Neutral Citation Number: [2014] IEHC 444

THE HIGH COURT

[2012 No. 3689 S]

BETWEEN

NORTH QUAY DEVELOPMENTS LIMITED

PLAINTIFF

AND

NIALL CARTY

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 15th day of October, 2014

1. Is a lease which is delivered into escrow pending the subsequent fulfilment of a conditions precedent binding on the parties once that condition has been fulfilled, even though the lease itself was never subsequently delivered to the other party in a manner which would thereby have formally released the lease from that escrow? In my judgment, absent special circumstances which would render the enforcement of that lease inequitable, this question must be answered in the affirmative. The present case may accordingly be said to represent a classic exemplification of two separate, but overlapping, equitable principles, namely, that an agreement for a lease is as good as a lease in accordance with the rule in *Walsh v. Lonsdale* and that equity regards as done what ought to be done.

2. These proceedings arise from an agreement originally arrived at in February 2007 whereby a company called Iverwell Ltd. ("Iverwell") entered into possession of retail premises at the Bridgewater Centre, Arklow, Co. Wicklow. The premises were the property of the landlord, North Quay Developments Ltd. ("North Quay"). It was contemplated by the parties at the time that Iverwell (which traded under the name Vienna Shoes) would fit out the premises as a shoe shop. A combination of high rents and a lack of consumer demand following the banking collapse of late 2008 meant that the business ultimately foundered. Iverwell ultimately went into liquidation in June, 2012.

3. In these proceedings the plaintiff, North Quay, now claims to be entitled to summary judgment against the defendant in the sum of €156,888 under the terms of a lease which was agreed in February 2007, but which was immediately held in escrow. (The background to the escrow agreement will be presently described.) Iverwell agreed to discharge the rent by quarterly payments.

4. Mr. Carty was also a party to this lease and he had guaranteed the performance of these payments obligations by Iverwell of which company he was also the principal director. It follows, therefore, that for this purpose at least, he stands in the shoes of Iverwell and that if the company is bound by the terms of the lease, he is also so bound.

5. It is not in dispute but that Iverwell defaulted on its obligations to pay the rent. Clause 9.1 of the lease stated that the guarantor covenanted with the landlord as a primary obligation that "the tenant and the guarantor shall at all times during the currency of this agreement". Clause 9.2 provided for joint and several liability. Clause 10.4.2 provided that the tenant and the guarantor:

> "shall be liable to observe and perform covenants and agreements equivalent to the covenants agreements on the tenant's part to be contained in the lease, including without limitation the liability to pay to the landlord from the rent commencement day by way of licence fee without set off deduction a counterclaim a sum equal to and payable in the same manner as the yearly rents which would have been payable under the lease had been granted and delivered…"

6. As Iverwell incurred debts in the sum now claimed by North Quay against Mr. Carty as guarantor, the issue now is whether the lease was actually effective to create such an obligation. The defendant's response is to say that the lease was simply executed in escrow and that Iverwell instead entered possession pursuant to an agreement described as an agreement for an occupational lease. This latter agreement terminated in December, 2008 when an architect's certificate of compliance with the Building Regulations following the fit-out of the retails premises as a shoe shop was supplied to the plaintiff. In essence, the defendant's case is that there was never an effective lease supplied by the plaintiff which would serve to release that lease from its provisional status in escrow. In these circumstances – or so the argument runs - the defendant cannot be held liable under the guarantee which is admittedly contained in the lease and in respect of which he would otherwise be liable to North Quay qua surety following the default of Iverwell.

7. The defendant maintains that this is not a purely technical defence on the part of the surety, but that this failure to deliver the actual lease to Iverwell has had practical consequences as well. Specifically, Mr. Carty contends that the absence of an executed lease meant that the liquidator appointed to the company was thereby precluded from selling what might under other circumstances have been the principal asset of Iverwell, namely, the lease of the premises. It also meant that North Quay could take re-enter possession of the premises at a moment's notice following the liquidation since it was not otherwise encumbered by a lease. It had the further consequence that North Quay could take the benefit of the elaborate and costly fit out of the premises which Iverwell had undertaken without the encumbrance of an actual lease.

8. North Quay in turn says that this particular line of argument has no relation to reality in that following his appointment the liquidator disclaimed the lease pursuant to s. 290 of the Companies Act 1963, as an onerous contract. This latter contention is borne out by the terms of the liquidator's letter of 5th July, 2012.

9. How, then, did this situation come about where there was confusion as to whether Iverwell held under an agreement for an occupational lease or an actual lease? What appears to have happened is that in February, 2007 two separate documents were signed by the parties, an agreement for an occupational lease and the actual lease itself. It seems clear that it was the intention of the parties that the agreement for the occupational lease would be supplanted by the actual lease once the architect's certificate of compliance was furnished by Iverwell to North Quay's solicitors. It appears that following the fulfilment of this condition precedent to the coming into effect of the lease itself, the obligation to supply Iverwell with a duly executed version of the lease was subsequently

overlooked. The question, accordingly, is whether this failure means that Mr. Carty cannot be sued on foot of the guarantee contained in that lease.

10. At one point, the objection was taken that neither document was stamped, but this objection has now been overtaken by events inasmuch as both documents have now been stamped.

The Application of the Rule in *Walsh v. Lon*sdale

11. The only remaining objection is one to which the courts have given a consistent answer for the best part of 130 years, namely, that since the enactment of the Supreme Court of Judicature (Ireland) Act 1877 (and its earlier English counterpart), an agreement for a lease is as good as a lease. This is illustrated by *Walsh v. Lonsdale* (1882) 21 Ch. D. 9 itself.

12. In that case the plaintiff had been allowed into possession of a mill under an agreement for a lease, even though the lease itself was never executed. While the plaintiff had previously being paying rent quarterly, the defendant subsequently demanded payment of a year's rent in advance under the terms of the (unexecuted) lease and he sought to re-enter the premises when such payment was not forthcoming. As the actual lease itself contained such a clause allowing the defendant to demand such payment in advance, the English Court of Appeal held that the plaintiff was bound in equity by the terms of the lease, even though it had never formally been executed by the parties.

13. As Jessel M.R. famously stated ((1882) 21 Ch. D. 9, 14-15):

> "There is an agreement for a lease under which possession has been given. Now since the *Judicature Act* the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say, 'I have a lease in equity, and you can only re-enter if I have committed such a breach of covenant as would if a lease had been granted have entitled you to re-enter according to the terms of a proper proviso for re-entry.' That being so, it appears to me that being a lessee in equity he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed."

14. This is the effectively the position in the present case, because even if no actual lease was formally delivered following the release of the lease from the suspensive form in which it was held in escrow, equity treats as done what ought to have been done. Once the certificate of compliance was furnished to the plaintiff's solicitors the pre-condition to the operation of the lease was satisfied and the lease - which ought, admittedly, at that point to have been formally released from escrow and delivered to Iverwell - took effect in equity. Adapting freely the words of Jessel M.R., one might say that the defendant cannot object to the terms of an agreement (namely, the actual lease) once the condition precedent to its effective operation has been satisfied, even if "the actual parchment" was not formally handed over to Iverwell, the company whose obligations he guaranteed under the terms of that lease.

15. There are, admittedly, limitations to the rule in *Walsh v. Lonsdale*: there may, for example, be circumstances in which the enforcement of the agreement for a lease would be inequitable. Nor is an agreement for a lease an actual lease, so that, for example, third parties might not be so bound. Depending, moreover, on the particular statutory context, it may be that references in certain statutory provisions would not apply to a mere agreement for a lease as distinct from a lease itself.

16. None of these limitations apply in the present case. Iverwell (and, by extension, Mr. Carty) continued in possession as if the lease had been duly delivered following its release from escrow. It follows that the defendant is bound by its terms. Of course, the situation might have been otherwise had Iverwell been so prejudiced by the failure to deliver the actual lease that its enforcement at the hands of North Quay might now have been held to be inequitable. This might, for example, have occurred had the liquidator wished to sell the lease to a third party but the sale fell through for want of an actual lease. This, however, was not the case here, as it is perfectly clear from the liquidator's letter of 5th July, 2012, that he had no use for the lease and that he wished to disclaim it under s. 290 of the 1963 Act as an onerous contract. Nor, for the reasons already set out, can the defendant qua guarantor be regarded as if he were third party with no knowledge of or interest in the terms of the lease.

17. An argument to the effect that the credit raising capacity of Iverwell was prejudiced by the failure to grant an actual lease was also advanced as a defence. This might possibly have amounted to real prejudice of the kind I just mentioned had, for example, Iverwell or the defendant been able to point to correspondence with a bank to the effect that the failure to deliver an actual lease prejudiced their respective ability to raise a loan. In the present case, however, there is little more than a generalised averment to the effect that there was or might have been such prejudice. In the light of the comments of McKechnie J. in *Harrisgrange Ltd. v. Duncan* [2003] 4 I.R. 1, 8 I cannot think that a "mere assertion" of this kind is in itself sufficient to raise a tenable defence in a claim for summary judgment in respect of a liquidated sum.

Conclusions

18. In summary, therefore, it is clear that the February, 2007 lease became binding and operative once the condition precedent for the operation of that lease was fulfilled. This occurred in December 2008 when Iverwell's architect supplied a certificate of compliance with the Building Regulations following the fit-out of the shop. At that point, the actual lease ought to have been formally delivered up to Iverwell and it is agreed that this did not happen.

19. Iverwell are nonetheless bound by that lease in equity as if the lease had in fact been formally delivered up to them. Iverwell suffered no prejudice as a result of this failure and, accordingly, it would not be inequitable to give effect to the lease in such circumstances. It follows, therefore, that by virtue of the application of the rule in *Walsh v. Lonsdale*, the defendant, qua guarantor of the lease, is bound by its terms.

20. In these circumstances, as the defendant cannot establish any realistic or arguable defence to the plaintiff's claim, I find myself obliged to give summary judgment for the sums claimed by plaintiff.