IRISH AIRLINES

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1983 NO. 7102P

THE HIGH COURT

BETWEEN/

IRISH AIRLINES PENSIONS LIMITED

PLAINTIFF

and

ABISCO INVESTMENTS LIMITED

DEFENDANT

Note of Judgment delivered by Miss Justice Carroll on the 29th day of January, 1985.

The Plaintiff as lessor provided the finance to develop the property comprised in a Lease dated the 9th of October, 1974 between the Plaintiff of the one part and Euro Estates Limited of the other part, for a term of ninety-nine years from the 8th of March, 1974. It was on a sale and lease-back basis. The rent reserved by the Lease was to be the rent from time to time payable whether as initially agreed or as increased pursuant to the provisions in the Lease or the Schedule.

For the initial period the rent was agreed at £34,036-19 (8¾% of the purchase price of £388,985-75). The initial period was from the 8th of March, 1974 ending on a date when any new unit was let or deemed to be let, whichever first occurred. Under paragraph (c) of the Second Schedule a unit was deemed to be let from a date which was six months after the completion of the unit at current market rental value, unless it was actually let at more than that. There were

therefore two matters which were deemed; one, was deeming a letting to have taken place, the other was deeming the amount of the rent.

Immediately after the initial period the rent was to be £34,036-19 plus 8¾% of advances made for that unit plus rolled-up interest.

Under paragraph (d) of the Schedule, as each unit was completed and either let or deemed to be let, the rent increased each time by adding 8¾% of the advances for that unit plus rolled-up interest.

When all the units were sublet or deemed to be let, it was possible to calculate the total initial head-rent and the total initial sub-rents.

"Total initial head-rent" was to be the total rent as revised under paragraph (d) on the subletting of the last new unit, actual or deemed.

"Total initial sub-rent" was the total of the rents payable or deemed to be payable on the subletting of the last new unit to be sublet (actual or deemed). Once these two calculations were made the formula expressed in paragraph (e) became a fixed fraction. Paragraph (e) provided that the revised rent was to equal the revised total sub-rent from subleases multiplied by total initial head-rent and divided by total initial sub-rents.

It was agreed in 1982 that the fraction in the formula would be expressed at 75.71%. This was not strictly speaking the equivalent of the total initial head-rent divided by the total initial sub-rents because in order to calculate it the current rent-roll in 1982 was used. Some of the units had been initially sublet at lower rents, but

the intention was to comply with the formula. By letter dated the 7th of April, 1982, the Ulster Investment Bank, which was concerned with the lessee's interest, asked the lessor's agents to confirm a rental split at 75.33% for the lessors.

By letter dated the 24th May, 1982, the lessor's agents altered the percentage to 75.71% due to the rentalisation or capitalisation of £5,666 being moneys advanced by the lessor to the lessee in respect of the development.

By letter dated the 19th of July, 1982, the lessor's agents state that they (i.e. Ulster Investments Bank) can take it the percentage (75.71%) will apply for the residue of the term subject to any further capital expenditure.

The Defendants are transferees from the original lessees, Euro Estates Limited. A contract was signed in December, 1983 by Donovan Brooks and his wife. A transfer was taken by the Defendants on the 8th of April, 1983. A supplemental agreement dated the 15th of April, 1982 was made between the Plaintiffs as lessors and the Defendants. By this agreement it was agreed that the yearly rent payable under the head-lease for the residue of the term thereof should be 75.71% of the total sub-rents from subleases as in the head-lease provided, and that the head-lease was to be construed as if such proportion of the total sub-rents from subleases was reserved as the rent payable under the head-lease, but otherwise the terms and conditions of the head-lease were thereby ratified and

confirmed in all other respects. Two of the subleases affecting the property dated the 28th of May 1975 and the 14th of July 1975 to Fitzsimons Transport Limited were surrendered by the liquidator of that Company on the 30th of March 1983, the Company having gone into liquidation in February of that year. The premises comprised in the subleases have not since been let.

Mr. Farrell for the lessees contends that the true construction of the supplemental agreement and/or the Lease is to provide that the yearly rent is 75.71% of the total sub-rents actually reserved by existing subleases.

He abandoned a claim that the lessor was only entitled to 75.71% of the rents received and concentrated on the claim that it was 75.71% of rents actually reserved. He claimed that if there was no sublease and therefore a rent void, (as in the case of the two former Fitzsimons subleases) there was no provision to deem that the premises were sublet.

In my opinion the construction of the Lease as amended by the supplemental agreement is as follows.

The supplemental agreement provided that for the residue of the term the yearly rent should be 75.71% of the total sub-rents from subleases as in the head-lease provided. It is therefore necessary to see how the head-lease provides for the ascertainment of this total of sub-rents.

Having substituted a fixed percentage, the supplemental agreement goes on to provide that the Lease should be construed as if such proportion or percentage of the total sub-rents were reserved as the rent payable under the Lease. I do not think

it adds anything to the first provision.

In my opinion the supplemental agreement merely substitutes a fixed percentage expressed in figures in lieu of the formula expressed in words for ascertaining a fraction. I do not accept that the provisions in the head-lease for ascertaining the total sub-rents from subleases are overridden by the supplemental deed. On the contrary one is specifically thrown back to the Lease to see how it provides for such ascertainment.

The Lease provides for an initial fixed rent for the initial period. Then during the period of development from the letting or deemed letting of the first unit to the letting or deemed letting of the last unit, the rent is increased by adding on 8¾% of the development cost of each unit.

After the completion of the new units (i.e. the completion of the last one) and for the residue of the term, paragraph (e) provides that the rent shall be revised upwards as often as the rent payable under any sublease is revised upwards. It also provides that this should take place in no case less frequently then every seven years. And it sets out the formula which is:-

Revised rent equals:-

$$\text{Revised total sub-rents from subleases} \times \frac{\text{Total initial head-rent}}{\text{Total initial sub-rents}}$$

In my opinion the revision upwards can happen in a number of ways.

Assuming a sublease with two year rent reviews, the lessor is entitled to a share in the increased rent on each review. The seven year period is a minimum requirement.

But an actual rent review under a sublease is not the only way in which a rent can be reviewed upwards. If the sublease comes to an end (naturally or by surrender) and a new sublease is granted at an increased rent, then the new rent is the appropriate rent to be divided. It must have been contemplated by the parties that there would be a series of subleases during the ninety-nine year term. In fact there could have been a series of short-term leases, none of which would necessarily have had to contain a rent review provision. Paragraph (e) does not confine an increase in rent under the Lease to those cases where rent is increased under a rent review clause in a sublease.

If a sublease terminates and is not sublet, either because the lessee wants to occupy and make use of the unit itself, or cannot do so because of market forces, then the unit is deemed to be let at current market rent. This derives from paragraph (c) which provides that after a certain initial period a unit is deemed to be let at current market rental value unless actually let at more. The paragraph provides that the expression "revised total sub-rent from subleases" (together with other phrases) shall be construed accordingly. There would be no point in mentioning revised total sub-rent from subleases in paragraph (c), if deeming a unit to be let only arose in respect of initial sub-rents. Therefore, the meaning of the phrase in paragraph(e) "revised total sub-rent from subleases" is to be ascertained by construing it in the light of the provisions in paragraph (c).

In my opinion the deeming provision applies as often

and whenever a unit is not let, or as often and whenever a unit is let at less than the market rent.

Mr. Farrell seemed to think that it was not fair that the lessee should be liable to pay a deemed rent in a case where he could not let the premises. But it would also be unfair if the Plaintiff, who put up all the money could get a return on its investment only if the lessee, who did not put up any money, could get a profit rent. It seems reasonable that the intention was that the lessors would get a percentage of the market rental value (or better if that could be achieved) throughout the entire term, and it was up to the lessee to achieve full occupancy. No doubt in 1974 that was not considered impossible.

However, I cannot look at the Lease and interpret it on whether I consider it was fair or not, or whether it was a good bargain or not. I can only construe it in the light of the words used, and that I have done.

Approved

Hella Cowell.

4-2-85

John Blayney SC

Roger Kenny SC

John Farrell SC