Neutral Citation Number: [2010] IEHC 54

THE HIGH COURT

COMMERICIAL

2009 4910 S

BETWEEN

HELSINGOR LIMITED

PLAINTIFF

AND

THOMAS WALSH AND MARY WALSH

DEFENDANTS

Judgment of Mr. Justice Charleton delivered the 5th March, 2010

1. This an application for summary judgment. It has a quite complex background which resulted in an unusual agreement dated the 14th April, 2005, whereby the parties agreed to lease a newly-built garage premises when it was constructed. It was not until the 1st September, 2008, that they formally entered into the lease itself.

2. Firstly, a word about the background. The premises which gave rise to financial liability in this case are situated at Grange Road, Baldoyle, Dublin 13. For a number of years before 2005 the defendants carried on a garage business there and they still do in the new premises. I am told that behind their property there was a site suitable for the development of housing. The plaintiff, a company related to Menolly Homes Limited, came to the defendants with a proposal; they would buy their existing garage, thereby gaining access to the housing site, and relocate them conveniently near to where their business was before. Whatever the proposal was, at that stage, it resulted in an arrangement which is in writing. In essence, the plaintiffs, as builders, agreed a cost with the defendants for building new premises on the new site. They were to lease it over four years and nine months from the date of practical completion and then they were to buy it. If it wasn't bought by the defendants, then the plaintiff could exercise other options. The rent for the premises was not set at a commercial rate; rather it was set at supposedly the cost of borrowing the money for construction. The premises were handed over on the 30th April, 2006. I am satisfied that no reasonable issue is raised by the defendants, but that practical completion can be thus dated. Extra works were then required by the defendant and, together with V.A.T., the invoice for these dated the 13th November, 2007, amounts to €947,725.00. There is no specific agreement for this, and this is important. It is hard to know how it was to be dealt with. Rent, calculated under the agreement as the cost of the money, was payable annually in arrears. Therefore, the relevant gale days would have been the 30th April, 2007, the 30th April, 2008, and the 30th April, 2009. This claim is therefore made up of a claim for arrears of rent, the cost of the construction borrowing, less what has been paid, together with the invoice for the extras.

3. Because the rent was calculated on the basis of the cost of the money, the rent due in arrears has varied from year to year. In 2007 it was €214,110.34; in 2008 it was €262,476.12; and in 2009 it was €267,212.42. This makes a total of €743,798.88. When one adds the extras to that, the sum claimed in this motion, less €520,000 paid on the account, totals €1,171,523.80.

The Agreements

4. Although there have been attempts to settle this matter, which resulted in agreement, that contract stipulated that in the event that the implementation of the settlement broke down the parties would be restored to their original rights and liabilities. That situation is what I am principally concerned with.

5. Under the agreement for the lease dated the 14th April, 2005, the parties contracted a consideration for the construction of the new building and site at the sum of €3,115,000.00, plus V.A.T. There was a call option period from the commencement of the date of lease, which was on practical completion, namely the 30th April, 2006. Then three possibilities arose under the agreement and subsequent lease. The first was that the defendants would become purchaser under the agreement and buy the premises at cost, namely the agreed sum for construction. This was to be exercised within four years and nine months of practical completion. Thereafter the plaintiff, as builder and vendor, in this agreement, had an option of requiring the defendant to purchase the premises. That arose when the purchase option, over four years and nine months, had expired or if the letting agreement was forfeited under the usual clauses to be contained in the lease. As a matter of fact, a forfeiture notice has been served in this case dated the 11th September, 2008, due, in a large part, to non-payment of rent. Then the plaintiff, as vendor, could take possession of the premises, sell it, deduct arrears due, and then give the balance to the defendant. I need to quote that clause, because an issue arises as to what "outstanding monies due" may mean:-

> "Without prejudice to any rights or remedies available to the vendor in the event that the purchaser does not complete the purchase as herein provided, the property shall be sold by the vendor and the vendor shall retain out of the nett proceeds of the sale the consideration herein specified, all sums due to the vendor, as landlord, pursuant to the letting agreement or lease to be entered into by the parties pursuant to the agreement for lease of even date, including interest on outstanding monies due and shall within fourteen days of the completion of the sale pay the purchaser any balance held."

6. Then there was the third situation that might arise. This came about in consequence of Clause 3(d) of the lease eventually entered into on the 1st September, 2008. There was a perpetuity period in the agreement for the lease, which was twenty-one years added to the purchase option period in favour of the defendants of four years and nine months. In

addition, however, when the lease was entered into, the defendant, as tenant, gained the following right, and I quote from the lease:-

> "The tenant may by notice in writing opt to extend the term of this agreement to a term of up to twenty-seven years from the date of practical completion in which event the annual rent set out in special condition 1 shall apply and all other covenants and conditions shall remain in full in full force and effect unless otherwise terminated."

7. Special condition 1 needs also to be set out here:-

> "The rent per annum for the first four years and nine months of the term shall be the amount per annum paid by the landlord as bank interest, costs and charges on its account number _____ ,which account relates to the finance for the construction of the show rooms and other buildings and premises including in the demise (together with V.A.T.) provided that the tenant shall be consulted at all reasonable times in connection with the account with a view to procuring a rate acceptable to the tenant but shall be payable on the dates set out in special condition 2 hereof and should the term continue before the said four years and nine months such yearly rent as becomes payable under the schedule."

8. The schedule provides for a rent review. This means that instead of the cost of borrowing the agreed price for construction, it becomes a real commercial rent; what a willing landlord would take of willing tenant give. It seems to me that the option to require the defendants to purchase the premises, on pain of loosing the premises and having them sold by the plaintiff, the balance being given to the defendants by the plaintiffs, ceases where the defendants choose to turn the lease agreement into a proper twenty-seven year lease. Then, however, they must pay an open market rental and their option to purchase the premises at the sum agreed is gone.

Issues

9. It is not productive, it seems to me, to again set out the principles upon which the court operates in deciding whether summary judgment should be granted to a plaintiff, or whether leave to defend should instead be given to a defendant. These are fully set out in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607. My own decision in *Danske Bank v. Durkin New Homes* [2009] IEHC 278 (Unreported, High Court, Charleton J., 26th June, 2009) is under appeal to the Supreme Court. I believe that where a legal issue can be decided as effectively at a summary hearing as on a plenary hearing, the court should not hold off granting judgment to a plaintiff, or allowing a defendant to enter a defence, on the basis that a plenary analysis is more appropriate. Plenary proceedings are reserved to issues of fact. Where the issues of fact are clear and where the law has been fully argued, then legal issues can and should be decided on an application for summary judgment. Where an assertion by a defendant is contradicted flatly by written correspondence, or where the entire of the relationship between the parties is governed by a written agreement, the court may proceed to judgment because no real prospect of a defence has been shown.

10. I turn, therefore, to the arguments on behalf of the defendants. There are two principle arguments. The first is that the amount of rent, within the first period of four years and nine months from practical completion was never agreed. As will be recalled from special condition 1, the rent during that period, payable by the defendants to the plaintiff, was not a true commercial rate. Should the defendants turn the agreement into one where the lease lasts for twenty-seven years, then a rent review clause operates after the expiry of that initial period. Over those first four years and nine months, which expire on the 30th January, 2011, the rent is simply the costs of borrowing the agreed amount for construction. It consists of "interest, costs and charges" on the relevant borrowing account. The plaintiff has the burden of borrowing that money. The defendants, on the other hand, are entitled to be consulted "at all reasonable times in connection with the account with a view to procuring a rate acceptable to the tenant". Essentially, what has happened here is that the defendants claim that the plaintiff has borrowed at a rate very close to 7% per annum, thereby giving rise to the liability in respect of three years rental in arrears of €743,798.88. The defendants' claim that this borrowing could have taken place, and that if consulted they would only have agreed to it taking place, at 4.614%. This would have given rise to rental in the sum €490,269.72 only; a substantial saving. The defendants have produced some evidence to the effect that bank borrowing could have been effected during the relevant period at rates between 4.43% and 5.41%. A new calculation has been made of a median figure; how it is arrived at I do not know, of 4.82% giving rise to a liability of €512,158.66 in respect of rent. The defendants say we have already paid €520,000.00.

11. A further argument is advanced by the defendants. It is that the sum for extras, in the amount of €947,725.00, is not due. These extras involved a fit out, or additional building works of some kind, to the premises. They say that this was not demanded until early 2008, nearly two years after practical completion. The defendants say that practical completion has never taken place. Let me say, about that, that I find this argument utterly unconvincing. In reality the defendants have been in possession of the premises and have been trading. Whereas the formalities of practical completion, the signing off on the building works by architects on each side, have not occurred, the behaviour of the defendants makes it obvious that they are getting practical value out of the premises.

12. The defendants further argue, however, that the amount in respect of extras should be subsumed into the rental. They say that it is not logical, and an unjust enrichment, for them to be required to pay for extras in building works when they may never own the premises. They say that if this were a landlord and tenant situation of an ordinary kind, the extras could be regarded as leaving open a claim for compensation for improvements, and then become payable by the landlord to the tenant, on the completion of the term. Unless the defendants, as tenant, under the agreement for lease and under the formal lease, were to exercise the option of purchasing the premises, the tenant would never gain the benefit of the extras.

13. Normally when one calls in a builder, one is obliged to pay upon completion of the works, usually with a month or so. Often, in addition, stage payments at various points in the work will be made or payments on account will be mutually negotiated. The defendants asked for these works and agreed the cost. The defendants have had the benefit of these works from the time of their completion. The defendants can purchase the value of these works by exercising the purchase option under the lease. When I look at the option whereby the plaintiff, as vendor, can at the expiry of four years and nine months or upon forfeiture, possess the premises, sell them, and give the defendant the benefit of any balance beyond those sums "due to the vendor as landlord pursuant to the letting agreement or lease", I see a reference to "outstanding monies due". This is a reference of a general kind which, were this clause to be operated, would include

the extras; these, I am told were a kind of fit-out on the construction. The defendant could, in addition, convert the lease, upon the expiry of the initial period of four years and nine months, into an ordinary term lease at a commercial rent of twenty-seven years. Then the defendants would certainly get the benefit of the extras over that period of time and would, it is argued, be entitled to claim compensation for improvement under the Landlord and Tenant Act 1980. I am not deciding that latter point.

14. When I look at the correspondence between the parties I see that that the solicitor for the defendants, on the 31st March, 2008, commented on three separate invoices. The first was for rent payable in arrears. This did not query the issue of rates of interest. The second was in respect of the purchase option. There, the defendants indicated that they had decided "until further notice not to exercise" that option. What may be important is that this was not a perpetual disavowal of the option. The third was in respect of variation to building works where the solicitors for the defendants commented "our client confirms this invoice is correct and is presently putting in place funding arrangements to discharge same". That, however, is not the entirety of the matter. There are other factors. The first is that under the later agreement for paying arrears, the extra payments were subsumed into arrears of rent. Secondly, that mechanism is born out by the wording of Schedule I, which refers to charges "to finance the construction". By the time of the demise of the tenement, that wording arguably included the extras. Lastly, and significantly, there is no other agreement as to time and mode of payment for extras in the papers.

15. Now, I turn to the issue of the rent payable over the initial period of four years and nine months. The plaintiff has emphasised not only the letter which I have just quoted, but a further series of letters, exchanged on without prejudice basis, whereby an agreement to settle the financial difficulties between the plaintiff and the defendants was arrived at on the 10th October, 2008. This agreement involved an immediate payment of €100,000 in respect of arrears of rent; a monthly payment of €60,000 towards arrears of rent and a review of the situation on the 1st February, 2009. The plaintiff therefore argues that because the parties have at all times accepted, by not querying, the bank charges due that no issue in relation to consultation on the interest rate can possibly arise. They say that the defendants are estopped from raising that issue. Estoppel is by its nature a question of the factual construction of the behaviour of parties, what they represented to each other, how they acted on foot of such representations, and what situation each is in at the time when it is claimed that legal rights are overridden by representation and so can no longer, as a matter of equity, be relied on.

16. In *Charles Rickards Limited v. Oppenhaim* [1951] K.B. 616 a contract for the sale of a Rolls Royce car contained a clause allowing for time for performance to be made of the essence of the contract. This clause was invoked; but further time was granted beyond the date stipulated to allow for completion. Denning J. held that the consequence was similar to that in *Central London Property Trust Limited v. High Trees House Limited* [1947] K.B. 130. Where a party, by his conduct, shows an unequivocal intention not to insist upon his legal rights, and that promise is acted on, in circumstances where it would be inequitable to allow him to go back on that promise, an estoppel is created. I quote the judgment of Denning L.J. in *Charles Rickards Limited v. Oppenhaim* at pp. 622 to 623:-

> "If this had been originally a contract without any stipulation as to time and, therefore, with only the implication of reasonable time, it may be that the plaintiffs could have said that they had fulfilled the contract; but in my opinion the case is very different when there was an initial contract, making time of the essence of the contract: "within six or at the most, seven months." I agree that that initial time was waived by reason of the requests that the defendant made after March, 1948, for delivery; and that, if delivery had been tendered in compliance with those requests, the defendant could not have refused to accept the coach-body. Suppose, for instance, that delivery had been tendered in April, May, or June, 1948: the defendant would have had no answer. It would be true that the plaintiffs could not aver and prove they were ready and willing to deliver in accordance with the original contract. They would have had, in effect, to rely on the waiver almost as a cause of action. At one time there would have been theoretical difficulties about their doing that. It would have been said that there was no consideration; or, if the contract was for the sale of goods, that there was nothing in writing to support the variation. There is the well-known case of *Plevins v. Downing*, coupled with what was said in *Bessler, Waechter, Glover & Co. v. South Derwent Coal Co. Ltd.*, which gave rise to a good deal of difficulty on that score; but all those difficulties are swept away now. If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it."

17. I accept that principle as being correct. Subsequent developments have shown that estoppel by conduct can give rise to a situation where, in effect, a new term is brought into the contract. In such circumstances, the plaintiffs argue that the defendants, having agreed the relevant amounts over a period of years, cannot now say: we insist on our legal rights.

18. In the circumstances of this case the situation on each side is not clear cut. It is not very clear indeed; the test for rejecting a defence on a motion for summary judgment, that the defendants have no defence. The lease contains a specific legal term requiring that the plaintiff consult with the defendant "with a view to procuring a rate acceptable to the tenant". This has never happened. There is nothing in the correspondence or in the affidavits before me which indicates that any effort at all was even made by the plaintiff in that regard. The sums involved show substantial variations which cannot be overlooked by the Court at this stage in the proceedings. The amount in respect of rent, depending as it does upon interest and bank charges, was clearly so dependant. It is arguable; on the contrary, that by their conduct the plaintiff has subsumed payment for the extras in the rent. Estoppel, in this context, must have the potential to work both ways. But how can a court decide the existence of estoppel, from the point of view of either party, at this stage absent the clearest documentary evidence? That is peculiarly a matter for evidence and one where reference to written documents may be insufficient to demonstrate that no defence is made out.

19. I do not believe it would be right for the Court on a motion for summary judgment to ignore a clear provision by putting over it the shroud of estoppel. Such an exercise would involve a consideration of how the plaintiff acted, or how the defendants acted, on foot of any representation claimed, and how they have acted either to their detriment or, on a more modern test, in such a way to make it inequitable for the defendants to now insist on their legal rights. I further find it difficult to see any clear representation by the defendants. Are there unequivocal representations in correspondence?

The defendants were, it is clearly arguable, simply negotiating within a financial situation. It may be that no issue as to bank charges occurred to them. It may be that the plaintiff did not think: are the extras becoming part of the arrears of rent? The initiative, however, on the contract, to raise the issue of bank charges and interest rates was clearly on the plaintiff. It is difficult for me to see the correspondence as being a representation of the unequivocal sort whereby legal rights are foregone in the interests of equity. Rather, it seems to me, that the balance is, on the state of the papers before me at present, swinging in the opposite direction.

Result

20. The defendants have made out an arguable case. We must now proceed with dispatch. I will hear counsel on a reference to mediation.

21. I will also hear counsel in relation to directions whereby liberty to defend is given to the defendants in respect of the amount claimed in the special endorsement of claim.