Neutral Citation Number: [2012] IEHC 299

THE HIGH COURT

COMMERCIAL

[2011 No.11562 P]

BETWEEN

REOX HOLDINGS PLC

PLAINTIFF

AND

DAVID CULLEN AND SIMON DAVIDSON

DEFENDANTS

Judgment of Mr Justice Charleton delivered on the 26th day of July 2012

1. With the unsupportable inflation in property prices that characterised the decade to 2007, rents for business premises inexorably climbed. Reviews of rent in leases typically occur at five yearly intervals. On leasing premises during those years, landlords insisted that such review covenants were worded so that a review could only allow for an increase in rent; so-called upwards-only review clauses. With the deflation that has beset property prices from 2008, the Oireachtas intervened by providing that any rent review clause in any new lease, or any agreement for such a lease, no matter how such a covenant was worded, would be construed so to allow both an increase and a decrease upon a review. That change was brought about by section 132 of the Land and Conveyancing Law Reform Act 2009. The section was commenced on 28 February 2010 by SI 471 of 2009 and provides as follows:

> (1)This section applies to a lease of land to be used wholly or partly for the purpose of carrying on a business.
>
> (2) Subsection (1) shall not apply where –
>
> (a) the lease concerned, or
>
> (b) an agreement for such a lease,
>
> is entered into prior to the commencement of this section.
>
> (3) A provision in a lease to which this section applies which provides for the review of the rent payable under the lease shall be construed as providing that the rent payable following such review may be fixed at an amount which is less than, greater than or the same as the amount of rent payable immediately prior to the date on which the rent falls to be reviewed.
>
> (4) Subsection (3) shall apply –
>
> (a) notwithstanding any provision to the contrary contained in the lease or in any agreement for the lease, and
>
> (b) only as respects that part of the land demised by the lease in which business is permitted to be carried on under the terms of the lease.

2. The issue that now arises for decision is whether that section applies to a situation whereby a lease with a guarantee was entered into before the law commenced, but on the collapse of the business of the tenant after the law commenced, the guarantee provides that the landlord has the option to require the guarantor to step into the shoes of the tenant on the same terms, especially the term as to upwards-only rent reviews. In other words, when exercised, is such an option under a guarantee "an agreement for … a lease"?

Facts

3. The plaintiff is a public limited company having its registered office in Cork city. The first named defendant is a Dublin businessman. He is the owner of the premises, the subject of the dispute between the parties, at Unit 17, Barrow Valley Retail Park, Sleaty Road/North Relief Road, Carlow. He is the landlord. The premises were formerly used as a do-it-yourself retail shop. The second named defendant was appointed as receiver of the premises by Ulster Bank Ireland Limited on 22 July 2011. The lease in question is dated 16 April 2007 and was made between the first named defendant as landlord, 4 Home Wholesale Services Limited as tenant and the plaintiff as the guarantor of the performance of the covenants in the lease by the tenant. The premises were demised to 4 Home Wholesale Services Limited for a term of 25 years from 18 August 2006 for use as a retail unit.

4. By clause 4.1 of the lease, 4 Home Wholesale Services Limited covenanted to pay the rents specified in clause 3. This required the payment of a stepped rent for the first five years of the term with a provision for upwards-only rent reviews every five years from the commencement of the term in accordance with the provisions of the fourth schedule to the lease. Clause 2 of the fourth schedule to the lease is headed "Upwards only rent review". This provides:

The rent first reserved by this Lease shall be reviewed at each Review Date in accordance with the provisions of this Schedule and, from and including each Review Date, the rent shall equal the higher of either the rent contractually payable immediately before the Relevant Review Date or the open market rent on the Relevant Review Date, as agreed or determined pursuant to the provisions of this Schedule.

5. By clause 6.1 of the lease, the plaintiff, as guarantor, covenanted with the first named defendant, as landlord:

That the Tenant or the Guarantor shall at all times during the Term (including any continuation or renewal of this Lease) duly perform and observe all the covenants relating to financial obligations on the part of the Tenant contained in this Lease, including the payment of the rents and all other sums payable under this Lease in the manner and at the times herein specified and all sums which may be due to the Landlord for mesne rates or as payment for the use and occupation of the Demised Premises, and the Guarantor hereby indemnifies the Landlord against all claims, demands, losses, damages, liability, costs, fees and expenses whatsoever sustained by the Landlord by reason of or arising in any way directly or indirectly out of any default by the Tenant in the performance and observance of any of its financial obligations or the payment of any rent and other sums arising before or after the expiration or termination of this Lease.

6. By clause 6.7 of the lease, the plaintiff as guarantor further covenanted that if:

> (i) a liquidator or Official Assignee shall disclaim or surrender this Lease; or
>
> (ii) this Lease shall be forfeited; or
>
> (iii) the Tenant shall cease to exist

THEN the Guarantor shall, if the Landlord by notice in writing given to the Guarantor within twelve months after such disclaimer or other event so requires, accept from and execute and deliver to the Landlord a new lease of the Demised Premises subject to and with the benefit of this Lease (if the same shall still be deemed to be extant at such time) for a term commencing on the date of the disclaimer or other event and continuing for the residue then remaining unexpired of the Term, such new lease to be at the cost of the Guarantor and to be at the same rents and subject to the same covenants, conditions and provisions (other than clause 6) as are contained in this Lease;

7. By clause 6.7.2 it was further provided that:

> … if the Landlord does not require the Guarantor to take a new lease, the Guarantor shall nevertheless upon demand pay to the Landlord a sum equal to the rents and other sums that would have been payable under this Lease but for the disclaimer, forfeiture or other event in respect of the period from and including the date of such disclaimer, forfeiture or other event until the expiration of twelve months therefrom or until the Landlord has granted a lease of the Demised Premises to a third party (whichever shall first occur).

8. On or about 11 November 2009, the tenant 4 Home Wholesale Services Limited changed its name to Wholeserve Limited. On 23 December 2010, a resolution was passed for the voluntary winding up of Wholeserve Limited and the appointment of a liquidator. On the same day, the liquidator wrote to the receiver giving notice that he was disclaiming the lease; thereby terminating the lease under clause 6.7. By letter dated 11 January 2011, the first named defendant as landlord gave notice to the plaintiff as guarantor that he had elected to exercise the entitlement conferred under the lease to require the plaintiff as guarantor to accept from and execute and deliver to him a new lease of the premises. Enclosed with that letter was a draft of the new lease which contained an upwards-only rent review clause in identical terms to that contained in clause 2 of the fourth schedule to the original lease. By letter dated 20 January 2011, the plaintiff as guarantor confirmed to the first named defendant that it was agreeing to enter into the new lease for a term commencing on 23 December 2010 subject to the same terms, covenants, conditions and provisions as contained in the original lease; but also stated explicitly that this agreement was subject to the application of section 132 of the Land and Conveyancing Law Reform Act 2009.

9. The second defendant, having been appointed as receiver of the premises by Ulster Bank Ireland Limited, on or about 22 July 2011, by letter dated 10 November 2011, through his solicitors, wrote to the solicitors for the plaintiff as guarantor requesting confirmation that the plaintiff would accept from and deliver to the receiver a new lease of the premises for the residue of the expired term; such new lease to be at the same rents, and subject to the same covenants and provisions as were contained in the original lease. By letter dated 15 November 2011, the solicitors for the plaintiff as guarantor informed the solicitors for the receiver that the plaintiff had already agreed to enter into a new lease; the terms of which lease had already been set out in correspondence and that it had paid rent under that new lease. Notwithstanding this, the solicitors for the plaintiff as guarantor agreed to forward a draft of the new lease. By letter dated 16 November 2011, the solicitors for the receiver sought confirmation that the plaintiff would accept that the new lease would contain an upwards-only rent review provision. The plaintiff as guarantor declined to provide that confirmation and, instead, reiterated an earlier argument that the law had changed.

10. On 21 November 2011, on the application of the liquidator of Wholeserve Limited, an order was made by the High Court granting him liberty to disclaim the lease pursuant to the provisions of section 290(1) of the Companies Act 1963, as amended. These proceedings were then commenced whereby the plaintiff as guarantor sought a declaration that, in the situation outlined, the law requiring rent review covenants in leases must be construed in accordance with the 2009 Act as providing for both upwards and downwards rent reviews.

11. The defendant receiver also claims that, if the plaintiff as guarantor is entitled to the benefit of the 2009 Act, then notwithstanding the option exercised by the receiver to require the plaintiff as guarantor to take a new lease, he is nevertheless entitled to a full indemnity for any loss on a downward rent review; a right secured, the defendant receiver claims, by clause 6.1 of the lease. The relevant clauses in the lease are quoted above.

12. Further, the defendant receiver claims under clause 6.2 which provides that the plaintiff as guarantor and the tenant are jointly and severally liable "whether before or after any disclaimer by a liquidator" for the tenant's obligations under the lease.

Construction

13. It is unnecessary in this judgment to reiterate the principles whereby commercial contracts are construed. The task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances; *Kramer v Arnold* [1997] 3 IR 43 at 55. Where the contract is concerned with commerce, the court should give to that agreement the construction which accords with the ordinary sense of business people; *Irish Bank Resolution Corporation Limited v Cambourne Investments Inc & ors* [2012] IEHC 262. The law on the construction of a commercial agreement seems to me to be beside the point. It is clear that all of the parties to the original lease and contract of guarantee, the landlord, the tenant and the guarantor, anticipated that future property prices would be unlikely to decrease and that the tenant would never obtain a rent reduction. That background does not matter. The prevailing economic circumstances have intervened and the law has changed for all new leases or agreements for such a lease; but is the law applicable?

14. In *JC Savage Supermarket Ltd & Anor v An Bord Pleanála* [2011] IEHC 488, this Court reiterated many of the basic principles of

statutory construction in concise form. Of these, the most fundamental canon is that restated by Denham J in *DB v Minister for Health and Children* [2003] 3 IR 12 at 21:

In construing statutes, words should be given their natural and ordinary meaning. The approach taken by the courts to the construction of statutes was described by Blayney J. in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101. He emphasised that the cardinal rule for the construction of statutes was that they be construed according to the intention expressed in the acts themselves. If the words of the statute are precise and unambiguous then no more is necessary than to give them their ordinary sense. When the words are clear and unambiguous they declare best the intention of the legislature. If the meaning of the statute is not plain, then a court may move on to apply other rules of construction; it is not the role of the court to speculate as to the intention of the legislature. In that case I held also that statutes should be construed according to the intention expressed in the legislation and that the words used in the statute declare best the intent of the Act.

15. A refinement applicable here is that in referring to a lease and to an agreement for such a lease, the Oireachtas used a technical term which, as such, must be construed in that sense; *Inspector of Taxes v. Kiernan* [1981] I.R. 117 at p. 122. It is clear that the guarantee as invoked by the receiver is not a lease. At issue is whether the terms of that guarantee constitute an agreement for such a lease. That term is not defined in the 2009 Act. Whereas the defendant receiver submits that an agreement for such a lease is not a term of art but, rather, means simply any agreement to enter into a lease, this Court cannot agree. In *Cosmoline Trading Ltd v Burke & Son Ltd & Anor* [2006] IEHC 38, the issue arose as to whether there was an agreement for the lease by the defendants of premises to the plaintiff. Finnegan P commented as follows:

It is well settled that to create an enforceable contract for the grant of a lease the following matters must be agreed -

(i) The parties ...

(ii) The premises …

(iii) The term …

(iv) The commencement date ...

(v) The rent ...

16. A useful definition of an agreement for a lease is to be found in Halsbury's Laws of England (2006 reissue) volume 27(1) at paragraph 75:

An instrument which only binds one party to create and the other to accept a lease in the future is an agreement for a lease. Moreover, an instrument is construed as an agreement for a lease and not as a lease, notwithstanding that it contains words of present demise, if the provisions to be inserted in the lease are not finally ascertained; ... or where certain things have to be done by the landlord before the lease is granted, such as the completion or repair or improvement of the premises, or by the tenant, such as the obtaining of sureties …

17. The defendant receiver argues that once the guarantee by the plaintiff was entered into, an agreement for a lease was thereby created. That agreement was, however, contingent in its operation on the occurrence of other factors and upon the exercise by the landlord of a choice of options. The lease contended for might never be entered into. It was dependant upon the occurrence of one of three conditions, namely the disclaimer or forfeiture of the lease or the tenant ceasing to exist. It was also dependant upon the defendant landlord exercising an option within twelve months to require the guarantor to enter into a lease as opposed to, in the alternative, seeking an indemnity of up to 12 months for lost rent. Such an agreement does not appear to this Court to carry the characteristics of a lease or of an agreement for such a lease. Whereas it can often be futile to cross-compare statutes, most especially Irish and foreign legislation, it is to be noted that similar provisions in England and Wales in the form of the Law of Property (Miscellaneous Provisions) Act 1989 are specifically worded so as to capture situations of contingent options.

18. Much more significantly to this decision, it is impossible to state that as of the date of coming into force of the 2009 Act the guarantor and the landlord had an agreement for a lease. One of the characteristics of such an agreement is that it is specifically enforceable; on the basis that an agreement for a lease is, in equity, as good as a lease. In this instance, until the occurrence of the contingency that gave rise to the entitlement of the landlord to make a choice between either requiring the guarantor to step into the tenant's shoes and hold the lease or seeking lost rent instead, and the option was exercised by the landlord to require the guarantor to become the tenant, no agreement for a lease existed. The availability of that mere contingency cannot be construed as a lease between the guarantor and the landlord and nor can it be construed as an agreement for such a lease.

19. In *Active Estates Ltd v Parnass and another* [2002] 3 EGLR 13 at issue was whether a series of changes in tenant, including one to an entity called Jointport, with the consent of the landlord, entitled the guarantor to disavow an obligation under contract to take a new lease for the residue of the disclaimed term of the lease. This Court is drawn to the reasoning of Neuberger J that it was upon the exercise of the option by the landlord to request the guarantor to take up the lease for the remainder of the term that an immediately enforceable contract arose. An agreement for a lease is, of course, a contract to enter into a lease that binds both parties and is enforceable as such. The judge relied on the earlier decision of Chadwick LJ as to the effect of such a notice in *Bausch v Steckel* [2001] L&TR 1. At page 11 of his decision, Neuberger J stated:

So far as principle is concerned, I would refer to *Basch [v Steckel],* where, at para 26, Chadwick LJ said:

The effect of the notice, if valid, is to bring into existence a contract under which the [guarantors] are obliged to take a grant. When they take a grant the landlord will, under the terms of that grant, be required to deliver possession; but he will not be required to deliver vacant possession until the grant is taken. By serving a notice the landlord asserts that he is ready, willing and able to give vacant possession at the time when the grant is taken.

In other words, in this case, the claimant must be in a position to give possession to the defendants when the lease is granted. Neither the claimant nor the defendants sought to force the issue of the grant of the new lease while Jointport was in occupation. If Jointport had been in occupation, and the claimant had not been able to exclude Jointport at the time the defendants sought to take the lease, then the claimant may have had a problem. But Jointport has now vacated and no problem, to my mind, therefore arises for the claimant in this connection.

20. In *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 the House of Lords was concerned with the rule that

conditions for the exercise of an option, including stipulations as to time, must be strictly complied with. In the course of his speech, Lord Simon at 945-946 commented, as follows, on the relation of the parties upon an option being called into force in accordance with a contract:

> … the parties, on the exercise of the option, are brought into a new legal relationship. It was argued … that the rent review clauses were also such unilateral terms. I cannot agree. The operation of the rent review clauses does not at all change the relationship of the parties, which remains that of landlord and tenant throughout the currency of the lease whether or not the machinery of the rent review clauses is operated.

21. Similarly, at 961 Lord Fraser contrasted a rent review clause with an option to renew a lease upon expiry of an initial term:

Options to purchase property or to renew a lease are both true options and their important characteristic for the present purpose is that, if they are exercised, they create a new contract between the parties. But when a rent review clause is operated it merely varies one term in a continuing contract.

22. That view was also taken by Lord Salmon at 951 where he said that:

Options to determine or to renew are not agreements to determine or renew. They are no more than irrevocable offers (kept open for good consideration) to do so providing the tenant complies with certain conditions usually before a certain date.

23. It is argued that a decision that a guarantee option is a contingency interferes with existing rights; consequently it is submitted on behalf of the defendant receiver that the Act of 2009 should be construed so as to avoid any retrospective effect. A statute is deemed to be retrospective when it takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past; *Hamilton v Hamilton* [1982] IR 466 at 473-474. The same case is authority for the proposition that there is a presumption at common law that legislation is not intended to have retrospective effect. To the extent that the 2009 Act interferes with a pre-existing arrangement which the parties had entered into on the basis of their view on the state of the law, the Court is not entitled to rearrange the balance of rights that arises from a decision of the Oireachtas to amend the law. Once the balance struck is reasonable no issue of unconstitutionality can arise; and indeed no claim that the section of the 2009 Act is contrary to the Constitution is pleaded in this case. As this court has stated previously in *JC Savage Supermarket Ltd & Anor v An Bord Pleanála* [2011] IEHC 488, at para 3.7:

Where two interpretations of a statute are possible, one of which is in conformity with the Constitution and the other of which is not, the courts must opt for the constitutional interpretation; McDonald v. Bord na gCon [1965] 1 I.R. 217 at p. 239. A strained interpretation is not to be forced onto the wording of a statute, however, in order to keep its effect within constitutional boundaries: *Colgan v Independent Radio and Television Commission* [2000] 2 I.R. 490. A partial severance of words from an enactment in order to bestow constitutional conformity on it, should not be undertaken where the result is that the courts are in effect legislating – bringing into force a provision that the Oireachtas never intended; *Maher v. Attorney General* [1973] I.R. 140 at p. 147.

24. The obligation of constitutional interpretation does not permit the re-arrangement of a scheme designated by the Oireachtas, provided the terms of the legislation are clear; *McDonald v Bord na gCon* [1965] 1 IR 217 at 239. The 2009 Act addresses the tension which arises between the unfortunate situation of retail tenants within our economy, which is in a state of marked deflation since 2008 because disposable income has been reduced, on the one hand, and, on the other, the situation of landlords who may have paid an inflated price for the real estate already let at the large rents then current or who, alternatively, may have obtained a handsome return by way of rent for a property purchased years before at a reasonable price. That balance was resolved by the Oireachtas in not interfering in either leases existing in February 2009 or in agreements for such leases. The legislation, however, establishes a general rule that in any other situation outside of these two exceptions, rent reviews should be both upwards and downwards. In particular, the terms of the legislation do not apply to any situation where a guarantor had previously agreed to step into the shoes of a tenant upon an event of default under a lease occurring and upon the landlord exercising a contractual option in that regard as that landlord saw fit as between alternatives.

25. Fundamentally, the situation of a guarantor is not covered by the 2009 Act. The situation of a guarantor who, at the option of the landlord, may be required to either pay up to a year's rent or to take over the lease is even more remote from the wording of the 2009 Act. There is not, furthermore, anything either obscure or ambiguous about the application of the legislation and nor is the wording of the section in its literal interpretation in any way absurd so as to invoke s 5 of the Interpretation Act 2005; see generally *JC Savage Supermarket Ltd & Anor v An Bord Pleanála* [2011] IEHC 488. This Court is not entitled to extend the law outside the boundaries set by the legislation.

26. Finally, the landlord having taken the option of requiring the guarantor to step into the shoes of the tenant, the general provision as to indemnity in clause 6.1 of the lease does not arise. That provision would entitle the landlord to seek arrears of rent up to the exercise of the option of the landlord as between seeking a new tenant, rent lost up to a certain level, or to require the guarantor to step into the shoes of the tenant. Upon the exercise of the later option, the entitlement to arrears of rent from the guarantor does not arise, as the clause ceases to be applicable. It is upon the exercise of the option in question in this case that a new situation provided for in contract comes about and governs the rights of the parties; in general see *Hewden Tower Cranes Limited v Yarm Road Limited & anor* [2003] EWCA Civ 1127.

27. An argument can arise as to the interaction between clauses 6.1, 6.2, 6.7 and 6.7.2 of the lease. The landlord argues that he is entitled to the indemnity under 6.1 in addition to exercising the option created under 6.7. In *Welch v Bowmaker (Ir) Ltd* [1980] 1 IR 251, at 254-255, Henchy J dealt with the question of the correct approach to the interpretation of contracts in circumstances where two contractual provisions dealt with a situation, one generally and one specifically. The following passage summarises the relevant law:

The relevant rule of interpretation is that encapsulated in the maxim generalia specialibus non derogant. In plain English, when you find a particular situation dealt with in special terms, and later in the same document you find general words used which could be said to encompass and deal differently with that particular situation, the general words will not, in the absence of an indication of a definite intention to do so, be held to undermine or abrogate the effect of the special words which were used to deal with the particular situation. This is but a commonsense way of giving effect to the true or primary intention of the draftsman, for the general words will usually have been used in inadvertence of the fact that the particular situation has already been specially dealt with.

28. The lease offers the landlord two specific options in clauses 6.7 and 6.7.2 which may be exercised in the event that the tenant ceases to exist or where the lease is surrendered or disclaimed, as occurred here. This specific provision is therefore not detracted from by the general indemnity contained under clause 6.1. In accordance with the maxim quoted by Henchy J, the court must seek to

give effect to the intention parties as reflected in the wording of the lease and was to have a particular situation dealt with in a specific manner. The applicability of the general indemnity in those circumstances is therefore ousted by the occurrence of a specified event. The terms of the lease merely clarify that the act of disclaiming the lease does not release either the tenant or the guarantor of their respective liabilities under the agreement up to that point. Similarly, the options under 6.7 and 6.7.2 are also mutually exclusive as one, but not both, may be exercised by the landlord. Clause 6.1 may operate to preserve entitlements already existing, to back rent for example, were the option to require the guarantor to step into the shoes of the tenant exercised.

Result

29. It follows that the plaintiff guarantor is entitled to a declaration that section 132 of the Land and Conveyancing Law Reform Act 2009 providing for upwards and downwards rent reviews applies to any new lease entered into by that guarantor with the landlord upon the exercise of the landlord of an option to require the plaintiff guarantor to step into the shoes of the defaulting tenant upon the occurrence of an event of default.