

MOORE v. DONNELLY

✓  
m

THE HIGH COURT

1985 No. 2707P

BETWEEN/

JOHN MOORE

PLAINTIFF

and

JOHN DONNELLY

DEFENDANT

Note of Judgment of Miss Justice Carroll delivered on the 17th of June 1985.

This case came before the Court on a Plenary Summons on the basis that there was only one nett point to be decided.

The plaintiff went guarantor for the rent reserved by a lease dated the 9th of September 1982 made between Anne Valerie Sheridan of the first part, Gilbert Ashe Construction Limited of the second part, John Moore (the plaintiff) and Joseph Buddock of the third part comprising premises situate at No. 5 Clyde Lane Ballsbridge, Dublin at the yearly rent of £12,250-00 payable by quarterly instalments.

No. 5 adjoins No. 6 Clyde Lane which are freehold premises and were owned by an associated company, Moore Construction Company Limited. Gilbert Ashe Construction Limited granted a fixed and floating charge over its assets including a fixed charge over the premises at No. 5 Clyde Lane to the Industrial Credit Company Limited by debenture dated the 22nd of September 1982. Moore Construction Company Limited also granted a debenture over its assets including the premises No. 6 Clyde Lane to the Industrial Credit Company Limited on the 22nd of September 1982.

By appointment dated the 24th of May 1983 the defendant John Donnelly was appointed Receiver of the assets of Gilbert Ashe

Construction Limited and on the same date he was also appointed receiver of Moore Construction Company Limited. A petition for the winding up of both companies was presented on the 28th of April 1983 and Vincent O'Neill was appointed liquidator on the 3rd of June 1983. The rent due on the 20th of May 1983 for the period May to July 1983 was not paid, nor was the rent for the quarter August to October 1983 or the quarter November to January 1984. The landlord sued the liquidator, the company in liquidation and the defendant as receiver for the rent. In a separate action she also sued the guarantors. Judgment was given in the Circuit Court against the company but not against the receiver, Mr. Donnelly. Judgment was also given against Mr. Moore as guarantor.

Clause 12 of the debenture provides as follows:-

"All moneys received by a receiver appointed hereunder shall be applied as follows:-

- (a) In payment of all sums necessary or proper in or for the purpose of the exercise of the powers and duties of such receiver hereunder.
- (b) In discharge of all outgoings affecting or payable in respect of the mortgage property.
- (c) In payment of his remuneration.
- (d) In payment of premiums on fire and other insurances and the cost of executing necessary or proper repairs to the mortgage property.
- (e) In payment of the interest on the mortgage debt and other moneys (if any) other than the mortgage debt due or payable under this deed and in such order as the lender may direct.
- (f) In or towards the discharge of the mortgage debt.

(g) In payment to the company of the residue of the moneys received by the receiver."

The plaintiff claims that the defendant entered into possession of the property at No. 5 Clyde Lane and made use of it as receiver, which was denied by the defendant.

The evidence was as follows:-

On his appointment Mr. Donnelly changed all the locks on Nos. 5 and 6. No. 6 provided the main entrance to the two properties, there being however a rear entrance to No. 5. The premises were interconnected in that a substantial portion of the dividing wall had been removed sometime in the past. All the lavatory accommodation was in the premises No. 5. Furniture belonging to Gilbert Ashe Construction Limited was in No. 5 as also were the books of the company.

Mr. Moore was employed by Mr. Donnelly to assist him as receiver in recovering moneys due to the company. He worked in both No. 5 and No. 6 going through files and papers. He was there for approximately five to six weeks when by his choice he worked at home. Early in 1984 he visited No. 5 and No. 6. No. 6 was then separated by a partition with plaster-work on both sides. He entered No. 5 by a rear door and he said that papers, documents and furniture were still in the building. The premises No. 6 were sold in May 1984 and prior to that all documents and furniture were taken out.

The business of the company ceased at the time of the liquidation and was not carried on afterwards. The receiver had staff in No. 5 and No. 6 and they used the toilets in No. 5 as there were none in No. 6.

Mr. Donnelly's evidence was that he was appointed receiver in May 1983 of Gilbert Ashe Construction Limited and also of

Moore Construction Company Limited. He changed the locks on all the premises. There was no business to carry on so that it was a case of realising the assets for the receivership. He engaged Mr. Moore to negotiate with people who owed moneys to the company for work in progress. Concerning the use of Nos. 5 and 6 he said that his attitude was the staff should use No. 6 for the receivership as they had clear title to their property. The only use they made of No. 5 was for toilet facilities. He took advice as to value from Messrs Jones Lang and Wootton. They advised there could be value in the leasehold of No. 5. He instructed them to advertise both for sale (this was done in August). When it was discovered there was no value in No. 5, they advertised No. 6 only. When they sold No. 6 they were told they must divide the two premises so they got a contractor. The key to No. 5 was given to Mrs. Sheridan, the landlord, before they did the separation of the premises.

When asked if the receiver derived any benefit, he said he did not realise anything for it. He said the receiver did not make use of the premises and he said it was no use to him. There were papers stored in No. 5 and there was furniture there. The papers were subsequently removed to a store and the furniture disposed of. He said the liquidator came to see him on his appointment to ask what his plans were. He said he wanted to realise the assets and they arranged he would look over the premises at Nos. 5 and 6. He went through papers with the directors. Mr. Donnelly held the keys of the changed locks all the time. The two premises appeared from the inside to be one unit. A substantial portion of the wall had been removed. The liquidator never got his hands on anything.

The issue is not whether the receiver was liable to the landlord to pay rent accruing due while he was in possession. It is clear that vis a vis the landlord he is not liable. Indeed this is the issue which was determined in the Circuit Court. At first it seemed the issue was whether the receiver is obliged to discharge rent accruing due while he was in beneficial occupation and possession of the property in priority to the mortgage debt. But then it was conceded that if the receiver did enjoy the use of the property he should also discharge the rent in priority to the mortgage debt. Therefore the issue comes down to an issue of fact namely whether the receiver took possession of the property and made use of it to the exclusion of the liquidator or whether he "walked away".

A receiver has no power to disclaim onerous leaseholds. Only a liquidator has this power if given leave by the Court. This was not done in this case. However the receiver returned the keys to the landlord in February 1984 who accepted them and only claimed rent due to January 1984.

I am satisfied on the evidence

- (1) that the staff employed by the receiver (and therefore the receiver) did make beneficial use of the premises No. 5. Indeed it would have been impossible to confine the receivership to No. 6 because of the lack of toilet facilities;
- (2) that the premises were under the sole control of the receiver, as he alone had the keys. The visit the liquidator made was by arrangement;
- (3) that the receiver did not at any stage "walk away" from the leasehold. The building of the partition wall between Nos. 5 and 6 commissioned by the receiver postdated the

handing over of the keys to the landlord.

Therefore the receiver was in beneficial occupation and possession of the premises from the date of his appointment. The receiver was bound under Clause 12 of the Debenture to apply the moneys received in discharge of the outgoings on the property in priority to the mortgage debt.

The issue has been put as an issue between the plaintiff as surety for the rent and the defendant as receiver. However, the declarations sought affect the Industrial Credit Corporation as debenture holder. Before making any declarations they should be given an opportunity to be heard. The matter will be adjourned pending communication with them.

*Mella Cancell,*

*Approved.  
12-7-85.*