Neutral Citation Number: [2012] IEHC 343

THE HIGH COURT

[2011 No.1645 S]

BETWEEN

WESTPARK INVESTMENTS LIMITED AND VENCOURT LIMITED

PLAINTIFFS

AND

LEISUREWORLD LIMITED AND LEISUREPLEX (TALLAGHT) LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 31st day of July, 2012

1. Are there any circumstances in which a tenant is entitled to refuse to pay rent to a landlord who, it is claimed, has failed to perform its contractual obligations for the tenant in such fashion as to deprive the tenant of the essence of the benefit of the contract? That, essentially, is the antecedent question which forms the background to this application for summary judgment on the part of the plaintiff landlord who contends that it is entitled to judgment in the sum of almost €959,600 by way of rent arrears. The issue arises in the following way.

2. In November, 1990 the plaintiff companies entered into a 35 year lease with the first defendant, Leisureworld Ltd., whereby the latter company agree to pay the rent prescribed by the lease in respect of certain premises at Tallaght, Dublin 24 "without any deductions." The first plaintiff, Westpark Investments Ltd. ("Westpark") was the landlord and the second plaintiff Vencourt Ltd. ("Vencourt") was the relevant management company. The premises in question are situated in the Village Green Centre, Tallaght, Dublin 24 and they are presently operated by Leisureplex Ltd. as an entertainment centre specialising in diverse activities such as bowling, children's adventure play areas and restaurants. The complex also specialises in birthday parties for younger children and discotheques for young teenagers.

3. In the modern era a complex of this nature simply could not operate successfully unless car park access for patrons could be guaranteed. The complex depends heavily for customers in the wider Tallaght and south Dublin region and those customers simply will not frequent the complex unless they can be assured that they will find a secure car parking space. Of course, in the nature of things, patrons frequenting the Leisureplex centre are much more likely to require to park for a significantly longer period of time than, for example, customers visiting other retail outlets in the immediate vicinity.

4. The original lease provided that the defendants had the use of some 177 car parking spaces. The car park is immediately adjacent to the complex, but other retail units are also close by. In 2007 the parties held discussions regarding plans of a company called Southside Taverns Ltd. ("Southside") to re-develop premises which it owns on the other side of the car park. (It appears that Southside and Westpark, if not technically sister companies, enjoy a high degree of common ownership.) It was envisaged that an underground car park would be built on the other side of the existing surface car park which would ultimately deliver access to more than 250 car parking spaces in total (albeit including a reduced number of spaces on the existing surface car park).

5. To that end the parties agreed to vary the original 1990 lease by deed of variation entered into on the 12th March, 2008. That deed provided that in return for the sum of €550,000, Leisureplex yielded up the its rights under the original deed and in return received access to a "minimum of I42 car parking spaces in common with others." Westpark further agreed by a side letter dated 3rd June 2008 that the Leisureplex would not be required to pay rent during the period from 1 September 2007 to 31 August 2010, with a further agreement to refund rent already paid during this period. This moratorium reflected the fact that during this period of contemplated redevelopment the number of car parking spaces would be reduced and the moratorium was presumably intended to compensate the defendants for that inconvenience.

6. A further deed which was also effected in March 2008 also allowed Westworld to install a pay and display parking system and to operate this "in accordance with good estate management." The parties further acknowledged that Leisureplex could refund its patrons the cost of parking fees and that Westworld would in turn reimburse Leisureplex where this was properly vouched. This pay and display system currently operates from 7am to 6pm, Mondays to Fridays only.

7. The proposed redevelopment did not, however, proceed. This is, perhaps, not altogether surprising given that many well intentioned plans of this nature were swept aside in the financial and economic tumult which beset the country in the latter half of 2008. As things stand, therefore, the proposed redevelopment remains incomplete and this situation is likely to continue for some time to come.

8. All of this has meant that there are less car parking places in the existing car park available for Leisureplex's customers- although the number of spaces actually lost remains a matter of dispute - and the proposed underground car park is now blocked off by an unsightly hoarding which intrudes into part of the existing car parking spaces. Westpark do not deny that some of the car parking spaces remain blocked off, but maintain that the shortfall is more than made up by access to other car parking spaces in the immediate Village Green Centre area.

9. All of this brings us to the crux of the legal issues in this matter. The three year rent moratorium came to an end in August, 2010 and it is admitted that Leisureworld have not paid rent since that date. At first blush, therefore, Westpark's claim for summary judgment in respect of the unpaid rent might seem unanswerable. The issue is, however, somewhat more complex than this. Leisureworld contend that this is not a case in which summary judgment should be granted by reason of what they contend are separate and significant breaches of contract on the part of Westworld.

The amount of available car parking spaces

10. First, it is said that Westworld are in derogation from grant in that only 70 car parking spaces have been made available. While Westworld accept that some of the car parking spaces have been lost, it maintains that some of the spaces had been lost through

the actions of Leisureplex when the premises was expanded in 1994 and in 1996. It also says that there is access to some 153 car parking spaces, namely 113 yellow spaces (being "pay and display" spaces), 5 red spaces (being reserved for disabled customers) and 35 blue spaces (disc parking spaces). For its part Leisureplex says that there are at present 41 disc permit disc spaces, 70 "pay and display" spaces and 4 disabled parking spaces. Part of the confusion here may centre on whether Leisureplex customers actually have access - whether in theory or in practice - to the disc parking spaces.

11. I conducted my own inspection of the car park and surrounding area with the consent of the parties. There is no doubt but that the hoarding has appreciably intruded into the range of car park spaces available, but beyond that a full hearing would be required to determine the extent to which these facilities have in practice been compromised and whether, in particular, disc parking facilities are in practice available to them. For the purposes of the present application- which, after all, presupposes that I must take the defendant's case at its height- I will assume that more than one half of the available car parking spaces have been denied to them.

The rent moratorium

12. There is no doubt but that the rent moratorium expressly came to an end at the end of August 2010. It is equally true to say that the side letter of June 2008 merely suspended the obligation to pay rent, so that, *ex facie*, the obligation to pay rent revived in September 2010. This, nonetheless, is not the full picture.

13. The moving party in these arrangements, Westworld, obviously did not contemplate that the underground car would remain indefinitely in this unfinished state. The rent moratorium was intended to compensate Leisureplex for the inconvenience it would suffer during this transitory period while the underground car park and associated development works were completed. In essence, neither party foresaw that construction work generally would come to an effective halt by reason of a credit and banking crisis of unparalleled severity, one consequence of which was that this project could not come to finality.

14. This consideration notwithstanding, the standard criteria of obviousness, necessity and business efficacy are simply not present such that one could imply a term which would relieve Leisureplex from the obligation to pay rent for an indefinite period. Leisureplex is, after all, deriving a substantial benefit from the contract. At the same time, the very fact that a side letter of that kind was agreed demonstrates a tacit recognition from Westworld that it was encroaching upon the rights of Leisureplex while these works were going on. Conversely, however, the entire premise of the March 2008 variation (as augmented by the June 2008 side letter) was that the construction work would have been completed by this time and that the surface car park facilities would have been restored and the overall facilities improved with an adjacent underground car park.

15. It is true that neither Leisureplex nor its customers will not have to suffer the noise and inconvenience which might have been brought about by active construction work on the underground carpark- a factor, no doubt, in the side agreement providing for the rent moratorium - yet the protruding hoarding detracts from the general appearance of the area and impacts, to one degree or another, on the range and amount of car parking spaces. Even, therefore, if one were, for this purpose, to take Westworld's case at its height and assume a relatively minor diminution in the number of car park spaces, it would nonetheless be difficult to see how it was not in breach of contract by (i) encroaching on the car parking spaces formerly provided for in the 2008 deed of variation (even allowing for the wide differences of opinion between the parties regarding the extent of this breach); (ii) allowing the visual amenities of the premises to be compromised indefinitely by the erection of the hoarding whose unsightliness undoubtedly conveys a poor message to passing customers and, perhaps most critically of all, (iii) not completing the underground car park (and associated works) as contemplated by the parties in 2008 within a reasonable time.

16. Leisureplex also complain that their customers are effectively harassed by a clamping scheme for the car park which is currently in operation and that they have lost business as a result. While not doubting the annoyance which even the most sanguine and law abiding feel about having their car clamped, it is. Unfortunately, an inherent feature of the good estate management which was expressly contemplated by the March 2008 deed of variation. While Leisureplex have probably lost some business as a result of clamping (or even the threat of clamping) and the rather confusing signage regarding "pay and display" parking on the one hand and disc parking on the other- although the extent of this was hotly disputed by Westpark such loss and damages as they have suffered on this account is probably best regarded as an ancillary feature of the amount of car parking spaces which are actually available to its customers and I propose to consider this issue as being effectively subsumed into the latter heading.

Whether a landlord who is in breach of contract can still recover rent?

17. It will be seen, accordingly, that the issue at the heart of the present case is the extent to which the Westworld's breaches of contract were such as to relieve Leisureplex from the obligation to pay rent. The standard formulation of that test is that contained in the classic judgment of Diplock L.J. in *Hong Kong Fir Shipping Company v. Kawasaki* [1962] 2 Q.B. 26 which is in the following terms:-

> "The test whether an event has this effect (to discharge one of the parties from future performance of his undertakings) or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertaking still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings."

18. This test has been frequently cited with approval by this Court: see, e.g., *Irish Telephone Rentals v. ICS Building Society* [1991] I.L.R.M. 880 per Costello J. and *Parol Ltd. v. Carroll Village (Retail) Management Services Ltd.* [2010] IEHC 498,per Clarke J.

19. In *Hong Kong Firs* the plaintiff company hired out its ship under a two-year time charter-party to a Japanese company, Kawasaki. It was to sail from Liverpool to collect a cargo at Newport Mews, Virginia, and then to proceed via Panama to Osaka. A term in the charter party required the ship to be seaworthy and to be "in every way fitted for ordinary cargo service." It transpired, however, that the crew were both insufficient and incompetent to deal with her old fashioned machinery; and the chief engineer was frequently drunk. In the course of the voyage, the engines suffered several breakdowns, and was off-hire for a total of five weeks, undergoing repairs. On arrival at Osaka, a further fifteen weeks of repairs were needed before the ship was seaworthy again. By this time, only seventeen months of the two-year time-charter remained. By this stage the defendant terminated the contract for the plaintiffs breach. The plaintiff riposted that Kawasaki were now the party in breach for wrongfully repudiating the contract.

20. In the English High Court, Salmon J. that although the ship was a seaworthy vessel on delivery in Liverpool, Hong Kong Firs had not exercised due diligence to maintain the vessel in an efficient and seaworthy state. Critically, however, Salmon J. ruled that this breach was not sufficiently substantial to enable Kawasaki to repudiate the charter. This conclusion was affirmed on appeal by the English Court of Appeal, since it could not be said that either the unseaworthiness in itself or the consequential delay was of such a magnitude as would deprive the other party of the benefit of the contract. As Sellers L.J. explained:

> "If what is done or not done in breach of the contractual obligation does not make the performance a totally different

> performance of the contract from that intended by the parties, it is not so fundamental as to undermine the whole contract. Many existing conditions of unseaworthiness can be remedied by attention or repairs, many are intended to be rectified as the voyage proceeds, so that the vessel becomes seaworthy; and, as the judgment points out, the breach of a shipowner's obligation to deliver a seaworthy vessel has not been held by itself to entitle a charterer to escape from the charter-party. The charterer may rightly terminate the engagement if the delay in remedying any breach is so long in fact, or likely to be so long in reasonable-anticipation that the commercial purpose of the contract would be frustrated."

21. The powerful and eloquent judgments in *Hong Kong Firs* are properly regarded as a milestone in the evolution of the law of contract. The case emancipated the common law from the stultifying formalism inherent in the distinction between conditions and warranties for the purposes of ascertaining whether a particular contract had been discharged by breach in favour of a test which sought to inquire whether the other party to the contract had been effectively denied the benefits which the contract intended he or she should enjoy.

22. This was the test which Clarke J. applied in *Parol Ltd*. where he stated:-

> "A landlord who either fails to comply with the landlord's obligations under a lease or acts otherwise in a manner to a sufficient extent so as to substantially prevent a lessee from using the lessee's premises in the manner contemplated by the lease in question, renders the lease open to being regarded as having been repudiated by the landlord concerned. What amounts to such conduct will depend on the facts of each individual case. Some actions on the part of the landlord may be one off but nonetheless so serious as to meet that test. On the other hand, a persistent failure on the part of the landlord (particularly when called upon to desist) might also amount, in principle, to circumstances justifying the lessee as treating the lease as having been repudiated, even though such action for a brief period of time or on a relatively small number of occasions, might not be sufficient."

23. In that case the defendant company had closed a major retail outlet in a shopping centre. The defendant sought to justify its breach of contract by reference to a series of complaints on the part of the tenant, such as the failure to open the car park by 9 am each morning, the early closing of some entrances, the failure to have adequate lighting at night and similar complaints of this nature. Clarke J. found on the facts that anticipated trading losses was the real reason for the decision to close the premises and that none of the suggested breaches of contract had played a role in this decision:

> "Taking each of those complaints, either individually or collectively, same seemed to me to barely establish any breach by Carroll Village of its obligations in respect of the management of the centre at all and certainly no breach which would go anywhere near satisfying the legal test for repudiation, which I have already set out. In those circumstances, I was not satisfied that any of those complaints could amount to a justification on the part of Superquinn for its decision to close the store."

24. In the present case the actual or potential breaches of contract on the part of Westpark are admittedly more serious. While Westpark point to the relatively consistent trading patterns of Leisureplex as reflected in their accounts, it nonetheless requires little imagination to see how the somewhat unsatisfactory nature of the carpark arrangements has impacted on the latter's business. It is certainly no answer to say in this context that if Leisureplex consider that the breaches are that serious that it can elect to repudiate the lease, as this would simply mean that it would be obliged effectively abandon a business and good will which they it has built up over twenty years.

25. But even if it were to transpire at the full hearing that the diminution in car parking spaces is as acute as Leisureplex contend it is, this breach (or breaches) could not in itself (or themselves) justify the total non-payment of rent. Leisureplex has nonetheless received (and receives) a substantial benefit from this contract and it must accordingly pay rent in accordance with the terms of the contract.

26. If, therefore, Leisureplex have a valid claim in respect of the car parking issues, this claims sounds against Westpark by way of counter-claim for breach of contract and not by way of defence. This brings us to the question of whether the Leisureplex's claim for unliquidated damages as against Westpark can properly be set off in these proceedings as against the rent which is otherwise admittedly due.

The extent to which Leisureplex can rely on the doctrine of set-off

27. Section 48 of the Landlord and Tenant (Ireland) Act 1860 ("Deasy's Act") deals with the right of set-off as between landlord and tenant in the following terms:

> "All claims and demands by any landlord against his tenant in respect of rent shall be subject to deduction or set-off in respect of all just debts due by the landlord to the tenant."

28. The conventional view is that s. 48 of Deasy's Act as interpreted by Maguire P. in *MacCausland v. Carroll* (1938) 72 I.L.T.R. 158 precludes a right of set-off against rent in respect of unliquidated claims: see, *e.g., Riordan v. Carroll* [1996] 2 I.L.R.M. 262, per Kinlen J. and *Harrisrange Ltd. v. Duncan* [2002] 4 I.R. 1, 21, per McKechnie J. Yet one cannot help wondering if, perhaps, *MacCausland* has not been over-interpreted as an authority. Certainly, the complete focus of the argument and judgment in that case appears to have been on the wording of the then applicable Circuit Court Rules. At that time Ord. 7, r.6 of those Rules contained a special provision with regard to set-off in actions for rent, since the tenant seeking to invoke s. 48 of Deasy's Act was required to make a lodgement by way of defence. It may be noted that Ord. 15., r. 7 of the Circuit Court Rules 1997 contains no such equivalent limitation

29. At all events, Maguire P. observed:

> "It seems to me that [Ord. 7, r. 6] taken with the wording of s.48 of the Landlord and Tenant (Ireland) Act 1860 makes it clear that the right of set-off in an action for rent is limited to where a liquidated sum is due by the landlord. That that is so appears clear from the wording of the rule and it seems it is only a claim for a liquidated sum that can be set-off as the rule says the defendant must lodge money in Court at the time of entering his defence."

30. The first thing to note is that s. 48 of the Act of 1860 makes no distinction on its face as between liquidated and unliquidated claims and there is nothing in the judgment which suggests that there is. Second, the judgment rests almost completely on the wording of then Circuit Court Rules, albeit that Ord. 7, r. 6 has no modern equivalent. Third, insofar as Maguire P. rested his judgment on s. 48 at all - which is not clear- it is clearly in a context where the scope and meaning of the section has been tacitly extended by the rules. Of course, the Supreme Court has since held that the scope and meaning of a statute cannot be extended by regulations

such as rules of court: see, e.g., *Frescati Estates Ltd. v. Walker* [1975] I.R. 177, 187-188 *per* Henchy J. and *Rainey v. Delap* [1988] I.R. 494, 479-480 *per* Finlay C.J.

31. These considerations notwithstanding, the result in *McCausland* can, I think, nonetheless be independently justified on the basis that the content of the right to set off conferred by s. 48 is one of a claim for a liquidated debt. After all, the section speaks of "all just *debts* due by the landlord to the tenant" (emphasis supplied) and this language certainly more happily accommodates a claim for an ascertainable liquidated sum as distinct from a general claim for breach of contract: see generally, Dowling, "Set-Off against Rent" (1988) 39 N.I.L.Q. 258, 270-271.

32. It should, however, also be observed that s. 48 is essentially permissive in that allows for a form of statutory set-off arising from mutual liquidated claims arising as between landlord and tenant from the contractual relationship. It cannot be said that the legislature thereby intended to abolish or extinguish the *equitable right* of set-off. This is especially so given that the Act of 1860 pre-dated the fusion of law and equity which was later to be effected in this jurisdiction by the Supreme Court of Judicature (Ireland) Act 1877. It should also be recalled that, in view of the presumption against unclear changes in the law, clear and express language would have been necessary for this purpose.

33. In line, therefore, with the views expressed by Dunne J. in *Irish Life Assurance plc v. Quinn*, High Court, 31st March 2009, I consider that Leisureplex can in principle, at least, invoke the doctrine of equitable set-off by way of counter-claim to the claim of Westpark. As the right of set-off is only excluded where the very nature of the agreement is inconsistent with the exercise of that rights (cf. the comments of Murphy J. in *Hegarty & Sons Ltd. v. Royal Liver Friendly Society* [1985] I.R. 524, 529), I likewise agree with Dunne J. in *Irish Life* that the use of the phrase "without deductions" in the 1990 rental agreement cannot in itself bar Leisureplex's right- if otherwise applicable - to equitable set-off as it is not necessarily inconsistent with the exercise of such a right.

34. The claim arises out of the same contract and, unlike specific facts of both Irish *Life and Moohan v. SR Motors (Donegal) Ltd.* [2008] 3 I.R. 650 where the cross-claims were regarded on their facts by both Dunne J. and Clarke J. respectively as *post-hoc* and opportunistic attempts based on slender evidence to resist judgment, the same cannot be said in the present case. Here in contrast, the very fact that Westpark agreed to a rent moratorium for three years pending the completion of the underground carpark is telling proof that the parties acknowledged that Leisureplex would suffer loss and damage while these carparking places were taken out of commission. Unlike, therefore, the specific defendants in both *Irish Life* and *Moohan*, Leisureplex are *prima facie* entitled to invoke the right of equitable set-off.

35. How, then, should this Court approach the issue of equitable set-off in these circumstances? As Kingsmill Moore J. noted in *Prendergast v. Biddle*, Supreme Court, 31st July 1957:-

> "On the one hand it may be asked, why a plaintiff with [an] approved and perhaps uncontested claim should wait for a judgment or execution of judgment on this claim because the defendant asserts a plausible but unproved and contested counter claim. On the other hand it may equally be asked why a defendant should be required to pay the plaintiff's demand when he asserts and may be able to prove that the plaintiff owes him a larger amount."

36. Kingsmill Moore J. then approached the matter this way:

> "It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counter claim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties. If, for instance, the defendant could show that the plaintiff was in embarrassed circumstances it might be considered a reason why the plaintiff should not be allowed to get judgment, or execute judgment on his claim, until after the counter claim had been heard, for the plaintiff having received payment by dues the monies to pay his debts or otherwise dissipated so the judgment on a counter claim would be fruitless. I mentioned earlier some of the factors which a judge before whom the application comes may have to take into consideration in the exercise of this discretion".

37. In other words, in a practical application of the principle that he who seeks equity, must do equity, the defendant seeking equitable set-off must be in a position to establish that there is a real prospect of success on that counter-claim. This is, perhaps, the principal - albeit by no means the only- discretionary factor which must inform the court's judgment. The entire approach was summarised thus by Clarke J. in *Moohan*:

> "(a) It is firstly necessary to determine whether the defendant has established a defence as such to the plaintiffs claim. In order for the asserted cross claim to amount to a defence as such, it must arguably give rise to a set off in equity, and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendants case, it would not be inequitable to allow the asserted set off;
>
> (b) If, and to the extent that, a *prima facie* case for such a set off arises the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate proportion of) the claim (or have same, in a case such as that with which I am concerned, referred to arbitration);
>
> (c) If the cross claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in *Prendergast v. Biddle*."

38. Applying those principles here, there are powerful grounds for suggesting that the plaintiff has been in breach of contract, albeit that the extent of any such breach remains to be determined during the course of the plenary hearing. At the moment, the extent of the losses suffered by the Leisureplex remains to some extent a matter of conjecture and the extent to which its customers can in practice avail of the disc parking spaces may be a critical factor here.

39. I confess that, even assuming that Westpark will be found to be in breach of contract, I have not found it easy to make an assessment of the likely calculation of the defendant's losses, as much will depend on the evidence on the car parking issues at the full hearing. If the car parking issue turned out to be as acute as Leisureplex suggest, these damages might be quite significant. If, on the other hand, the loss of spaces has been as marginal (or even non-existent) as Westpark claim, then the level of damages might be significantly more modest. As I have already indicated, it is, however, hard to see how Westworld will ultimately avoid liability for breach of contract in respect of the presence of the hoarding and the non-completion of the underground car park works.

40. In these circumstances, I have concluded that Leisureplex are entitled to summary judgment for 50% of the outstanding rent,

with the balance of the claim standing adjourned for plenary hearing. Given the entitlement of the plaintiff to outstanding rent when measured against the uncertainties associated with (to some variable degree) issues of liability and (more especially), the quantum of damages so far as the defendant's counter-claim is concerned, I do not think that I can quite adopt the approach of O'Sullivan J. in *Leopardstown Club Ltd. v. Templeville Developments Ltd.* [2006] IEHC 133 and remit the entirety of the claim to plenary hearing.

41. Of course, this does not at all mean that Leisureplex will not ultimately be able to establish that the level of damages payable to it are greater than this. This figure simply this represents my best assessment on an *ex aequo et bono* basis of the likely range of possible damages which might or will be established by way of counter-claim when measured against and set-off against the admitted entitlement of the plaintiff to unpaid rent and as to how the respective rights and interests of the parties can be fairly maintained on an interim basis pending the outcome of the full hearing.

42. I propose therefore to give summary judgment in the sum of €478,000 and I will discuss the precise form of order with counsel.