

Neutral Citation No. [2008] NICH 9

Ref: **GIR7153**

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

Delivered: **02/05/08**

2007 No 126402

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION**

BETWEEN:

SHERIDAN MILLENNIUM LIMITED

Plaintiff

and

VILLAGE THEATRES 3 LIMITED

Defendant

GIRVAN LJ

[1] The plaintiff by a lease of 8 July 2004 demised to the defendant part of the premises in the Odyssey Complex being that part now known as Storm Cinemas. The lease is for a term of 25 years from 14 May 2001 and is subject to a current rent of £1,246,402 from 14 May 2006 fixed at rent review. The defendant covenanted to pay the rent the insurance rent and a service charge calculated in accordance with the terms of the lease and payable quarterly in advance on 1 February, 1 May, 1 August and 1 November in each year.

[2] By Clause 3(2)(a) it was provided:

“The rent shall in all cases be paid by equal quarterly payments in advance on the normal Rent Days (defined as 1 February, 1 May, 1 August and 1 November) in every year without any deduction whatsoever ...”

By Clause 3(1) the defendant covenanted:

“To pay the rents herein mentioned at the times and in the manner herein provided without any deduction ...”

By Clause 3(1)(b) it was provided that if any part of the rents remained unpaid for a period of 14 days interest would run 4% over the prescribed rate of interest (defined as the Ulster Bank base rate) until payment.

[3] The defendant did not pay the rent following the due date on 1 November 2007. The amount due at that date was £466,802.15. Mr Orr QC on behalf of the defendant acknowledged that that sum was correctly calculated and that there was no dispute that rent at that amount was due.

[4] The plaintiff issued proceedings on 20 November 2007 seeking payment of the sum due together with interest at the contractual rate and costs. It issued proceedings under Order 14 for a summary judgment in respect of the claim on the basis that the defendant had no defence.

[5] A separate writ was issued on 21 February 2008 seeking payment of a further rent falling due on 1 February 2008. The Order 14 application, however, does not relate to that claim although in reality the outcome of the present application is likely to establish the plaintiff's entitlement to recover judgment on foot of those proceedings.

[6] The defendant resists the Order 14 judgment on the basis that it claims to have a right to an equitable set-off against the amount claimed. This claimed equitable set-off arises out of a potential liability of the defendant to meet a claim brought against it by its sub-lessee Odyssey Cinemas Limited ("OCL") which has issued separate proceedings (2007 No 67262). In those proceedings OCL claims that it was entitled to rescind and has rescinded a sale agreement made with the defendant in May 2006 under which a sub-lease by the defendant to OCL was granted of the premises which are the subject of the lease between the plaintiff and the defendant. OCL contends that it was induced to enter into the sub-lease by fraudulent misrepresentation on the part of the defendant. It alleges that the premises prior to sale have been affected by noise and vibration emanating from adjoining premises in the Odyssey complex and that the defendant, although aware of the problem, deliberately failed to disclose the problem despite questions being raised by way of standard inquiries prior to sale. It is also alleged that the defendant deliberately failed to disclose antecedent litigation arising out of the defendant's failure to pay rent. OCL has ceased to pay rent for the premises although it continues its occupation. OCL pleads an alternative case against the defendant on the basis of the defendant's failure to provide OCL with quiet enjoyment of the premises but it has not quantified any specific loss under that heading. Its claim focuses on its right to claim rescission and damages for fraud.

[7] The defendant has joined the plaintiff as a third party to the proceedings issued by OCL. In the plaintiff's writ action for rent the defendant has counterclaimed seeking to offset against the plaintiff's claim for

rent the sum any sum for which the defendant is liable to OCL in OCL's claim. The defendant contends that this counterclaim gives rise to an equitable setoff.

[8] On first impression the covenant to pay rent due under the lease without deduction would appear to establish that the plaintiff is entitled to recover the full rent without any sum being deductible from it whatever the alleged basis of the deduction. However, authority suggests that this first impression is misleading and that clear and express words are necessary to preclude a right to exercise an equitable set-off (see Connaught Restaurants Limited v Indoor Leisure Limited [1994] 4 All ER 834 and the discussion of the authorities in Sheridan Millennium Limited v Odyssey Property Co [2004] NI 117). Thus, if the defendant has an arguable equitable set-of clause 2(3)(a) and clause 3(1) would not preclude the defendant's argument that it should be given leave to defend the claim.

[9] Mr Horner QC on behalf of the plaintiff contends however that there is no arguable set-off in the present case. Firstly the defendant could not seek an indemnity from the plaintiff in respect of its liability for a fraudulent representation made by the defendant to OCL to which the plaintiff was not an alleged party. This argument is incontestably correct. Secondly, even if the defendant is liable to OCL for breach of warranty or breach of the covenant of quiet enjoyment OCL has never particularised it and there is no financial claim that could be passed on to the plaintiff. In any event that liability is entirely speculative, unascertained and uncertain and would only come into play if OCL failed in its main claim which OCL is vigorously pursuing. Thus, it is argued, the contingent liability asserted on foot of the counterclaim cannot qualify as an equitable set-off.

[10] In Esso v Milton [1994] 3 All ER 593 the Court of Appeal stated:

“In order for a defendant to be able to rely on equitable set-off, his counterclaim has to be closely connected with the same transaction as that giving rise to the plaintiff's claim and the relationship between the respective claims has to be such that it would be manifestly unjust to allow one to be enforced without regard to the other. In the present case both claims arose out of a single agreement and the terms of the agreement governed fuel delivery. However, the mere fact that both claim and counterclaim arose out of a single relationship between the parties was not sufficient to supply the close link necessary to support an equitable set-off and a close connection did not exist between each individual fuel delivery

and the defendant's subsequent claim based a repudiatory breach of the overall agreement. Nor, in the circumstances would it be unjust to allow the plaintiff to recover payment for the fuel sales without taking into account the defendant's claim for future losses."

In the present case the defendant's contingent and speculative counterclaim is not closely connected with the defendant's clear and undisputed contractual liability to pay rent. It could not be argued that the relationship between that counterclaim and the plaintiff's claim is such that it would be manifestly unjust to allow the plaintiff to recover its undisputed rent without regard to the counterclaim that only becomes a liability on the happening of a series of contingencies.

[11] In the circumstances I am satisfied that the plaintiff is entitled to summary judgment on foot of its claim in the writ. Accordingly the plaintiff is entitled to payment of the sum of £466,802.15 together with interest at 4% over Ulster Bank base rate until payment. I shall hear counsel on the question of the date from which the interest should run. I shall also hear counsel on the question of costs.