

**THE HIGH COURT**

**COMMERCIAL**

**2010 1548 P**

**BETWEEN**

**STAPLEYSIDE COMPANY**

**PLAINTIFF**

**AND**

**CARRAIG DONN RETAIL LIMITED**

**DEFENDANT**

**JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 17th day of December, 2010**

1. The plaintiff is the owner of the Crescent Shopping Centre in Limerick and is the landlord of the defendant, which holds a unit there. In these proceedings, the plaintiff claims rescission of an agreement between the plaintiff and the defendant on 15th May, 2009, damages, and, alternatively, judgment in the sum of €115,286.63, being the amount of arrears of rent foregone, pursuant to the agreement of 15th May, 2009, which, it claims, was repudiated by the defendant. The plaintiff also claims outstanding rent from the year 2008, with interest thereon, pursuant to contract.

**Background**

2. By a lease dated 6th February, 2002 (hereinafter the "Lease"), the defendant leased a premises at Unit 25X in the Crescent Shopping Centre, Dooradoyle, County Limerick (the "Premises") for a term of twenty-five years, at an annual rent of €152,368.37, which was reviewed upwards under the terms of the Lease on 7th September, 2006, to €309,500. The defendant claims to have made improvements to the Unit, including the installation of a mezzanine level, to the value of approximately €400,000.

3. In early 2009, the defendant contacted the plaintiff with a view to negotiating a reduction in rent, having regard to adverse trading conditions. After some discussion on the issue, the plaintiff sent an email to the defendant on 29th April, 2009, proposing two options in the following terms:-

*Option 1*

*Pay 75% of Q1 and Q2 rent + 100% of Q1 and Q2 service charge and insurances now*

*Pay 75% of Q3 and Q4 rent by way of monthly Standing Order commencing 1/7/09 and service charge quarterly in the normal way*

*Clancourt have an option to take surrender of the Unit 25X lease subject to 90 days notice*

*Clancourt/Carraig Donn to negotiate new lease on alternative unit in event that Unit 25X lease surrendered*

*Review position again at 31/12/2009 if option not exercised*

*Option 2*

*Pay 67% of the full year's 2009 rent + 100% of Q1 and Q2 service charge and insurances now*

*Pay Q3 and Q4 service charge quarterly in the normal way*

*Clancourt have an option to take surrender of the Unit 25X lease subject to 90 days notice and refund of rent paid in advance*

*Clancourt/Carraig Donn to negotiate new lease on alternative unit in event that Unit 25X lease surrendered*

*Review position again at 31/12/2009 if option not exercised."*

4. The offer was made on a without prejudice basis, but neither party to the proceedings is claiming privilege on the basis that Option 2 appears to have been acted upon and part-performed.

5. The reference to "Clancourt" in the email of 29th April, 2009, is, in effect, a reference to the plaintiff company which is a member of the Clancourt group of companies and no issue arises on this point.

6. By letter dated 13th May, 2009, the defendant sent a cheque to the plaintiff for €207,365, being 67% of the full 2009 rent. It was sent under cover of a letter from Mr. Cathal Kenny of the defendant company, to Mr. Enda McDonald of Clancourt Management. The letter stated:

*"As per the agreement reached between our two companies, please find enclosed a cheque for Eur 207,365.00 which covers the full rental charge for 01st January, 2009 to 31st December, 2009, and reflects the agreed rent reduction of 33% for payment up front.*

*We would be grateful if you could organise the necessary Credit Notes to enable us to reconcile our accounts to reflect*

*the above discount and the discount we received last year of circa Eur 9,000.00. If you could also provide us with a statement, we would appreciate it."*

The text of the letter suggests that the defendant had elected to accept Option 2.

7. On 10th November, 2009, the plaintiff wrote to the defendant, enclosing a "Termination Notice". The notice stated, *inter alia*:

*"We, STAPLEYSIDE COMPANY, HEREBY GIVE YOU NOTICE that it is our intention to terminate, on 16th day of February, 2010, the term granted by the Lease referred to in the Schedule hereunder in respect of premises located within the Crescent Shopping Centre, Dooradoyle, County Limeick."*

The Schedule refers to the Lease of 6th February, 2002. The notice period was in excess of ninety days.

8. On 18th December, 2009, the defendant responded by serving the plaintiff with a notice of intention to claim relief under s. 20 of the Landlord and Tenant (Amendment) Act 1980. The defendant claims that the notice of termination gave rise to a situation which permitted it to claim a new tenancy on the grounds that it satisfied the conditions set out in Part II of the 1980 Act, and, in particular, that it was a tenant in occupation of a business tenancy for in excess of five years.

9. The plaintiff claims that the defendant has repudiated the agreement of 13th May, 2009 (being the date of acceptance of the offer in the email of 29th April, 2009) and seeks rescission of the agreement and all sums due on foot of the original Lease. The defendant, for its part, claims that it is entitled to a new tenancy, since its tenancy has been determined by the landlord.

10. The resolution of the dispute between the parties turns, to a significant extent, on an interpretation of the clause in the email of 29th April, 2009, which states:

*"Clancourt have an option to take surrender of the Unit 25X Lease subject to 90 days notice and refund of rent paid in advance."*

11. Unfortunately, the clause is drafted in a manner which lacks legal clarity or certainty. It refers to the landlord having " . . . an option to take surrender of the Unit 25X lease subject to ninety days notice . . . ". This suggests that the landlord can call on the tenant to surrender its lease. But the tenant has not surrendered the lease. A surrender, as understood in landlord and tenant law, is something which comes from the tenant and not from the landlord. A surrender can come from the tenant with the consent of the landlord or it can arise by act or operation of law. A landlord cannot force a tenant to surrender his lease against his will, if he is otherwise complying with the terms of the lease.

12. In this case, what has happened is that the landlord has served a Termination Notice on the tenant, giving ninety days notice. It seems to me that in law, this is a different matter from accepting a surrender of the lease by the tenant. There is no evidence in this case that the tenant ever surrendered the Lease and it is accepted by both parties that the plaintiff terminated the Lease by giving ninety days notice. That is not what is provided for in Option 2 of the email of 29th April, 2009.

13. The plaintiff contends that the agreement gave it an entitlement to terminate the tenancy by serving ninety days notice on the defendant. The defendant accepts that this is so. But the defendant says that it was not prepared to surrender its landlord and tenant rights and that it did not do so. On the contrary, it served a notice of intention to claim relief. On 28th May, 2009, the plaintiff sent to the defendant a draft document purporting to formalise the agreement. The Memorandum of Agreement contained the following, at clause 2:

*"In consideration of such reduction of rent, and the benefit to be derived by the Lessee therefrom, the Lessee HEREBY AGREES AND DECLARES that if the Lessor shall be desirous of terminating the term granted by the Lease at any time hereafter AND shall have given to the Lessee not less than ninety days prior notice in writing (hereinafter called a 'Termination Notice') of its intention in that behalf (expiring on any day) the Lessor shall be entitled on the expiry of that Notice to terminate the said term."*

The defendant refused to execute that document on the basis that it would be waiving its rights to claim a new tenancy.

14. At the commencement of the case, the court was informed that it could rely on the witness statements as the evidence of the persons making those statements and no other evidence was called. None of the witness statements addressed the issue of whether or not the defendant, as tenant, would have a right to a new tenancy under the provisions of the Landlord and Tenant (Amendment) Act 1980.

15. In construing the contract, I have to have regard to what is now frequently referred to as the "factual matrix" surrounding the agreement. In the context of this case, it means I must consider the agreement against the background of a Lease which provided for upwards-only rent reviews and where the rent was reviewed upwards from a figure of €152,368.37 to €309,500.00 in September 2006. Within two years, economic conditions had completely changed and the economy went into recession. For the defendant and other companies engaged in the retail business, this had very serious consequences. The combination of a significant rent increase and trading difficulties for the tenant is the factual background to the negotiations that culminated in the agreement which is now in dispute.

16. It was the plaintiff who made the proposal on 29th April, 2009. Option 2 sought to deal, *inter alia*, with the issue of surrender, but expressed it in a way, and in a context, which was contrary to its meaning, as understood in the law of landlord and tenant. I am satisfied that the parties intended that the tenant would be given a rent reduction and that the landlord should have a right to determine the tenancy on ninety days notice. But this was not what was in the agreement. I am also satisfied that no one appears to have given any thought to what statutory rights could be invoked by the tenant in the event that notice was given. Given the lack of clarity and legal certainty in the agreement between the parties and since the termination of a tenancy would be an event significantly affecting the rights of the tenant, it seems to me appropriate that I should apply the *contra proferentem* rule. In this case, its application involves construing any ambiguity in the text of Option 2 against the landlord. Applying that principle, I am not prepared to construe the words "Clancourt have an option to take surrender of the Unit 25X Lease subject to ninety days notice . . ." as giving the landlord of the right to serve notice of termination or notice to quit giving ninety days notice without regard to the tenant's right to claim a new tenancy.

17. However, the *de facto* position is that the parties accept that the plaintiff was entitled to terminate the tenancy by serving ninety days notice and the agreement made between the parties was, to some extent, part-performed because the tenant sent a

cheque to the plaintiff for 67% of the full 2009 rent in May of that year. This was accepted by the plaintiff, which issued credit notes to the defendant. The landlord now complains that if the tenant is entitled to a new tenancy, this makes a nonsense of the agreement because the landlord has taken a reduction in rent with no corresponding benefit to it. To some extent, that is to ignore the commercial realities that existed. The plaintiff was faced with a situation where it had lost a number of tenants in the Crescent Shopping Centre and rents, generally, were falling. The empty units in the Centre were evidence of an inability by many tenants to pay the rents which had been fixed and also due to tenants going out of business. If the plaintiff had not agreed to accept a reduced rent from the defendant, it may well have forced the defendant out of business. Responding to this argument, the plaintiff claims that it had another tenant ready to move into the Unit. It is of interest to note that in the draft agreement furnished among the documents, the proposed rent for the new tenant was €200,000 *per annum* during the first five years of the term, which is considerably less than the rent due by the defendant following the 2006 rent review. On the other hand, it appears that it may have involved a sub-division of the existing Unit, but that would have left the landlord in a position where it had to get another tenant. The defendant gave evidence that it was not prepared to agree to the sub-division of the Unit as to do so would have necessitated a reconfiguration which would have resulted in the loss of the benefit of the improvements made.

18. At the end of the day, the plaintiff is not entitled to enter into a lease with a new tenant for Unit 25X if the defendant was entitled to a new tenancy. When the defendant had informed the plaintiff of its difficulties in paying the rent, the plaintiff could, if it wished, have held the defendant to the terms of the Lease of 15th May, 2009, and if there was a default on the part of the defendant, the forfeiture clause could have been operated. But instead, the plaintiff offered two options to the defendant and the defendant appears to have acted on the basis of Option 2. The final clause of Option 2 stated:

*"Clancourt/Carraig Donn to negotiate new lease on alternative unit in the event that Unit 25X lease surrendered  
Review position again at 31/12/2009 if option not exercised."*

19. All this appeared to do was to give the tenant a right to negotiate a new lease, but it did not provide the basis on which this lease would be granted or what would happen if the negotiations were unsuccessful. This clause offered very little by way of comfort to the tenant if it had to leave Unit 25X but wanted to remain in the Crescent Shopping Centre.

20. The plaintiff's argument that it derived no benefit from the defendant accepting Option 2 unless it could terminate the Lease is an attractive one. But it does not, of itself, mean that it is entitled to an order for possession or rescission of the agreement of 15th May, 2009.

21. Insofar as the agreement purported to deprive the defendant of the right to claim a new tenancy at the termination of its existing Lease, the defendant relies on s. 85 of the Landlord and Tenant (Amendment) Act 1980, which provides:

*"So much of any contract, whether made before or after the commencement of this Act, as provides that any provision of the Act shall not apply in relation to a person, or that the application of any such provision should be varied, modified or restricted in any way in relation to a person shall be void."*

22. The defendant says that this section must be read together with s. 17 (1)(a)(iiia) of the 1980 Act, as inserted by the Landlord and Tenant (Amendment) Act 1994, which provides that a tenant will not be entitled to a new tenancy in the following circumstances:

*"If s. 13(1)(a) applies to the tenement, the terms of the tenancy provided for the use of the tenement wholly and exclusively as an office and, prior to the commencement of the tenancy, the tenant had executed, whether for or without valuable consideration, a valid renunciation of its entitlement to a new tenancy in the tenement and had received independent legal advice in relation to the renunciation."*

23. It seems clear that that section does not apply in the present case as there is no evidence of any such agreement "*prior to the commencement of the tenancy*" or that the defendant "*. . . had received independent legal advice in relation to the renunciation*" or indeed that "*. . . the terms of the tenancy provided for the use of the tenement wholly and exclusively as an office*".

24. It would seem, therefore, that if Option 2 purports to interfere with the defendant's statutory right to claim a new tenancy, that provision is void. But the plaintiff says that this case is wholly different. The defendant, by an agreement subsequent to the Lease, and for valuable consideration, agreed to the surrender of the Lease. It argues that s. 85 does not operate as a bar to a tenant freely entering into an agreement, at any time during the term, to surrender the lease and that if such a bar did exist, s. 17(1)(a)(iii) which refers to a tenant surrendering a lease would have no application or logical meaning. That sub-section reads:

*"A tenant shall not be entitled to a new tenancy under this part if -*

*(iii) a tenant has terminated the tenancy by notice of surrender or otherwise."*

25. I do not accept that argument because that sub-section involves a surrender coming from the tenant. That is not what happened here.

26. The plaintiff also argues that by not yielding up possession or surrendering the Lease, the defendant has repudiated the agreement as set out in Option 2, and that the plaintiff is entitled to rescission of the contract. It also argues that this breach of contract by the defendant was a repudiatory breach because of the centrality of the obligation to yield up possession and the worthlessness of the agreement without performance of this obligation. I do not accept this argument, having regard to the application of the *contra proferentem* rule and the use of the word "*surrender*" in Option 2 when, what in fact happened was a demand for possession by the plaintiff on giving ninety days notice. If the parties never discussed the issue as to the rights of the defendant on the termination of the tenancy, I cannot see how a claim to a new tenancy can be excluded. The current situation has arisen because of the unfortunate manner in which Option 2 was expressed.

27. I hold that there was no repudiatory breach of contract on the part of the defendant. The plaintiff took a step which was outside the terms of the agreement because it did not "*take surrender of the Unit . . .*" but rather, served a Notice of Termination. Notice of Termination has been given by the landlord and accepted by the tenant, subject to its right to claim a new tenancy. It seems to me that there has been a break in the old tenancy agreement and that the parties should be free de novo to enter into a new tenancy agreement. This seems to be fair and reasonable to both parties, having regard to current economic conditions and rental values. For better or worse, the Lease has been terminated and a new tenancy sought by the defendant. While there has been part-performance of Option 2, that agreement was not completed.

28. In those circumstances, it seems equitable that the plaintiff should be entitled to rent up to the date of termination of the Lease at the rate reviewed under the Lease, namely, €309,500 *per annum* and I will allow the Plaintiff's claim to that extent.

I refuse the other reliefs sought by the plaintiff. It appears that the claim for a new tenancy should be dealt with in the Circuit Court and I will hear counsel on the form the order should take, both on that issue and the arrears that may be due.