IRISH SHELL v COSTELLO

1974 No. 4045 P

THE HIGH COURT

BETWEEN

IRISH SHELL & B. P. LIMITED

PLAINTIFFS

AND

JOHN COSTELLO LIMITED

(No. 2) DEFENDANTS

High Court Hearing Number 2

Judgment of Mr. Justice Doyle delivered the 3rd day of October, 1983.

When this Action was last before me I came to the conclusion that the agreement between the parties, whereby the Defendants occupied the premises the subject of the Action, did not create the relationship of landlord and tenant, but merely a licence to use the site at Friarsland as a petrol and service station and a hiring of the petrol pumps and other equipment thereon. In this view of the legal effect of the arrangement between the parties I was mistaken as the majority judgment of the Supreme Court makes clear: the relationship of landlord and tenant was created. As stated by Griffin J. in his judgment, with which O'Higgins C.J. agreed:

"In all the circumstances of this case although some of the provisions of the agreement appear to be personal in their nature (e.g. that in

"relation to the sale of the Plaintiffs' products), in my opinion what was given to the Defendants went far beyond a personal privilege given to the occupier of the site, and was in the nature of a tenancy of the site."

It had been argued on behalf of the Plaintiffs that no tenancy could subsist having regard to the provisions of Section 3 of the Landlord and Tenant Act (Ireland) 1860 which section provides that the relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and that the relation shall be deemed to subsist in all cases in which there is an agreement by one party to hold land from or under another in consideration of any rent. The Plaintiffs had argued that since there was no "rent" provided for in the agreement there could not be a tenancy.

In this connection Griffin J. observes:

"Whilst it is correct to say that the agreement did not provide for the payment of any "rent" as such for the premises, when the true nature of the agreement is considered the reality of the position is that the periodic payments made by the Defendant were in fact rent although cloaked under the guise or under the label of payment for hire of the equipment."

The Learned Judge went on to say:

"In my judgment therefore looking at the transaction as a whole the

"agreement between the parties created the relationship of landlord an[d] tenant and not that of licensors and licensees between the Plaintiffs [a]nd the Defendant".

As stated, the judgment of Griffin J. was concurred in by O'Higgins C.J.

The Supreme Court, after making provision for amendment of the Pleadings and giving liberty to Plaintiffs and Defendants to amend so as to bring before the High Court the matters now in issue, directed the substitution of certai[n] new paragraphs to replace those already on the Pleadings and in particular directed that the following new paragraph 5 (a) should be incorporated in th[e] Statement of Claim:

"The circumstances pertinent to the matter set forth in paragraph 5 hereof were that on determination of the said agreement the Defendants were unwilling to renew it on the same terms and conditions and the Plaintiffs were unwilling to renew it on any other terms, and negotiations to bring about the agreement of the Plaintiffs through the Defendants continuing further to use the said equipment and service statio[n] (whether as tenant or otherwise) proved fruitless and on the 5th day of November 1974 the Plaintiffs by letter notified the Defendants that on the 14th November all responsibility in respect of the said property of the Plaintiffs was to be handed over to the Plaintiffs

"representative and any relevant keys and documents the Defendants might have, and by the said letter the Defendants were made clearly to understand that on the said 14th of November 1974 all (if any) right of the Defendants to be on or in the said premises or to use the said equipment would absolutely cease and determine."

The Plaintiffs were also given liberty to substitute for the existing paragraph 8 sub-paragraph 3 the following:-

"(iii) Further and other relief and in particular, if necessary and by way of alternative to (i) and (ii) above, an Order that the Plaintiffs do recover possession of the said premises and equipment from the Defendants together with such damages by way of mesne profits as may be appropriate in respect of the use and occupation of the said equipment and premises by the Defendants from the 14th day of November 1974 to the date of the actual recovery of possession of the said premises by the Plaintiffs".

The Court further directed that the Defendants should be at liberty to make such consequential amendments in their defence as they might be advised and, upon such amendments having been made that the Action should be remitted to the High Court for further hearing of the Plaintiffs' claim as so amended. The Defendants also exercised the liberty given to them to amend their defence.

The amended paragraph 4 now reads:-

"The said tenancy has not been lawfully determined. The said letter dated the 5th of November 1974 did not purport to be nor was it capable of being construed as a Notice to Quit and did not determine the tenancy under which the Defendants then held and still hold the said premises".

At paragraph 5 (a) a new paragraph of the amended defence reads:-

"If the said tenancy has been lawfully determined or if no tenancy was created or continued after the 30th of June 1974 (which is denied) the Defendants by remaining in possession held the said premises under an extension of such terminated tenancy by virtue of the provisions of Section 29 of the Landlord and Tenant Act 1980, by reason thereof if the Defendants do not hold the premises under the tenancy pleaded in paragraph 4 hereof, the Defendants claim to be entitled to retain possession pending the hearing of an application for a new tenancy under the provisions of the said Act."

These allegations in the defence are largely controverted by new terms in the amended reply. In particular it is alleged at paragraph 2 (c):-

"If necessary the Plaintiff will rely on the fact that at no time was any notice of intention to claim relief under the Landlord and Tenant Acts served on the Defendant".

At paragraph 2 (d):-

"The Defendant did not and does not hold the premises as tenant by virtue of the matters alleged in paragraph 5 (a) of the Defence or otherwise."

At paragraph 3 (b):-

"The Defendant is not entitled to any relief under the Landlord and Tenant Act 1931 or the Landlord and Tenant Amendment Act 1980."

This, then, is the form and nature of the proceedings as amended which I am now asked to resolve. In primo I must decide whether the tenancy which the Supreme Court has declared to have existed between the parties was or was not effectively terminated. The transaction which apparently is relied upon to have demonstrated the termination of the relationship of landlord and tenant between the parties is the letter of the 5th of November 1974. I must now consider whether this document complies with all the long standing requirements of the landlord and tenant law to effect the termination of a tenancy. It is well-settled law that, to terminate a tenancy, clear and explicit language must be used. The landlord must make clear to the tenant that his tenancy is being determined. In the course of the argument addressed to me by Counsel I looked for assistance on the problem whether, when the minds of the parties were not ad idem as to the nature of the legal relationship, it would be possible to use clear and explicit language sufficient to determine a

tenancy when the person giving the Notice of Intention so to determine did not himself believe that a tenancy existed. I do not blame Counsel for being un-able to give me any guidance on such an almost metaphysical question.

It is clear that some type of occupancy, permissive or pursuant to the legal effects of the pre-existing tenancy, continued after that letter was delivered by the Plaintiffs to the Defendants. As the Supreme Court has held that a tenancy preceded the delivery of the letter I can only assume that what succeeded the delivery of the letter, in the dubious understanding of both parties, amounted in fact to a continuing tenancy, probably for a successive six months period. This appears to have been different in character to the tenancy which the Supreme Court has found existed when the occupancy of the garage was first negotiated and under the subsequent differing arrangements made between the parties. I am driven to the conclusion that this original arrangement, to use a neutral term, had terminated or been discontinued. It seems to follow therefore that that original tenancy had been terminated before the commencement of the Landlord and Tenant Amendment Act of 1980 which became operative on the 8th of September of that year. It appears therefore, that from the purported demands for possession contained in the letter of the 5th of November 1974 expressed to become operative on the 14th of November 1974 until the commencement of the Act on the 8th of September 1980, some payment

continued to accrue and be due and payable by the Defendants to the Plaintiff in the nature of mesne profits and my task now is to estimate what is a proper and reasonable sum to be assessed to compensate the Plaintiffs for the use by the Defendants of the property during that period. The nature of the occupation, one supposes, may come under the head of a tenancy arising by implication from the acts of the parties, as stated in Section 29 of the Act. The question as to whether the Plaintiffs are entitled to obtain a new substantive tenancy agreement at the termination of this period is, as Griffin J has pointed out, not a matter for this Court but a question to be decided elsewhere. I understand that proceedings have already been commenced in the Circuit Court with a view to seeking relief of this character.

Evidence was called to assist me in resolving this difficult question which depends on many considerations, notably the steady increase in rents of business and other premises since 1974; the fact that the Consumer Price Index is taken into account in estimating what may be the rate or extent of such increase; and the help if any, to be derived from examination of comparable premises in other areas or indeed in the same area, although it was not found possible to give me much assistance on this particular approach to the problem.

In all the circumstances it will be seen that any effort at a close appraisal of the varying rent must be speculative on my part. I prefer to take

a fixed figure which in my view will afford just compensation for the period between November 1974 and September 1980. I arrive at a figure of £1,750 per annum as what is an approximation to a fair average to cover that period.

I do not intend (nor would it be right for me thus to invade the jurisdiction of the Circuit Court) to direct that this rough average which I have arrived at is to be taken as in any way binding upon the learned Circuit Judge who ultimately has to deal with the question between the parties and their rights under the Landlord and Tenant Acts.

Approved
Thomas A. Doyle
13 Decr., 1983