Neutral citation no.2005 IEHC 252

THE HIGH COURT

[2002 No.7886 P]

BETWEEN

MANUEL JIMINEZ

PLAINTIFF

AND
DANIEL MORRISSEY, PATRICK J.McGRATH,
MARY McGRATH AND THOMAS McGRATH

DEFENDANTS

Judgment of O'Neill J.delivered the 18th day of July, 2005.

1. The plaintiff is the owner and operator of a restaurant known as Da Pinos.He operates this restaurant at the junction of Parliament St.and Cork Hill in the city of Dublin which he holds the premises on foot a lease made on the 11th December, 1993, from the first named defendant.The lease in question demised to the plaintiff the premises known as Units 1 and 2 and the Basement area thereof as described and delineated on the plans annexed to the lease and edged in red being part of the premises described in the second part of the first schedule of the lease.The term of the lease was for a period of 33 years from 9th December, 1993, at the then rent of £40,000 per annum which has since risen to approximately €120,00 per annum.

2. The first named defendant acquired his interest in these premises from the second, third and fourth defendants under an indenture of lease dated the 24th June, 1992, whereby the second, third and fourth defendants demised to the first defendant, in consideration of the payment of a sum of £395,000, the aforesaid Units 1 and 2 for a term of 999 years subject to a yearly rent of £1.00.

3. For some seven to eight years the plaintiff has complained of a leak in the flat roof at the rear of the premises demised to him.This leek has been permitting rainwater to enter the kitchen area of the premises causing leakage on to the walls and the floor of same.

4. In July, 2002, when an adjoining property owner was carrying out works, remedial work was carried out to this flat roof but it would appear that it failed to rectify the leak.

5. The first issue which arises in this litigation is whether any of the defendants are liable to the plaintiff in respect of the repair of the flat roof in question, and hence liable for the prevention of the leak and/or damages in respect of it.

6. Mr.O'Dwyer S.C.for the plaintiff submits that the first named defendant by virtue of his covenant to repair in his lease with the plaintiff is liable.He concedes that although the lease from the first named defendant to the plaintiffs does demise the roof in question to the plaintiff, because the lease from the McGraths to the first named defendant did not demise the roof to him, he could not in turn give it to the plaintiff.That notwithstanding Mr.Dwyer submits that he is liable under the covenant to repair and he is entitled under the repairing covenant in his lease with the McGraths to call upon the second, third or fourth defendants to carry out the necessary repairs or alternatively if he does not wish to do that, to suffer damages, accordingly, in respect of the cost of repairs and the plaintiff's consequential losses.

7. He further submits that the continuance of the leak is a breach of the covenant for quite and peaceful enjoyment contained in the lease from the first defendant to the plaintiff.In this regard he contends that the quite and peaceful enjoyment of the premises has been interrupted, insofar as an essential part of the operation of a restaurant, namely its kitchen and wash up area is interfered with when rain water leaks into the premises and furthermore for the duration of the period of repair it is apprehended the restaurant will have to be closed down.

8. Mr.Gardiner S.C.who appeared for all defendants submitted that notwithstanding the covenant to repair the first named defendant did not covenant to repair the roof because this was not demised to him by the McGraths and hence he could not repair that which he did not have.Similarly if the lease from the first named defendant to the plaintiff had demised the roof to the plaintiff he would not have covenant to repair it.He submitted that his covenant to repair did not include those parts of the estate, not demised.As the roof remained part of the estate not having demised to the first named defendant he submitted that it remained outside the obligation of repair of the first named defendant.

9. He further submitted that the second, third and fourth named defendants had transferred their interest in the property in 2001 to a company known as Cork Hill Management Ltd.and hence the second, third and fourth named defendant had no liability in respect of the complaints now made by the plaintiff and it was a matter for the plaintiff to sue the correct parties which he had not done.

10. He further submitted that the plaintiff was not entitled to avail of the covenant for a quite and peaceful enjoyment in the lease because he himself was in breach of his obligations under the lease in that he had failed over several years to pay the service charges due.

11. Before embarking upon a consideration of the issues raised in this case it is necessary to set out the relevant portions of the lease from the McGraths to the first named defendant of June, 1992 and the lease from the first named defendant to the plaintiff of the 11th December, 1993.

The Lease of the 11th November, 1993:

> *"4.2 To pay the rent or increased rent hereby reserved or any sums hereby payable hereunder on the days and in the manner herein prescribed without any deduction.*
>
> *4.3 To pay to the Landlord from time to time on demand without any deduction or abatement the amount or amounts payable by the Landlord on foot of paragraphs 9, 43, 44, 45 and 46 of the Sixth Schedule of the Superior Lease.*
>
> *…*
>
> *4.10 To keep clean and tidy and to repair and keep in good order repair and condition from time to time and at all times during the term hereby created the interior of the demised premises and without derogating from the generality of the foregoing the doors locks plate glass and other windows fixtures fittings fastenings internal wires waste water drains and other pipes and sanitary and water apparatus and central heating plant apparatus and installations therein and painting papering and decoration thereof (damage by any of the Insured Risks as hereinafter defined in Clause 5.1 hereof*

excepted).

4.11 To keep in good and sufficient repair and condition the portions appropriate to the demised premises of the party structures common to the premises and other part or parts of the estate or adjoining premises and where necessary to join with the Lesser or at its written request with the occupier of any other part or parts of the estate or of adjoining premises (as the case may be) in carrying out and completing any requisite repairs to any one or more of such party structures and on each such occasion duly to bear and pay one half or such other proportion as in any particular case may be appropriate to the total cost of properly carrying out and completing such repairs.

…

4.34 To comply with all the covenants (other than for payment of rent) conditions and provisions contained in the Superior Lease or Leases specified in the Second Schedule hereto ….

Quite Enjoyment

5.3 That the Tenant paying the rents nearby reserved and observing and performing the covenants and agreements on the part of the Tenant hereinbefore contained shall and may peacefully hold and enjoy the demised premises during the said term without any interruption by the Landlord or any person or persons lawfully claiming under or in trust for it.

5.4 To keep in good repair order and condition all parts of the Estate not hereby demised including any common areas and the right of way, the roof, the exterior and all structural parts of the Estate to include the internal structural parts and party walls and to keep the right of way properly lit.

Provided that this Covenant

1. Shall apply only to those parts of the estate the poor order or condition of which would materially effect the carrying on of business in the demised premises.

2. This Covenant shall not apply to those parts of the estate which form part of the demised premises or premises demises or sold to other tenants or owners of parts of the estate.

3. This covenant shall not apply to those parts of the estate the repair and maintenance of which is the responsibility of the tenant or other tenants or owners of parts of the estate.

FIRST SCHEDULE

FIRST PART:The Demised Premises: ALL THAT the premises known as Unit 1 and 2 and the Basement area thereof more particularly delineated on the plans annexed hereto and thereon edged in red, being part of the Estate, including by way of demise where appropriate:

1. All walls, pillars, floors, roofs, and ceilings, window frames and shutters (if any), forming part thereof which are not party structures, that is to say, walls, structural floors, and structural ceilings separating and dividing the demised premises from adjoining premises.

2. One divided half part of the party structures.

3. SECOND PART : The Estate : ALL THAT the premises known as 37/40 Parliament Street, Dublin 2 and 1 to 6 Cork Hill Upper Exchange Street Dublin as are more particularly delineated on the map attached hereto and thereon outlined in green….

SECOND SCHEDULE

SUPERIOR LEASE: (Clause 4.34) : Lease May 24th June, 1992 between P.J.McGrath, Mary McGrath, and Thomas McGrath of the one part of Daniel Morrissey of the other part.…".

The Lease of the 24th June, 1992

"FIRST SCHEDULE ABOVE REFERRED TO

(The Estate)

ALL THAT the premises known as 37 to 40 inclusive Parliament Street, 1 to 6 inclusive Cork Hill Dublin 2 and more particularly delineated on the Plans and outlined in green.

SECOND SCHEDULE ABOVE REFERRED TO

(The Reserved Property)

ALL THOSE the main structural parts of the buildings forming part of the Estate including the roofs foundations and external parts thereof (but not the glass of the windows of the Units nor the interior faces of such of the external walls as bound the Units) and all cisterns tanks sewers drains pipes wires ducts and conduits not used solely for the purpose of one Unit.…

THIRD SCHEDULE ABOVE REFERRED TO

(The Demised Unit)

ALL THAT Unit forming part of the Estate and known as numbers 1 and 2 and the basement thereof ALL WHICH said Unit is for the purpose of identification only shown on the plans annexed hereto and thereon outlined in red TOGETHER with one half part in depth of the concrete between the ceilings of the said Unit and the floors of the Unit above it excepting in the case of the Units on the top floor of the Estate in which there is included the roof of the Estate so far as it constitutes the roof of the said Unit and one half part in depth of the concrete below the floors of the said Unit and the ceiling of the Unit below it AND TOGETHER with all cisterns tanks sewers drains pipes wires ducts and conduits used solely for the purposes of the said Unit but no others EXCEPT AND RESERVING from the demise the main structural parts of the building and which the said Unit forms part including the roof foundations and external parts thereof but not the glass of the windows of the said Unit nor the interior faces of such of the external walls as bound the said unit.ALL INTERNAL WALLS separating the demised unit from any other part of the Estate shall be partly walls and shall be used repaired and maintained as such….

SIXTH SCHEDULE ABOVE REFERRED TO

(Covenants By Lessee With Lessor)

…

3. To the satisfaction in all respects of the Lessor's Surveyor to keep the Demised Unit and all parts thereof and all fixtures and fittings therein and all additions thereto in a good and tenantable state of repair decoration and condition throughout the continuance of this demise including the renewal and replacement of all worn or damaged parts and shall maintain and uphold and whenever reasonable rebuild reconstruct and replace the same and shall yield up the same at the determination of the demise in such good and tenantable state of repair decoration and condition and in accordance with the terms of this covenant in all respects.…

43. To contribute and to keep the Lessor indemnified from and against the Proportionate Amount of all costs and expenses incurred by the Lessor in carrying out its obligations under and giving effect to the provisions of the Seventh Schedule hereto including Clauses 9 to 13 inclusive of that Schedule, after deducting interest, if any, received by the Lessor on cash in hand.

44. On the execution hereof and on each quarter day (being the first day of each successive period of three months after the date of commencement of the term hereby granted) during the continuance of this demise pay to the Lessor on account of the Lessee's obligations under the last preceding clause an advance amounting:

(i) in the period ending on the 31st December, 1992 to £1,800.00 payable upon execution and

(ii) during the remainder of the term hereby granted to one quarter of the proportionate amount (as certified in accordance with Clause 12 of the Seventh Schedule) due from or paid by the Lessee to the Lessor for the accounting period to which the most recent notice under Clause 12 of the Seventh Schedule relates increased by 5%.

45. Within twenty-one days after the service by the Lessor on the Lessee of a notice in writing stating the Proportionate Amount (certified in accordance with Clause 12 of the Seventh Schedule) due from the Lessee to the Lessor pursuant to Clause 43 of this Schedule for the accounting period to which the notice relates to pay to the Lessor or be entitled to receive from the Lessor the balance by which that Proportionate Amount respectively exceeds or falls short of the total sums paid by the Lessee to the Lessor pursuant to the last preceding clause during that period….

SEVENTH SCHEDULE ABOVE REFERRED TO

(Covenants On The Part Of The Lessor)

...

4. To keep the Reserved Property and all fixtures and fittings therein and additions thereto in a good and tenantable state of repair decoration and condition including the renewal and replacement of all worn or damaged parts PROVIDED that nothing herein contained shall prejudiced the Lessor's right to recover from the Lessee or any other person the amount or value of any loss or damage suffered by or caused to the Lessor of the Reserved Property by the negligence or other wrongful act or default of the Lessee or such other person.…".

Decision

12. It is clear and indeed there was very little argument about it, that the lease of the 24th June, 1992, did not transfer the roof to the first named defendant.That being so there was equally little argument but that the apparent demise of the roof in the lease of the 11th December, 1993, to the plaintiff was ineffective.What is also beyond argument is that Clause 5.4 of the lease of 11th December, 1993, imposes on the first named defendant an obligation to keep in good repair and condition inter alia, the roof.I am quite satisfied that the inclusion of *"roofs"* in the description of the demised premises as contained in the first schedule to the lease of the 11th December, 1993, was an error and that having regard to the fact that the roof was not demised under the lease of the 24th June, 1992, and also the fact that there is an express covenant on the part of the first named defendant to repair the roof in the lease of the 11th December, 1993, it was never intended that the roof would form part of the demise to the plaintiff.

13. Notwithstanding the fact that the roof was not demised to the first named defendant under the lease of the 24th June, 1992, there is nevertheless an express covenant to repair it, in Clause 5.4 and the first named defendant is bound by this and would have

to call upon the Lessors in the lease of the 24th June, 1992, to honour its obligation to repair the roof or otherwise be liable in damages to the plaintiff, unless, as is submitted by Mr.Gardiner Clause 5.4.3 has the effect of excluding any obligation to the plaintiff on the part of the first named defendant to the plaintiff, to repair the roof.In this regard Mr.Gardiner relies heavily on the final phrase in Clause 5.4.3 which reads *"or owners of parts of the estate."* He contends that as the second, third and fourth defendants and their successors in title Cork Hill Management Limited were and are *"owners of parts of the estate"* i.e.the roof and were responsible under that lease for its repair and maintenance.

14. It is not easy to reconcile Mr.Gardiner's submission with the general scheme of these two leases.If Mr.Gardiner is right the net effect would be that Clause 5.4 would appear to be rendered nugatory, insofar as the *"main structural parts of the building and which the said unit forms part including the roof, foundations, and external parts thereof…and all cisterns tanks sewers drains pipes wires ducts and conduits not used solely for the purpose of one unit."* as reserved in the lease, of the 24th June, 1992 to the Lessor in that lease who on Mr.Gardiner's submission would be an "owner of parts of the estate", as envisaged in Clause 5.4.3 of the lease of the 11th December, 1993.

15. It would seem to me that such an interpretation of Clause 5.4.3 would rob the first named defendants covenant to repair of any real meaning or substance and in my view that cannot have been intended.

16. It is quite clear that in the lease of the 24th June, 1992, the Lessor had by virtue of Clause 4 of the Seventh Schedule to that lease a clear obligation to keep the reserved property in a good and tenantable state of repair decoration and condition.The first named defendant enjoys the benefit of that covenant.

17. I am quite satisfied that it was not intended that the lease of the 11th December, 1993, should operate in such a way as to exclude any meaningful obligation to repair on the part of the first named defendant in respect of the reserved estate and thus to leave the plaintiff with no redress or recourse in respect of disrepair of the reserved estate, bearing in mind that he would have had no right or entitlement to carry out repairs to the reserved estate without the permission of its owners and he does not enjoy privity with the Lessors under the lease of the 24th June, 1992.

18. I have therefore come to the conclusion that Clause 5.4.3 does not have the effect as contended for by Mr.Gardiner of excluding any obligation on the part of the first named defendant to repair this roof, and he remains liable to the plaintiff under Clause 5.4 of the lease of the 11th December, 1993, in respect of its disrepair.It is a matter for the first named defendant whether he elects to call upon the Lessors under the lease of the 24th June, 1992, to effect repairs or is content to suffer damages in respect of the claims made by the plaintiff.

19. In the light of the foregoing conclusion it is unnecessary for me to express any opinion on the second submission by the plaintiff, which was that his entitlement to a quite and peaceful enjoyment of the demised premises pursuant to Clause 5.3 of the lease of the 24th June, 1992, has been breached.However for the sake of completeness, in the light of the submissions made and the evidence given by the first named defendant, I should express an opinion on that topic.

20. Although the authorities dealing with quite enjoyment do not in any kind of specific way define, that, which can constitute a disruption of quite enjoyment it would appear to me to be beyond doubt that for there to be a breach of a covenant in respect of a quite and peaceful enjoyment there has to be an interference with the enjoyment by the lessee of his demise which is of a very substantial nature, indeed many of the cases involved a total disruption of possession.

21. In this case no evidence at all has been given as to the extent of the interference caused by this leak, but taking it to be, as described, by Mr.O'Dwyer in his opening, namely a leak into the kitchen and cleaning portion of the restaurant which occurs when there is inclement weather, causing rainwater to come down the walls and onto the floor, I would be inclined to the view that such an interference falls significantly short of the threshold of substance that would be required to give rise to a beach of a right to quite enjoyment.It was said by Mr.O'Dwyer that at no stage, so far, has the business of the restaurant been interrupted and indeed in a busy kitchen and cleaning area, it is hard to see how an episodic leak of the kind complained of would add materially to the overall presence of liquids and vapours that one would expect to find in a busy restaurant kitchen.

22. It would seem to me that the leak as described falls more, into the category of an annoying irritation rather than a breach of the right to quite and peaceful enjoyment.It has been said that for the purposes of carrying out repairs it may be necessary to close down the kitchen and therefore the restaurant for a short period.Even if that is so, the temporary interruption of a business for a short duration in order to carry out essential repairs would not in my view be normally regarded as amounting to a breach of the right to quite and peaceful enjoyment.

23. I am of the opinion therefore that the complaints made by the plaintiff as described by Mr.O'Dwyer do not amount to a breach of the applicant's right to quite enjoyment under Clause 5.3 of his lease.

24. Apart from the foregoing the evidence of the first named defendant as to the non-payment by the plaintiff of service charges including charges in respect of insurance was not challenged as to the fact of such non-payment but was challenged on the basis that all of the procedures set out in the lease of the 24th June, 1992, had not been complied with and therefore a valid demand not made of the plaintiff for these charges.

25. The plaintiff has an obligation under his lease to pay that which is due by the first named defendant to his Lessor.The plaintiff is not a party to the lease of the 24th June, 1992, and is not entitled to insist on a punctilious observance of the elaborate accounting procedures set out in that lease for determining the amount of the service charges.

26. The plaintiff's obligation is to pay that which is due by the first named defendant.I am quite satisfied on the evidence that the first named defendant was legally bound to pay these charges to his Lessor and indeed the evidence established that he was sued in the Circuit Court for a substantial portion of these service charges and was obliged to submit to the claim made by his Lessor.

27. I am satisfied that the plaintiff in failing to have met his obligation to pay these service charges has been for some considerable time in default of his obligations under the lease of the 11th December, 1993, and that being so he could not be regarded as *"performing the covenants and agreements on the part of the tenant"* and therefore is not entitled to the benefit of Clause 5.3 of his lease.

28. In conclusion therefore I am of the opinion that the first named defendant is liable to the plaintiff by virtue of Clause 5.4 of the lease of 11th December, 1993, in respect of the disrepair of the roof over the kitchen area of the plaintiffs demise and the plaintiff has failed to demonstrate there has been a breach of his right to quite and peaceful enjoyment of his demise and furthermore is not

entitled to the benefit of Clause 5.3 of the lease of 11th December, 1993, because of the breach of his obligation to pay service charges due.