THE HIGH COURT

[2021] IEHC 36

2020/250 S

BETWEEN

GERARD GANNON

PLAINTIFF

AND

PARKFLY LIMITED AND LAST BUS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Quinn delivered on the 15th day of January, 2021

1. The plaintiff's claim is for possession of premises at Turnapin Great, Swords Road, Santry, County Dublin, and for judgment against the first named defendant in the amount of €2,185,204.91 for rent payable by the first named defendant pursuant to a lease of the premises, and for mesne rates. The defendants have consented to orders for possession. This judgment relates to the plaintiff's application for summary judgment in respect of rent.

2. The first named defendant opposes the application on two grounds:-

   (1) That the calculation of the rent, part of which is referable to turnover in accordance with a formula contained in the lease, is erroneous and that, if anything, it has overpaid rent to the plaintiff.

   (2) That the matter of the calculation of the rent is now in dispute between the parties and ought to be referred to an independent expert in accordance with the provisions of a clause in the lease providing for such a referral.

3. I have concluded that the plaintiff is entitled to judgment for the amount claimed of €2,185,204.91.

Background

4. For a term from 1 July, 2013, to 4 October, 2018, the plaintiff granted to the first defendant a lease of the carpark premises, referred to as "The 2014 Lease".

5. On 17 May, 2019, the plaintiff executed a lease of the premises to the first named defendant for a period of twelve months from 5 October, 2018, to 4 October, 2019. This lease is referred to as "The 2019 Lease" or "The Lease" and was on terms broadly similar to the 2014 Lease.

6. The leased lands were used by the first named defendant to operate the business of a car park used principally by persons using Dublin Airport.

7. I shall return later to the relevant terms of the lease itself.

8. On 17 May, 2019, the parties also entered into a Deed of Renunciation with a view to eliminating, says the plaintiff, any doubts concerning the defendant's potential rights of possession or renewal in respect of previous leases.

9. There was also entered into on 17 May, 2019, a Licence Agreement whereby the plaintiff licensed to the second defendant a property adjoining the leased premises consisting of a bungalow which was used by the second named defendant as an office. A Deed of Renunciation was also entered into in respect of the bungalow premises.

10. The second named defendant is under the same ownership and control as the first defendant, and operates a bus service between the car park and the airport.

The 2019 Lease

11. The lease was stated to be for a term of twelve months from 5 October, 2018, to 4 October, 2019.

12. The "*Permitted User*" was defined as "*the use of the Demised Premises as a carpark*".

13. The rent payable was described in detail in the Fourth Schedule to the Lease.

14. The Fourth Schedule contained a formula whereby the rent payable was a combination of a Base Rent of €1.5 million per annum payable monthly in advance and a Turnover Rent.

15. The Turnover Rent was an amount equating to 35% *"of the turnover in a turnover period together with VAT thereon less the Base Rent".* The Fourth Schedule contained also a worked example of a calculation of Turnover Rent.

16. The definition of term "*Turnover*" is of central importance in the proceedings:-

> *"Means the gross aggregate of all sums of money or other consideration received or receivable from the user of the Demised Premises including but not by way of exception:*
>
> *(i) for all goods and products sold, leased, hired or otherwise disposed of in at or from the Demised Premises; and/or*
>
> *(ii) from all services performed, sold or rendered by the Tenant and from all business of any nature whatsoever conducted in, at or from the Demised Premises; and*
>
> *(iii) all sums received or receivable by the Tenant for the use and/or occupation of the Demised Premises or any part thereof by any other person or concessionaire subject to the covenants and conditions in this Lease.*
>
> *(iv) And Without Prejudice to the generality of the foregoing shall also include: -*
>
> *(a) all amounts received or receivable from orders which originated or were received or accepted and performed at or from the Demised Premises notwithstanding that payment is made to a person other than the Tenant*
>
> *(b) …*

(c) *all amounts received or receivable from sales and services which the Tenant in the normal and customary course of the Tenant's operations would or should credit or attribute to the Tenant's business on the Demised Premises*

(d) *…."*

17. The term "*Turnover Certificate*" is defined as follows:-

> *"Means a Certificate from the Tenant's Auditors in a format to be approved by the Landlord (acting reasonably) certifying the Turnover for the turnover period."*

18. The Fourth Schedule contained provisions for the payment of Interim Turnover Rent based on Interim Turnover Certificates, payment of the Turnover Rent itself within 28 days of the expiry of Turnover Periods, obligations on the tenant to maintain accounts and records to be accessible for inspection by the landlord and obligations to furnish such information and assistance to the landlord as may be reasonably required for the purpose of "*verifying the veracity of the Turnover Certificates*."

19. Paragraph 1.6 of the Fourth Schedule is a provision for referral of a dispute to an expert. I refer to it in more detail at paragraph 108.

Correspondence in 2019 and 2020

20. On 27 August, 2019, the plaintiff's solicitors, Smith Foy & Partners, wrote to the first defendant reminding it that the 2019 Lease terminated on 4 October, 2019. They informed the defendant that as of 6 August, 2019, there were arrears of rent due and owing in the sum of €1,927,984.17.

21. They also stated that their client would be making contact in the weeks prior to the expiry date of the Lease with a view to carrying out an inspection of the property and identifying any breaches of covenant and conditions and, if necessary, preparing a schedule of dilapidations.

22. On the same day Smith Foy wrote also to the second named defendant reminding it that the licence agreement for the bungalow terminated on 4 October, 2019 and that the premises must be vacated on or before that date.

23. On 6 September, 2019, Mason Hayes & Curran replied to Smith Foy on behalf of the first named defendant.

24. In this letter, Mason Hayes & Curran denied that there were any arrears of rent due in respect of the 2019 Lease. They stated that arrears of rent in the amount of €1,927,984.17 referred to in the letter of Smith Foy related to the first named defendant's occupancy of the property in respect of periods prior to 5 October, 2018, and would be dealt with in due course.

25. Mason Hayes & Curran also expressed their client's surprise at the reference to a schedule of dilapidations and stated that their client had been proceeding on the basis that the plaintiff would enter into a new tenancy with it. They gave as reasons for this expectation,

representations which they claim had been made in a course of dealing over a period of fifteen years that its tenancy would be renewed, that the first named defendant had worked over a long number of years to build up a successful and profitable carpark business at the property, which it would not have made sense for them to do if the plaintiff could simply terminate the lease and potentially takeover that business.

26. Mason Hayes & Curran then indicated that if the plaintiff were to refuse to renew the tenancy, this would lead to reduced parking capacity at Dublin Airport and the elimination of effective competition which they stated would raise issues for the plaintiff *"and his lenders*" under the Competition Act, 2002.

27. They also stated that they had continued to take bookings beyond 4 October, 2019, and that if the tenancy was not renewed approximately 60 jobs would be lost through redundancies. They then requested the draft of a new lease and stated that any refusal by the plaintiff to enter into a new tenancy would be challenged by them "*through court proceedings if necessary".* No such proceedings were issued.

28. On 9 October, 2019, Smith Foy replied to Mason Hayes & Curran refuting the claims made.

29. On 3 April, 2020, Smith Foy wrote to Mason Hayes & Curran notifying them that they were instructed that the amount due in respect of the 2019 Lease, now expired, was €2,185,204.91 and a statement was attached.

30. On 17 April, 2020, Mason Hayes & Curran replied, expressing their client's surprise at the claim for arrears and stating that this was incorrect. They continued:-

> *"Our client's clear position is that not only are there no arrears of rent due pursuant to the terms of the lease dated 17th May 2019 up to the end of October 2019 but rather, our client has in fact overpaid in the sum of approximately €400,000."*

31. No basis for this estimate of an overpayment was stated in that letter.

32. On 30 April, 2020, Smith Foy replied stating that they had been instructed to issue proceedings for recovery of the outstanding monies due.

33. On 10 July, 2020, Smith Foy wrote again noting that the defendants remained in occupation of the premises without making any continuing payments. They referred also to details of the turnover rent pursuant to the Fourth Schedule of the Lease furnished to their client on 27 March, 2020. This was a reference to a Turnover Certificate signed by the defendant's auditor, BDO, on 23 March, 2020.

34. On 24 July, 2020, Mason Hayes & Curran replied stating that their client was surprised at the threat of proceedings and making a number of further points which can be summarised as follows:-

(1) Alleging that the plaintiff *was "deliberately and opportunistically taking advantage of the COVID-19 situation in an attempt to obtain possession of the property in circumstances where he would never have done so but for COVID-19*". Mason Hayes & Curran suggested that this was inconsistent with the approach advocated by Government and stated that the Emergency Measures in the Public Interest (COVID-19) Act 2020 placed a moratorium on evictions.

(2) That their client had been proceeding on the basis that the plaintiff would grant a new tenancy.

(3) They repeated a number of reasons stated in earlier correspondence and added that their client was of the view that the plaintiff had "*benefitted handsomely from Parkfly's hard work in this regard and substantial rental payments have been made by our client in respect of the carpark to your client over this period*". It cited payments totalling in excess of €16 million over the period of six years, 2014 to 2019 inclusive.

35. Mason Hayes & Curran stated that in as much as the plaintiff had stated his intention to sell the property, the defendants wished to be involved in such process. They also indicated that they reserved their right to complain about the plaintiff's actions to the Government and, specifically, the Tánaiste and Minister for Enterprise, Trade & Employment.

36. On 31 July, 2020, Smith Foy & Partners replied to Mason Hayes & Curran restating the claim for the sum of €2,185,204.91 and in relation to the matter of possession referring Mason Hayes & Curran to the Deed of Renunciation of 17 May, 2019. Smith Foy then invited the defendant to make any proposals it wished regarding settlement of the arrears and inviting Mason Hayes & Curran to indicate if they had authority to accept service of proceedings.

37. On 21 August, 2020, Mason Hayes & Curran replied to Smith Foy. They stated that before their client could make any proposals, they needed to know the plaintiff's intentions in respect of the property.

38. Mason Hayes & Curran then stated that they believed that their client and the plaintiff had "*worked in an effective partnership since December 2003 in relation to the carpark business at Dublin Airport*". They repeated previous assertions made to the effect that the plaintiff had benefitted from the defendants' expertise and their belief that any rental arrears could ultimately be addressed by their client in the context of renewals of the tenancy. They also stated that they believed their client "*can and should be allowed to trade out of the difficulties that its partnership arrangement with your client has encountered as a result of the COVID-19 pandemic".*

39. On September 8, 2020, these proceedings were commenced by Summary Summons.

These proceedings

40. The plaintiff sought orders for possession of the carpark as against the first named defendant and possession of the cottage premises against the second named defendant. It also sought judgment in the sum of €2,185,204.91 against the first named defendant in respect of the 2019 Lease, and mesne rates from 5 October, 2019, until possession or judgment.

41. The application is grounded on an affidavit of the plaintiff, sworn 7 September, 2020, and an affidavit sworn by his employee and Head of Finance, Mr. Simon Doyle, also sworn 7 September, 2020.

42. In para. 9 of the affidavit of Mr. Doyle, he states that the amounts due were as follows:-

"(a) Balance of rent from 1 October 2019 to 4 October 2019, €933.25

(b) Turnover Rent from 1 January 2019 to 4 October 2019 being the sum of €2,183,209.52 and

(c) amount due for insurance €1,062.14"

43. Mr. Doyle states that the total figure of €2,185,204.91 (being the above three items) represents the balance due in respect of the 2019 Lease and he asserts that this amount has not been disputed.

44. The plaintiff exhibited Turnover Certificates of BDO issued on 30 April, 2019, which incorporates a certified turnover figure from the period 4 October, 2018, to 31 December, 2018, in the amount of €2,277,592 and a Certificate dated 23 March, 2020, certifying the turnover for the period of nine months and four days from 1 January, 2019, to 4 October, 2019, in the gross amount of €10,249,082.

45. Mr. Doyle states that no monies have been paid by the defendants in respect of occupation after 5 October, 2019, and a claim is made for mesne rates in respect of such occupation. It is accepted by the plaintiff that the claim for mesne rates will be remitted to plenary hearing.

46. The plaintiff applied for entry to the Commercial List and the matter was first listed before the court on 22 September, 2020, when the proceedings were entered into the Commercial List and adjourned for one week.

47. On 29 September, 2020, orders were made by consent for possession of the premises against both the first and second named defendants and the proceedings were adjourned to Monday, 5 October, 2020.

48. On 5 October, 2020, being the third day on which these proceedings were listed before this Court, and the day on which the application for summary judgment was fixed for hearing on 20 November, 2020, Mason Hayes & Curran wrote to Smith Foy. In this letter, they informed Smith Foy that their client considered that a substantial error had occurred in the manner on which turnover rent had been calculated both in respect of the 2019

Lease and prior thereto, and called on the plaintiff to acknowledge that this was the case so that a recalculation could be made.

49. Mason Hayes & Curran stated as follows:-

> *"Our client's position in relation to the alleged rent arrears claimed in the Summary Summons is as follows:-*
>
> *(i) Pursuant to the terms of the Lease, Parkfly Limited was authorised to use the Demised Premises solely for the purposes of use as a car park. This is defined as the "Permitted User" and is reflective of Parkfly Limited's business at the Demised Premises – it provides the car parking services. Turnover is calculated on the aggregate of all sums received or receivable from the "user" of the Demised Premises. As the Permitted User is used as a car park only, this means that the turnover can only be the car park income and not any bus income.*
>
> *(ii) Your client was aware at all times that a separate service was to be provided to the car park by Last Bus Limited. At your client's suggestion, Last Bus Limited was granted a licence only of the bungalow property. From this property, Last Bus Limited ran the park and ride/shuttle bus services for the car park the subject matter of the Lease to and from the airport.*
>
> *(iii) The fee charged to customers is properly regarded as a car parking fee, payable to Parkfly Limited and a bus fee, payable to Last Bus Limited. A small handling charge was charged by Park Fly to Last Bus for handling this process.*
>
> *(iv) It is estimated that approximately 30% of the overall income in the broadest sense was attributable to sums due to Last Bus for the provision of the bus services. This is where our client says the discrepancy lies, namely that the 30% income due to Last Bus for the bus services should not have been included in the calculation of turnover for the purposes of determining the turnover rent payable for the car park.*
>
> *Our client considers the above to represent a substantial error in how turnover rent was calculated both for the period referenced in the Summary Summons and prior to that, and we hereby call upon your client to acknowledge that this was so and that recalculation is required."*

50. Mason Hayes & Curran continued that if such acknowledgement and agreement could not be made, they wished to invoke clause 1.6 of the Fourth Schedule of the Lease, being the provision for referral of a dispute between the parties to an Independent Chartered Accountant, to act as an expert.

51. Mason Hayes & Curran stated that their client believed that a recalculation consequent on the correction of the error described in their letter would leave their client due a refund.

52. They then requested that the proceedings be adjourned until this aspect had been resolved, either through agreement or by the appointed expert.

Affidavits of John O'Sullivan

53. Mr. O'Sullivan is a director of each of the defendants. He swore two affidavits, one on 15 October, 2020 and 4 November, 2020.

54. The affidavits are for the most part a repeat of the contents of the letter from Mason Hayes & Curran dated 5 October, 2020, asserting that an error has occurred in the calculation of Turnover.

55. Mr. O'Sullivan asserts that under the terms of the Lease, the defendant was authorised to use the Demised Premises solely for the purpose of use as a carpark. He refers to the definition of the term "Permitted User" which is the use of the Demised Premises *"as a carpark"*. He says that the first defendant's Turnover should be calculated on the aggregate of all sums received or receivable from that "*user*" only and says that the Turnover can only be the carpark income and not any bus or other income.

56. Mr. O'Sullivan states that the plaintiff was aware that at all times a separate service was being provided by the second named defendant, as a shuttle bus between the carpark and Dublin Airport. He says that the fee charged to customers is properly regarded as a carparking fee, which he states is payable to Parkfly, and a bus fee, payable to Last Bus. Importantly, he does not say that customers paid the shuttle bus fare separately to the second defendant.

57. Mr. O'Sullivan estimates that approximately 30% of the overall income "*in the broadest sense was attributable to sums due to Last Bus for the provision of the bus services*". He states that Last Bus invoiced its standard operating costs plus a margin to Parkfly on the basis of bus hours worked by an agreed rate per hour. He refers also to the existence of another company, Citi Bus Limited ("Citi Bus"), a subsidiary of Last Bus which received an annual top-up payment in addition to the standard revenue paid by Parkfly to Last Bus for services provided to Parkfly and subcontracted by Last Bus to Citi Bus.

58. Mr. O'Sullivan states that the payments made to Last Bus including these top-up payments together resulted in an average amount of approximately *"30% of the carpark revenue accruing to Last Bus and Citi Bus per annum for bus services".*

59. In support of this calculation, he exhibits a table identifying charges levied by Citi Bus to Parkfly.

60. Mr. O'Sullivan states that the discrepancy arises because the 30% income due to Last Bus for the bus service should not have been included in the calculation of Turnover for the purpose of determining the Turnover rent payable for the carpark. He says that this represents a substantial error in how Turnover rent was calculated both for the period referenced in the summary summons and prior to that.

61. Mr. O'Sullivan says that Parkfly has reviewed its certified and audited financial records and he exhibited a table illustrating the amounts certified and which form the basis of the plaintiff's claim and the amounts which he says should have been used to calculate Turnover rent if the Last Bus income is excluded. He says that this table illustrates that the rent paid to the plaintiff over a period of several years exceeds the amount owed if a correct Turnover calculation is made.

62. Mr. O'Sullivan states as follows:-

> *"The error arose as a result of a misunderstanding of the definition of the Turnover rent by Parkfly's management team in interpreting the terms of the Lease and the basis for the Turnover rent calculation. Parkfly's auditors certified the Turnover figures in line with the instructions of Parkfly management team and the auditors were never asked to conduct a review of the amount certified as Turnover in the light of the relevant clauses in the Lease. As a result the incorrect Turnover figures, which erroneously included the income attributable to Last Bus, were certified for the purposes of calculating the Turnover rent."*

63. Mr. O'Sullivan states that he does not suggest any error on the part of Parkfly's auditors, BDO. He simply states that they should have been advised and requested to separate out the revenue received and attributable to passenger transport services.

64. Mr. O'Sullivan states that the issue of separate revenue streams for carparking services and passenger transport services was raised in an audit with the Revenue Commissioners in 2013 and he states that, subsequent to that audit, Parkfly accounted for the two revenue streams separately for VAT purposes and he states that Parkfly, Last Bus and Citi Bus have continued to follow this practice.

65. It is significant that Mr O'Sullivan states that Parkfly itself accounted separately for these revenue streams for VAT purposes, meaning that on his own description of the matter the first defendant was still the party accounting for the revenues.

66. Mr. O'Sullivan states that the:-

> *"High quality bus service was what made the carpark such a commercial success in previous years and which in turn has generated large rental incomes for Mr. Gannon. The provision of the bus service was carried out by Last Bus and Citi Bus and I fail to see how Mr. Gannon considers this irrelevant or a matter of Parkfly's internal affairs in circumstances that separate companies were engaged to provide the service."*

67. Mr. O'Sullivan states that monies paid to Last Bus and Citi Bus were monies that they were entitled to receive for the provision of transport services. He says that Parkfly is not entitled to the revenue for the passenger transport services.

68. Mr. O'Sullivan states that the error was "*identified in the course of an intensive review of matters in relation to the lease following the service of the within proceedings and Parkfly is now taking all appropriate steps in order to have the error corrected".*

69. As regards the role of the auditors, Mr. O'Sullivan states as follows:-

> *"No instruction or request was made by Parkfly to its auditors to interpret the Turnover provisions of the Lease and therefore I fail to see the relevance of Mr. Gannon's comments at paragraph 25. Parkfly's auditors were asked to review and certify the Turnover figures. However and as stated previously, the auditors were not provided with the instruction to exclude the revenue attributable to Last Bus and Citi Bus, as I now realise they should have been."*

Plaintiff's response

70. The plaintiff says that the defendant is now engaged in an exercise of manipulation of the accounts of Parkfly so as to reduce the Turnover rent.

71. Mr. Gannon refers to the terms of the Lease and states that nowhere was it suggested that the cost of running the carpark would affect the calculation of the Turnover Rent. He says that the cost of running the carpark including the cost of provision of the shuttle bus between the carpark and airport was entirely a matter for Parkfly, and Parkfly is the only named tenant on the Lease. The plaintiff says that it is of no concern to him as to how the defendant arranged for persons using the carpark to exit the carpark or travel to the airport. As far as he was concerned, the Lease provided for the payment of a Base Rent and a Turnover Rent "*based on the money paid to the tenant by customers using the carpark"*. He says, therefore, that it was of no impact to the lease obligations as to how the defendant would arrange its internal affairs and whether and to what extent it subcontracted to Last Bus Limited or its subsidiary.

72. The plaintiff also points out that BDO are the auditors to Parkfly and, therefore, when issuing certificates were aware of any payments being made by Parkfly to Last Bus or Citi Bus. There had never previously been any suggestion that the amount of those payments would impact on the *"gross Turnover*" as provided for in the Lease. The certificates were prepared specifically for the purpose of the lease rental calculation.

73. The plaintiff also states that the proposition that Turnover rent would be reduced by costs incurred by Parkfly is unsupported by any previous correspondence or course of dealings and that all previous certificates and payments were made on the basis of certified turnover without any such deductions.

74. The plaintiff refers to the fact that the basis of calculation of the Turnover rent has never been disputed until the letter of 5 October, 2020, being the third day on which these proceedings were listed before this Court. He says that the error now relied on and the interpretation of the lease now proffered is inconsistent with the manner in which Turnover rent was calculated and paid over a period of in excess of six years.

75. The plaintiff says that the 2019 Lease was, although itself a new document, reflective of the concept of the Turnover rent as provided for in the 2014 Lease and that certificates presented and issued by BDO have never previously been challenged.

Construction of the Lease

76. I have already quoted extensively from the terms of the Lease. I shall repeat here with my emphasis, the most relevant provisions: -

> "*Turnover*" means the gross aggregate of all sums of money or other consideration received or receivable from the user of the Demised Premises including but not by of exception:
>
> (i) For all goods and products sold
> (ii) From all services performed, sold or rendered by the Tenant and from all business of any nature whatsoever conducted in, at or from the Demised Premises
> (iii) All sums received or receivable by the Tenant for the use and/or occupation of the Demised Premises or any part thereof by any other person or concessionaire subject to the covenants and conditions in this lease.
> (iv) amounts received or receivable "*notwithstanding that payment is made to a person other than the Tenant*". [emphasis added]

77. There is no dispute that payments made by customers of the first defendant, whether for parking or for bus fares, were made to the first defendant and the first defendant says that it in turn made such payments or was charged such amounts as the second defendant and/or Citi Bus levied against it relating to the bus service.

78. The first defendant is the tenant and the only obligor under the Lease and it is clear from the provisions quoted above that its Turnover is a gross amount, unaffected by such amounts as it pays to other parties.

79. Mr. O'Sullivan states in para. 10 of his second affidavit that it was the bus service which "*made the carpark such a commercial success in previous years and which in turn has generated large rental incomes for Mr. Gannon".*

80. That Parkfly Limited would choose to organise its affairs so that the shuttle bus operated by other companies owned and controlled by Mr. O'Sullivan, and which it says made the car park such a success, cannot affect the calculation of the gross income earned by it from the carpark.

81. Mr. O'Sullivan states that "*Parkfly is not entitled to the revenue for the passenger transport services".* The accepted evidence is that Parkfly was the party that collected all charges from customers of the carpark, and then applied a portion of those revenues to payments to its associated companies for the provision of transport. All of these revenues in gross terms clearly fall within the definition of "*gross aggregate of sums of money*" contained in the Fourth Schedule.

82. The defendants submit that the Turnover was limited to monies received and receivable *"from the user of the Demised Premises".* The term "*Permitted User*" is defined in the Lease to mean use of the Demised Premises "*as a carpark*".

83. There are three difficulties with this submission. Firstly, it is clear even from Mr. O'Sullivan's affidavit that, although the bus services to and from the airport were provided by his associated companies contracted by the first defendant, they formed part of and enhanced the carpark service for which customers paid only the first named defendant.

84. Secondly, the language of the Fourth Schedule clearly extends to all monies received by the first defendant or paid to any other person, and include payments relating to the use or occupation of the premises "*by any other person*".

85. Thirdly, the phrase "Permitted User" is not used in the definition of "*Turnover*" in the Fourth Schedule.

86. I have been referred to the so-called "*text in context*" principle endorsed by the Supreme Court in *Jackie Greene Construction Ltd v. IBRC* (*In Special Liquidation*) [2019] IESC 2, *Law Society of Ireland v. MIBI* [2017] IESC 31 and *Arnold v Britton and Others* [2015] UKSC 36, [2015] AC 1619 as approved by Whelan J. *in Point Village Development Ltd (In Receivership) v Dunnes Stores* [2019] IECA 233. All of these judgments develop and enshrine the principle that, where there is an issue of interpretation of a contract or construction of a document which is capable of bearing more than one meaning and it is necessary to ascertain the intention of the parties, regard may be had to:-

> *"Not just the words used, but also the specific context, the broader context, the background law, any prior agreements, the other terms of this agreement, other provisions drafted at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise of the agreement."*

87. In *Arnold v Britton*, Lord Neuberger at paragraph 15, said that the meaning of a document must be assessed in the light of a number of factors to include such matters as the facts and circumstances known or assumed by the parties at the time that the document was executed.

88. The definition of Turnover in the Fourth Schedule to the Lease in this case clearly and unambiguously extends to the gross revenues of the first named defendant. It is not capable of bearing more than one meaning. The proposition that there should now be deducted, from the amount taken into the calculation and certified by the defendant's own auditors over many years, amounts paid or payable by the first named defendant to other companies owned or controlled by it, not only contradicts the express terms of the Fourth Schedule itself but is inconsistent with the manner in which the parties have operated the terms of the 2019 Lease and the 2014 Lease over the previous period of six years.

Summary judgment

89. The principles governing an application for summary judgment were described extensively by McKechnie J. at paragraph 9 in *Harrisrange Ltd v Duncan* [2002] IEHC 14, [2003] 4 IR 1 as follows:-

"(i) The power to grant summary judgment should be exercised with discernible caution,

(ii) In deciding upon this issue the Court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done,

(iii) In so doing the Court should assess not only the Defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the Plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting Affidavit evidence,

(iv) Where truly, there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use,

(v) Where however, there are issues of fact which in themselves are material to success or failure, then their resolution is unsuitable for this procedure,

(vi) Where there are issues of law, this summary process may be appropriate but only so, if it is clear that fuller argument and greater thought, is evidently not required for a better determination of such issues,

(vii) The test to be applied, as now formulated is whether the Defendant has satisfied the Court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the Defendant says credible?", - which latter phrase I would take as having as against the former an equivalence of both meaning and result,

(viii) This test is not the same as and should be not elevated into a threshold of a Defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence,

(ix) Leave to defend should be granted unless it is very clear that there is no defence,

(x) Leave to defend should not be refused only because the Court has reason to doubt the bona fides of the Defendant or has reason to doubt whether he has a genuine cause of action,

(xi) Leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally,

(xii) *The overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter Judgment or leave to defend, as the case may be."*

90. In *McGrath v O'Driscoll* [2006] IEHC 195, Clarke J. (as he then was) said:-

> *"So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."*

91. In *IBRC v. McCaughey* [2014] IESC 44, [2014] 1 IR 749, Clarke J. (as he then was) made the following observations:-

> *"… the issue is as to whether, in substance, facts have been deposed to which might arguably provide a defence. If it is possible that a clearer view of the precise and detailed facts may emerge at a plenary trial, then the Court, on a summary judgment motion, should, as it were, give the benefit of the doubt to the defendant. Different considerations would, of course, clearly apply where the legal rights and obligations of relevant parties are defined by documents which have been placed before the Court. In such circumstances the Court can, provided that to do so would not run the risk of injustice, interpret the documents, which task may well involve a careful analysis of the precise wording."*

92. In this case a careful analysis of the language of the Lease, being the critical document placed before the court, is possible and I have considered the submissions made by the parties which enable a clear conclusion to be made.

93. In *Aer Rianta c.p.t. v. Ryanair Ltd* [2001] 4 IR 607, at p. 615, McGuinness J. posed the question as follows:-

> *"Thus it is for this court to decide whether in the instant case the defence set out in the affidavits of Mr. O'Leary, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or bona fide defence. Since there had been no oral hearing and neither deponent has been cross-examined on his affidavit, it was not for the learned High Court Judge to weigh the affidavit evidence of Mr. O'Leary and Mr. Byrne or to attempt to resolve the factual contradictions contained in it."*

94. Nowhere in his affidavits does Mr. O'Sullivan repeat the numerous complaints which he made through his solicitors in correspondence throughout 2019 and 2020 referring to such matters as:-

(1) A right to renewal of the lease;

(2) A right to extension of the lease;

(3) The existence or otherwise of a partnership in which the defendant contributed to the revenues and profits of the plaintiff;

(4) Breaches of the Competition Act; and

(5) Breaches of the Emergency Measures in the Public Interest (COVID-19) Act 2020.

95. For the most part, those submissions and complaints were made in the context of initial resistance to the plaintiff's demands for possession of the property, which the defendants ultimately conceded.

96. The proposition that a fundamental error had occurred in the calculation and certification by the defendant's auditors of "*Turnover*" is introduced for the first time in the letter of 5 October, 2020.

97. At its highest, the evidence given by Mr. O'Sullivan in both of his affidavits is that on, or some time shortly before, 5 October, 2020, he formed and communicated a view that the calculation of Turnover had been erroneous. In his first affidavit, he states that this was due to a misunderstanding "*by Parkfly's management team in interpreting the terms of the lease".* In his second affidavit, he confirmed that the phrase *"management team*" did not include any other persons and that he alone was responsible for the error.

98. No evidence was given by any other member of the defendants' "*management team*", and no evidence was proffered by BDO.

99. The defendant exhibits tables presenting its own recalculation of the rent based on Mr. O'Sullivan's new interpretation of the Lease.

100. He also exhibits a table showing the amounts which had been charged by Last Bus Limited to Parkfly Limited.

101. Neither of these tables add to the construction of the Lease.

102. Mr. O'Sullivan makes his own estimate that approximately 30% of the revenues collected by the first defendant were attributable to bus services provided by companies owned and controlled by him, and which were not a party to the Lease. Again, this adds nothing to the proper construction of the Lease.

103. This evidence amounts to no more than a bare assertion of Mr. O'Sullivan's opinion that the Turnover rent, calculated and certified by the defendants' auditors over a period of several years should at all times have been calculated on a different basis and all previous calculations and payments have been based on one error which he has now discovered.

104. This opinion is contradicted by the clear language of the Lease, the history of previous certificates and payments, and Mr. O'Sullivan's own assertions that the car park trade

which generated the revenues certified by BDO, has been enhanced by the bus services provided by the other companies controlled by Mr. O'Sullivan.

105. In response to a Notice to Produce Documents, the defendant furnished copies of its financial statements for the years ended 31 December, 2014, through to 30 September, 2018, and draft financial statements for the period ended 30 September, 2019, all prepared by BDO.

106. The Turnover Certificates of BDO relied on by the plaintiff, and until 5 October, 2020, by the first defendant, state that their client Parkfly Limited has engaged them for the purpose of confirming gross Turnover. The Certificate in each case states as follows:-

> *"We confirm that the following amounts are in agreement with the accounting records."*

107. There was nothing in those Certificates or in the financial statements or any notes thereto to suggest that the amounts referable to Turnover should be adjusted, for any purpose, by reference to payments made to associated companies in respect of shuttle buses.

Expert referral

108. Clause 1.6 of the Fourth Schedule provides as follows:-

> *"In the event of a dispute between the Landlord and the Tenant as to any matter pertaining to this Schedule including for the avoidance of any doubt the amount of the Turnover Rent, the calculation of the Turnover or the identification of any alleged discrepancy by the landlord pursuant to clause 1.5(d) hereof such dispute shall be determined by an Independent Chartered Accountant to be appointed by agreement between the parties hereto or in default of such agreement on the application of either party to be appointed by the President for the time being of the Institute of Chartered Accountants in Ireland and such independent accountant so nominated shall act as an expert and not as an arbitrator and his decision shall be binding on the parties."*

109. When Mason Hayes & Curran wrote to Smith Foy on 5 October, 2020, putting forward their description of the error in the manner on which Turnover had been calculated, they referred to the provisions of clause 1.6 stating that if there is a dispute pertaining to the "*discrepancy*", it should be referred for binding expert determination under that clause.

110. On the same day the court fixed the hearing of the application for summary judgment for 20 November, 2020, and made its directions for the exchange of affidavits and written legal submissions in advance of that date.

111. Smith Foy did not reply to the letter of 5 October, 2020, and on 22 October, 2020, Mason Hayes & Curran wrote again by reference to clause 1.6 proposing the names of four independent chartered accountants inviting the plaintiff to indicate any preference as between them "*so that the expert determination process may be commenced in early course".*

112. On 3 November, 2020, Mason Hayes & Curran wrote again notifying the plaintiff of their intention to write directly to the President of the Institute of Chartered Accountants to nominate an independent chartered accountant to act as expert. Smith Foy replied that day stating that there is a dispute in relation to the meaning of Schedule Four and that the plaintiff did not consent to the matter being referred to the President of the Institute of Chartered Accountants for an appointment pursuant to clause 1.6.

113. After further exchanges of correspondence, Chartered Accountants Ireland noted that there was a dispute as to whether an appointment should be made pursuant to clause 1.6 and stated that an appointment of an independent chartered accountant to act as expert would not be made in those circumstances.

114. The defendants submit that it is not open to the plaintiff to press for judgment without observing the provisions of clause 1.6 and engaging in a referral to an expert in accordance with that clause. They rely on established jurisprudence to the effect that the court should respect the choices made by parties in contracts where they agree to refer a dispute to an expert.

115. Reference was made extensively to the judgment of the Supreme Court in *Dunnes Stores v McCann and Point Village Development Ltd* [2020] IESC 1.

116. In that case, at paragraph 48, Dunne J. endorsed the principle that the court should respect the choice of parties who agreed to submit a dispute to an expert for binding determination. Dunne J. said the following:-

> *"… there are strong policy reasons for the courts not to get involved in resolving a dispute which is the subject of an expert determination clause. I have no difficulty with that proposition as a general principle. Clearly, when two parties enter into a contract such as the one at issue in this case, in general, there is no reason why the parties should not be left to resolve their disputes in accordance with the manner in which they have agreed to do so. It will not be appropriate as a general proposition for the courts to intervene. There may be unusual situations or circumstances in which an intervention can arise as has been canvassed in some of the authorities previously referred to."*

117. Dunne J. continued:-

> *"… I would reiterate the point made by [Hogan J.] with which I agree, namely that there is a public policy interest in encouraging the use of alternative dispute resolution to provide potential litigants with a means of resolving their dispute in a way which is cheaper and more efficient than litigation through the courts and that such policy considerations would be undermined if the process provided for by parties in an agreement could be halted by initiating court proceedings in order to seek a judicial determination of a legal dispute in the course of the expert determination process. I agree that such an approach would be entirely*

unsatisfactory and would, as he said, undermine the use of the alternative dispute resolution process provided for by the parties themselves."

118. In that case, a dispute arose as to whether the Point Square had been completed in accordance with the specifications in a development agreement. At the request of the parties, the President of the Royal Institute of Architects in Ireland had appointed an independent architect to determine the dispute. Following his appointment, each of the parties had made submissions to the appointed architect.

119. A dispute then arose as to the extent to which the appointed expert could decide questions of law or whether a court could be asked in advance to determine questions of law which may arise in the course of the resolution of the expert referral.

120. The Supreme Court held that the independent architect expert should be allowed proceed with his function and the fact that he may be obliged in the course of carrying out his function to interpret the development agreement did not preclude him from exercising his function. That function necessarily involved the resolution of mixed questions of law and facts.

121. In that case, the dispute had already been referred to the independent architect. The plaintiff now submits that the invocation of clause 1.6 of the Fourth Schedule is grounded on an "*invented*" dispute in an attempt to delay payment obligations which had accrued by reference to Certificates issued by the defendants' own auditor.

122. The plaintiff says that if there is a dispute it is between the defendant and his own auditor, and therefore there is no "*dispute*" as contemplated by clause 1.6.

123. The plaintiff claims that the provisions of clause 1.6 are intended to address a situation in which there may be a discrepancy between the amount of a Turnover Certificate and the records of the tenant or another such dispute relating to the manner of calculation of the Turnover rent. It submits that this clause was not intended to enable the defendant, when faced with demand for payment of the rent calculated by reference to Turnover Certificates presented by the defendant's auditor, to design a new construction of the terms of the Lease.

124. The defendants submit that it is not for the court in these proceedings to act as a "*gatekeeper*" as to whether a dispute which the defendants seek to refer to an expert pursuant to clause 1.6 is a genuine or *bona fide* dispute, and that clause 1.6 refers to *"any dispute".*

Conclusion as regards Clause 1.6

125. It is clear from *Dunnes Stores v McCann* that as a matter of policy the court should respect and give effect to the contractual provisions for referral of disputes to an expert. It is also clear from the judgment of Dunne J. that this is a general proposition and there may be cases in which "*an intervention can arise*". A rigid application of the policy will not be appropriate for every case. This case is an example of such a clause being invoked for the purpose of delay. Therefore, the court is not precluded from moving directly to apply

the principles described in *Harrisrange Ltd v. Duncan.* In doing so, the court must examine whether the summary judgment procedure is suitable for the case. This in turn engages the question of whether the defendant has an arguable defence, or has simply made a mere assertion of a situation which would form the basis of a defence (per McKechnie J.).

126. No suggestion has been made that the basic arithmetic of the calculation of Turnover Rent was flawed.

127. The first defendant's claim is that the Turnover amount ought to have excluded a portion of the receivables which the defendant now states is referable to the cost associated with the shuttle bus service. I have already found that this is a construction wholly unsupported by the clear terms of the Fourth Schedule.

128. In response to this motion for summary judgment, the defendant seeks to go behind the Certificates of its own auditor, and offers no explanation or evidence of what position the auditor would take in the matter if this different and new construction were put to him.

129. The "*dispute*" is a bare assertion that Mr. O'Sullivan believes that an error has occurred over many years, contrary to the evidence of previous reliance by both parties on Turnover Certificates produced by the same auditors.

130. The affidavits of Mr. O'Sullivan are no more than an articulation of his view, and are inconsistent with the express terms of the Lease and the history of reliance by both parties on previous Turnover Certificates.

131. I shall grant judgment against the first named defendant in the amount claimed of €2,185,204.91.

132. The plaintiff has said that the claim for mesne rates may be referred to plenary hearing and I shall hear the parties as to any further orders or directions required.