for breach of contract which were quantifiable on the basis of the Guarantors' liability as guarantors up to 4th August, 2011, the date on which the notice under Clause 7.1 of the Guarantee was served on them, on the basis that they remained liable on foot of the Guarantee, notwithstanding the surrender of the lease on 2nd June, 2011, by analogy to the decision of the High Court in *Tempany v. Royal Liver Trustees Limited* (1984) ILRM 273. In other words, the damages were quantified on the basis that they were miscreant guarantors. Thereafter, they were miscreant prospective lessees who reneged on the obligation which arose on 4th August, 2011 to take a lease, which would endure until 21st February, 2019. The distinction as to the capacity in which the Guarantors were liable is not reflected in the Revised Schedule. The Court took the view, for the reasons outlined earlier, that it was not possible to quantify the loss incurred by the plaintiff as a result of the wrongdoing of the Guarantors after 4th August, 2011 in the latter capacity.

15. In conclusion, it is important to emphasise that I do not consider the exercise embarked on above as the exercise of the Court's jurisdiction to revisit a question after the delivery of a judgment. Rather I consider it as an addendum, by way of explanation, to the judgment to address the issue raised by the plaintiff. Apart from that, I am not satisfied that the plaintiff has met the test identified in the decision of the High Court (Clarke J.) in *In the matter of McInerney Homes Limited* [2011] IEHC 25 (at para. 3.7) as to whether the Court has jurisdiction to revisit – "that there be 'strong reasons' for doing so". The plaintiff, in my view, has not established "strong reasons" in this case.

16. With this judgment the parties will be given an Appendix, which is a note of the relevant parts of the DAR recording in relation to the hearing on 28th February, 2013 and 1st March, 2013 on which I have relied, to avoid creating any further grounds for misunderstanding.

17. Finally, bearing in mind the saying "Homer sometimes nods", if the decision of the High Court is wrong, the appropriate course for the plaintiff is to appeal it.

Costs

18. The plaintiff was successful in the proceedings and obtained judgment in the sum of €199,435.60 against the Guarantors. The grounds on which the Guarantors sought to demonstrate that they had no liability to the plaintiff were rejected. Accordingly, on the basis of the primary rule governing liability to costs, that the costs follow the event, an order for costs should be made in favour of the plaintiff.

19. Counsel for each of the Guarantors submitted that there should be no order as to costs. It was submitted that the solicitors for each of the Guarantors had sought in open correspondence to compromise the plaintiff's claim or, as an alternative, to have the

dispute mediated. I have considered the letter dated 20th February, 2012 from D.M. O'Connor & Co., the solicitors for the first named defendant to the plaintiff's solicitors, which contained an offer of compromise and in which the plaintiff was requested to postpone prosecution of these proceedings pending mediation within the meaning of Order 56A of the Rules of the Superior Courts (the Rules). I have also considered an open letter dated 17th April, 2012 from Brian Lynch & Associates, the solicitors for the second named defendant, in which the offer in the letter of 20th February, 2012 was implicitly supported and in which there was also a formal request to postpone the prosecution pending mediation within the meaning of Order 56A. In fact, neither Guarantor made an application to Court under Order 56A, rule 2 and, accordingly, Order 99, rule 1B of the Rules, which requires the Court, in considering the awarding of costs of any action, where it considers it just, to have regard for the refusal or failure without good reason of any party to participate in any ADR process referred to in Order 56A has no application.

20. In response counsel for the plaintiff submitted, by reference to the decision of the Court of Appeal in England and Wales in *Halsey v. Milton Keynes General NHS Trust* [2004] 1 WLR 3002 that the onus was on the Guarantors, as unsuccessful parties, to discharge the burden of showing that the plaintiff's refusal to participate in mediation was unreasonable and that the Guarantors had not discharged that onus. Counsel for the plaintiff pointed out that this was a debt collection case against guarantors, that technical defences had been raised which were unsuccessful, that the plaintiff had a strong case, even an unloseable case, on the Guarantee and could not be penalised for not going to mediation and that, in any event, the Court could not be satisfied that mediation would be successful.

21. Having regard to the factors pointed to by counsel for the plaintiff, which are relevant factors, I am satisfied that the refusal of the plaintiff to respond positively to the letters of 20th February, 2012 and 17th April, 2012 and compromise on the basis suggested or participate in a mediation process, does not preclude the plaintiff's entitlement to costs under the primary rule.

22. Counsel for each of the Guarantors also relied on the indigence of each of the Guarantors and the existence of the previous summary judgment in favour of the plaintiff against the Guarantors and the instalment orders referred to in the judgment as a basis for the Court making no order as to costs. Counsel for the plaintiff, on the other hand, submitted that the plaintiff is entitled to judgment including costs and it is for the plaintiff to determine how to deal with it. It was pointed out that a judgment remains in force for twelve years and that even if there are no assets to meet it at this point, assets could come into being during the twelve year period. It was even suggest that the Guarantors might win the Lottery or get back on their feet within that period.

23. While one has to sympathise with the Guarantors because of the parlous financial situation in which they find themselves, that is not a basis for departing from the primary rule and not granting the plaintiff an order for costs against the Guarantors.

24. Accordingly, there will be an order for costs in favour of the plaintiff against the Guarantors (*i.e*. the second and third defendants), but excluding the cost of the hearing on 21st June, 2013, in respect of which there will be no order.