Neutral Citation Number [2012] IEHC 187

THE HIGH COURT

COMMERCIAL

[2009/4910S]

BETWEEN

HELSINGOR LIMITED

PLAINTIFF

AND

THOMAS WALSH AND MARY WALSH

DEFENDANTS

JUDGMENT of Mr. Justice Sean Ryan delivered the 2nd February 2012

The plaintiffs motion for summary judgement in this case was refused and the matter was referred to plenary hearing. See the written judgment dated the 5th March 2010 delivered by Mr Justice Charleton. The background to the case is set out in that judgment.

Mr James Doherty, Barrister, appeared for the plaintiff. The defendants represented themselves. When the case was called, counsel announced that his and his solicitor's retainer had been withdrawn and that the defendants would present their own case. Mr and Mrs Walshe were accompanied by their daughter Sandra who assisted them during the hearing.

The matter may be summarised as follows. Pursuant to a series of agreements made in 2005 the defendants gave up their garage premises in Baldoyle, Dublin 13 so that an associated company of the plaintiff could demolish the buildings to give access to a major housing and apartment development that was then under construction. In return, the plaintiff agreed to build a new garage premises on a nearby site that the plaintiff owned. The plaintiff borrowed the money to fund the construction of the new garage as part of the overall funding of the scheme of development. The building took longer than expected and the defendants had to order many extras to make the premises suitable for use in their business. The cost of the extras is one of the issues in this case.

The arrangement was that the defendants would move into the premises in the first instance as tenants on foot of a letting agreement that was to continue for 4 years and 9 months. The rent was to be the cost to the plaintiff of borrowing the money to pay for building the garage. It was agreed that the building cost was €3,115,000 so the interest on that amount was to be the rent. At the end of the period of the letting agreement, there were put and call options: the defendants could decide that they were going to buy the garage or the plaintiff could require them to do that. Alternatively, the defendants could choose to continue as tenants at a commercial rent.

The defendants moved into the garage in or about April 2006. There was some controversy about that date. Mr Tom Walsh and his son Mr Mark Walsh complained about the delay in building the garage. And they said that by the time the extras that they had to order were completed, it was much later in 2006. Although Mr Justice Charleton found that the relevant date was 30th of April 2006, Mr Walsh senior and junior felt they had not got the value of the building until later that year.

The claim herein is for the cost of the extras and also for arrears of rent. In its summary summons the plaintiff claims firstly arrears of rent up to the 29th day of April2009 in the amount of €743,798.88 less rent paid in the amount of €520,000 and secondly extras in the amount of €947,725 inclusive of VAT. Further rent has become due since then.

The plaintiffs evidence formally proved its case on the two issues. Mr John Casey, a Chartered Accountant who is a partner in Price Waterhouse Coopers testified as to the objective reasonableness of the interest rate that the plaintiff charged having regard to the nature of the loan and comparing the Anglo Irish Bank margin with other banks. Mr. Seamus Ross Junior was centrally involved in all of the transactions with the defendants. Mr Ben Curtin and Mr Ronan Quinn gave uncontroversial evidence in accordance with their witness statements.

Mr Mark Walsh, the defendants' son, who works in the business, explained their position. He said that the original deal was that Helsingor were to transfer 1½ acres to the Walsh's in return for their half-acre site. They were to build the garage on the 1½ acres. However, the day that they went in to sign, Seamus Ross Junior said that he could not sign for 1½ acres because they could not build a garage on land that did not belong to them. The Walshes, who had their solicitor with them, went along with this last minute change. In the result, the deal was changed according to Mr. Walsh so that they were given a different half-acre site instead of the location where the garage was to be built. They negotiated about the price to be paid for building the garage. He said that the Walshes explained that they could only afford €2 million. There were figures being debated that were much higher but eventually the building cost was agreed at €3.115 million.

Helsinger built their road on the original Walsh garage site. The new garage took a year to build. They had been offered a turn-key site but when they got it, there were no railings or gates and the building was not usable. He accepted that there were always going to be some extras. They had to keep agreeing or looking for extras in order to get the building to a state of completion where it could be used. Although it is true that they moved in to the garage premises at the end of April 2006, they still had other temporary premises nearby which they had to use and his evidence was that they could not actually use the garage building until later in the year. He was cross examined about that and said that he had acknowledged in his witness statement that they were using the premises from an earlier date. The point is then according to Mr Walsh that the specification and the provision for the €3.115 million was inadequate and it cost them nearly €1 million on top of that to make the building usable. He said they lost business. He said that he agreed the €835,000 figure with Mr. Carroll of the plaintiff company but it was not to be paid until the whole building was going to be purchased. This was contradicted by documentary evidence that was put in cross examination by Mr Doherty. The defendants' solicitor expressly agreed an invoice for the cost of the extras.

Mr Peter Cosgrave and Mr Tom Walsh, the first defendant, also gave evidence. Mrs Mary Walsh, the second defendant, presented a letter in which she said that she did not understand the nature of the transactions. Mr Des Walshe gave expert evidence on the interest issue.

The Walshes wanted to keep the cost of the building down to the minimum but that inevitably affected the specification. The plaintiff was committed to building at a fixed price and the competing interest of the intending occupiers was reflected in the extras.

One cannot help feeling sympathy for the defendants. Mr Tom Walsh has been in business as a garage man all his life. He and his wife cannot understand how they have gone from a position of reasonable comfort and success to a situation in which they are facing claims of more than €1 million and even more trouble because the plaintiff has served notice of forfeiture and that will have to be dealt with in due course. They and their family are understandably bitter about the circumstances in which they became involved in these transactions that have led to this disaster. But this Court cannot make a new set of agreements between the parties.

The defendants have not made a counterclaim in this action and they have not sued Helsingor for any breach of contract. They could have considered claiming for delay in completion of the building and for loss of business as a result. Mr and Mrs Walsh had professional advice: they had a solicitor acting for them in the various transactions; they have had an architect who presumably concerned himself with the specification of the garage that was to be built and they had a quantity surveyor. This Court is confined to the issues raised in the pleadings filed by the parties. In the circumstances, these matters raised by the defendants do not arise for decision.

In its Statement of Claim dated 14th of May 2010 the plaintiff sets out the two claims that are made in the case. Paragraph 22 deals with arrears of rent. Paragraph 24 (iii) of the Defence is as follows: --

> It is conceded that Special Condition I of the agreement for lease envisages the payment of rent to the plaintiff by the defendants. However, the defendants say that it is an express or implied term of the said special condition, in order to give the contract business efficacy and/or to represent the obvious intention of the parties to the contract, that the costs claimed as rent will be fair and reasonable and will be truly reflective of a competitive commercial rate that could have been obtained by the plaintiff had it acted with reasonable diligence in the matter. The rate of interest claimed by the plaintiff are not fair or reasonable, and do not reflect the rate of interest that would have been incurred had a competitive commercial rate been obtained by the plaintiff.

The special condition is as follows: --

> The rent per annum for the first four years and nine months of the term shall be the amount per annum paid by the landlord as bank interest, costs and charged on its account number ---------, which account relates to the finance for the construction of the showrooms and other buildings and premises included in the demise (together with VAT) provided that the tenant shall be consulted at all reasonable times in connection with the account with the view to procuring a rate acceptable to the tenant ..."

The defendants were not consulted as this condition required. The issue accordingly arises as to whether the rent as claimed by the plaintiff on the basis of the interest rate that it paid to its bank was reasonable in the circumstances and is properly chargeable to the defendants. On this question there was conflicting evidence. Mr. John Casey, Chartered Accountant, testified as to the objective reasonableness of the interest rate that the plaintiff charged having regard to the nature of the loan and comparing the Anglo Irish Bank margin with other banks. Overall Mr. Casey thought that it was a reasonable rate. The essential point he made was that a 2.5% margin was a good rate, when one took into account the sort of loan it was, which involved a considerable element of risk which would be reflected by the bank in the margin it charged. Mr. Casey put that in context of the average margin that Anglo was able to achieve over all of its spread of loans which included much safer ones than this project. (All of this of course is highly relative in light of what we know now about this and indeed other banks). Mr. Casey compared the margins that Anglo achieved with those in AIB and Bank of Ireland and overall put this loan in context. He also said that it would have benefited from being included in a much larger scheme that was being developed and funded by Menolly which was another reason for thinking that the loan rate was a good one.

The defendants expert was Mr Des Walshe. He was less qualified professionally than Mr Casey but I have to say that I was very impressed with his practical knowledge and experience. He is a business graduate who began his banking career with Bank of Ireland in 1988 and he has worked in the banking and financial services sector since then. He disagreed with Mr Casey on two points. In the first place, he thought that the interest rate should be 1.25% over Euribor instead of 2.5%. Secondly, he excluded the VAT element in the building cost, which in his view should not have been included for the purpose of the rent calculation. The probability is that if this loan had been negotiated as a single item in which a successful business was moving to new and improved premises, then in the circumstances of 2005 they would have been able to get a substantially better interest rate.

On the question of VAT it seems to me that Mr Walshe is persuasive. He points out that the rental invoice is rated at 0% VAT. It is true that the rules concerning VAT are immensely complex but it does seem to me that it is illogical as well as unfair that the defendants should have to pay rent in respect of a tax liability that they do not have. Moreover, Mr Walshe points out that the plaintiff was able to claim back any VAT it paid.

As to the rate of interest, I think that the interest that was charged at 2.5% margin was indeed higher than could have been achieved but I think that Mr Walshe was too optimistic. I propose accordingly to allow a figure of 2% above Euribor. According to a very helpful table produced by Mr Quinn, one of the plaintiff's witnesses, allowing for the cost of building at €3,115,000 and the 2% margin, and the total rent up to April 2011 comes to €795,864. From this must be deducted the sum paid by the defendants, €520,000, leaving a balance as of that date of€275,864.

The other element of the claim is for €835,000 plus VAT for extras that were provided at the Walshes' request during the building of the garage.

Counsel for the plaintiff, Mr Doherty, drew attention first to the affidavits dealing with this part of the claim that were sworn for the summary proceedings. Second, he opened the pleadings and particularly the Defence. Paragraph 8 of the Statement of Claim sets out the second element of claim in the amount of €835,000 plus VAT, as follows:-

> In the course of construction of the premises, the plaintiff agreed to carry out certain additional works over and above those the subject of the agreement of lease and the costs of these additional works and extras was agreed by the defendants in an amount of €835,000 plus VAT.

Paragraph 6 of the Defence says:-

> Paragraph 8 of the Statement of Claim is admitted.

Paragraph 23 of the statement of claim says: --

> Separately, the defendants are presently indebted to the plaintiff in respect of the agreed extra works carried out at the premises in the amount of €947,725 (inclusive of VAT).

Paragraph 20 of the Defence is as follows:-

> With regard to what is pleaded at paragraph 23 of the Statement of Claim, it is denied that the defendants are presently indebted to the plaintiff in respect of the agreed extra works carried out at the premises in the amount of €947,725."

Finally, on the pleadings, paragraph 25 of the Defence is as follows:-

> Without prejudice to any other plea herein, the defendants say that the plaintiffs claim herein is contrary to the principle against unjust enrichment and/or contrary to the principles of equity. The defendants say, that in circumstances where the plaintiff has served a notice of forfeiture, and where the plaintiff apparently reserves its alleged rights under the various agreements entered into between the parties, the plaintiff is disentitled to seek the sum in respect of 'extras' of €835,000 plus VAT, or any other sum as the payment of same by the defendants would cause the plaintiff to be unjustly enriched at the defendants expense.

This is a very general plea which relates to a forfeiture claim and this action is not a forfeiture claim. Whatever validity the point may or might have and I have to say I am sceptical as to whether it is of any real value, I do not see how it can have any relevance in this claim for debt under the two headings of claim.

By Invoice no. 110701 dated 13/11/07, €835,000 plus VAT of €112,725 making a total of €947,725 was billed to the defendants by the plaintiff. By letter of the 31st March 2008, the defendants' solicitor, Mr Kennedy, stated as follows:

> "Invoice no. 110701- Variation to Building Works - our client confirms this invoice is correct and is presently putting in place funding arrangements to discharge same."

Mr Mark Walsh acknowledged that this figure had been agreed, although as in his witness statement he said that he thought it would only be payable on exercise of the purchase option. That qualification is quite contrary to what the solicitor wrote.

In the result there is no answer in my view to the plaintiffs claim for extras and to a sum for arrears of rent as set out above.

At the end of the hearing Ms. Sandra Walsh, who has been the McKenzie friend for her elderly parents Mr and Mrs Walsh, referred to expert evidence that she intended to call. Mr. Kevin Rudden proposed according to his brief witness statement to deal with alleged pyrite contamination or infestation of the garage premises. On the application of Mr James Doherty, counsel for the plaintiff, I ruled that Mr. Rudden's evidence was inadmissible. It had nothing to do with the case. The question of pyrite had not been raised in the proceedings. This case began as a Summary Summons and there was an application for summary judgment, which was heard and ruled upon in a written judgment by Charleton J. The issue of pyrite was not raised at that stage. The matter was remitted to plenary hearing and there was a Statement of Claim and a full Defence was filed. But again there was no mention of pyrite. The case came on for directions in the Commercial Court on a number of occasions and there was a change of legal representation but still nothing was said about pyrite.

Ms Walsh was really asking for liberty to amend the Defence in order to raise the question of pyrite. She said that she had reports of March 2009 and November 2010. She said she gave the first report to Mr Ben Curtin of Helsingor and she gave the second report to her own solicitor, who said that it was too late at that stage. Obviously, I do not know whether it was too late, but it does mean that the defendants' legal advisers were in possession of the second report and the defendants themselves were aware of it since March 2009, therefore it is very late in the day to be bringing up the issue at this stage. In fairness it should be said that of course Mr Rudden had furnished a witness statement, so that the plaintiff was aware of that, but no question of that kind had featured in the previous affidavits or in the pleadings for this hearing and the plaintiff was entitled to rely on what was in the pleadings.

If the Walshes are entitled to make a claim based on pyrite, that is a matter for separate proceedings.

There will be judgment accordingly for the plaintiff

> (1) in the amount of€835,000 plus VAT which as claimed is €947,725
>
> (2) for arrears of rent to April2011 in the sum €275,864.

These sums come to €1,223,589. However, before giving judgment for a specific sum, I will give the parties an opportunity to consider the form of the Order.