

THE HIGH COURT

2001 No. 5158 P

BETWEEN

THE IRISH GLASS BOTTLE COMPANY LIMITED

PLAINTIFF

AND
DUBLIN PORT COMPANY

DEFENDANT

Judgment of Carroll J. delivered 15th February, 2005.

1. The plaintiff (IGB) are lessees from the defendant (Dublin Port) a statutory company formed by the Harbour Act, 1996, of three plots of land which together amount to about 25 acres under three leases in the area of Dublin Port near to Strand Road, Sandymount and East Link Bridge. It is a very valuable site. It adjoins a site fronting on to Strand Road, known as the Fabrizio site, which is undeveloped.
2. The first lease is dated 13th May, 1965, for 99 years from 1st April 1994 containing 14.463 acres at an annual rent of £4338.15 (reduced to £4300).
3. The second lease, dated 26th April, 1973 for 24 years 8 months from 1st August, 1972 containing 2.27 acres, the initial annual rent being £3,063.
4. The third lease was granted on the surrender of a lease dated 13th May, 1965. It is dated 31st March, 1994 and is for 99 years from 1st April, 1964 at a rent of €2,478.75 containing 8.462 acres.
5. The second lease is a long strip on the east side of the other two plots, running their combined length.
6. A large hangar-type building was erected about half way down the plot and was used for the storage of soda ash, a necessary ingredient of glass manufacture. At the side of the hangar four demountable concrete bays were put in place for the storage of cullet, i.e. broken glass of different colours, which is a necessary ingredient of glass manufacture. In the course of the trial it was discovered that these bays had been dismantled and removed and are no longer used for storage. The remainder of the site has been surfaced for the storage of containers with glass in them. Access to the hangar building and the two areas used for parking is along a road constructed on the other two sites and servicing the complex. There is no access to the hangar from either side bordering on the parking area.
7. The covenants as to user in the leases are as follows.
8. Clause 14 of the first lease provides that the lessee:-

"will use the demised premises and all buildings and structures thereon for the manufacture of glass and the products thereof as the main purpose and may also use the same for purposes which are ancillary to the main purpose, including the manufacture of containers and packages of all descriptions, but will not use the said premises, buildings or structures or any part thereof, for any other main purpose without first having obtained the consent in writing of the landlord."
9. Clause 14 of the second lease provides that the lessee:-

"will use the demised premises and all buildings and structures thereon for the manufacture of glass and products thereof as the main purpose and may also use the same for purposes which are ancillary to the main purpose, including the manufacture of containers and packages of all descriptions, but will not use the said premises, buildings or structures or any part thereof for any other main purpose without first having obtained the consent in writing of the landlord."
10. Clause 3(xii) of the third lease provides that the lessees covenant that they:-

"will use the demised premises and all buildings and structures thereon for the manufacture and storage of glass and products thereof as the main purpose and may also use the same for purposes which are ancillary to the main purpose including the manufacture and storage of containers and packages of all descriptions but will not use the said premises, buildings or structures, or any part thereof, for any other main purpose without first having obtained the consent in writing of the landlords which consent shall not be unreasonably withheld."
11. Dublin Port contends that the premises demised by the second lease are not a tenement within the meaning of the Landlord and Tenant Acts, 1931 to 1996. If the premises are not a tenement, then s. 67 of the Landlord and Tenant (Amendment) Act, 1980 which entitles a lessee to apply for a change of user, such consent not to be unreasonably withheld, does not apply.
12. On 4th August, 2000 IGB wrote to Dublin Port saying they were constantly reviewing the development of their business. As part of their current review they were looking at increasing or changing the utilisation of their site by providing warehousing for third parties in addition to their existing activities or even relocating the manufacturing part of the business to a facility on the outskirts of Dublin. They requested an endorsement in respect of each of the leases amending the permitted use to "the manufacture of glass and the products thereof and the manufacture of containers and packages of all descriptions and/or as warehousing both in connection with the Tenant's business and/or in connection with the provision of warehousing and logistical services to third parties."
13. On 22nd August, 2000 Dublin Port replied to say that it was not in a position to consent to the proposed change of use.
14. IGB wrote again on 20th October, 2000 to say their information was that there was a growing shortage of warehousing capacity for third-party customers in the general port area. They could not see how the use of their warehousing space and employee skills to provide warehousing and logistics to third parties could in any way be detrimental to the objectives of the Dublin Port Company and the Docklands area in general. IGB asked that if the Dublin Port continued to withhold consent to a change of use they would be grateful if it would set out the basis of its decision and the factors which had been taken into account as grounds for refusal.
15. Dublin Port replied as follows on 16th November, 2000:

"IGB were given possession of the site it currently occupies in Dublin Port for the sole purpose of using same for the use as specified in the leases i.e. the manufacture of glass products with warehousing and offices ancillary to such use. The raw material essential to the manufacturing of IGB's products requires to be imported through Dublin Port and, indeed, to assist in this process a pipeline has been laid from the IGB site to the quayside. Possession of the site would not have been given to IGB if it had intended using the same for the new uses proposed. It is vital for the proper development and use of port land that businesses situated therein are those that have an essential requirement of easy access to ships entering Dublin Port."

16. The letter continued that the plans, i.e. the city plan and the docklands plan referred to by IGB were not relevant. The Dublin Port was not the author of either of these plans and had no control over the contents. The letter concluded by saying they had carefully considered the request and wished to advise they were not in a position to consent to the change of use as same would not be appropriate for the proper planning, management and development of Dublin Port.

17. IGB again wrote on 24th January, 2001 pointing out that none of the leases required IGB to import any raw materials through Dublin Port. Secondly, the pipeline was for the delivery of heavy fuel oil rather than importing of raw materials. IGB pointed out that the terms of the licence did not require them to use the pipeline. Thirdly, IGB urged that the use of their property for third-party warehousing and logistical services would offset warehousing facilities which had been lost in the port area over the last number of years. It offered to accept a modification to the proposed change of use which would state that the warehousing and logistical services provided to third parties must be substantially for port-related businesses.

18. The correspondence concludes with a letter dated 26th March, 2001 from Dublin Port to IGB when Mr. Connellan, the Chief Administrative Manager stated their position was as outlined in the letter of 16th November, 2000 and there was nothing for him to add.

19. On 6th April, 2001 IGB issued a plenary summons claiming a declaration that Dublin Port had unreasonably withheld its consent to the change of user requested by the plaintiff contrary to s. 67(2) of the Landlord and Tenant (Amendment) Act, 1980 and seeking an order directing Dublin Port to furnish its consent to change of user and also claiming consequential damages.

20. In its defence Dublin Port claims that the lease of the 26th April, 1973 is not a tenement within the meaning of s. 2 of the Landlord and Tenant Act, 1931. In particular it claims that the land which is covered in part only by buildings, the portion not so covered is not subsidiary and ancillary to the buildings. If the premises comprised in the lease are not a tenement the lessee does not have the right under s. 67(2) of the Landlord and Tenant Amendment Act, 1980 to request a change of user.

21. The relevant time is the time the application for the change of user was made and it is a question of fact whether or not the portion of the land not covered by the building at that time was subsidiary and ancillary to the building.

22. At the time of the application in August 2000 the building was used for the storage of soda ash. The storage of cullet in the bays which were subsequently dismantled has no relevance as the bays could not be considered as permanent structures.

23. The remainder of the site was used as one big parking lot where the finished product (i.e. manufactured glass) was stored in containers. Access was obtained by the road way running along side the land comprised in the lease.

24. In my opinion the use of the unbuilt on lands for storage of the finished product could not be considered as subsidiary and ancillary to the storage of soda ash in the building.

25. The reality of the situation was that the storage of soda ash was subsidiary and ancillary to the manufacture of glass but not to the storage of finished product. The storage of the finished product was also subsidiary and ancillary to the manufacture of glass but not to the storage of soda ash. Glass manufacture was being carried out when the application was made in August 2000.

26. The decision to cease manufacturing glass was made at the end of 2002. And IGB imported all glass from thereon. At the same time IGB acquired a glass manufacturing plant in the UK but said this had nothing to do with their decision to cease manufacturing glass in Dublin.

27. Mr. Harrington for IGB who gave his opinion that the land around the building was subsidiary and ancillary to the building said that the building needed marshalling space. In cross examination he said he did not know soda ash was stored in the building. His approach is flawed in that the test is not how the building and lands might have been used but rather how they were actually used. I specifically reject his opinion even though for the purposes of ruling on the application for a direction I was obliged to take it at face value. In my opinion based on the actual use made by IGB in August 2000 the use of the lands not covered by the building were not subsidiary and ancillary to the building.

28. Accordingly since the lands comprised in the lease of 26th April, 1973 is not a tenement the IGB is not entitled to call on Dublin Port to give its consent to a change of user.

29. The next issue to be decided is whether Dublin Port is unreasonable in withholding its consent to the change of user requested by the letter of 4th August, 2000.

30. The principles of law to be applied derived from the various decided cases are as follows:-

1. The onus is on the lessee to prove the premises are a tenement and that consent is unreasonably withheld (see *Rice v. Dublin Corporation*) [1947] I.R. 425.

2. The lessor must consider the application for the change of user on its merits. It cannot have a blanket policy of refusal (see *Rice v. Dublin Corporation*, [1947] I.R. 425, *O'Gorman v. Dublin Corporation*[1949] I.R. 40 and *White v. Carlisle Trust*) [1976-7] I.L.R.M. 311.

3. The lessor is entitled to consider its own interest in deciding whether or not to give consent (*W & L Crowe Limited v. Dublin Port & Docks Board* [1962] I.R. 294 and *Murphy v. O'Neill* [1948] I.R. 72).

4. The lessor is entitled to know precisely the nature of the proposed user and all details which might affect the question of whether to give consent or not (*Lloyd v. Earl of Pembroke & Anor* [1954] 89 I.L.T.R. 40).

5. This case also held that the tenant must intend to use the premises itself for the change of user. This question was reserved for further argument by the Supreme Court.

6. The reasonableness or not of the lessor's refusal of consent does not depend on the special circumstances of the tenant's case. The tenant's trading difficulties do not mean that the landlord must facilitate the tenant (*OHS v. Green Property* [1986] I.R. 39 and *Wanze Properties v. Mastertron Ltd.* [1992] I.L.R.M. 746).

7. The landlord may state the grounds for refusal to the court even if no reason had previously been given (*Rice v. Dublin Corporation* [1947] I.R. 425).

8. The landlord is prohibited from charging a fine or increasing the rent before giving consent to a change of user (s. 67(2) of the 1980 Act).

9. In addition Dublin Port must observe the objects of the company. These are set out in s. 11 of the Harbours Act, 1996 and provide as follows:

(a) to take all proper measures for the management control operation and development of its harbour ...

(b) to provide such facilities services accommodation and lands in its harbour for ships goods and passengers as it considers necessary

(c) to promote investment in its harbour

(d) to engage in any business activity either alone or in conjunction with other persons that it considers to be advantageous to the development of its harbour

(e) to utilise and manage the resources available to it in a manner consistent with the objects aforesaid.

31. In deciding that the request of I.G.B. could not be granted, Mr. Connellan, the C.E.O. of Dublin Port, did not bring the request to the board. In my opinion he was justified as he had not been furnished with any detailed plan by I.G.B. He was concerned that an income stream of £200,000 (mainly profit) derived from port activities from the tonnage and import of raw materials and oil, would disappear. It was not clear what was proposed. An increase in warehousing would not lead to any increased revenue. He contested the need for further warehousing as he said that one of the largest warehouses, Stack R, was not fully occupied. He said the port is there to facilitate the movement of goods not for storage although some storage may have to be accommodated for a time. The amendment suggested by I.G.B. to confine warehousing to port-related business was an unworkable proposition and would be impossible to police. There was no detail about how traffic would be affected. Generally there was a total lack of detail. Even the suggestion that there would be third party lettings was only viewed as a possible way of dealing with warehousing. When the application was made in August, 2000, I.G.B. were actually manufacturing glass. It ceased manufacture at the end of 2002 which was a major change in circumstances.

32. In my view, I.G.B. have failed to discharge the onus of proof that consent to a change of user was unreasonably withheld. It failed to give Dublin Port all the details to which it was entitled in order to enable it to reach a decision on the request. Also Dublin Port was entitled to reach a decision based on its own best interests.