

THE HIGH COURT

COMMERCIAL

[2018 No. 9011 P]

BETWEEN

DUBLIN CINEMA GROUP LIMITED

PLAINTIFF

AND

BALARK TRADING GP LIMITED

AND

BALARK INVESTMENTS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 29th May, 2019

1. This case involves two discovery motions in connection with, inter alia, an injunction application by the plaintiff ("Dublin Cinema"), the former owner and seller of the Screen Cinema (the "Screen Cinema") on Townsend Street in Dublin 2, regarding the use of the Screen Cinema (and a neighbouring property ("College House") by its current owner. Dublin Cinema seeks to prevent the current owner, the first named defendant ("Balark"), from using both the Screen Cinema and College House as a cinema or theatre for a period of 20 years from the date of the sale by Dublin Cinema of the cinema, which took place on the 15th October, 2016, in alleged breach of a restrictive covenant agreed at the time of the sale of the Screen Cinema. Dublin Cinema remains the owner and operator of the Savoy Cinema (the "Savoy Cinema") on O'Connell Street, Dublin 1 and it seems therefore that it is seeking to protect its interest in the Savoy Cinema in bringing these proceedings. The second named defendant ("Balark Investments") is part of the same group of companies as Balark.

2. The first discovery application is by Dublin Cinema seeking documents from the defendants which might indicate the intention of Balark to use the Properties as a cinema/theatre. The second discovery application is by Balark seeking documents from Dublin Cinema which relate to the effect, on the operation of the Savoy Cinema, of the use of the Screen Cinema and its neighbouring property, College House (collectively, the "Properties") as a cinema/theatre in alleged breach of the covenant.

3. For the reasons set out below, this Court refuses both motions as being unnecessary for the fair disposal of the issues in dispute between the parties.

Background

4. Dublin Cinema was, prior to its sale and closure, the operator of the Screen Cinema and the owner of a leasehold interest in that property. The second named defendant ("Balark Investments") was the owner of the fee simple in the Screen Cinema. In addition, Balark Investments was the owner of the neighbouring property to the Screen Cinema, i.e. College House.

5. On the 15th of February, 2016, Dublin Cinema sold to Balark Investments its leasehold interest in the Screen Cinema. When selling its interest in the Screen Cinema, Dublin Cinema, presumably to protect its continuing interest in the Savoy Cinema, restricted the right of Balark Investments to use the Properties as a cinema or theatre. It did so by means of Special Condition 26.1 of the Contract for Sale. Paragraph 7 of the Statement of Claim states that Balark Investments:

"[...] agreed, and so as to bind its successors and assigns, that it would not use or facilitate, participate or assist to be engaged or concerned or interested in the use by itself or any third parties of the Screen [Cinema] and College House as a cinema or theatre venue of any kind for a period of 20 years of the date of completion of the said sale [on the 15th February, 2016]."

6. On the completion of the sale of the Screen Cinema, Balark Investments executed a Deed of Covenant to the same effect as this restrictive term in the Contract for Sale.

7. On the 27th of January 2017 Balark Investments transferred to Balark, its interest in the Properties.

8. On the 16th of July 2018 Balark was granted planning permission for the redevelopment of the Properties. The planning permission requires, as part of the redevelopment, the inclusion of a 500-seater entertainment venue.

9. Once Dublin Cinema became aware of this planned redevelopment, and presumably in light of the apparent inconsistency between the terms of the planning permission requiring the Properties to be used as an entertainment venue on the one hand and the terms of the restrictive covenant preventing the use by Balark of the Properties as a cinema or theatre on the other hand, Dublin Cinema contacted Balark seeking undertakings regarding the use of the Properties. These undertakings were also sought because Dublin Cinema had become aware that there was evidence of engagement regarding the Properties between the defendants and Press Up Entertainment Group/Paddy McKillen Junior, who have experience in the management of cinemas/theatres.

10. Dublin Cinema sought undertakings in the following terms from Balark:

- that it would not use or facilitate the use of any part of the Properties as a cinema or theatre venue of any kind, and
- that the said grant of planning permission will not be implemented for as long as the said entertainment venue is a requirement thereof.

11. While Balark disputes that it is bound by the restrictive covenant, to which it was not a party (since the Contract of Sale was with Balark Investments), it did nonetheless give the first undertaking to not use the Properties as a cinema/theatre, but refused to give the second undertaking.

12. However, Dublin Cinema's position is that it is not possible for the Properties to be used as an entertainment venue, without breaching the covenant that they not be used as a cinema/theatre. While this is not an issue for this Court at the discovery stage, there certainly seems to be a strong argument to this effect.

13. However, it is also the case that this Court cannot eliminate the possibility that Balark could come up with a use for a 500-seater entertainment venue which did not involve its use as a cinema or theatre.

14. It would appear that Balark's position is that it is willing to take on the commercial and financial risk that it can comply both with its undertaking to Dublin Cinema and with the grant of planning permission.

15. In any event, Balark's position is that it has given the undertaking that it will not use the Properties as a cinema/theatre and that should be the end of the matter. Equally, its solicitors have stated by letter dated 24th January, 2018 to Dublin Cinema's solicitors that:

"the current position is that [Balark] is considering a number of options with regard to the use which will be made of the entertainment venue, but no decision has been made."

Thus, Balark states that it has not finalised its intended use for the Properties.

16. For its part, Dublin Cinema has put on affidavit that it does not believe that Balark does not intend to use the Properties as a cinema/theatre, since Mr. Lorcan Ward, a director of Dublin Cinema, has averred at paragraph 9 (1)(d) of his affidavit dated 30th January, 2019 that:

"It is noteworthy that the Defendants now state that a decision has not yet been made with regard to the use of the 500 seater entertainment venue. This position was never pleaded despite its obvious significance, if true. The Plaintiff does not accept that statement of fact in circumstances where the surrounding evidence indicates that over 18 months ago, negotiations with Press Up Entertainment Group/Paddy McKillen Junior were "at an advanced stage" and where that has never been denied."

17. Against this background, the motions for discovery must now be considered.

Dublin Cinema's motion for discovery

18. Dublin Cinema's motion for discovery seeks the following categories of documents from the defendants:

"All documents evidencing or relating to the design and proposed or contracted or intended user of the 500-seater entertainment venue in the Screen Property and/or College House (as defined in the pleadings) in the period from 15 February 2016, including but not limited to the following types of documents:

- (a) All reports, advices, memoranda, correspondence and records of communications relating to such subject matter, created by any one or more of, or communicated between any two or more of, the following: the Defendants, their related companies, their common and respective servants, agents, directors, officers, employees and/or associates.
- (b) All correspondence and records of communications (including reports and any other attachments and enclosures therewith) relating to such subject matter between:
 - (i) Of the one part, the Defendants, their related companies, their common servants, agents, directors, officers, employees and/or associates, and
 - (ii) Of the other part:
 - (A) Press Up Limited, Press Up Entertainment Group (and/or its constituent companies), Patrick McKillen Junior, and each and any of them and their common or respective, servants, agents, directors, officers, employees and/or associates;
 - (B) Any other persons or entities who have agreed, offered, treated, negotiated or inquired about the operation of the said entertainment, and each and any of them and their common or respective, servants, agents, directors, officers, employees and/or associates;
 - (C) Dublin City Council and/or An Bord Pleanála and/or their respective servants, agents, officers and/or employees.
 - (D) Henry J. Lyons Architects and/or their respective agents, servants, officers and/or employees."

19. Dublin Cinema believes that these documents may show that Balark intends to use the Properties as a cinema/theatre and hence that they are necessary and relevant to the substantive proceedings.

20. The key issue for determination in the substantive proceedings will be whether Balark is, at that stage, in breach of the restrictive covenant prohibiting the use of the Properties as a cinema/theatre. Accordingly, the relevance and necessity of the discovery Dublin Cinema seeks must be considered in this context.

21. It seems clear to this Court that the key issue for the resolution of this dispute will be whether the use of the Properties as an entertainment venue *ipso facto* constitutes a breach of the covenant on its non-use as a cinema or theatre.

22. While it is not for this Court to determine this substantive issue, this Court cannot, for the purposes of deciding what is relevant and necessary for the discovery motions, eliminate the possibility that one could come up with a use for a 500-seater entertainment venue that would not constitute that property being used as a theatre or cinema.

23. In the substantive proceedings, the onus will be on Balark to show that whatever use it has at the time of that hearing for the

500-seater entertainment venue does not contravene the cinema/theatre restriction. If it fails, then it will have to face the financial consequences of that failure arising from its breach of the restrictive covenant (assuming it is held to be bound by it, as the successor in title of Balark Investments).

24. Equally, in considering whether discovery is relevant and necessary, this Court cannot ignore the fact that Balark has given an undertaking not to use the Properties as a cinema/theatre.

25. This Court must consider in all these circumstances whether the discovery sought by Dublin Cinema is relevant and necessary to the fair disposal of the dispute between the parties.

26. In this regard, the essence of the covenant at the heart of the substantive proceedings relates to the 'use' of the Properties, since it prohibits the 'use' of the Properties as a cinema/theatre, and it prohibits the facilitation, participation or assistance to be engaged in the 'use' of the Properties as a cinema/theatre.

27. It seems to this Court therefore that the substantive proceedings are about the 'use' of the Properties and accordingly, the relevance and necessity of the discovery must be considered in this context. Balark has given an undertaking that it will not use the Properties as a cinema/theatre; it has stated that it has not made any decision about the use of the Properties. While this statement was made in open correspondence, if Dublin Cinema wanted to have that confirmation on oath, or any other matter confirmed on oath regarding the use of the Properties, it could deliver an Interrogatory in this regard.

28. However, since Balark's position appears to be that it is possible to use the Properties as an entertainment venue without being a cinema/theatre, an answer by Balark to an Interrogatory is unlikely to satisfy Dublin Cinema, which takes the opposite view. Therefore, this issue can only be resolved by the Court hearing proceedings about the *actual* use of the Properties or the *actual* intended use of the Properties at the time of the substantive hearing.

29. For this reason, this Court does not believe that any historic material regarding any exchanges between Balark and its architects etc., regarding the use of the Properties, is relevant and necessary to the dispute between the parties.

30. It is quite conceivable that documents could have been exchanged between Balark and its architects etc., which may show that at some stage in the past Balark did intend to use the Properties as a cinema/theatre. This may have been for a myriad of reasons, e.g. because it had legal advice at that stage to the effect that it was not bound by the restrictive covenant, or that it believed that it could negotiate a compromise with Dublin Cinema, or that it believed that some last minute modification would enable it to use the Properties as an entertainment venue, but not as a cinema/theatre.

31. Equally, it is conceivable that Dublin Cinema is correct in its belief that Balark does in fact hope to use the Properties as a cinema/theatre and that Balark is going as far as it can, stopping short of actually using the Properties as a cinema/theatre, in the expectation that some solution will be found to achieve its goal.

32. However, what is relevant to the dispute is not what might have been Balark's intention in the past, or indeed its hopes regarding the future use of the Properties, but what the *actual* use of the Properties or the actual intended use of the Properties will be when the substantive proceedings are heard.

33. The fact that this discovery relates, not to the actual current use of the Properties, but the *alleged intended use* of the Properties is clear from paragraph 7 (b) of the affidavit of Mr. Ward, on behalf of Dublin Cinema, where he avers:

"[...] in a context where the Defendants refuse to state what use is proposed for the 500-seater entertainment venue with box office, green room and stage, the undertaking offered fails to resolve *the possible (indeed likely) dispute* between the Plaintiff and the Defendants whether that proposed use of the 500-seater entertainment venue constitutes use as a cinema or theatre venue of any kind [...]" (emphasis added)

34. The conditional nature of the dispute underlying this discovery motion is also clear from paragraph 20 of the Statement of Claim which states:

"If [Balark] fulfils its intention, then the interest of [Dublin Cinema] in the Savoy Property will be substantially impaired, and [Dublin Cinema] will suffer loss and damage." (emphasis added)

35. What seems clear to this Court is that, if an actual use of the Properties is not established by the time the substantive proceedings are heard, and one is dealing with either an intended use at that stage or still no finalised intended use, then the current undertaking (which is, in any case, in a form similar to the injunction sought by Dublin Cinema, save for the 20-year time-period), would render the injunction unnecessary. Of course, if that undertaking were to be withdrawn by Balark, an injunction might be necessary or there might well be, at the substantive hearing, some other reason why the trial judge might conclude that an injunction in similar terms as the undertaking was necessary.

36. For these reasons, this category of discovery sought by Dublin Cinema, seeking documents regarding the past intentions of Balark is unnecessary for the fair disposal of the issues between the parties when this matter comes to trial, since that trial will deal with the then actual use by Balark or the then intended use by Balark (assuming it has been finalised) of the Properties.

37. Accordingly, this category of discovery is refused.

Balark's motion for discovery

38. Balark's motion for discovery seeks discovery of the following category of documents:

"All documents which evidence, concern and/or relate to the purported effects of the operation of a cinema or theatre venue of any kind at the Screen Property on the business operated by the Plaintiff at the Savoy Property and/or on the Plaintiff's use or enjoyment of the Savoy Property."

39. As previously noted, Dublin Cinema owns and operates the Savoy Cinema on O'Connell Street. Accordingly, Balark argues that determining in the substantive proceedings whether the covenant binds Balark as the successor in title of Balark Investments will require an assessment of whether the covenant enures for the benefit of the dominant land or runs with the land, in this case the Savoy Cinema, and thus, whether it touches and concerns the Savoy Cinema in the sense of affecting the nature, quality or value of the Savoy Cinema.

40. In seeking this discovery, Balark conceded that the relevant date for determining whether the covenant runs with the land is the date of its creation, which in this case is the 15th February, 2016 and so it conceded that any order should be restricted to documents created after that date.

41. However, Balark's category of discovery also suffers from the same defect as Dublin Cinema's category of discovery, in the sense that it is based, not on the actual use of the Properties, but rather on the *alleged intended use* of the Properties. This is clear from paragraph 20 of the Statement of Claim which has been set out above and which refers to Dublin Cinema suffering loss and damages *if* Balark fulfils its (alleged) intention to use the Properties as a cinema/theatre.

42. While Balark denies even having an intention to use the Properties as a cinema/theatre, if it had such an intention, Dublin Cinema concedes in this paragraph of the Statement of Claim that it is a question of Balark having to *fulfil* that intention before there is any loss or damage to Dublin Cinema's business at the Savoy Cinema.

43. It seems clear that Balark's discovery is therefore directed at an impairment of the interest of Dublin Cinema in the Savoy Cinema that does not currently arise. As such, discovery of documents relating to this issue is also not relevant and necessary for the fair disposal of the issues between the parties.

44. In any case, the question of whether the covenant entered into by Balark Investments is binding on Balark is a legal proposition which is either correct or is not correct. Any documents in the possession of Dublin Cinema regarding the effect on the Savoy Cinema, of the Screen Cinema resuming operation as a cinema/theatre, does not impact upon that legal determination. Indeed, any such documents in Dublin Cinema's possession, which Balark concedes will have been created after 15th February, 2016, will be irrelevant to the Court's determination, as to whether the covenant created on the 15th February, 2016 binds Balark.

45. For the foregoing reasons, both motions of discovery are rejected.