Neutral Citation Number: [2009] IEHC 153

THE HIGH COURT

2007 789 S

BETWEEN:

IRISH LIFE ASSURANCE PLC

PLAINTIFF

AND

GRAHAM QUINN

DEFENDANT

JUDGMENT of Ms. Justice Dunne delivered on the 31st day of March, 2009

The plaintiff herein has sued the defendant herein on foot of a guarantee entered into between the plaintiff of the one part and the defendant of the other part. The plaintiff is the landlord of a limited liability company called L'Avenue Decleor Limited which is the tenant of premises at Irish Life Mall, Irish Life Centre, Dublin 1. The sum of €73,263.60 is alleged to be due and owing by the defendant to the plaintiff on foot of the said guarantee in respect of arrears of rent and service charges.

A summary summons was issued on behalf of the plaintiff to recover the said sum. Following the entry of an appearance on behalf of the defendant, an application was made to the Master of the High Court for liberty to enter final judgment. Following the exchange of affidavits, the matter was adjourned to the judge's list for hearing. The matter came before me from hearing on 20 March, 2009.

In essence, there was no dispute in relation to the amount alleged to be due in respect of rent. There was some dispute in respect of the calculation of the figures due in respect of the sum claimed by way of service charge. In that regard, it was submitted on behalf of the defendant that there was no entitlement to look for the service charge until such time as the amount of the service charge was certified annually by a certificate signed by the auditors of the landlord. It was claimed that the certificate for the years 2006 and 2007 had not been provided. That is correct. Since the commencement of the proceedings, the certificate for 2006 has been supplied. The certificate for 2007 is still awaited. In regard to this argument, reliance was placed on the provisions of the lease. The issue of the service charge is dealt with in the lease at clause 3.2. It provides under the tenant's covenants:

> "To pay the landlord without any deduction by way of further and additional rent
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> (a)… a reasonable percentage of the expenses and outgoings incurred by the landlord in the repair maintenance, renewal and insurance of the common parts of the areas and buildings from time to time designated by the landlord as the "centre" and the provisions therein and the other heads of expenditure set out in part one of the second schedule…
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> (b)… a reasonable percentage of the expenses and outgoings incurred by the landlord in the repair, maintenance, renewal and insurance of the areas and buildings from time to time designated by the landlord as the "mall" and the provision of services they are in and the other heads of expenditure set out in part two of the second schedule..."

The lease continues that the payment of the service charges is subject to the following terms and provisions:

> "(i) the amount of the service charge shall be ascertained and certified annually by a certificate (hereinafter called the "certificate") signed by the auditors of the landlord so soon after the end of the landlord's financial year as may be practicable and shall relate to such here in manner hereinafter mentioned."

Relying on the provisions set out above, counsel on behalf of the defendant argued that the plaintiff herein could not issue proceedings in respect of the amount of the service charge claimed until such time as the certificate signed by the auditors of the landlord had been made available to the defendant. I have to say that that argument seems to me to be untenable in the light of the provisions of clause 3.2 (vii) which provides that:

> "On every gale day of every year during the term the tenant shall pay to the landlord such a sum (hereinafter called the "advance payment") in advance and on account of the service charge for the quarter thence next ensuing as the landlord or its agents shall from time to time specify at its or their discretion to be fair and reasonable provided that subject and without prejudice to the foregoing provisions the amount of the advance payment for the quarter current at the date of the grant thereof shall be such amount as shall be certified by the landlord or its agents as fair and reasonable in all the circumstances."

Clause 3.2 (ix) provides:

> "It is hereby agreed and declared that the landlord shall not be entitled to re-enter under the provisions in that behalf hereinafter contained by reason only of non-payment by the tenant of any advance payment of the service charge as aforesaid prior to the signature of the certificate but nothing contained in this clause or these presents shall disable the landlord from maintaining an action against the tenant in respect of non-payment of any such

advance payment notwithstanding that the certificate had not been signed at the time of the proceedings subject nevertheless to proof in such proceedings by the landlord that the advance payment demanded and unpaid is of a fair and reasonable amount having regard to the prospective service charge ultimately payable by the tenant."

It is clear from the above provisions of the lease herein that the landlord is entitled to pursue a claim for the service charge notwithstanding that the annual certificate has not been signed by the auditors. I am satisfied therefore that there is no merit in the argument that the amount due in respect of the service charge cannot be the subject of proceedings until such time as the certificate has been provided. The amount in respect of the service charge is subject to verification of the precise amount due in respect of the year 2006, having regard to the certified amount.

The second issue raised by the defendant is an allegation that the plaintiff is in breach of its obligations of good estate management. The gist of the complaint is that the anchor tenant in the centre left and was not replaced by a tenant of similar quality and that one third of the other units are vacant. Thus, it is claimed that the business of the tenant suffered, thereby causing a loss. The level of the loss is not quantified in any way. On this basis, the defendant claims to be entitled to counterclaim for such loss and to set off the loss against the sums claimed herein.

A number of points were made on behalf of the plaintiff about this issue. The first point made is that the lease expressly stipulates that the payment of rent and service charge shall be made "without any deduction". Reliance was also placed on the provisions of s. 48 of the Landlord and Tenant Amendment Ireland Act 1860 (Deasy's Act) which provides:

> "All claims and demands by any landlord against his tenant in respect of rent shall be subject to deduction or set off in respect of all just debts due by the landlord to the tenant."

The provisions of Deasy's Act and in particular s. 48 were considered in the case of *MacCausland and Kimmitt v. Carroll and Dooley*, [1938] 72 I.L.T.R. 158, at p. 159 where Maguire P. stated as follows:

> "It seems to me that that rule taken with the wording of section 48 of the Landlord and Tenant (Ireland) Act 1860, makes it clear that the right of set off in an action for rent is limited to where a liquidated sum is due by the landlord. That that is so appears clear from the wording of the rules and it seems it is only a claim for a liquidated amount that can be set off, as the rules says the defendant must lodge money in court at the time of entering his defence. Therefore the tenant here in proceedings for the rent would not be allowed to set off any Counterclaim from damages for Breach of contract based on the failure of the landlord to carry out the repairs."

By way of response to the plaintiff's arguments, it was contended that the defendant did not seek to rely on the statutory right of set-off contained in s. 48 of Deasy's Act but relied on the equitable right of set-off.

Reliance was placed on the decision in the case of *Moohan and Anor. v. S & R Motors (Donegal) Ltd.,* (Unreported, High Court, Clarke J., 14th December, 2007). In the course of his judgment in that case, Clarke J. referred to the judgment in *Prendergast v. Biddle*, (Unreported, Supreme Court, 21st July, 1957), saying:

> "It is clear *from Prendergast v. Biddle* (Unreported, Supreme Court, 21st July, 1957, Kingsmill Moore J.), that the test as to whether a cross claim gives rise to a defence in equity, depends on whether the cross claim stems from the same set of facts (such as the same contract) as gives rise to the primary claim. If it does, then an equitable set off is available so that the debt arising on the claim will be disallowed to the extent that the cross claim may be made out.
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> On the other hand if the cross claim arises from some independent set of circumstances then the claim (unless it can be defended on separate grounds) will have to be allowed, but the defendant may be able to establish a counterclaim in due course, which may in whole or in part be set against the claim. What the position is to be in the intervening period creates difficulty as explained by Kingsmill Moore J., in *Prendergast v. Biddle* in the following terms: --
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> > 'On the one hand it may be asked, why a plaintiff with a proved and perhaps uncontested claim should wait for a judgment or execution of judgment on this claim because the defendant asserts a plausible but improved (sic) and contested counterclaim. On the other hand it may equally be asked why a defendant should be required to pay the plaintiff's demand when he asserts and may be able to prove that the plaintiff owes him a larger amount.'
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> The court's discretion as to be exercised on the basis of the principles set out by Kingsmill Moore J. later in the course of the same judgment in the following terms:-
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> > 'It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counterclaim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties. If, for instance, the defendant could show that the plaintiff was in embarrassed circumstances it might be considered a reason why the plaintiff should not be allowed to get judgment, or execute judgment on his claim, until after the counterclaim had been heard, for the plaintiff having received payment might use the money to pay his debts or otherwise dissipate it so that judgment on the counterclaim would be fruitless. I mention only some of the factors which a judge before whom the application comes may have to take into consideration in the exercise of his discretion.'
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> It seems to me that it also follows that a court in determining whether a set off in equity may be available, so as to provide a defence to the claim itself, also has to have regard to the fact that the set-off is equitable in nature and, it follows, a defendant seeking to assert such a set-off must himself do equity."

I accept that the defendant herein is not entitled to a right of set-off by reason of s. 48 of Deasy's Act. However, it appears that the defendant may be entitled to a set-off in equity in relation to a cross claim arising out of the same contract. I do not accept that the phrase "without any deduction" means that the defendant contracted out of the right to an equitable set-off.

In those circumstances, the question arises as to whether the defendant in this case has done equity such that he is entitled to an equitable set-off. I propose therefore to assess the cross claim in this case having regard to the decision of Kingsmill Moore J. in *Prendergast v. Biddle* and Clarke J. in *Moohan and Anor. v. S & R Motors (Donegal) Ltd*.

The defendant herein in his grounding affidavit stated as follows:

> "I say that the company ... runs a hair and beauty salon from the premises. I say that the company entered into the lease with the plaintiff on the basis that the plaintiff would run a high end shopping mall with anchor tenants and full occupancy of the retail units so as to bring in large numbers of customers or "footfall". I say that the plaintiff has totally failed in this regard in relation to its obligation of good estate management. By way of example I say that one of the main anchor tenants Iceland Food Ltd the frozen foods supermarket chain has been allowed to vacate its premises in the mall and rather than replacing it with another anchor tenant of a similar nature, the plaintiff has replaced it with a chemist shop. In addition I say that a number of the units are totally empty. I say that for the last number of years at any one time only about 10 of the 15 units are occupied. I say that the impact this is having on the company's business is devastating as the foot fall of customers into the mall is now extremely low. I say that it is obvious that allowing the anchor tenant to vacate its premises and allowing one third of the units to be empty means that there is no incentive for members of the public to attend at the mall. I say and believe that the plaintiff is in breach of its obligation of good estate management in this regard. As set out above the lease was entered into on behalf of the company on the basis that the mall would continue to have a substantial anchor tenant and full occupancy of its units so as to attract customers, unfortunately the plaintiff has failed to ensure that this is the case and as a result the company and other tenants are suffering losses and financial hardship.
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> In addition to this I say that the plaintiff is in breach of its obligations as set out in the second schedule of the lease. I say that the quality of the flooring and lighting in the common areas of the mall is very poor and results in the mall looking very shabby and uninviting to customers. This again has resulted in very poor customer numbers attending the mall."

There is no evidence before this Court to suggest that the issue now complained of by the defendant had been put forward previously as a basis for the non-payment of rent and service charges. There is very little evidence on affidavit to assist the court as to the strength of the cross claim. There is little in the way of evidence to suggest that such a claim would succeed. There is no attempt to quantify the loss alleged. There is no suggestion that following the demand for payment herein that the defendant engaged in any attempt to raise the issue of a breach of the obligation of the plaintiff of good estate management as a defence to the plaintiff's claim. It appears to be very much a last ditch effort on the part of the defendant to avoid his obligations under the terms of the guarantee entered into by him in respect of the company. Obviously, if this had been an issue raised in correspondence prior to the issue of these proceedings, one would attach more weight to the matter.

Clarke J. in the *Moohan* case referred to above also commented on the lack of any meaningful attempt to quantify the claim in that case:

> "The most striking feature of the cross claim now put forward by *S & R Motors* is the extent to which it has only been formulated with any precision in very recent times indeed. It was only on the filing of an affidavit of 29 November, 2007 (just a few days before the motions came on for hearing) that any attempt to establish that the cross claim might be such as would extinguish the claim was attempted."

In the present case, it is the position that the defendant has failed to make any effort whatsoever to attempt to quantify the claim. Accordingly there is no evidence of any kind whatsoever before this Court to suggest that the amount of any cross claim would be such as to meet and extinguish the plaintiff's claim herein. That being so, it is difficult to see why the plaintiff should not be entitled at this point in time to judgment for an amount to which it is clearly entitled and in respect of which, there is no *bona fide* defence.

Bearing in mind the fact that the issue of good estate management does not appear to have arisen prior to the affidavit sworn herein by the defendant, the fact that it is not clear on the evidence that the defendant has any reasonable prospect of success in the cross claim and that there has been no attempt whatsoever to quantify the cross claim, I do not think it would be appropriate to delay the plaintiff in entering judgment in circumstances where it is clear that there is no *bona fide* defence to the claim. The defendant is not precluded in any way from pursuing a claim that the plaintiff herein is in breach of its obligations under the lease in respect of good estate management. However, I do not think that in equity the defendant is entitled to do so in the course of these proceedings. In those circumstances, I am satisfied that the plaintiff is entitled to judgment in the amount claimed herein subject to verification of the figures having regard to the amounts set out in the certificate for the year 2006.