

THE HIGH COURT
COMMERCIAL

[2018 No. 9011 P]

BETWEEN

DUBLIN CINEMA GROUP LIMITED

PLAINTIFF

AND

BALARK TRADING GP LIMITED

AND

BALARK INVESTMENTS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 6th day of November, 2019

SUMMARY

1. This judgment relates to an application by the defendants to strike out the plaintiff's proceedings on the grounds that they are, *inter alia*, bound to fail.
2. In making their application, the defendants rely upon the jurisdiction conferred on this Court under Order 19, Rule 28 of the Rules of the Superior Courts ("RSC") to strike out proceedings which disclose no reasonable cause of action or which are frivolous or vexatious. In the alternative, the defendants submit that this Court should use its inherent jurisdiction to strike out the proceedings as being unsustainable, disclosing no cause of action and on the basis that they are bound to fail.
3. In the substantive proceedings, the plaintiff ("Dublin Cinema Group") seeks an injunction to prevent the defendants from developing a property, known as the Screen Cinema in Dublin which was previously owned by the plaintiff, as a cinema or theatre venue in light of the second named defendant's ("Balark Investments") covenant not to use that property as a cinema/theatre.

BACKGROUND

4. On the 15th February, 2016 Dublin Cinema Group sold its leasehold interest in lands located on Townsend Street, Dublin 2 to Balark Investments for the sum of €30 million. These lands were, at the time of the sale, occupied by the Screen Cinema, which was operated by Dublin Cinema Group prior to its closure in 2016. It is relevant to note that at the time that the sale was effected, Balark Investments already owned the fee simple in the Screen Cinema and also owned an adjacent property, College House. For ease of reference, in this judgment the Screen Cinema property and College House will be referred to collectively as the "Balark Property".
5. Included in the Contract for Sale of the Screen Cinema was a restriction on the ability of Balark Investments to use the Balark Property as a cinema or theatre venue for a period of 20 years. It would seem that this restrictive covenant was included in the sale of the Screen Cinema in order to protect Dublin Cinema Group's interest in the Savoy Cinema which it continues to operate on O'Connell Street, Dublin 1. This restrictive condition was contained in Special Condition 26.1 of the Contract for Sale in the following terms:

"[Balark Investments] hereby agrees and so as to bind its successors and assigns, that it shall not use or facilitate, participate, or assist or be engaged or concerned or interested in the use by itself or any third parties of (a) [the Screen Cinema] and (b) the adjoining property commonly known as College House, Townsend Street, Dublin 2, [...] or any part of [Screen Cinema] and the College House Property, as a cinema or theatre venue of any kind, for a period of 20 (twenty) years from the date of completion of the within sale [15th February, 2016]."

6. Following the completion of the sale, Balark Investments executed a Deed of Covenant in favour of Dublin Cinema Group. This Deed of Covenant was in similar, although not identical, terms to Special Condition 26.1 of the Contract for Sale, to the effect that Balark Investments was

"not to use or permit the use of any part of the Balark Property [...] as a cinema or theatre venue of any kind, for a period of 20 (twenty) years [...]."

7. On the 16th November, 2016 an application for the registration of the Balark Property with the Deed of Covenant as a burden on the title was lodged with the Property Registration Authority.
8. On the 27th January, 2017 Balark Investments transferred to the first named defendant ("Balark Trading"), its interest in the Balark Property. Subsequently, on the 16th July, 2018, Balark Trading was granted planning permission for the redevelopment of the Balark Property. On the 3rd October, 2019 title to the Balark Property was transferred to College Square 3 Limited Partnership, an entity within the Balark group of companies.
9. The planning permission granted by An Bord Pleanála to Balark Trading in July 2018 provides for the redevelopment of the Balark Property to include, inter alia, a 500-seater entertainment venue in the following terms:

"a circa 500 number seater entertainment venue at basement -1 and basement -2 levels (2,100 square metres) including an associated bar, restaurant and box office located in a part double-height space at ground floor level and first floor level (1,249 square metres); a double-height void at ground floor level providing an external pedestrian route through the urban block."

Thus, the Balark Property has planning permission to be developed, not as a cinema/theatre, but rather as an entertainment venue, although as will become clear Dublin Cinema Group maintains that it is impossible for the property to be used as an entertainment venue without a breach of the covenant that it will not be used as a cinema/theatre.

10. It appears that upon Dublin Cinema Group becoming aware of the planned redevelopment of the Balark Property pursuant to this planning permission and also on foot of their knowledge of engagement between the defendants and Press Up Entertainment Group/Paddy McKillen Junior, who are well-known in the entertainment

industry and who have experience in the management of, *inter alia*, cinemas and theatres, Dublin Cinema Group sought, by letter dated 13th August, 2018, two undertakings from Balark Trading to the effect that:

- (i) it would not use or facilitate the use of any part of the Balark Property as a cinema or theatre venue of any kind and,
- (ii) that the aforementioned grant of planning permission would not be implemented for as long as the entertainment venue is a requirement thereof.

11. On the 15th October, 2018, Dublin Cinema Group issued the within proceedings against the defendants. On the 22nd October, 2018, the proceedings were entered into the Commercial Court.
12. In their Statement of Claim dated 16th October, 2018 Dublin Cinema Group sought, *inter alia*, the following three forms of relief:

"A declaration that [Balark Trading] is not entitled to use or permit the use of the [Balark Property] as an entertainment space, or otherwise as a cinema or theatre of any kind, for the period of 20 years from 15 February 2016, or otherwise acting in breach of the Contract for Sale dated 15 February 2016 [...] or the Deed of Covenant [...];

An injunction restraining [Balark Trading] from using or permitting the use of the [Balark Property] as a cinema or theatre venue of any kind, which includes its intended use as an entertainment space, for the period of 20 years from 15 February 2016, or otherwise acting in breach of the Contract for Sale or the Deed of Covenant;

An injunction restraining [Balark Trading] from implementing a grant of planning permission issued by An Bord Pleanála under Dublin City Council Register Reference No. 3637/17 (An Bord Pleanála Ref. PL29S.300709) for as long as the entertainment space for which the planning permission provides, or a cinema or theatre venue of any kind, is a requirement thereof."

13. On the 2nd November, 2018 the defendants gave an undertaking to Dublin Cinema Group in the terms of the first undertaking sought in the letter of 13th August 2018, that they would not use or facilitate the use of any part of the Balark Property as a cinema or theatre venue of any kind for a period of 20 years. However, this wording did not cover the terms of the second undertaking sought by Dublin Cinema Group in that letter, namely that the planning permission would not be implemented for as long as the entertainment venue was a requirement thereof. In any event, this undertaking was not accepted by Dublin Cinema Group, for the reason, it seems, that the undertaking was not binding on third party successors of the defendants and that therefore, any sale and transfer of the Balark Property to a third party would render that undertaking meaningless.

14. In a subsequent letter dated 21st October, 2019 solicitors acting for the defendants wrote to the solicitors for Dublin Cinema Group signalling the willingness of the defendants to offer further and extended undertakings to deal with, *inter alia*, Dublin Cinema Group's concern that the undertaking did not bind its successors. The terms of the proposed undertakings are set-out in the letter as follows:
- "1. Give an undertaking to the Court on the same terms as the existing Undertaking (i.e. an undertaking not to use or facilitate or permit the use of any part of the Balark Property as a cinema/theatre venue of any kind for a period expiring on 15 February 2036); and
 2. Give an undertaking to the Court that the Balark entities shall procure that any third party successor or assignee of the Balark Property shall give the same undertaking."
15. This letter offering the above undertakings was sent to Dublin Cinema Group the day before the within motion was heard before this Court. Accordingly, at the hearing of the within application to strike out the plaintiff's claim, this Court afforded the parties a period of time to facilitate discussions. Following these discussions, this Court was informed of certain matters that had been agreed between the parties. Specifically, this Court was informed of the following:
- (i) That the defendants accepted that the Deed of Covenant, prohibiting the use of the Balark Property as a cinema or theatre venue, runs with the land and is therefore binding on successors and assigns in title of the defendants, and benefits the successors and assigns in title of Dublin Cinema Group as owners of the Savoy Cinema Property;
 - (ii) That it was agreed that the defendants and College Square 3 Limited Partnership would give the first undertaking set-out in the letter dated 21st October, 2019 to the court;
 - (iii) That it was agreed that the defendants and College Square 3 Limited Partnership would give an undertaking (similar to the terms of the second undertaking as set-out in the letter dated 21st October, 2019) that in the event of any disposition or sale of the Balark Property, they would procure from the successor or assign the same undertakings but in writing to Dublin Cinema Group, instead of to the court, within 21 days of the transfer concerned;
 - (iv) That it was agreed that College Square 3 Limited Partnership would be added as a defendant to give its undertakings; and,
 - (v) That the above agreed matters would be recorded in recitals to this Court's Order in the within application.
16. On the basis therefore that the above matters had been agreed, the within motion proceeded on the understanding that Dublin Cinema Group would now only be seeking

the third relief originally sought in the Statement of Claim, namely an injunction preventing the defendants from implementing the grant of planning permission (An Bord Pleanála Ref. PL29S.300709) for as long as the entertainment space for which the planning permission provides is a requirement thereof.

17. It follows that the motion of the defendants therefore is restricted to the strike out of Dublin Cinema Group's application for this injunction, on the grounds that the injunction it seeks (to restrain the defendants from implementing the planning permission for the use of the Balark Property as an entertainment venue) is unsustainable, bound to fail and discloses no reasonable cause of action.

ANALYSIS

18. This case only exists because of a claimed breach of a Deed of Covenant, which Deed was executed on the 15th February, 2016, the same date as the execution of the Contract for Sale. Therefore, the starting point for any analysis of whether Dublin Cinema Group's application for an injunction (premised on this restrictive covenant) is bound to fail involves a consideration of the wording of that covenant.
19. This restrictive covenant states:

"In consideration of the sale by DCG [Dublin Cinema Group] to Balark, by way of surrender of DCG's interest in the Lease, Balark for itself and its successors and assigns in title, the freehold owners for the time being of the Balark Property which premises for the avoidance of all doubt includes but is not limited to the Screen Property, HEREBY COVENANTS with DCG its successors and assigns, to the intent that the burden of such covenant shall run with and bind the Balark Property which premises includes but is not limited to the Screen Property and each and every part thereof, to the intent that the benefit thereof shall be annexed to and run with each and every part of the Savoy Property, not to use or permit the use of any part of the Balark Property which premises includes but is not limited to the Screen Property, as a cinema or theatre venue of any kind, for a period of 20 (twenty) years from the date hereof." [Emphasis added]
20. It is crucial to note that this restrictive covenant does not restrain any building or development of the Balark Property - it is solely a restriction on use. Furthermore, it is specifically a restriction on use as a cinema or theatre venue. There can be no doubt that the terms of the covenant are unequivocal in imposing a restriction on the use of the Balark Property and that it imposes absolutely no restriction on building or development.
21. These clear terms perhaps explain why Dublin Cinema Group has not pleaded that the covenant restraining the use of the Balark Property is to be interpreted as a covenant restraining development or building.
22. However, the fact that Dublin Cinema Group has not pleaded that there is any restriction contained in the covenant regarding building or development is significant, when one considers that the injunction it seeks in these proceedings clearly involves a restriction on

development, since it seeks to prohibit the defendants from *implementing* planning permission in the terms as granted by An Bord Pleanála.

23. It is nonetheless Dublin Cinema Group's contention that the use of the Balark Property as an entertainment venue will of necessity amount to its use as a cinema or theatre, in breach of the restrictive covenant. It is however relevant to note that at no point in the planning permission application process did Dublin Cinema Group lodge any objection to the Planning Authority. Furthermore, it appears that no appeal to the grant of the planning permission was made by Dublin Cinema Group. This is notwithstanding that Dublin Cinema Group was aware, at least ten months before the grant of planning permission, that a planning application for an entertainment venue had been lodged by the defendants. This is clear from an email dated 14th September, 2017, sent by Mr. Lorcan Ward, a director of Dublin Cinema Group, to a Mr. Richard Booth, on behalf of the defendants, in which Mr. Ward explicitly acknowledges the planning permission application submitted by the defendants.
24. Dublin Cinema Group goes further than simply contending that the venue will be used as a cinema/theatre if it is used as an entertainment venue, as it claims that, as a matter of planning law, it is not possible for the defendants to refrain from using the Balark Property as a cinema or theatre venue. In a replying affidavit sworn on 16th July, 2019 by Mr. Ward, it is averred that:

“[T]here is a legitimate concern, whether it is lawful, as a matter of planning law to build the development on the basis of mixed uses authorised by the planning authority and to refrain from activating one of the uses.” (Emphasis added)
25. One of the uses to which Mr. Ward is clearly referring is the use as an ‘entertainment venue’. However, no authority is cited by Dublin Cinema Group, either by way of affidavit or submission, in support of this claim that the defendants would be in breach of planning law by not using the Balark Property as an entertainment venue (which Dublin Cinema Group says will necessarily involve its use as a cinema/theatre), having been granted planning permission to so use it.
26. The most that is said by Mr. Ward in this replying affidavit in this regard is that he “*is advised*” that it may be unlawful for the defendants to refrain from using the Balark Property as a cinema/theatre. In the absence of any legal authority cited in support of this view, this particular argument amounts to nothing more than an assertion.
27. A related argument maintained by Dublin Cinema Group, in relation to the planning permission, is that in the event of the Balark Property not being developed as a cinema/theatre, Dublin City Council may issue proceedings pursuant to section 160 of the Planning and Development Act, 2000, not because of the defendant's use of the property in breach of planning laws, but rather because of its *failure* to use the property in compliance with the terms of the planning permission, for example, by leaving the premises idle. Again, no legal authority is cited in support of this contention that it is a breach of planning laws for an applicant to fail to put the property to the use for which he

applied and obtained planning permission, nor is any authority cited for the proposition that the planning authority would take enforcement proceedings against the applicant in such circumstances. Counsel for Dublin Cinema Group cited in support of this proposition the case of *Horne v. Freeney* (Unreported, High Court, Murphy J., 7th July, 1982) which he stated was authority for the proposition that the grant of planning permission is not divisible and that if several uses are provided for, they must all be complied with. However, that case involved a failure to comply with a grant of planning permission because some of the specifications in the planning permission were not complied with by the applicant, for example, the roof was constructed of steel sheets rather than concrete slabs. The circumstances in which the application was brought in the *Horne* case cannot be said to be comparable to the present case, which does not involve an actual failure to comply with the specifications set out in a grant of planning. Nowhere in the planning permission granted in the within case is it stipulated that the entertainment venue must include a cinema or theatre and so this Court can find no basis for Dublin Cinema Group's claim that that failure to use the space as a cinema/theatre will amount to a breach of planning.

28. This Court cannot lose sight of the fact that all of these claims by Dublin Cinema Group, that the defendants cannot leave the property idle and that Dublin City Council will take s. 160 proceedings against the defendants for so doing, are made against a background where there is no dispute about the actual use of the Balark Property. This is because the defendants have given extensive undertakings (to the satisfaction of Dublin Cinema Group) that they will not use the property as a cinema/theatre.

29. In this regard, even if Dublin Cinema Group is correct in its belief that it is not possible to use the Balark Property as an entertainment venue, without it also being used as a cinema/theatre, this does not mean that the defendants become thereby entitled to use it as a cinema/theatre. First, they are bound by the restrictive covenant and secondly, they are bound by the undertakings given to this Court. Furthermore, s. 34(13) of the Planning and Development Act, 2000 makes it absolutely clear that the grant of planning permission does not entitle the defendants to carry out any development which is in breach of private rights, since this section states that:

“A person shall not be entitled solely by reason of a permission under this section to carry out any development.”

30. Of course, if, after its development as an entertainment venue, Balark Trading was to use the venue in such a manner, such that it was found by a court to be used as a cinema or a theatre, then the defendants would be in breach of the restrictive covenant.

Jurisdiction to strike out

31. The authority of this Court to strike out proceedings which are bound to fail was considered by Clarke J. (as he then was) in *Salthill Properties Limited & Anor. v. Royal Bank of Scotland plc & Ors.* [2009] IEHC 207 at para. 3.12:

"It is true that, in an application to dismiss proceedings as disclosing no cause of action under the provisions of Order 19, the court must accept the facts as asserted in the plaintiff's claim, for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim. However, I would not go so far as to agree with counsel for Salthill and Mr. Cunningham, to the effect that the court cannot engage in some analysis of the facts in an application to dismiss on foot of the inherent jurisdiction of the court. A simple example will suffice. A plaintiff may assert that it entered into a contract with the defendant which contained certain express terms. On examining the document the terms may not be found, or may not be found in the form pleaded. On an application to dismiss as being bound to fail, there is nothing to prevent the defendant producing the contractual documents governing the relations between the parties and attempting to persuade the court that the plaintiff has no chance of establishing that the document concerned could have the meaning contended for because of the absence of the relevant clauses. The whole point of the difference between applications under the inherent jurisdiction of the court, on the one hand, and applications to dismiss on the factual basis of a failure to disclose a cause of action on the other hand is that the court can, in the former, look to some extent at the factual basis of the plaintiff's claim." (Emphasis added)

32. In this case, there is no dispute on the facts, namely the terms of the restrictive covenant, which is not in issue, and therefore the key question is whether the construction/development of the Balark Property could amount to a breach of that covenant. This case is, in many ways, similar to the example given by Clarke J. in *Salthill*, since Dublin Cinema Group has attempted to convince this Court that the restriction on 'use' in the covenant has the meaning Dublin Cinema Group ascribes to it, namely a prohibition on the *construction/development* of an entertainment venue, for the various reasons it has given.
33. This Court cannot see any basis for the assertion that the mere development of the Balark Property as an entertainment venue (or even as a cinema or theatre venue) is a breach of the restrictive covenant on its use as a cinema or theatre. A breach of the restrictive covenant will only occur in circumstances where the proposed entertainment venue is actually used as a cinema or theatre. Thus, on this point, this Court has engaged in an analysis of the facts and concluded that as a matter of interpretation an injunction seeking to prevent the *development/construction* of a property as an entertainment venue (or even as a cinema/theatre) is bound to fail if that injunction is based (as this one is) on a restrictive covenant not to use that property as a cinema/theatre.
34. It is also relevant to note it is Dublin Cinema Group's intention to argue at the hearing of the substantive case that there is no other possible use of the entertainment venue other than as a cinema or theatre. For their part, the defendants claim that they "*have not made a final decision, or even a tentative decision, on the use to which they will put the entertainment space once constructed*" (to quote para. 24 of the grounding affidavit of Mr. Crean dated 25th June, 2019). In this regard, it should be noted that at para 3.0 of

the document entitled '*College House Entertainment Venue Management Strategy*', exhibited to Mr. Ward's affidavit dated 16th July, 2019, which was submitted to the planning authorities as part of the planning application, several uses of the Balark Property are suggested, including:

"theatre, dance, circus, trade shows, conferences, fashion, seasonal activities, art exhibitions etc."

35. It is noteworthy that none of these alternative uses are engaged with or challenged by Dublin Cinema Group, rather the argument advanced on its behalf is that the Balark Property will "*inevitably*" be used as a cinema/theatre. This position is maintained by Dublin Cinema Group despite the terms of the undertaking given by the defendants to not use the property as a cinema/theatre.
36. It is also relevant to note that Dublin Cinema Group appears at all times to have been well aware of the very fine but clear distinction between '*construction*' and '*use*' of a property. This is because Dublin Cinema Group itself appears at all times to have understood that the *construction* of the Balark Property as an entertainment venue (or even as a cinema/theatre) did not breach the restrictive covenant on its *use* as a cinema/theatre venue. This conclusion can be drawn from the fact that the Contract for Sale, which Dublin Cinema Group negotiated, contained Clause 26.1 prohibiting the *use* of the property as a cinema/theatre by Balark Investments, yet the very next clause, Clause 27.1, envisages Balark Investments constructing, as distinct from using, the Balark Property as a cinema/theatre.
37. This is because Clause 27.1 of the Contract for Sale envisages a situation where Balark Investments first applies for planning permission without any reference to a cinema/theatre, which application is refused (presumably because of the Local Area Plan, which requires that the cultural uses of the property were to be retained, along with the requirement for an entertainment facility). In that eventuality, Clause 27.1 then envisages, notwithstanding the restrictive covenant in Clause 26.1 on the use of the property as a cinema/theatre, that Balark Investments would apply for and be granted planning permission for the *construction* of a cinema/theatre venue at the Balark Property. Once the construction is completed, Balark Investments is obliged to enter negotiations with Dublin Cinema Group for the sale/lease of the cinema/theatre venue to Dublin Cinema Group.
38. On this basis, it seems that Dublin Cinema Group was well aware of the fine but clear distinction between Balark Investments itself *using* the property as a cinema/theatre and Balark Investments *constructing* the property as a cinema/theatre (albeit for its use by a third party, in that instance, Dublin Cinema Group), yet it is now seeking to prevent the defendants from *constructing* the property as an entertainment venue by claiming that this construction necessarily involves a breach of Clause 26.1. To put the matter another way, the Contract for Sale itself, which prohibits the *use* by Balark Investments of the Balark Property as a cinema/theatre, envisages Balark Investments *constructing* a cinema/theatre at the Balark Property, albeit with a view to it being sold/leased to, and

used by, Dublin Cinema Group. It seems therefore that Dublin Cinema Group knew all too well of the fine distinction between constructing and using a property.

39. However, in these proceedings, Dublin Cinema Group is now arguing, *inter alia*, that construction necessarily encompasses use and so leads to a breach of the covenant, even though it is clear from the wording of the Contract for Sale that the Balark Property's use (as a cinema/theatre) was prohibited, yet the *construction* (of a cinema/theatre) was permitted (*albeit* with a view to its subsequent sale/lease to Dublin Cinema Group).

CONCLUSION

40. The only issue in this case is whether Dublin Cinema Group's application for an injunction to prevent the defendants from implementing the planning permission to develop the Balark Property as an entertainment venue should be struck out as, *inter alia*, bound to fail. This is because the defendants have given undertakings not to use the Balark Property as a cinema/theatre in terms satisfactory to Dublin Cinema Group.
41. For the reasons set out above, this Court cannot see any legal basis for the granting of an injunction prohibiting the defendants from constructing/developing, as distinct from using, the Balark Property as an entertainment venue. There is a very clear distinction between *constructing* a building to be used as an entertainment venue (or indeed even as a cinema/theatre) and *using* it as an entertainment venue (or as a cinema/theatre).
42. Indeed, it is this Court's view that even if Balark intends to use the Balark Property as a cinema/theatre (in the teeth of the undertaking that it has given), the *construction* of the property as an entertainment venue (or even as a cinema/theatre) is not one and the same as its use as an entertainment venue (or even as a cinema/theatre).
43. Unless and until the Balark Property is being used as a cinema/theatre, this Court cannot see how Dublin Cinema Group has any right to a remedy based on its *belief* as to the defendants' intentions.
44. Similarly, this Court cannot find any authority for the view that *constructing* a cinema/theatre (even if this were being done, rather than the construction of an entertainment venue) involves a breach of a covenant on the *use* of a building as a cinema/theatre.
45. Dublin Cinema Group has obtained extensive undertakings from the defendants to satisfy itself that the defendants and any successors in title will comply with the restrictive covenant not to use the Balark Property as a cinema/theatre. Despite these undertakings, it clearly does not trust the defendants and wishes to prevent them from developing the Balark Property as an entertainment venue, because of its fear that it will be used as a cinema/theatre. These undertakings were given by the defendants in order to bring this expensive litigation to an end and should have done so, in this Court's view. However, for reasons best known to Dublin Cinema Group, it persisted with its injunction application to prevent the construction of the entertainment venue as per the terms of the planning permission.

46. Of course, it is possible that Dublin Cinema Group might be correct not to trust the defendants and it is of course possible that the defendants might be hoping or intending to use the Balark Property as a cinema/theatre in the future, if it transpires that it is not in fact possible to use it as an entertainment venue, without breaching the restrictive covenant and its undertakings to this Court. Indeed, it is even possible that the defendants might be intending to use the Balark Property as a cinema/theatre in breach of the restrictive covenant and undertakings. However, that is a hypothetical situation which does not concern this Court as it is not the purpose of the courts to police the *intentions or possible intentions*, as distinct from the acts, of commercial parties. It is also not the purpose of the courts to entertain or engage with possible future hypothetical situations.
47. Accordingly, it is this Court's view that the injunction application brought on behalf of Dublin Cinema Group is bound to fail and must be struck out.