

HILL v Mulcahy

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THE HIGH COURT

SOUTH EASTERN CIRCUIT

COUNTY OF WATERFORD

BETWEEN:

FRANCHEA M. HILL, TIMOTHY F. KELLY
AND EAMONN F. KING, TRADING AS
CAPITOL CLEANERS

Applicants
(Appellants)

and

KATHLEEN MULCAHY

Respondent

Judgment delivered by O'Hanlon J. the 30th day of April, 1984.

In this case the applicants applied for a new lease pursuant to the provisions of the Landlord and Tenant Act, 1980, in respect of a lock-up shop and ancillary accommodation used by them for a dry-cleaning business, on the ground floor of No. 14 O'Connell Street, Dungarvan, in the County of Waterford, and they were successful in their application before the Circuit Court.

An Order was made by the learned Circuit Court Judge on the 6th March, 1981, directing the respondent to grant a new lease for a term of 35 years from the 12th October, 1980, at the yearly rent of £2,600, payable weekly (exclusive of rates) "but otherwise subject to the terms and conditions of the previous tenancy of the applicants in the premises insofar as such terms shall be applicable, and that in assessing the said rent no allowance should be made to the applicants on foot of their claim for compensation for improvements to the said premises."

Subsequent to the making of this Order, a dispute arose between the applicants and the respondent as to the terms and conditions which should be incorporated in the new lease. In particular, the respondent was anxious that the lease should contain covenants restricting change of user from the dry-cleaning business without the prior consent of the respondent, and restricting the right of assignment, subletting or parting with possession of the premises without such prior consent.

The original letting of the premises was made orally by a landlord who was deceased before the present application was made to the Circuit Court, and the respondent was unable to establish by evidence that the terms and conditions of the original letting included the restrictions on change of user and the right of alienation now sought to be imposed on the lessee. In this difficult situation a fresh application was made to the learned Circuit Court Judge by notice of motion, and a further Order was made on the 3rd October, 1983 directing that the lease should contain the provisions which were sought by the respondent but no finding of fact was made that the like provisions had ever formed part of the original letting of the premises. Against this Order the applicants now appeal to the High Court.

I am of opinion that the appeal is well-founded, by reason of the fact that I would hold that the learned Circuit Court Judge was functus officio

when he made his first Order on the 6th March, 1981. He then declared that the new lease should correspond with the old letting agreement save in relation to the rent and the length of the term, and as the respondent could not establish that there were formerly any restrictions on change of user or rights of alienation I have to hold that they did not form part of the original letting agreement. The direction that these restrictions should be introduced into the new lease, came later, and was, in my opinion, inconsistent with the terms of the original Order made in March 1981. For this reason I feel that I have to accede to the applicants' appeal against the order of the 3rd October, 1983.

However, I agree with the view which was obviously taken by the learned Circuit Court Judge, that in a modern letting of a business premises for 35 years, one would normally and reasonably expect to find the restrictions on change of user and alienation, without the lessor's consent, which are now sought by the respondent, and I believe that had these matters been present in the minds of the parties when the matter first came before the Court they would have been readily disposed of in the manner sought to be achieved by the later Order of October 1983.

In these circumstances, as I believe the omission to have these matters canvassed and dealt with in the original hearing was in all probability

attributable to an oversight on the part of both parties, I think the respondent should be given an opportunity of raising the matter again, and it seems to me that the only way this can be achieved is by way of an appeal to the High Court against so much of the Order of the 6th March, 1981, as directed that the new lease should be subject to the terms and conditions of the previous tenancy (save as to rent and length of term) insofar as such terms shall be applicable. To enable the respondent to take this further step, should she wish to do so, I propose to extend the time for lodgment of notice of appeal against that part of the Order of the 6th March, 1981, up to and including the 18th May, 1984.

R. J. O'Hanlon

R.J. O'Hanlon

30th April, 1984