NEUTRAL CITATION NUMBER [2011] IEHC 535

THE HIGH COURT

[2009 No. 2615 S]

BETWEEN

TURVEY BUSINESS PARK LIMITED

PLAINTIFF

AND

LEO BENTLEY AND SUSAN BENTLEY

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on 15th April, 2011

1. In these proceedings the plaintiff seeks summary judgment for the sum of €33,872.69 in respect of unpaid service charges. The Master granted the plaintiff liberty to enter final judgment for this on 5th November, 2010, and the defendants have now appealed to this Court against that decision. Moreover, without prejudice to that appeal, the defendants have sought liberty pursuant to s. 5 of the Arbitration Act 1980 ("the 1980 Act") to have the dispute referred to arbitration in accordance with paragraph 5.3 of a lease entered into between the plaintiff and defendant in respect of the business park premises on 20th October, 2005.

2. While the agreement is (correctly) described as a lease, in substance it represented the sale of the premises for a significant capital sum. In return the lessor (a company entitled Damestown Limited and who in reality was the vendor) granted the lessee a 999 year lease at a peppercorn annual rent of €1. The lessee was also obliged to pay the service charge calculated in the manner envisaged by one of the schedules to the lease. This in turn envisaged that the lessor's auditor (who was to be either a chartered or certified accountant) would certify the amount of such costs. The service charges payable by this lessee represented approximately 25% of the services costs incurred by the plaintiff in respect of the units and the common areas of the business park.

3. The lease envisaged that the lessor would procure the incorporation of the plaintiff which would act as the management company to the business park an, furthermore, that it would have the power to "determine and enforce the lessee liability for the service charge as hereinafter contained."

4. Before considering the substance of the dispute, however, it seems apposite to deal with the arbitration issue first.

Does the Court have Jurisdiction under the 1980 Act?

5. The Arbitration Act 2010 ("the 2010 Act") came into force on 8th June, 2010. While s. 4(1) repealed the earlier Arbitration Acts, 1954-1998, this was expressed to be subject to the saving clause in s. 4(2). This provides:-

> "Subject to section 3, the repeal of the Acts referred to in subsection (1) shall not prejudice or affect any proceedings, whether or not pending at the time of the repeal, in respect of any right, privilege, obligation or liability and any proceedings taken under those Acts in respect of any such right, privilege, obligation or liability acquired, accrued or incurred under the Acts may be instituted, continued or enforced as if the Acts concerned had not been repealed."

6. Given that the 1980 Act stands repealed, the Court has therefore no jurisdiction thereunder *unless* the defendant's motion comes within the scope of this saving clause.

7. It is to be noted that the word "proceedings" is defined by s. 4(3) as including arbitral proceedings. So far as the present case is concerned, therefore, given that no arbitral proceedings had been pursued to finality prior to 8th June, 2010, the question then is reduced to asking whether any arbitral proceedings were pending as of that date.

8. Section 7(1) (b) provides that, in the absence of an agreement between the parties, arbitral proceedings "shall be deemed to be commenced" on:-

> "...the date on which a written communication containing a request for the dispute to be referred to arbitration is received by the respondent."

9. It is not in dispute that on no date prior to 5th November, 2010 (*i.e.,* the date of the Master's order) had a written communication containing such a request been received. It follows, therefore, that no arbitral proceedings were pending as of 8th June, 2010. This in turn means that as the saving clause in s. 4(2) has no application to the present case, the consequence of this is that the Court no longer has any jurisdiction under the 1980 Act.

10. This conclusion in itself probably has little practical implications for the present case. Section 6 of the 2010 Act gives the UNICTRAL Model Law on International Commercial Arbitration the force of law in the State and the Model Law is applied by s. 6(b) to arbitrations which are not international commercial arbitrations. Article 8(1) of the Model Law provides that:

> "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

11. Article 8(1) is in its terms quite similar to the provisions of s. 5 of the 1980 Act. Article 8(1) provides that the Court shall stay the proceedings and refer the matter to arbitration if a valid and operative arbitration clause subsists between the parties and the party seeking a stay has not otherwise submitted to the jurisdiction of the Court.

12. In the present case, therefore, I am prepared to treat the defendant's motion as being a request pursuant to Article 8(1) of the Model Law to stay the proceedings in favour of arbitration. This, however, presupposes that the arbitration clause in question applies

to the present dispute and it is to this question which we may now turn.

Does the Arbitration Clause Apply?
13. Clause 5.3 of the lease provides that:

> "All disputes or differences which may arise touching on the provisions of this Lease or the operation or construction thereof or the rights and liabilities of the Lessor or the Lessee for the resolution of which no provision has been made in this Lease shall be referred to the arbitration of a single arbitrator....and the Arbitration Acts 1954 to 1998 shall apply accordingly PROVIDED that without prejudice to the generality of the foregoing and for the avoidance of doubt IT IS HEREBY AGREED AND DECLARED that the Clause shall have no application to any certificate or other documents furnished by the Lessor's surveyor, the Lessor's Insurers or the Lessor's Auditor in accordance with the provisions of this Lease which is deemed to be conclusive evidence for the purposes of this Lease of all matters of fact referred to therein SAVE for manifest error."

14. The object of this clause is plainly to ensure that major disputes between the parties would be referred to arbitration. The reality of the situation was that given the nature of arrangement between the parties where the lessees were in truth the full owners of the property subject only to an obligation to pay annual service charges to the lessor, it is hard to envisage circumstances where this arbitration clause would ever come into play. The arrangements here were in reality very different from the types of commercial landlord and tenant disputes- such as rent reviews- which are customarily referred to arbitration.

15. In fact, the only disputes between the parties which were likely to arise in practice related to the quantification of the annual services charge. Here the policy of the lease was quite clear. It provided for a speedy and (presumably) cost effective method of calculation of the charges by providing for a certification process by an external auditor. It may be justly observed that this procedure is somewhat opaque and, indeed, rather rough and ready. That, however, is the procedure to which the parties agreed in respect of a commercial agreement and, absent perhaps a manifest injustice, the courts must be slow not to respect and give effect to it. This is especially so given that there had to be an expeditious and cost effective procedure whereby the (relatively small) service charges were apportioned as between the various users of the business park. In any event, the potential for injustice is mitigated by the fact that the certificate is expressed to be no longer conclusive in cases of manifest error.

16. At all events, the policy of the clause is clear: the arbitration clause does not apply in the cases of disputes concerning certification by the lessor's surveyors, insurers or auditor. Since the auditor is given the power to certify in respect of services charges, it follows that disputes of this nature do not come within the scope of the arbitration clause. It follows in turn that the present action has not been brought "in a matter which is the subject of an arbitration agreement" within the meaning of Article 8(1) of the Model Law. It further follows that the jurisdiction to stay in favour of arbitration, which is provided for in Article 8(1), simply does not arise.

17. If this is so, then the question of whether the Master was correct to proceed to give summary judgment at a time when the defendant was considering invoking the arbitration clause does not arise. It is true that in *Moohan v. S. & R. Motors (Donegal) Ltd*. [2007] IEHC 435, [2008] 3 I.R. 650 Clarke J. held that summary judgment was not appropriate where the defendant's actual application for a stay pending arbitration had yet to be heard and determined by this Court. As Clarke J. observed, a litigant in that situation finds himself or herself in an impossible position, since if it had sought to contest the substance of the claim by filing replying affidavits it would have effectively submitted to the jurisdiction of the court and, accordingly, forfeited its right to seek arbitration.

18. The premise of *Moohan*, however, is that the arbitration clause is prima facie valid and applicable to the dispute in question or, at least, that it is arguably so. If, however, as in the present case, it is plain that the arbitration clause does not cover the subject matter of the dispute, then the *Moohan* principles do not apply. In such circumstances the application for summary judgment must be determined as if no question of an arbitration clause arose. This, in turn, means that the net question is whether the defendant can advance an arguable defence to the claim: see, *e.g.*, the comments of Denham J. in *Danske Bank v. Durcan New Homes* [2010] IESC 22.

Has the defendant presented an arguable defence to the plaintiff's claim?
19. The present proceedings were commenced in June 2009 with the object of seeking payment in the sum of €48,200.92 in respect of services charges which related to the period between 2007 and 2008, save for one very small sum in respect of the calendar year 2006. A further sum of interest was also claimed.

20. On 1st September, 2009, a firm of accountants produced two reports for 2007 and 2008 dealing with the service charges. The reports set out a statement of expenditure of the plaintiff for the years in question. The accountants stated that they considered that it was their responsibility "to form an independent opinion, based on our examination, on the service charge account." The reports went on to conclude that "the service charge costs presents a fair summary of the costs" for the years in question.

21. It is true that the accountants did not actually use the words "certify" in their reports. But it seems to me that it would be unreal to regard it as otherwise than a certification and it would be inappropriate to approach the matter with the same strictness as if, for example, the court was dealing with the legality of a search warrant. In my view, therefore, the accountants must be taken to have thereby effectively certified what service charges were due.

22. The defendants maintain that the accounts were not prepared in the manner specified in the schedule to the lease, but as these amounts were certified, they are binding, save for manifest or obvious error. Nothing has been advanced by the defendants which would allow for the conclusion that the certificate has been vitiated by such a clear error. It is true that the defendants maintain that they need to have sight of the invoices which make up the annual service costs in order to make this assessment, but I do not think that it was ever intended that the parties would be entitled to engage in such a minute, line by line examination of the service charges. If there is an obvious error, this should be evident from the headline summary of the accountant's reports themselves.

23. The lease further provides that the lessee is required to pay "such sums in advance and on account of the service charge as the lessor shall in his sole discretion deem to be a fair and reasonable interim payment on account of the service charge for the year then commencing." There is then a procedure whereby credit is given for any monies which may have been overpaid by the lessee by way of account. This happened in the present case where, following the presentation of the accountant's certificates in September 2009, the estimated service charges for 2007 were reduced from €18,790.11 to €11,438.33 and for 2008 from €10,718.52 to €7,742.07.

24. While the defendants point to the appreciable reductions in the service charge estimates in the wake of the accountants' reports as showing that the amounts of service charges claimed is excessive, I would rather say that it demonstrates the fact that initial estimates made by the plaintiff in respect of the initial payment on account have been on the conservative side and that the

accountants have sought to discharge their independent mandate in order to ascertain the true figure.

25. There remains the question of interest. It is conceded that the interest claimed was based on the initial services charges claimed, as distinct from the lower sums subsequently certified by the accountants in September, 2009. In these circumstances, it would not be appropriate to give summary judgment in respect of the interest claimed.

Conclusions
26. In these circumstances, I propose to give summary judgment in favour of the plaintiff in the sum of €19,182.40. I will adjourn to the plenary hearing the plaintiff's claim for interest.

Postscript
27. In the wake of the delivery of this judgment in draft, but before a final order was drawn up, the parties addressed me a number of matters. It was agreed that the defendants are entitled to a credit (dating from an overpayment in 2006) of €152.53. It was further agreed that the first defendant made a payment of €4,000 in September 2009, the only issue being whether this payment should be credited to the 2007 services charges or to the 2009 services charges instead. In the circumstances, the plaintiff agreed that the figure should be deducted from the summary judgment figure pending the outcome of the plenary hearing.

28. In the circumstances, I will now give judgment to the plaintiff taking these figures into account in the sum of €15,029.87.