Neutral Citation: [2013] IEHC 564

THE HIGH COURT

[2009 No. 1599 P.]

BETWEEN

YIPPI TRADING LIMITED

PLAINTIFF

AND

JOHN COSTELLO AND JACQUELINE MULHARE (AS LEGAL PERSONAL REPRESENTATIVES OF JOSEPH COSTELLO DECEASED)

DEFENDANTS

JUDGMENT of Mr. Justice Ryan delivered the 6th December, 2013

The question that arises in this case is whether a car park that is held by the parties in fee simple as tenants in common in equal shares should be divided into equal parts owned separately.

The plaintiff is a management company of five adjoining, one-storey commercial units located at the rear of a substantial new development of retail and office accommodation at Dargle Road, Bray, Co. Wicklow which is known as Raven's Hall. The defendants are the executors of the late Joseph Costello, who was the developer of the building project on the site of the old Sunnybank Inn. Between the terraced block of units run by the plaintiff and the new complex lies the car park that originally belonged to the public house and which is the subject of the dispute that I have to resolve.

Yippi Trading Ltd and the defendants, in their capacity as legal personal representatives of the late Joseph Costello, are co-owners of the car park as freehold tenants in common. The public house originally owned and controlled the whole area but that changed as a result of two agreements in 1980. On the 3rd November, 1980, Sunnybank Inn Limited conveyed an undivided moiety of the area to the plaintiff's predecessor in title in fee simple in equal shares. The vendor and purchaser made another agreement on the 23rd November, 1980 to regulate the use of the land that was now being held in common. The parties agreed as follows:-

> 1. That the plot of ground shall at all times be used as a car park for the parties themselves, their employees, customers and invitees and licensees and to provide access whether on foot or in vehicles for the parties, their employees, customers, invitees and licensees to the respective adjoining premises of the parties from Upper Dargle Road.
>
> 2. That the cost of repairing and maintaining the tarmacadam surface on the car park shall be borne equally by the parties hereto.
>
> 3. Each party will cooperate with the other in regulating the orderly use of the car park as a car park and will not permit any part thereof to be used by anyone other than those requiring parking facilities while visiting or calling to the respective premises of the parties.
>
> 4. That all expenses incurred in marking out the car park in car parking spaces or in providing lighting thereof or in controlling the use of the car park as a car park shall be borne equally by the parties hereto.

There was no problem with the car park until approximately 2006, when construction began for a major development project on the site of the public house, which had been closed for some years. The work continued until 2008 and caused a great deal of disruption to the occupiers of the units managed by the plaintiff and their visitors. The development comprised approximately 100,000 sq ft. of shops and offices on three floors.

The developer of the Sunnybank Inn site was Mr. Joseph Costello who died on the 10th February, 2007, having been seriously ill for a period of about one year. The defendants are his legal personal representatives. Mr. John Costello is the brother of the late Joseph Costello and is a retired veterinary surgeon who has turned to the management of the development with a view to preserving the assets of the deceased for the benefit of the deceased's children.

These proceedings were commenced by Equity Civil Bill dated the 12th December, 2007, in which complaint was made principally about nuisance and trespass during the construction phase of the property. There was also a claim for trespass because of the encroachment onto the car park area of a boundary wall erected during the course of construction. By order of Cooke J. made on the 19th November, 2012, the proceedings were amended and transferred to this Court with the inclusion of a claim for relief under s. 31 of the Land and Conveyancing Law Reform Act 2009. In particulars that were served in May 2013, two new complaints were included, namely, that there was an alteration of levels of part of the common property and that by reason of the construction the car park had now come to be used by third parties. In the course of the proceedings, the claim for damages for nuisance and trespass was withdrawn, but the claim for severance of the interests of the parties was strenuously maintained and that is the issue that has to be decided.

The Land and Conveyancing law Reform Act, 2009 replaced the Partition Acts and governs the relations between the parties to this action. The relevant parts of section 31 provide as follows:-

> 31(1) Any person having an estate or interest in land which is co-owned whether at law or in equity may apply to the court for an order under this section.
>
> (2) An order under this section includes-
>
> (a) an order for partition of the land amongst the co-owners, (b)

(c) an order for sale of the land and distribution of the proceeds of sale as the court directs,

(e)

(f) such other order relating to the land as appears to the court to be just and equitable in the circumstances of the case.

(3) In dealing with an application for an order under subsection (1) the court may -

(a) make an order with or without conditions or other requirements attached to it, or

(b) dismiss the application without making any order, or

(c) combine more than one order under this section.

(6) The equitable jurisdiction of the court to make an order for partition of land which is co-owned whether at law or in equity is abolished."

The plaintiff seeks an order dividing the car park into two parts, with it being granted the number of car parking spaces it had before the development commenced. The reasons are:

1. As owner in common the plaintiff is entitled to partition, subject to such consequential measures as are required.

2. The occupiers of the plaintiffs units have been disrupted since 2008 and do not want to have any more to do with the defendants.

3. They want their half of the property, which is the only fair solution of the dispute.

4. When the gym in Raven's Hall was operating the plaintiff occupiers' spaces were often taken.

5. Their use of the car park is also restricted because of use by Bray residents.

6. The building work encroached on the car park, which was changed and a retaining wall was built which impedes access to the plaintiffs units for deliveries.

7. The plaintiff is not interested in running a car park company.

The defendants do not dispute that there was disruption during the building work or that there is a big problem with outsider parking but say that is not related to their development. The defendants resist division on the grounds that:

1. The agreement between the parties dated 23rd November, 1980 is binding and should be enforced. On the basis of the maxim *pacta sunt servanda*, the Court should decline to make an Order for partition of the car park.

2. A joint management system is in accordance with the 23rd November, 1980 agreement; Examples of management solutions include a pay and display system, permits, a barrier, electronic fobs or a clamping system. The defendant's solicitor, by letter of the 5th May 2013, called on the plaintiffs to operate the car park agreement but it was not responded to and the plaintiffs have acknowledged that a management solution has never been tried.

3. The plaintiff recognised the need for action and envisaged the steps that the defendants favour in a letter of 3rd June, 2010 written by its solicitor to an auctioneer/valuer in connection with the case, where he said

> "We will have a look at the possibility of car park management for the future as I understand that the increases in Pay and Display charges in Bray has meant that the car park has become extremely popular for users of the Estate and nearby Shops. We will have to look at ways of putting in place a system of clamping or Barrier or some other method of controlling the use of the Car Park."

4. An order in favour of the plaintiffs could potentially decrease the value of their premises. There would be less flexibility in the event of a partition solution and potential planning implications.

5. As a result of the construction, the potential number of car park spaces has grown from 43 to 47 spaces.

6. Severance would be complex, difficult and unsatisfactory because rights of way will have to be granted to each party over the other's holding; it might require planning permission or undermine the existing planning that was granted on the premise of common ownership.

7. The defendants own an area at the back of the plaintiffs building with space for up to 18 cars.

The witness for the plaintiff was Mr David Garvey, whose company Advanced Surgical Concepts, occupies two of the five units and has been in the location since 1998. Mr. Garvey began working there in 2000. Prior to the redevelopment by the late Mr Costello, for the first five years until 2005 the Sunnybank Inn was a quiet, unused public house. It did not use the car park as it had no customers so he and other unit holders had exclusive use of the car park. It was tarmaced but not delineated and the 44 spaces were underused.

There were ten or eleven planning applications relating to the property and Mr Garvey objected to a number of them. The witness understood the application to be predicated on having a car park for the occupants of the proposed building. The plan was to transform the site from an old sleepy pub into big business and shopping units.

Construction started in 2006 and lasted 12 - 18 months. The occupants could not park in the car park during the construction but there was an access road and they parked at rear of site. There were heated discussions about the car park being off limits during that time. Some cars were damaged and having to drive through a building site was annoying.

Physical changes were made to the car park. The defendants removed an embankment and built an ESB sub-station, removed part of the main car park and built a retaining wall. The car park is now smaller and narrower. Trucks and vans have difficulty and large articulated trucks find it impossible to turn and drive up to units because of the retaining wall.

When the works were completed, parking was not an issue while the property was vacant but that changed when the retail units on ground floor and the gym above them were operating. A third floor above the now vacant gym floor has never been occupied.

These things have affected Mr Garvey and other tenants in their use of the car park. Parking is a premium in Bray and this is now effectively the only free car park in Bray. The gym being closed has alleviated the situation but the problem will recur if another tenant is found.

Mr Garvey sees division as the solution with the plaintiff getting 22 of the 44 spaces. Yippi is not interested in running a parking company. Wheel clamps or meters are not going to work.

In cross-examination, Mr Garvey agreed that although Yippi instituted proceedings in 2007, it was not until November company which owns the common assets. Looks after the assets of the tenants in the car park. Has 5 directors. Garvey not a director. Action was taken in 2007, not until November 2012 that the claim for partition was made based on same facts. Cooke J. allowed an amendment to introduce a claim for partition. On the 1ih May 2013, further particulars were furnished in which Yippi made two new complaints, namely, encroachment by the new building and that third parties were using the car park and had been encouraged by the defendants.

The witness never attended a meeting to try to find a management solution, nor was he aware of anyone from Yippi attending a meeting to resolve the matter. He agreed that the car park was upgraded by the defendants. He did not believe Yippi paid for any of that work.

The evidence revealed some disagreement about the precise number of parking spaces and whether the building work reduced or increased them, the ownership of some particular areas and the use that is made of them but none of the disputed issues is of great importance. It has to be remembered that there is no way of deciding definitively how many spaces there are because they are not marked out and so they can only be estimated.

Mr. Garvey agreed in principle with the suggestion of Mr Conlon SC, for the defendants, that if were to be a management solution there were various options, including a permit system, pay and display clamping or a barrier at the front of the car park. The plaintiff's solicitor had suggested in one letter using a barrier or other system to deal with outsiders using the car park but Mr. Garvey agreed no action was taken in relation to that.

The defendants' evidence began with Mr. John Costello, who is the brother and one of the executors of the late Joseph Costello who died in February 2007 while the development was being built. He had been seriously ill for about a year.

He did not agree that users of the gym created a problem in the car park. When it was in operation, only a very small number parked there in business hours. But there is a difficulty with unauthorised use. Such users include people who work in Bray, parents leaving and collecting children at school and shoppers.

There is an underground car park operated by a door code which is not open at present but which is available for use by tenants in the building and could cater for gym users when needed.

A caretaker employed by the defendants comes in on two days per week. He clips the trees and cleans the car park.

In regard to possible solutions, Mr Costello suggested a pay and display system operated on behalf of the co-owners. The car park should not be open to the public. Reserved or permanent spaces could be delineated. Only minor management would be required.

His understanding was that there could be planning issues involved in division in that the planning application was based on common ownership and usage of the car park.

Mr Peter Duffy, architect, said that planning permission might be required in putting severance into effect. In regard to the option of erecting gates, they would open and shut and thereby impede the use of some spaces.

Mr Frank Gallanagh, auctioneer and valuer, said that in his opinion partition would not work. Although he accepted that he had no experience of running a commercial car park, he said that he has been dealing with a car park company in Bray. Division is not a realistic possibility. There would be difficulties for both parties and he instanced deliveries. A barrier would affect access to the ramp in the car park and would itself reduce the number of spaces. The property would be devalued if partition happened. The situation lends itself to 'pay as you go' parking.

The parties submit that the court is at large in deciding the question. They have addressed practical issues in their evidence and submissions, in addition of course to the defendants' reliance on the car park agreement.

The 2009 Act gives the court a wide discretion in cases of dispute to decide how best to reconcile the competing interests. Section 31 includes the power to refuse to make an order and dismiss the application outright. S-s.(3) permits the court to attach conditions to any order or to grant a combination of orders under s. 31. There is no guiding case law on this provision. There will undoubtedly be situations where there is little sense in keeping tenants in common tied in to a legal relationship which does not meet their needs and in which shared ownership of the property is no longer feasible. In such a scenario there is merit in the court making an order in favour of partition of the property in question. However, I do not feel that this case fits that category.

It seems to me that for an order of partition to be made, division of the property in question must be feasible in both a practicable and legal sense and have regard to any potential planning permission implications. It is a question of practicality rather than of principle. If partition is refused in one circumstance, that is not the end of the matter for all time and in every situation. The relationship continues and with that the option if circumstances change of seeking to persuade a court to adopt one or more of the statutory reliefs.

The benefits of severance of common ownership are clarity and simplicity and freedom to control one's own property without the need for third party consent. I think that a court will generally be sympathetic to an application under s.31. However, the disadvantages and complications of partition in the circumstances of this case outweigh the gains that the plaintiff hopes will result. I would have

come to that conclusion on balance without the car park agreement but when the 1980 deed is put into the equation the practical justice of retaining common ownership becomes even more clear.

The inconvenience resulting from the building work was the origin of this dispute and the primary reason for the proceedings. Another problem has arisen because of increasing pressure on parking facilities in Bray and how much it costs. But these issues are among the things the agreement of 23rd November 1980 was intended to cover. It may come to pass that the car park deed is set aside because the co-ownership of the car park is terminated. That could happen by a new agreement or by court order. But in the meantime, there is a specified mode of dealing with the shared asset. That has not failed; it has not been tried.

I have come to the conclusion that partition is not the answer to this application for the following reasons but I do not base conclusions on the possible need for planning permission for partition or that the present permission for Raven Hall might be invalidated or on a reduction in the value of the property.

1. There is an agreement for the management of the car park. The parties are required to co-operate.

2. The problems that have arisen are practical and are amenable to a range of measures to deal with them. The biggest, indeed it may be the only problem is outsider parking which can be controlled by co-operation in managing the common asset.

3. The parties are business people who do not exhibit personal animus towards each other so there is no reason to think that co-operation IS impossible.

4. Sharing out only the car park spaces would leave a residual area in common ownership that would still be subject to the 1980 agreement. That would require that spaces be marked out since there are none at present and co-operation would be required for that.

5. Partition would necessarily involve mutual rights of way over the parties' separate properties; those rights would require joint management so actual segregation would not result.

6. A co-operative management solution is an option, as the plaintiff acknowledged in 2010. Such an approach has not been tried.

7. The late addition of the partition claim implies that the plaintiff is not irrevocably committed to it.

8. Access rights by the parties and their legitimate visitors are exercisable over so many areas of the car park that their interests are inextricably mixed up. The evidence of Messrs Garvey and Costello as to deliveries, tenant access to upper floors of Raven Hall and individual ownership of abutting or enclosed pockets of land amply justifies this point.

9. Difficulties such as those encountered by delivery lorries going to the plaintiffs units because of the new retaining wall could best be addressed in concert and again possible solutions were canvassed in evidence.

10. It is open to the parties to agree to cut out pieces of the common areas and put them into exclusive, individual ownership.

Accordingly, I dismiss the application for partition without making any order.