Neutral Citation Number [2006] IEHC 133

THE HIGH COURT

[2004 No. 1082S]

BETWEEN

THE LEOPARDSTOWN CLUB LIMITED

PLAINTIFF

AND

TEMPLEVILLE DEVELOPMENTS LIMITED AND PHILIP SMYTH

DEFENDANTS

Judgment of O'Sullivan J. delivered the 4th of May, 2006

1. This is an appeal by the first and second defendants as tenant and part guarantor of rent due to the plaintiff under lease dated 5th June, 1998, against a summary judgment of the Master of the High Court for arrears of rent, interest and costs. At the time the matter came before the Master there were no replying affidavits, the defendants being out of time limited for that purpose. The matter has been heard by way of rehearing before me and there are extensive replying affidavits and responses thereto.

2. The defendant accepts the calculation and *prima facie* entitlement of the plaintiff to the rents but have referred to a number of complex ongoing disputes arising out of their occupation of a significant portion of the plaintiff's property at Leopardstown, Co. Dublin. Accordingly the defendants assert defences by way of set off and also a counterclaim and seek to have the plaintiff's claim remitted for plenary hearing.

3. I propose, first, to set out as briefly as possible the nature of the disputes referred to by the defendants and then to indicate, again as briefly as possible, the submissions made by counsel on behalf of the parties.

Background

4. The plaintiff owns and operates a racecourse over a large tract of land at Leopardstown, Co. Dublin. By lease of 5th June, 1998, the first defendant occupied part of these lands upon which are constructed, inter alia, a large and complex sports facility, several outdoor tennis courts and indoor tennis courts underneath two air filled domes and ancillary buildings. They also enjoy, in common with the plaintiff, the right to have their patrons park their cars in two identified car parks at all times and on "race days" (somewhere between twenty and thirty days per annum) on further car parks designated by the defendant and on non-race days on the residue of a parcel of land referred to in these proceedings as "the yellow hatched lands" which lie between the buildings referred to and the south eastern motorway. The first defendant's entitlement to occupy the yellow hatched lands was made subject to part occupation thereof of the south eastern motorway and the arrangements between the parties made on 5th June, 1998, anticipated the provision by the plaintiff of a "new site" to be provided by the plaintiff in replacement of any of the first defendant's entitlements under the lease of 5th June, 1998, which would be affected by the motorway.

5. Because in June 1998 the anticipated CPO had not yet been served, the parties were unable at that time to identify particular areas which would be affected by it. Accordingly the arrangements then made were temporary in nature the general intention being that suitable alternative facilities would be granted to the first defendant to replace those lost to the CPO.

6. Events have moved on, the CPO has been served and the road has been built and indeed there were injunction proceedings dealt with by myself on 10th December, 2003, when I granted the first defendant (as plaintiff in those proceedings) an injunction restraining the building of a ramp intended for construction in connection with the then proposed motorway, portion of which trespassed onto lands over which the first defendant had rights. The injunction was granted in the context of a then anticipated imminent arbitration dealing with a number of disputes. It proved impossible, subsequent to the granting of the injunction, for the parties to agree the questions to be referred to arbitration and as a result of the delay the injunction was ultimately discharged by Murphy J. on 30th July, 2004, the ramp has subsequently been completed. The difficulties and delays continued and today in a separate judgment I have ruled on issues relating to the arbitrator's jurisdiction.

7. The foregoing is relevant in the instant context, however, because the claims (and losses) which have been referred to arbitration are relied upon by the first defendant by way of defence to the plaintiff's claim for rent. I will now set out these briefly so that the legal submissions of the parties can be more fully understood.

The Defendants' Claims

8. These are set out in a fifty four paragraph affidavit of the second defendant who is a director of the first. This elicited a seventy six paragraph response from Matthew O'Dwyer, General Manager of the plaintiff. There is a further twenty nine paragraph affidavit from Mr. Smyth, responded to by a thirty one paragraph affidavit from Matthew O'Dwyer and a third thirteen paragraph affidavit from Philip Smyth. There are voluminous exhibits to these affidavits and the hearing before me took substantial parts of two days in court devoted to legal submissions the affidavits being in the main read by myself outside of this hearing by arrangement with the parties. There is a claim that construction vehicles trespassed onto the first defendant's area for two days in January 2002, that there was a loss of thirty one car park spaces obliterated by the construction of a ramp, portion of which was trespassing on the defendant's portion of the yellow hatched area (after allowing for the CPO "take"), damage to an airlock at the corner of one of the two domes covering indoor tennis courts, and further damage to the sub-floor and foundations supporting this dome by the team engaged in constructing the ramp. A further claim complains that portion of the land occupied by this dome was wrongly conveyed by the plaintiff to the acquiring road authority and a further complaint relates to the inadequacy of the "new site" offered by the plaintiff to replace the facilities lost because of the CPO. The first defendant contends that because 5.5 acres of parking were taken for the new road the new site should have included, but did not, an area of this amount for parking. This issue has been referred to arbitration. There are mutual claims by the parties in relation to the other's alleged delay in progressing the arbitration but these were not particularly relied upon in Court.

9. The first defendant relies upon the background that, with its cooperation, the plaintiff has made a compensation claim to the road acquiring authority which yielded "almost €30 million" – the cooperation being a waiver by the defendant of its own claim for compensation in favour of merging it with the plaintiff's. A further complaint relates to an allegation that a sign at the entrance to the complex from the road does not conform to an agreement that the defendants' sports facility would be referred to at the top whereas its name appears at the bottom where it is difficult to read because of obstruction from foliage. Efforts to arrange a further sign have been deliberately frustrated according to the defendant. So also in relation to arrangements for a shuttle bus service from the front gate of the sports facility on race days, the allegation being that the plaintiff has deliberately refused to engage in negotiations which would minimise inconvenience to the first defendant.

10. In response to these complaints Matthew O'Dwyer's second affidavit (his first being in support of the claim for summary judgment

for rent and interest) points out that the first defendant has been in continued occupation of the premises demised to it under lease and despite this the plaintiff has not received rent for three years. The defendant has continued to operate its sports and fitness business and no liquidated sum is due to it. All of the disputes are hotly contested and the relationship between the parties it is stated has reached a very low ebb. The vast bulk of the issues have been referred to arbitration. A background of non-cooperation by the first defendant is set out including an allegation that the first defendant initially delayed referring the issues to arbitration and having agreed, subsequently has failed to serve an amended statement of claim in relation to the balance of the issues before the Court. Criticism is made of the defendant's conduct in relation to the injunction proceedings relating to the ramp (including the initiation and subsequent abandonment of contempt proceedings against the plaintiff) and also the allegation is made, as already indicated, that the defendant is delaying the arbitration proceedings. Reference is made to a rent review arbitration and service charge arbitration which result in the defendant not having to pay any increased rent or service charges until these are concluded.

11. It is asserted that the plaintiff has complied with its obligations under the licence because the plaintiff was entitled to recover for its own purposes part of the area hatched yellow provided it offered a "new site" to the defendant which it has said it has done. There is of course a major dispute as to the adequacy of this site.

12. The conveyance of the airlock lands was a mistake and not deliberate as alleged, and moreover the plaintiff has agreed with the local authority to have them re-conveyed back. This is known to the defendant whose account is therefore misleading. Furthermore there is sufficient space for the construction of the additional seven tennis courts on the lands offered to the defendant notwithstanding an allegation to the contrary by them. The first defendant has never indicated an alternative site that would be acceptable.

13. Regarding parking rights it is said that the area where a hundred and fifty spaces have been lost, was muddy and wet in winter (the busiest time) and unsuitable. Moreover, they were not under the lease at all and the defendant was offered further parking on the far side of the bridge but this was refused because the defendants' solicitor's letter dealing with this said it already had parking rights in any car parks which the plaintiff designates. Whilst the thirty one car parking spaces (obliterated under the ramp) are completely lost this is not true of the one hundred and fifty spaces at all. (In fact during the hearing it appeared that these were now accessible to the first defendant, albeit it perhaps in a way less convenient than originally). With regard to signage the plaintiff says it has no obligation to consent to additional signs and it is further stated that the plaintiff has complied with its shuttle bus obligations for race days. A further affidavit from Philip Smyth continues engagement in regard to a number of these matters and concludes that the defendant would be entitled to compensation "which amount would be well in excess of the arrears of rent allegedly due". A response from Matthew O'Dwyer proceeds with further engagement and notes towards the end that "all Mr. Smyth has is a claim of belief as to Templeville's entitlement to compensation. Significantly, he has omitted to provide any evidence whatsoever of any claimed loss whatsoever." Both counsel accepted that this was a throwing down of the gauntlet to Mr. Smyth to quantify the claim and this is what he did in a responding third affidavit.

14. Therein he says that as a result of the repeated "egregious" conduct of the plaintiff towards the first defendant, Templeville sustained considerable financial loss and expense which will form part of its claim/counterclaim for damages. He says the Westwood Club management accounts in respect of the business at Leopardstown for the years 2002, 2003 and 2004 demonstrate heavy losses of income. Between the three years the loss is circa €1,750,000.00. He says "this in turn translates into a loss of profit (net of expenses) of circa €1,400,000.00. The figures for 2005, to date, show that there has been no recovery in performance". He goes on to say that approximately 50% of the aforesaid loss of profits is attributable to the actions of Leopardstown by way of interference and disruption with the business activities of Westwood Club. These have been referred to in his earlier affidavits but he specifically refers to, the issue in relation to advertising signage, the refusal to engage in relation to the operation of the shuttle bus on race days, the refusal of the plaintiff to replace car parking, the refusal of the plaintiff to grant the new site which will enable Templeville to develop its tennis facilities and the general approach adopted by the plaintiff in its day to day dealings with Templeville and in its refusal to implement the terms of legal agreements. As a result the defendant and the Westwood Club are continuing to suffer substantial loss of income. He attributes a loss of circa €700,000.00 since January 2002 to the complained of actions of the plaintiff and he says the claim for damages is substantial indeed and "may well exceed" any claim for arrears. He exhibits a letter from the company's auditors supporting the loss for the three years.

The Submissions

15. Mr. Gordon SC on behalf of the plaintiff submits that no specific link is made between the claims elaborated in the affidavits and any particular loss apart from the mere assertion that half the company's loss for the nominated three years is attributable to these activities of the plaintiff. Some of the complaints relate to matters going back as far as 2002 and there is no excuse for the complete absence of any attempt to quantify the loss in relation to these complaints.

16. Indeed there is no substance to the claims. For example in relation to car parking the claim for loss of one hundred and fifty car parking is greatly exaggerated if non-existent and must be seen in the context that the defendant has access to a wide variety of other car parks so designated by the plaintiff in the Leopardstown complex. The defendants' claims are exaggerated and it is note worthy that in his last affidavit Philip Smyth resiles from asserting that the defendants' claim will greatly accede the plaintiff's and merely says it may well do so. It is instructive that the first and indeed the second of the specified heads of claim in Philip Smyth's last affidavit relates to the signage and shuttle bus issues respectively. These must be relatively small heads of claim and indeed the evidence at present would not justify any award at all. These so called defences are not bona fide and are not sufficient to protect the tenant from the landlord's conceded claim for rent. The first defendant has been in occupation but the landlord has received no rent for three years.

17. In response, in relation to the facts Mr. Cush SC for the first defendant pointed out that it was always clear that the first defendant's claim sounded in general damages and that the significant drop in income and in profits took place in the middle of an economic boom when one would expect a sports facility in south County Dublin to be doing exceedingly well. By accepting that only half of these losses were attributable to the plaintiff's behaviour they were acknowledging that there may be other reasons for this drop in income. It is unfair for the plaintiff to pick on the final list which is not comprehensive and whilst the issues relating to signage and shuttle bus may not themselves be the biggest element in the defendants' claim if a Court on a full hearing were to decide that the plaintiff were deliberately frustrating the defendant in these regards such a finding would colour its approach to the other more significant heads of claim. The loss of five and a half acres for car parking adjacent to the domes must be a very significant part of the defendants' claim but of course depends on the outcome of the arbitrator's decision. The failure to deliver a suitable site for the development of the defendants' tennis courts is also significant and there is a manifest loss of thirty one sites obliterated by the construction of the ramp. Moreover, it is unfair to complain that the defendant is not progressing these claims because a major one relating to car parking will depend on the outcome of the arbitration.

Legal Points

18. Mr. Gordon SC on behalf of the plaintiff makes the following submissions:-

None of these defences are available to the defendant because the covenant in the lease provides for payment of the rent "clear of all deductions" This precludes a defence of either legal or equitable set off or a defence based on an equitable right to set off unliquidated claims, assuming, which is not admitted, that these latter two defences exist in Irish law.

It is a matter of interpreting the covenant. This interpretation gains support for the observation in Wiley's Landlord and Tennant Law at para. 12.09 where he notes that the two concepts (of set-off and deduction) tend to be used interchangeably. Accordingly these defences are unavailable because the defendant as tenant has contracted to pay the rent without set-off of any kind.

If this point is correct that is the end of the matter and judgment should be marked.

19. If the foregoing is not correct s. 48 of Deasy's Act provides:

> "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."

20. Under this section as interpreted in Irish Law a tenant may avail himself only of a set-off in relation to a liquidated amount. Reliance is placed on *MacCausland and Anor. v. Carroll and Anor.* (ILTR Volume LXXII, 158 at 159) where McGuire P. ruling on a Circuit Appeal held:

> "It seems to me that the rule 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 amount that can be set-off, as the rule says the defendant must lodge money in Court at the time of entering his defence."

21. In that case the tenant's claim in relation to an alleged failure of the landlord to carry out repairs was not allowed to be set-off against the claim for rent. This case was referred to with approval by Kinlen J. in *Riordan & Anor. v. Carroll & Anor* [1996] 2 ILRM 263. It was also referred to, *obiter*, again with approval, by McKechnie in *Harrisrange Limited v. Duncan* [2003] 4 IR 1, where the plaintiff's claim for summary judgment for mesne rates was refused.

22. Reliance was also placed on a comment in an article in Volume 39 No. 3, Autumn 1988 of the Northern Ireland Law Quarterly by Professor Alan Dowling to the effect that the judge in *MacCausland* was correct in holding that it is only liquidated amounts that can be set off under s. 48 of Deasy's Act, because it is suggested that is in keeping with the concept of a debt, and in keeping also with the cases on legal set-off under the statutes of set-off.

23. Furthermore in relation to the question whether an equitable right of set-off in common law survives s. 48 of Deasy's Act Mr. Gordon SC submitted that there is no Irish case since the foundation of the State which allows such a right and he refers again to the three cases already mentioned. English cases dealing with an equitable right of set-off are of no assistance because the equivalent of Deasy's Act does not apply in that jurisdiction. Even so, a case relied upon by Mr. Cush SC, *British Anzanai (Felixstowe) Limited v. International Marine Management (U.K) Limited* [1980] 1 Q.B 137, proceeded on the basis that counsel for the plaintiff lessors conceded that there is no case in which it has been held that there is no set-off of an un-liquidated claim against rent. Leaving aside the consideration that this was an English case, therefore, it is scarcely authority for a decision that such a right of set-off exists.

24. By a asserting such a right, and in Irish law, Mr. Cush is therefore pushing at the boundaries.

25. Furthermore it is only if all of these arguments fail that the court would proceed to apply the usual rules applicable to defences raised in summary judgment applications as set out, for example, by the Supreme Court in the judgments in *Aer Rianta Cpt. v. Ryanair Limited* [2001] 4 I.R. 607.

26. He relied also on a judgment of Murphy J. in *First National Commercial Bank Plc. v. Anglin* [1996] 1 I.R. 75 quoting the principle laid down in *Banque De Paris v. De Naray* [1984] 1 Lloyd's Rep. 21, saying:-

> "The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the court had to look at the whole situation to see whether the defendant had satisfied the court that there was a fair or reasonable probability of the defendants having a real or bona fide defence."

27. Having regard to his earlier recited observations in relation to the facts Mr. Gordon SC submitted that there was not a bona fide defence in the present case. He also relied in particular on the last of the (xii) principles referred to by McKechnie J. in *Harrisrange* at pg. 8 to the effect that the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be.

28. If the court concludes that there is no defence but that there is a counterclaim then the principles enunciated by Barrington J. in *Agra Trading Limited v. The Minister for Agriculture* (Unreported, 19th May, 1983) apply and he submitted that under these principles the particular reference to the apparent strength of the counterclaim 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 (as referred to at pg. 14) and bearing in mind that the claim for rent is admitted subject only to the existence of the defences and counterclaim, the plaintiff should be entitled to mark judgment for rent and interest.

29. In response Mr. Cush SC submitted that if the court is satisfied that a defence has been raised then the ordinary summary judgment principles should apply as, for example, enunciated by the Supreme Court in *Aer Rianta Cpt. v. Ryanair Limited.* Alternatively if such defence is not available but that a counterclaim exists then the court should apply the principles set out in *Agra Trading Limited*.

30. With regard to the raising of defences in response to Mr. Gordon's argument that the rent was to be paid by agreement without any deductions (and therefore without any reference to set-off or counterclaim) the comment in Wylie at para. 12.09, to the effect that there is a distinction between a right of set-off and a right of deduction does not in fact support this argument. There is at least an arguable case that a defence exists which invokes an equitable right to set-off the un-liquidated claims of the tenant against the claims for rent.

31. In order to defeat such an argument the plaintiff would have to show two things, namely that the deduction or set-off referred to in s. 48 of Deasy's Act is confined to liquidated claims (a proposition admittedly supported by two Irish decisions of the High Court dealing with appeals from the Circuit) but also no independent right of equitable set-off exists in Ireland, or, in other words, that without saying so s. 48 of Deasy's Act abolished such an independent right of set-off.

32. This precise point has never been raised in this jurisdiction before and, if the court were simply to accede to it on this summary application, it would, *inter alia*, be ignoring the analysis advanced by Professor Dowling in the article referred to at pg. 275 where he suggests after such an analysis that it would be very unlikely that a court would hold that such equitable right of set-off has been abolished by s. 48. The learned author continues by suggesting that, accordingly, there exists in favour of a tenant both a legal right of set-off under Deasy's Act and an equitable right of set-off where the circumstances are such that the tenant's claim impeaches the title to the plaintiff's demand. This latter concept appears to be a reference to a close connection between the claims of the defendant as tenant and the plaintiff's demand as landlord. (See the judgment of Forbes J. in *British Anzanai* pg. 152, e).

33. There are, clearly, some substantial and indeed untried points of law which are not suitable for determination on an application for summary judgment. Furthermore having regard to the existence of substantial claims notwithstanding the criticism of the plaintiff the matter should be referred for plenary hearing. An incidental advantage of plenary hearing would be that the plaintiff could claim for all rent as distinct from being confined to rent due only at the time of the initiation of the summary summons.

Conclusion

34. In the *Aer Rianta* case Mr. Justice Hardiman's view was that:-

> "The fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

35. This in his view was the general principle as distinct from cases where credibility arises starkly for example where defence affidavits were mutually contradictory or flatly contradicted by a private detective or indisputable documentation. Mrs. Justice McGuiness in the same case in remitting the proceedings for plenary hearing concluded that the probability remained open on the affidavit evidence then before the court that the defendant had a real or bona fide defence, or that what was put forward by him was credible. In her view the matters which were so acutely at issue between the parties required to be resolved in a full hearing.

36. I have had to consider not only the claims raised by the defendant but also the rejection of them in the plaintiff's affidavits and the criticism of these claims by counsel for the plaintiff. Can I, as a result, be satisfied that I can exclude a fair or reasonable probability of the defendant having a real or bona fide defence, to use the language of McGuiness J. in *Ryanair Cpt.* at pg. 617? Alternatively is this a case, to use the language of Hardiman J. in the same case at pg. 605 where the length, complexity and subtlety of the competing arguments, factual and legal, on affidavit and in court, recall the observations of O'Brien C.J. and his colleague in *Crawford v. Gillmor* [1891] L.R. Ir. 238, to the effect that the case has been so long at argument – and he did not think that it had been argued at unnecessary length – showed that it was not a case for final judgment upon an interlocutory motion because judgment should not be given on a motion for final judgment in any case where any serious conflict as to matter of fact or any real difficulty as to matter of law arises.

37. It is noteworthy that Hardiman J. referred not only to length, complexity and subtlety of competing arguments of fact but also of law.

38. With one qualification I think the foregoing applies to the instant case and my conclusion therefore is that it is not a case appropriate for summary judgment.

39. The one qualification is that none of the authorities referred to or indeed advanced in argument appear to deal directly with the situation which arises in the present case where claims which are allegedly exaggerated and contingent on the outcome of arbitration are made by the defending tenant. There are of course, references in the authorities to the fact that the mere assertion of claims is not of itself sufficient to ward off summary judgment. Nor can it be the law, I think, that the mere multiplication of paperwork and reiteration of argument and grievance can of itself protect a tenant from a landlord's right to summary judgment for rent. If that were all that were contained in the defendant's lengthy affidavits and exhibits I would be justified I think in making an order for summary judgment. However I think there is more than that in the material advanced by the defendant. The claims sound in general damages, they are indeed in part contingent on the outcome of an arbitration and in my opinion the linkage between the complaints and the claimed losses is less than compelling. Mr. Cush SC says, however, it is, or at least may be, significant that a sports facility operating in the south side of Dublin during a boom should show a sustained loss over three years. On the authorities final judgment should be exercised on an application such as the present one only with caution and only when the court is satisfied to rule out a fair or reasonable probability of the defence having a real or bona fide defence. I am not so satisfied. On the contrary to use the wording of Hardiman J. in *Aer Rianta* it is not to me very clear that the defendant has no case. Nor are the issues "simple and capable of being easily determined." I am however, concerned at the lack of material quantification of the defendants' claims and in that regard I will discuss with counsel the question of terms pending final hearing.

40. Accordingly there will be an order setting aside the order of the Master of 15th March, 2005, substituting therefor an order giving the defendants leave to defend the proceedings and adjourning the case for plenary hearing.

41. I will consult with counsel in relation to any further directions including as to whether an order is necessary confirming that the second named defendant be at liberty to defend these proceedings.