Neutral Citation: [2016] IEHC 28

THE HIGH COURT

[2015 No. 10686 P.]

BETWEEN

THOMAS THOMPSON HOLDINGS LIMITED,

MONTAYA DEVELOPMENTS LIMITED AND

CARLOW CENTRE MANAGEMENT LIMITED

PLAINTIFFS

AND

MUSGRAVE GROUP PLC,

MUSGRAVE RETAIL PARTNERS IRELAND LIMITED AND

MUSGRAVE OPERATING PARTNERS IRELAND LIMITED

DEFENDANTS

DECISION of Mr. Justice Hedigan delivered on the 22nd day of January, 2016

1. The first named plaintiff is the owner of Carlow Shopping Centre. The first and second named plaintiffs are the landlord in the lease dated 30th September, 1994, of the property that is known as the anchor unit in the centre. The third named plaintiff is the management company of the centre.

2. The third named defendant was assigned to the lessee's interest under the lease in 2011 pursuant to the sale and purchase of the Superquinn Group. The first and second named defendant respectively own and operate the Supervalu grocery store which has been trading from the anchor unit since 2011.

3. On 2nd December, 2015, the defendants announced the intention in the national media to close the store located in this centre on Friday, 22nd January, 2016, which, in fact, is today.

4. The plaintiff claims that this unilateral proposed breach of contract on the part of the defendants, if allowed to proceed unchecked, will cause irrevocable and irreparable damage to the plaintiffs and to third party businesses currently located in the centre. They say the plaintiffs will experience significant interference with its rent roll and the management of the centre and an immediate diminution in value in the asset value of the centre.

5. Moreover, the threatened closure of the Supervalu store presents an existential crisis they say to the continuation of the plaintiffs business. The third party businesses located in the centre and the centre itself will also be badly affected by the sudden departure of the core attractive force provided by the defendants. There will be a serious decline in the footfall of customers in the centre. It is in those circumstances that the plaintiffs seek an order by way of interlocutory injunction restraining the defendants from closing the Supervalu store in clear breach of the "keep open" covenant in order to maintain the status quo ante pending a full trial of the proceedings. The defendants claim that, if compelled to abide by the terms of their lease with the plaintiff and to keep open their premises, they will suffer continuing trading losses until the end of the term of the lease in September 2018.

6. The principles to be applied are very helpfully set out by Clarke J. in *Okunade v. Minister for Justice* [2012] 3 I.R. 152 I summarise them under eight headings, as follows:-

> (i) Is there a fair or bona fide question to be tried or a strong likelihood of success at trial depending on the nature of the order sought.
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> (ii) If so, would damages be an adequate remedy and is it likely that the defendants could pay damages.
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> (iii) If not, will the plaintiffs undertaking as to damages adequately compensate the defendant if he is successful at trial.
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> (iv) If so, will the plaintiff be in a position to meet his undertaking if it is called in.
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> (v) If damages would not adequately compensate either party then the court must consider where the balance of convenience lies. It should ask itself, where will the least harm be done. It should compare the consequences of deciding either way.
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> (vi) If all matters are equally balanced, the court should attempt to preserve the status quo.
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> (vii) It should attempt to minimise the risk of injustice.
>
> (viii) The risk of injustice from not acting must be greater than that of acting in order to justify the court's departing from the status quo.

7. In terms of the criteria concerning the likelihood of success at trial versus a serious issue to be tried, the court must first ascertain the nature of the order sought. This is because where a prohibitory order is sought, the question for the court is simply whether the plaintiff raises a fair, serious or *bona fide* question to be tried. This is a relatively low hurdle. On the other hand, where the order sought is a mandatory one, then the court must refrain from acting unless the plaintiff has established "a strong case that is likely to

succeed at the hearing". (See *Maha Lingham v. HSE* [2006] 17 ELR 137 at 140. In order to do that, the court must examine the substance of the case.

8. Although as appears from the pleadings, the plaintiff characterises the order sought as prohibitory, its effects in substantive terms would be to force the defendant to continue operating their Supervalu store until September 2018, against their wishes and contrary to their interest because they are operating it as a substantial loss, i.e. of €136,000 for the year ending 2012; €108,000 for the year ending 2013; €651,000 for the year ending 2014; and €582,000 for the year ending 2015.

9. Such an order, in my view, cannot be described realistically as merely prohibitory. It is clearly a mandatory order.

10. Thus, the plaintiff must demonstrate that it has a strong case that is likely to succeed at trial. The defendant argues that this is an application for an order to carry on a business that is a losing concern, can the court do so?

11. Although there is no clear Irish authority on the question, it has been directly addressed in the House of Lords in Co-operate Insurance v. Argyll Stores Holdings [1998] A.C. 1. Delivering the judgment of the court, Hoffman J. stated as follows:-

"No authority has been quoted to show that an injunction will be granted enjoining a person to carry on a business, nor can I think that one ever would be, certainly not where the business is a losing concern."

12. Later, at p. 11, Hoffman J. went on to observer that:-

"Specific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the common law damages to which a successful plaintiff is entitled as of right.

And further, at p. 50, Hoffman J. also stated:-

"From a wider perspective, it cannot be in the public interest for the courts to require someone to carry on business at a loss if there is any plausible alternative by which the other party can be given compensation."

13. This judgment was considered by Costello P. in *Wanze Properties v. Five Star Supermarket* (Unreported, High Court, 24th October, 1997). This case also involved an application for an injunction in an action for specific performance.

14. Costello P. granted the injunction. It must be noted though that the defendants therein were not trading at a loss and had taken a deliberate commercial decision to close the store and open another some four hundred yards away. Costello P. seemed to consider these facts as very significant.

15. In this case, by contrast, the defendants have invested heavily in the store over the last four years in an effort to make it financially viable. He referred at p. 4 of his decision to the Argyll judgment which he said:-

"indicated a rule of law which should be applied other in an exceptional circumstance."

He went on later on the same page to state:-

"This case, the plaintiffs argue, is different."

16. It seems to me that Costello P. in *Wanze* considered favourably the House of Lords judgment in Argyll notwithstanding his observations on p. 3 of his judgment that in Ireland there had been some development of the law relating to specific performance in cases up to the date of his decision. He seemed to deal with the case before him on the basis that it was one of the exceptional ones to which Hoffman J. had referred. It also must be borne in mind that his decision was made, as is the case here, in an interlocutory application. This discrete question of law was raised in the case of *Parol v. Friends First* [2010] IEHC 498 before Clarke J., see paragraph 2.8.

17. Because, however, of the position adopted by the parties in that case, it was not resolved in the judgment because it was not necessary to do so. It is plainly an issue that would greatly benefit from a reserved decision. I note that in their textbook on *Specific Performance in Ireland* 2012, by Buckley Conroy and O'Neill, the learned authors stated at para. 7.18:-

"One must regard the jurisdiction to enforce the covenants as exceedingly limited in the absence of any reserved judgment at plenary stage clearly departing from Argyll.

18. Notwithstanding that the issue of the enforcement of the covenant has been argued in some detail before me, it is not for me to decide this legal issue at this interlocutory stage. My role is to determine whether the plaintiff has a strong case likely to succeed at trial on this issue. On a review of the above cases, it seems to me that whilst the plaintiff has raised an arguable case and a bona fide question, it cannot in the light of the above authorities, be realistically considered as a strong case likely to succeed at trial.

19. That being the necessary legal criterion in order to justify the court making the mandatory order sought, the plaintiffs' application must fail.

20. In the event this matter goes further, in the interest of finality, I should outline my findings on the other criteria that I set out above in summary:-

> (a) I have been unable to identify any reason to find that damages would not be an adequate remedy. Moreover, it has not been suggested and there is no evidence before the court that the defendants would not be able to pay any damages that might be awarded. Moreover, I can find no ground to believe that the assessment of those damages would be impossible or even difficult were the plaintiff to succeed at the trial. It would seem to me that those damages could be assessed applying normal criteria with the evidence of the usual experts on financial loss.
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> (b) As to the undertaking as to damages, it is freely admitted by the plaintiff that it is not in a financial position to provide a meaningful one. Bearing in mind, the strong probability that the defendant would sustain continuing and substantial financial loss if ordered to keep the store open, this is a very significant matter for the defendant. In my view even if the other criteria had been met, this would have been a bar to the plaintiffs obtaining their order. I accept that a court is not required to insist on an undertaking as to damages being given in every case, nevertheless, it is the almost

invariable practice of the court to require one. There would need to be very special reasons justifying the court in not requiring such an undertaking, I can find none herein.

(c) Considering the balance of convenience, the court must take into account the least harm principle. If the defendants do not close their store now, it will still do so in September 2018. In the period in between, it is not difficult to apprehend the current and potential tenants will be fully aware of the imminent departure of the anchor tenant. This is sure to have a depressing influence on the level of rents that can be demanded by the plaintiffs of their existing and potential tenants and thereby of the value of the entire centre. It would be a period fraught with uncertainty and concern. This, by any measure, is hardly a desirable state of affairs. If, however, the defendants do close the store, then it is in both theirs and the plaintiffs' interests to find some other tenant. If they succeeded in doing so , it would likely provide that measure of security which business requires if it is to thrive. It is not possible at this stage to weigh the balance between these two different scenarios and therefore on the least harm and the equal balance principles, the court should not intervene.

(d) Where does the risk of injustice lie? It is certainly the case that the plaintiffs have their contract in which the defendant promised to keep open the store. Nonetheless, the lease itself provides explicitly for the breaches of covenant where at clause 2.5(7) it obliges the tenant to indemnify the landlord in respect of any breaches thereof. The lease itself, therefore, contemplates damages as a remedy for breach of, inter alia, the covenant to keep open.

21. Lastly, and more generally, this Court would have grave doubts over the wisdom of forcing companies that are trading at a loss to continue to do so. It seems a proposition that flies in the face of commercial standards of conduct. It seems to be something futile and impractical fraught with all manner of consequential difficulties.

22. The court must refuse the injunction sought herein.