

Neutral Citation No. [2008] NICH 8

Ref: **GIR7154**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **02/05/08**

2007 No 67262

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION

BETWEEN:

ODYSSEY CINEMAS LIMITED

Plaintiff

and

VILLAGE THEATRES 3 LIMITED

Defendant

and

SHERIDAN MILLENNIUM LIMITED

Third Party

GIRVAN LJ

[1] The defendant Village Theatres 3 Limited seeks summary judgment under Order 14 in relation to its counterclaim against the plaintiff ("OCL") for rent due on foot of an under-lease made between the defendant as lessor and OCL on 26 May 2006 whereby the defendant demised to OCL the premises now known as Storm Cinemas in the Odyssey Complex for the term ending on 11 May 2006 at an annual rent of the amount equivalent to the superior rent fixed by the lease between Sheridan Millennium and the defendant (see the judgment in proceedings 2007 No 126402). The rent was to be discounted by 75% in the first year of the term and 50% in the second year.

[2] The lease contains a covenant in Clause 9 which states:

"The annual rent and other sums due under this lease shall be paid by the tenant or any guarantor without (as the case may be) deduction, counterclaim or set-off."

[3] OCL's defence to the counterclaim is that it has rescinded the agreement under which the under-lease fell to be created on the ground of fraudulent misrepresentation by the defendant. It is OCL's case that it was

induced to enter into the agreement and the under-lease by reason of the defendant's fraud in failing to disclose the existence of a serious noise and vibration problem emanating from adjoining premises of which the defendant was fully aware and in providing false answers to pre-contract inquiries in that connection.

[4] The defendant points to OCL's continued occupation of the premises and contends that this shows that OCL has by its conduct and in particular by its continued occupation affirmed the contract and the under-lease. Although counsel recognised that its continuation of possession of the premises may have no legal basis, OCL contends that it is not evidence of affirmation which is not, in any event pleaded. OCL is placed in the quandary of facing the possibility that the defendant's claim that OCL has not rescinded the contract or was not entitled to rescind the contract may succeed. This is a triable issue. Mr Orr on behalf of the defendant argued that even if the OCL had effectively rescinded the contract it is bound to pay a use and occupation rent for the premises or mesne profits on the basis that it is being occupied by OCL as a trespasser. The defendant should accordingly be entitled, at least to judgment for such a claim if less than the actual rent.

[5] It is clear that until trial of the issues whether OCL was entitled to rescind and has effectively rescinded the agreement and the lease the defendant's claim for rent is not clearly established. While there is force in Mr Orr's contention that OCL would be bound to pay at least mesne profits or a use and occupation rent for the premises there is no clear or undisputed minimum amount shown to be due under that heading.

[6] For these reasons the defendant's claim for summary judgment on foot of its counterclaim cannot succeed. In the course of argument the question arose as to whether the court could impose on OCL as a condition of leave to defend a requirement that it give up possession of the premises. Mr Reynolds QC on behalf of OCL argued that OCL should be entitled to unconditional leave to defend since it has a clear arguable defence to the claim for rent and any claim for mesne profits or for use and occupation rent is unquantified, may amount to nothing and in any event the plaintiff's claim for damages for fraud and breach of covenant and warranty will or may well exceed the ongoing claim for use and occupation.

[7] Although it seems very unlikely that OCL will be entitled to occupy the premises without any obligation to pay the equivalent of a rent for its use and occupation and although the continued occupation may create an argument that OCL has affirmed the contract the issues are not so free from argument or doubt that summary judgment should be granted or that a condition requiring OCL to yield up possession should be imposed as a condition for granting leave.

[8] If OCL refuses to pay the rent for the premises because it is entitled to do so because it was entitled to rescind and has rescinded the lease its continued occupation of the premises would have no legal basis. If OCL was not entitled to rescind its failure to pay rent is a breach of covenant since it would have no basis for withholding rent, the lease excluding any entitlement to withhold even on the basis of a set-off. The defendant may accordingly be entitled to pursue a claim for possession of the premises in these circumstances. Such a claim however is not asserted in the present proceedings and thus is not relevant in the context of the Order 14 application.

[9] For these reasons the defendant's application for summary judgment must be dismissed.

[10] It is clearly important that this action should be tried as quickly as possible bearing in mind that the defendant may be deprived of rent to which it is properly due and the amount of the rent must inevitably give rise to cash flow difficulties from the defendant's point of view bearing in mind that the defendant has no answer to its landlord in respect of the rent due in relation to the superior lease. The parties accordingly should ensure that the action is progressed with expedition and an expedited hearing sought.