APPROVED

THE HIGH COURT

[2022] IEHC 600

[2020 333 S]

BETWEEN

KENNETH TREACY

PLAINTIFF

AND

LEE JAMES MENSWEAR LIMITED AND JAMES O'REGAN

DEFENDANTS

JUDGMENT of Mr. Justice Charles Meenan delivered on the 2nd day of November, 2022

Background

1. The plaintiff is a landlord and owner of 45 Oliver Plunkett Street, Cork and the ground floor of 9 Marlboro Street, Cork (together "the premises").

2. The first named defendant is a limited liability company having its registered office at 43 Oliver Plunkett Street, Cork. The second named defendant is a businessman and is director and shareholder of the first named defendant.

3. By an indenture of lease in writing dated 14 June 2007 the plaintiff leased the premises to the first named defendant at a yearly rent of €222,500. By a further agreement of the same date the second named defendant agreed to guarantee the performance of the said lease by the first named defendant, in particular, payment of rent and other sums payable under the lease. The second named defendant also agreed that on the default of the first named defendant that

the plaintiff could proceed against him as if the second named defendant was named as the payer under the said lease.

4. The plaintiff's claim against the first named defendant is that it has failed, contrary to the terms of the lease, to pay rent and further failed to pay insurance premiums that had become due. Though a part payment was made by the first named defendant the plaintiff states that as of 1 December 2020 the amount of €143,101.42 was due and owing by the defendant. This amount was specified in an invoice dated 1 December 2020 which sets out the sum of €1,000 as being monies due for insurance and the sum of €185,416.70 in rent arrears for the period March to December 2020. Allowing for the part payment this leaves a balance due of 143,101.42. As of 1 June 2021, this amount had increased to €257,224.09. This amount was made up of insurance due of €3,872.65 and rent arrears for the period 1 March 2020 to 30 June 2021 of €296,666.72. Allowing for the part payment this left a sum of €257,224.09 claimed by the plaintiff.

5. The plaintiff seeks summary judgment for rent arrears and unpaid insurance premia.

Application for summary judgment

6. The application for summary judgment is grounded on an affidavit of the plaintiff. This affidavit exhibits the indenture of lease dated 14 June 2007 together with the correspondence with the defendants. In response there was an affidavit sworn by the second named defendant on behalf of both defendants. The second named defendant criticises the level of rent under the said lease stating:

> "I say and believe that the first named defendant and I would never have entered into the agreement if we had had the slightest inkling that the economy was about to collapse .."

The affidavit details the various attempts made to seek a reduction in rent which was acceded to for a period of time. The affidavit then sets out the defence of the defendants.

7. The starting point for the defence is the various restrictions which commenced in March 2020 brought in by the Government to prevent the spread of the Covid-19 virus. The effect of these restrictions was that the first named defendant was obliged to close the demised premises for business for the period between March 2020 and May 2021. Arising from these closures the defendants rely on the following provisions contained in the said lease:

> "Clause 4.14.1.5:
>
> Not to engage in any activity in or on the demised premises which may result in:
>
> The landlord incurring liability or expense under any statutory provision".
>
> and Clause 4.15.5 "not to use the demised premises --- for any illegal --- purpose ---"

8. The defendants submit that by reason of the regulations to deal with the Covid-19 pandemic they were prevented from using the premises as a retail outlet. It is submitted that this amounted to frustration of contract, thereby relieving the first named defendant of its obligation to pay rent and other amounts under the said lease.

9. In a supplemental affidavit of the plaintiff, it was stated that the plaintiff had demolished the demised premises in December 2005, rebuilding them as one combined commercial space. This development was funded by a seven-figure loan subject to a mortgage which required repayments from the plaintiff. The plaintiff stated that he was dependent on the rent from the demised premises to meet his mortgage repayments on the building and to support himself.

Consideration of defence

10. The criticisms which the second named defendant set out in his affidavit concerning the level of rent against the background of a significant downturn in economic conditions do not amount to a defence at law. This lease was a commercial arrangement entered into freely by both parties. The substantive defence put forward by the defendants is frustration of contract brought about by the strict Covid-19 regulations.

11. There are a number of authorities on frustration of contract which I will now refer to. *Ringsend Property Ltd v. Donatex Ltd and Bernard McNamara* [2009] IEHC 56 Kelly J. (as he then was) stated at p. 13:

> "The defence of frustration is one of limited application and narrowness. It arises in circumstances where performance of a contract in the manner envisaged by the parties is rendered impossible because of some supervening event not within the contemplation of the parties. As was said by Lord Radcliffe in *Davis Contractors Limited v. Fareham UDC* [1956] AC 696:-
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> 'Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.'
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> His Lordship went on to state that:-
>
> 'It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.'
>
> In this jurisdiction the doctrine of frustration was considered by Blayney J. in *Neville & Sons Limited v. Guardian Builders* [1995] 1 ILRM. In that case he quoted with approval from the speech of Lord Simon in *National Carriers Limited v. Panalpina (Northern) Limited* as follows:-
>
> 'Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the

outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.'

These quotations demonstrate the narrow scope for the doctrine of frustration to be invoked."

12. In the instant case the effect of the Covid-19 regulations was to prevent the first named defendant trading from the demised premises as it had done before the regulations. Such restrictions were only in place for so long as the regulations were in force. Thus, the events relied upon by the defendants to give rise to the defence of frustration were temporary in nature. This amounts to what has been referred to as "partial frustration". Returning to the said judgment of Kelly J. the following is stated:

"As to *'partial frustration',* it is considered in Treitel at paras. 50-07 and following. The author refers to some civil law systems where partial destruction of the subject matter of the contract can lead to the same type of relief in respect of that part as would be available in respect of the whole in cases of total destruction. He cites German law and provisions of the civil code in that jurisdiction. The author goes on, *'these rules have no direct counterpart in English law, under which, in cases of partial impossibility, the contract is either frustrated or remains in force. There is no such concept as partial or temporary frustration on account of partial or temporary impossibility…the concept of partial discharge in English law is restricted to obligations which are severable, whether in point of time or otherwise.'"*

13. This issue was recently addressed by O'Moore J. in *Footlocker Retail Ireland Ltd v. Percy Nominees Ltd* [2021] IEHC 749. The facts of this case are similar to those of the instant case. Footlocker operated its business from premises leased by Percy Nominees Ltd. Following

the enactment of Covid-19 regulations it was unable, like the defendant in the instant case, to operate its premises as a retail outlet. Footlocker sought a declaration the lease was frustrated and that it had no liability for rental payments under the lease from the date of the coming into force of the Covid-19 regulations. O'Moore J. cited the passages from Kelly J. set out above stating:

> "In the present case, Foot Locker has not established that there has been any partial discharge of severable obligations. The obligation to pay rent, the basic requirement placed on the tenant by any lease, is not a severable obligation. Relieving the tenant of this obligation, while permitting it to occupy the premises to the exclusion of the landlord or any alternative tenant, is not what Kelly J. contemplated when referring to the concept of partial discharge."

and:

> "45. The Irish authorities, in a consistent and principled way, have decided that partial frustration is not a legal concept applied in these courts. They also establish that the doctrine of frustration, if successfully invoked, results in the termination of the relevant contract (or lease) …"

14. I also refer to the decision of Sanfey J. in *Oysters Shuckers Ltd T/A Klaw v. Architecture Manufacture Support (EU) Ltd and Anor* [2020] IEHC 527. This case also considered the effect of the Covid-19 regulations. Sanfey J., having referred to the passage from Kelly J. cited above stated:

> "86. I agree with the observations of Kelly J. in this regard. The obligation to pay rent is an integral and indeed fundamental part of the contract. The obligation may be suspended in certain circumstances set out at clause 3.2 of the disputed lease; those circumstances do not apply here. Accordingly, the plaintiff cannot argue that the rent obligation is frustrated, while arguing that the lease itself remains valid."

15. In my view, the authorities are overwhelmingly against the defence being put forward by the defendants. Though it may be argued that the doctrine of frustration is an evolving one the contention by the first named defendant that it was discharged of its obligation to pay rent for so long as the covid-19 regulations were in force has no basis in law. Whilst Covid-19 regulations were in force the first named defendant continued to remain and enjoy rights afforded by law to a tenant albeit the subject to temporary restrictions. Clauses 4.14 and 4.15 do not alter this and cannot be relied upon by the Defendants.

16. In the course of submissions, the defendants sought to rely on a decision of the Supreme Court of Massachusetts in UMNV 205-207 Newbury, *LLC v. Caffè Nero Americas Inc* (No. 2084 CV 01493-BLS 2 (Mass. Super. Ct 2021). This case, once again, concerns regulations brought in by the Governor of Massachusetts to combat Covid-19. As a result of these regulations the defendant Caffè Nero had to close its premises to the public and claimed it was not required to pay rent for the period of such closure. This case was decided with reference to "the Statement (Second) of Contract No. 26 (1981)." This would seem to indicate the existence of specific legal provisions on contracts which, of course, have no application in this jurisdiction. Also, it may be of significance that in this case Caffè Nero vacated the premises and returned the keys. In any event, the authorities in this jurisdiction are consistently against the case being made by the defendants.

17. This is an application for summary judgment, and I have been referred to various authorities that should be applied on an application such as this being *Aer Rianta CPT v. Ryanair Ltd* [2001] IESC 94, *Harrisrange Ltd v. Duncan* [2002] IEHC 14 and *Danske Bank AS v. Durkan New Homes* [2010] IESC 22. I refer to the following from the judgment of Peart J. in *Governor and Company of the Bank of Ireland v. Kathleen Quinn* [2016] IECA 30:

> "39. I am therefore satisfied for these reasons that the trial judge was correct to conclude that the provisions of the Act do not apply to the loan facility sued upon, and for that

> reason the defences sought to be put forward for the purposes of having the claim adjourned to a plenary hearing do not pass the Aer Rianta threshold. I can see no basis on which it could be thought that the defendant's arguments could be advanced further at a plenary hearing than they could be advanced on the motion for judgment. The facts are not in dispute. The issues raised are legal issues, and can be and were determined on the motion that came before Hedigan J. In my view he determined these issues correctly."

18. Likewise in the instant case I am satisfied that the defence raised by the defendants can be determined within the confines of an application for summary judgment.

Conclusion

19. By reason of the foregoing, I am satisfied that the plaintiff is entitled to recover the sums sought from the first named defendant and also from the second named defendant as guarantor. I will therefore grant judgment in favour of the plaintiff and will hear the parties on the precise amount of the judgment. As for costs my provisional view is that as the plaintiff has been entirely successful he is entitled to the costs of the proceedings to include reserve costs. I will list this matter for final orders on 17th November. Any submissions to be filed no later than 11th November 2022.