Neutral Citation Number: [2013] IEHC 293

The High Court

Record No: 2012/694SP

In the matter of a lease dated 22 September, 1987 made between Royal Insurance plc of the first part, Bewley's Cafés Limited of the second part and Campbell Catering Limited of the third part

And in the matter of an action

Between

Ickendel Limited

Applicant

And

Bewley's Café Grafton Street Limited

Respondent

Judgment of Mr. Justice Charleton delivered on the 25th day of March, 2013

1.0 This is a construction summons in respect of a lease. Bewley's is the tenant and Ickendel is the landlord. The leased hereditament is prosaically described in the legal documents as a four story over basement premises. In fact, it is the inviting establishment on Grafton Street that is known to generations of Dubliners as Bewley's Oriental Café. The provisions as to rent review are claimed by the tenant Bewley's to be ambiguous. It is argued that the Court should resolve the ambiguity to enable a lower rent to be set by the arbitrator charged with reviewing the rent.

1.1 The time frame explains why this dispute ended up in court. Through their predecessors, the parties entered into this lease on the 22nd September, 1987. The term was for 35 years. There is a rent review every five years. The first of these was on the 1st January, 1992. Thereafter there have been reviews in 1997, 2002 and 2007; but for the one in 2012 this issue about upwards-only or downwards-possibly revision of the rent was first raised. That is not surprising. From 2007 to 2012 there has been marked deflation in the rental and housing purchase sector. Using round figures, the initial rent in 1987 for the building was €213,000. The last rent fixed was at the height of the property price inflation that undermined the Irish economy. That 2007 review fixed a rent of €1,463,964. At least that figure is now claimed for the 2012 rent review by the landlord. This is on the basis that the lease expressly provides that the rent cannot decrease on review.

1.2 That sum would not now be obtained for these premises on the open market. There has been a marked decrease in the rents obtainable for retail premises and food outlets. Counsel informed me during this hearing that for premises in Grafton Street where a new tenant was found after a tenant had surrendered a premises, the decrease from that time to the present was 52%. I do not know if that is typical and I am not fixing the rent. Results worse than that, however, are typical of the decline in purchase prices of property over the last six years: hence the argument in this case. Ickendel, as landlord, claims that the structure of the rent review clause is that it is ratcheted up step by step for each review. The landlord accepts that, should there be deflation, the rent fixed on one rent review to the next would not be increased. Bewley's, as tenant, construes the clause in question in the context of the entire lease as being a threshold clause; whereby the first rent fixed in 1987 is the base line below which a rent cannot go, but with each rent fixed subsequently reflecting the open market whether upwards or downwards.

Construction of a lease

2.0 There is no dispute as to the proper approach to how a lease should be construed. The law can therefore be set out briefly. Meaning is to be gleaned from the plain words of an agreement; where there is no doubt as to the meaning of a clause, then it should be given that meaning; what a section of a document means is to be seen in the context of the entire agreement set against the background of the factual matrix that generated it; where there is no ambiguity then it is unnecessary to consider the need to confer business efficacy on the agreement; but where the words used may reasonably bear more than one meaning then consideration as to how the agreement is to sensibly operate may allow one construction over another. There are many cases which support those propositions. Reference is often made to the decision of Barron J. in *Erin Executors and Trustee Co Ltd v. Farmer* [1987] IEHC 18 (Unreported, High Court, Barron J., 11th November, 1987) and to the Supreme Court's decision in *Analog Devices BV v. Zurich Insurance Company* [2005] 1 IR 274 where from para. 13 Geoghegan J. approves the analysis of Lord Hoffman *in I.C.S. v. West Bromwich BS* [1998] 1 W.L.R. at p. 896 from p. 912. These decisions assist in the construction of contracts generally. There are no special rules for the construction of a rent review clause; *Co-operative Wholesale Society v. National Westminster Bank plc* [1995] E.G.L.R. 97 at paras. G-H. Nor does the contra preferentum rule apply in circumstances where the parties have negotiated a lease at arms length with each having the chance to make amendments and suggestions, often with the benefit of legal advice; *Amax International Ltd v. Custodian Holdings Ltd* [1986] E.G.L.R. 111. It might be otherwise where a lease is presented on a take or leave it basis, as with a standard document produced by a housing society or a local authority. That is not the situation here. In construing this lease, I have to bear in mind that the Supreme Court have made it clear that no rewriting of what the parties have agreed could possibly be permitted either in the guise of sympathy for any party stuck in a financial quagmire or pursuant to any notion of the courts construing public policy in aid of a result. In *Marlan Homes v. Walsh and Wedick* [2012] IESC 23 (Unreported, Supreme Court, 30th March, 2012) McKechnie J. observed in paras. 48- 52:

> 48. The central issue which first must be determined is whether or not the appellants are in breach of their contractual arrangements with Marlan Homes: if they are not, the remaining issues do not arise.
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> 49. This issue, which is one of interpretation falls to be decided by reference to the appropriate principles which are not in dispute and which were put concisely by Keane J. in Kramer v. Arnold [1997] 3 I.R. 43 at p. 55, where the learned judge held:

> *"In this case, as in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was having regard to the language used in the contract itself and the surrounding circumstances."*

The correct approach therefore is to have regard to the nature of the document in question and to consider the words used, by reference to the context in which they are set.

50. The type of document has a clear relevance in a specific sense but also in a general sense for, as has been pointed out in many judgments, courts will not "easily accept that parties have made linguistic mistakes, particularly in formal documents." This was stated by Geoghegan J. in *Analog Devices B.V. & ors. v. Zurich Insurance Company & ors.* [2005] I.R. 274, where he adopted the five principles set out by Lord Hoffman in *Investors' Compensation Scheme v. West Bromwich Building Society* [1998] 1 W.L.R. 896. One may obviously add that documents prepared with the benefit of professional assistance, including, but not limited to legal advice, increases such formality. The words in question must be given their ordinary and natural meaning, in a sense as would be understood by a reasonable person having an interest in or knowledge of the material circumstances.

51. It is important however to note that where the parties have committed their responsibilities to written form, in a particular manner, it must be assumed that they have intended to give effect to their obligations in that way. Such must be recognised as their right, both commercially and under contract law. Accordingly it is important that, when faced with a construction issue, a court should focus its mind on the language adopted by the parties being that which they have chosen to best reflect their intentions. It is not for the court, either by means of giving business or commercial efficacy or otherwise, to import into such arrangement a meaning, that might also be available from an understanding of the more general context in which the document came to exist, but is one not deducible by the use of the interpretive rules as mentioned.

52. The boundary between what is permissible and not in this context is captured by the following quotation from *Charter Reinsurance Co. Ltd. v. Fagan* [1997] A.C. 313 where at p. 388 Lord Mustill stated:-

> *"There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms."*

2.1 I would respectfully agree with this passage and am bound by it. In particular, I am not to rewrite the agreement that constitutes this lease or to take language that is plain and disregard it as a linguistic mistake.

2.2 Even, as the transaction in that case was characterised, in extraordinary circumstances approaching hysteria brought on by frenzy in the market place, an agreement must be left alone once it is clear what the parties have agreed. The Supreme Court in that case reversed the decision of Clarke J. in the High Court on an underlying basis that there was no need to resort to any principle of construction where no ambiguity was present. I cannot rewrite what the parties have done and cannot possibly follow any opinion of Honohan M. to the contrary in his decision in *Kidney & McNamee v. Charlton* [2009] MR 1. In that decision, it is to be noted that the sense of one authority has mistakenly been altered by the omission of the negative in the quotation.

2.3 Again I quote McKechnie J. in *Marlan Homes v. Walsh and Wedick* at paras. 70-71:

> As will be recalled the trial judge interpreted the relevant contractual provisions as obliging the appellants to provide, what he variously described as a "effective charge" or an "effective security" over, inter alia, the lands of DCC so that if a mortgagee was obliged to realise that security he could do so by way of sale or other disposal. I cannot see how Clause 6(c) and/or Clause 14 can be read in this manner, without doing what Lord Mustill cautioned the court against doing in Fagan (para. 52 supra), which was in substituting its own views of the bargain for those actually contracted for, by the parties.
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> 71. The relevant provisions of both the November and December Agreements do not mention the giving of an "effective security" or any security with like effect. The obligation of the appellants does not extend to the value, quality or efficacy of the security: these are matters entirely for Marlan Homes. If it was intended otherwise, with regards to the lands of DCC, then an express provision to that effect would have to. Quite evidently, as is acknowledged by all concerned, the December Agreement did not confer such an entitlement or power in that regard on the appellants. This situation was or was capable of being fully known to Marlan Homes at all times. Therefore, as stated earlier, if such a requirement existed it would have to be found in the November Agreement. It cannot, in my view, be deduced from any of the relevant provisions of such agreement.
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> 72. In fact when Clause 14 of the December Agreement is considered, in conjunction with the covenants which Marlan Homes entered into with regard to the appellants' obligations under that agreement, it is clear that such a requirement does not exist. Whether it was ever specifically adverted to is not known. If it was, its legal standing was not established in a contractual setting. The reasons why the parties proceeded as they did remain a matter for them.

2.4 This trenchant comment applies with equal force to all commercial agreements negotiated at arms length.

2.5 In turning to the construction of the agreement I must have regard to the factual matrix in which it was set. There is little doubt that in the Ireland of 1987, of high inflation and high interest rates and economic gloom, few would have thought seriously that property prices would spiral downwards. Rather, even with real deflation, inflation generally would probably have kept them on a general upward trend. At the time of the last rent review twenty years later, the misplaced mood that an economy could be substantially sustained by real property transactions would have informed all but those unaffected with a belief that property prices were on an endless upward trajectory. I discount this, as I must, in now turning to the relevant provisions of the lease.

The lease

3.0 The calculation of the overall rent for the premises was determined by reference to the front portion of the building on Grafton

Street and then the full rent for the premises, including that portion on Clarendon Street, was calculated by multiplying that figure by 1.4. The lease begins with a definition section which is not relevant to the issue which arises. Section 2, deals with the demise of the premises and the rent applicable and here I quote without the peculiar quirks of punctuation and spelling that characterise these documents:

> The landlord hereby demises onto the tenant ... the demised premises ... to hold the same subject ... to all rights easements and quasi-easements and privileges to which the demised premises are or may be subject ... with the benefit of provisions contained or referred to in the documents referred to in the documents ... referred to in the third schedule hereto unto the tenant from 6 August 1987 for a term of 35 years yielding and paying therefor ... during each of the years of the term to and including 31 December 1991 and in proportion for any less time than a year first clear yearly rent of £168,000 and thereafter during each of the successive periods of five years of which the first shall begin on 1 January 1992 a rent (hereinafter called "the first revised rent") equal to the greater of (A) the rent payable under during the preceding period or (B) such revised rent as may from time to time be ascertained in accordance with the provisions in that behalf contained in clause 6 hereof (whichever shall be the greater) to be paid by bankers order ... the first of such payments in respect of the period from 6 August 1987 to 28 September 1987 to be made on the date hereof [and] secondly during each of the years of the term up to and including 31 December 1991 and in proportion to any less time than a year the clear yearly rent of £15,000 and thereafter during each of the success of periods of five years of which the first shall begin on 1 January 1992 a rent (hereinafter called "the second revised rent") equal to the greater of (A) the rent payable under during the preceding period, or, (B) such revised rent as may from time to time be ascertained in accordance with the provisions in that contained in clause 7 to be paid in the same manner and on the same dates as are hereby appointed for the payment of the rent hereinbefore firstly reserved thirdly on demand the monies referred to in clause 3.2 hereof ...

3.1 Turning to the rent review clause, this is provided for in section 6 of the lease. This is what clause 6.2 states:

> The anterior rent so to be determined by the arbitrator shall be such as in his opinion represents at the Review Date the full open market yearly rent for the interior building let as a whole without fine or premium ... on the basis of a letting with vacant possession thereof to a willing lessee for a term equal to that granted by the within written Lease and subject to the provisions therein set forth (other than as to the amount of the initial rent thereby reserved) ...

3.2 Clause 6.4 reads:

> If the first revised rent in respect of any period ("the Current Period") shall not have been ascertained on or before the review date referable thereto rent shall continue to be payable up to the gale day next succeeding the ascertainment of the first revised rent payable during the preceding period and on such gale day the lessee shall pay to the lessor the appropriate instalment of the first revised rent together with any shortfall between (i) rent actually paid for any part of the Current Period and (ii) rent at the rate of the first revised rent attributable to the interval between that Review Date and such gale day (other than the said appropriate instalment payable in arrear) and together further with interest on said shortfall ...

3.3 Clause 7.1 deals with the rent review for the second revised rent and it reads:

> The second revised rent in respect of any of the periods referable thereto ("the Relevant Period") shall be the rent payable in respect of the preceding period increased in the same proportion as the increase in the first revised rent for the same relevant period and shall be deemed to have been ascertained on the date upon which the first revised rent shall have been ascertained ... the provisions of clauses 6.4, 6.5 and 6.6 hereof shall apply to the second revised rent mutatis mutandis ...

3.4 There is also provision in clause 3 for an upwards only review of rent where there has been an assignment of a portion of the premises, not to exceed 15%. The period of rent is not annual in that event but is quarterly. I do not think that clause 3 assists either party. What is noteworthy, however, is that no such express upwards only clause is imported into the terms of revision of the lease. That is important.

Meaning

4.0 I am not entitled to take into account that in the intervening five years since the last rent review, 2007 to 2012, rentals for retail and restaurant premises even in the best areas have dropped markedly. Nor am I entitled to substitute my own view of what would be a fair arrangement between the parties. The reality has been demonstrated often enough in courts dealing with commercial and chancery matters that where tenants are held to rents appropriate to a more buoyant business era, the result may be liquidation or examinership. It is the bargain of the parties that matters. In that context, it is hard to imagine that one or other may ever have foreseen rapid deflation in property prices; instead both are likely to have contemplated the opposite. Nor is there any need to look at dictionaries to construe what the word 'preceding' means. It means what ordinary speech takes it to mean; that which goes before and often it means what goes immediately before. Where 'preceding' is to be unambiguously used to mean an event that was proximately before, a qualification should be put on the use of the word to ensure that there is no misunderstanding. That is not what has happened here. Were the lease, in fixing the rent review, to contemplate that the point of comparison for each rent review were not the preceding rent fixed, the word 'original rent' could have been used in order to fix that meaning. That did not happen either. Many leases contain an express clause making it clear that on review of rent, the sum payable is never to drop. Various forms of wording are used in that regard but what characterises each such approach is the lack of ambiguity in a choice of wording that literally locks a tenant into an upward spiral on each rent review. Such a clause, one that in effect copper fastens a meaning, because the parties actually thought about what might happen if deflation were a real possibility, does not appear in this lease. Consequently, it emerges that there is a case to be made for the interpretation of either side.

4.1 It is powerfully argued that clause 6.4 demonstrates from its language that the parties never contemplated that the rent would ever decrease. Otherwise, it is urged, the terms would read differently to a clause that is said to contemplate that each such revision would be an increase. Providing that the "Lessee shall pay to the Lessor the appropriate instalment of the first revised rent together with any shortfall between (i) rent actually paid for any part of the Current Period and (ii) rent at the rate of the first revised rent attributable to the interval between that Review Date and such gale day" does not make sense otherwise, is the argument advanced. That situation, however, would only happen were there to be an increase in rent. A landlord should not in circumstances where the rent increases but the rent review is delayed, for instance for a year, be kept out of the sum due. That much is plain. The reference in the complex wording to that prior rent is, however, reasonably to be construed as a baseline. In providing that "a rent (hereinafter called "the first revised rent")", is to be paid on a rent review, that sum is specified as being required to be "equal to the greater of (A) the rent payable under during the preceding period or (B) such revised rent as may from time to time be ascertained in

accordance with the provisions in that behalf contained in clause 6 hereof (whichever shall be the greater)", what is made clear is that the rent when revised can never drop below the rent payable for "the preceding period". That period is, in fact, the first rent reserved by the lease. Further, it is made abundantly clear that on revision the setting of the rent to be paid is, in accordance with clause 6.2, "the full open market yearly rent for the interior building let as a whole without fine or premium ... on the basis of a letting with vacant possession thereof to a willing lessee for a term equal to that granted by the within written Lease and subject to the provisions therein set forth", with the exclusion expressly of the rent that was initially fixed and, further, any reference to what rent is then currently being paid. It is also markedly part of subsequent reviews that these refer back, under clause 7.1 to "the first revised rent". This allows for complete freedom as to rent with the exception that a base line is fixed by the initial rent that cannot be a term of the new lease and which cannot under the terms of the lease be undermined through a lesser sum for rent being fixed. More fundamentally, it must be remembered that a market rent is what is prescribed as the outcome of the rent reviews. It is patently obvious that a market rent, as so defined in the lease to reflect the legal understanding of that term, cannot be fixed at an amount that is less than what a willing lessee would offer in the context of what the market dictates will enable the premises to be run at a profit and what a landlord would regard as a satisfactory return. All of these kinds of negotiations are ultimately based on compromise so that a reasonable bargain can be struck. What cannot, equally, be a market rent is one which no willing lessee would offer because the possibilities of reasonable business in the economic climate prevailing at the time of the rent review render it impossible to trade profitably. That, ultimately, is what the construction urged so eloquently by counsel for the landlord posits and I cannot see it as sustainable in the context of the lease fixing a market rent on each revision. By requiring a market rent on revision of the rent payable, a tension is set up between that clause and any other clause which is argued to require that the market is not to be allowed to prevail. Such a conflict may operate to make contending provisions less than clear as to the overall effect. By choosing a market rent as the end result of any revision, however, a definite and well defined legal result is declared as the agreement of the landlord and the tenant. The parties bargained so as to agree never to allow the rent on revision to fall below the initially agreed rent and I cannot see that they bargained thereafter for anything other than a fair open market rent. That can rise and that can fall.

4.2 Argument by counsel on each side as to the terms of this lease demonstrates a variety of possible approaches. What is clear, however, is the absence of a clause that would put the case made by the tenant Bewley's and the case made by the landlord Ickendel outside the ambit of ambiguity. In terms of factual matrix, this lease was for the rent of a café premises and both sides negotiated at arms length. It is apparent that the rent reserved was never to fall below that agreed on the signing of the lease. By making that provision, a base line for return of rent to the landlord was set. Were the parties to have agreed an ever increasing rent upon review, many clauses in various plain wordings were available to give effect to such a purpose. Any such clause is absent. Crucial to my decision is that an open market rent of the premises is what is contemplated by the clear wording of the lease on each rent review. That is the central clause in the lease that is relevant to a rent review as that is what the rent review must achieve. To proceed, as the landlord argues, towards ever increasing sums in rent every five years whilst deflation has decreased the appropriate return, is to substitute an unreal figure for the rent of these premises in place of what the lease provides expressly for; which is "the full open market yearly rent for the interior building let as a whole without fine or premium ... on the basis of a letting with vacant possession thereof to a willing lessee for a term equal to that granted by the within written Lease".

4.3 That being so, the rent review clause can only reasonably be construed so as to allow for a fall in rent on each review; where there is no such fall but an increase, any delay in the review date requires the additional rent to be paid from the date of review to the tenant; but that the rent can never fall below the rent preceding the first rent review, namely the rent reserved in 1987.

4.4 Alternatively, the ambiguity in the clause requires a commercial construction. It is not in accordance with business sense that a rent appropriate to five years previously should govern a hospitality market markedly changed for the worse. Had rents increased those increases would represent the open market rent and it is also the case that where rents fall an open market review of what a willing lessee would pay demonstrates that the rent is less.