

THE HIGH COURT
COMMERCIAL

[2018 No. 9011 P]

BETWEEN

DUBLIN CINEMA GROUP LIMITED

PLAINTIFF

AND

BALARK TRADING GP LIMITED

AND

BALARK INVESTMENTS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 20th day of November, 2019

Summary

1. This judgment considers which party, if any, should be liable for the costs of a strike out application taken by the defendants ("Balark Trading" and "Balark Investments") against the plaintiff ("Dublin Cinema Group"). As such, this judgment is ancillary to the principal judgment delivered by this Court on 6th November, 2019 (*Dublin Cinema Group Limited v. Balark Trading GP Limited & Anor.* [2019] IEHC 776) and terms used in the principal judgment are also used in this judgment and accordingly, it should be read in conjunction with the principal judgment. In the principal judgment, this Court granted the strike out application brought by the defendants as the substantive proceedings brought by Dublin Cinema Group were determined, by this Court, as being bound to fail.
2. In this application, Dublin Cinema Group seek costs, on the basis that some of their reliefs were rendered moot due to a confirmation and undertakings given by the defendants on the first day of the hearing. The defendants have a cross-application for costs, on the basis that they were successful in their strike-out application.
3. In any application for costs, it is relevant to note the position regarding mediation. Specifically, it is important for a court to consider whether an offer to mediate was made by either party and indeed whether any such offer was accepted or rejected. In the present case, an offer to mediate by one of the parties was accepted by the other, and a mediation was undertaken (which, unfortunately, was unsuccessful). Accordingly, as a preliminary point it is to be noted that there are no cost implications arising from any failure by any of the parties to mediate.

Background

4. In the Statement of Claim in Dublin Cinema Group's substantive proceedings, it sought three primary reliefs regarding a restrictive covenant which had originally been executed by Balark Investments, as the purchaser of the Screen Cinema (referred to in the principal judgment as the "Balark Property"), to the effect that Balark Investments would not use the Balark Property as a cinema or theatre venue for 20 years from the date of sale. As noted in the principal judgment, Balark Investments subsequently transferred its interest in the Balark Property to the first named defendant, Balark Trading. The reliefs in the Statement of Claim were therefore claimed against Balark Trading. These reliefs were,

it appears, sought by Dublin Cinema Group in order to protect its commercial interests as owner of the nearby Savoy Cinema.

5. The three reliefs sought can be summarised as follows:
 - (i) A declaration that Balark Trading is not entitled to use or permit the use of the Balark Property as an entertainment space, or otherwise as a cinema or theatre of any kind, for a period of 20 years from the date of sale of that Property, or otherwise acting in breach of the Contract for Sale or the Deed of Covenant;
 - (ii) An injunction restraining Balark Trading from using or permitting the use of the Balark Property as a cinema or theatre of any kind, including its intended use as an entertainment space, for a period of 20 years from the date of sale or otherwise acting in breach of the Contract for Sale or the Deed of Covenant; and,
 - (iii) An injunction restraining Balark Trading from implementing the grant of planning permission for the Balark Property, for as long as that grant of planning permission provides for an entertainment space or a cinema or theatre venue of any kind.
6. As noted in the principal judgment, on the first day of a two-day hearing, Dublin Cinema Group withdrew its application for the first two reliefs originally sought in the Statement of Claim and confirmed to the Court that it would only be pursuing the third relief. This withdrawal was on foot of undertakings and confirmations (set-out in detail in para. 15 of the principal judgment) given by the defendants following discussions which had taken place between the parties during the morning and early afternoon on that first day of the hearing.
7. The third relief, seeking an injunction restraining the implementation of the planning permission, was contested at the hearing and the defendants were ultimately successful in their strike-out motion in relation to this relief. As previously noted, the substantive proceedings brought by Dublin Cinema Group have therefore been struck-out.
8. The issue as to whether the costs of the proceedings, insofar as they relate to that third relief, should be awarded to the defendants is straight forward. This is because costs follow the event and the event in that case is clearly the loss by the plaintiff of its claim to be entitled to an injunction preventing Balark Trading from implementing the grant of planning permission. On this basis, these costs should be awarded to the defendants.

Who is to be awarded costs regarding the withdrawn reliefs?

9. A more difficult issue is the question of the costs of the proceedings, insofar as they relate to the first two reliefs, i.e. the declaration and injunction regarding the use of the Balark Property as an entertainment venue or a cinema/theatre for 20 years.
10. In this regard, it is relevant to note that in November 2018, the defendants gave an undertaking that they would not use or facilitate the use of the Balark Property as a cinema or theatre venue of any kind (the "November Undertaking"). However, this undertaking was not sufficient for Dublin Cinema Group to withdraw its proceedings

seeking the first two reliefs. This is because this undertaking did not address the issue of the running of the benefit and burden of the covenant with the land and the related issue of whether a successor in title to Balark Trading would be entitled to ignore the restrictive covenant.

11. This issue of whether the November Undertaking would bind third parties in the event of the sale or transfer of the Balark Property had been raised by Dublin Cinema Group in both the Notice for Particulars and in the Notice for Further and Better Particulars. In their replies to the Notice for Particulars, the defendants stated that there was *"no question"* of reserving to themselves the right to transfer the Balark Property to a third party free of the undertaking. Yet, in the very next sentence, the defendants stated that it *"is not possible for the Defendants to give an undertaking on behalf of third parties not before the Court"*. Not satisfied with what it felt was an *"indirect"* and *"opaque"* response, in the Notice for Further and Better Particulars dated 20th December, 2018, Dublin Cinema Group sought clarification. On 9th January, 2019 in replies thereto, the defendants confirmed that they did in fact reserve the right to transfer the Balark Property free of the November Undertaking.
12. However, on the day of the hearing of the strike out application the issue of the running of the covenant and the related issue of whether successors in title were bound by the covenant was resolved between the parties, with the defendants conceding that they would not seek to transfer the Balark Property free of the November Undertaking. In summary, the agreed matters between the parties which led to the withdrawal of reliefs one and two are as follows:
 - (i) The defendants accepted that the restrictive covenant runs with the land and is therefore binding on successors and assigns in title of the defendants, and benefits the successors and assigns in title of Dublin Cinema Group as owners of the Savoy Cinema Property;
 - (ii) It was agreed that the defendants and College Square 3 Limited Partnership (the third party to whom title in the Balark Property had been transferred) would give an undertaking not to use or facilitate/permit the use of the Balark Property as a cinema or theatre venue for 20 years; and,
 - (iii) It was agreed that the defendants and College Square 3 Limited Partnership would give an undertaking that, in the event of any disposition or sale of the Balark Property, they would procure from the successor or assign the same undertakings in writing to Dublin Cinema Group within 21 days of the transfer concerned.

Relevance of mediation to costs

13. Before adjudicating on the effect of this settlement agreement on the application for costs, this Court first considered whether a failure to mediate and/or the conduct of a mediation might have costs implications for the parties. This is because it seems clear that this Court, in exercising its discretion in relation to costs, may have regard to a refusal of a party to engage in mediation and/or the conduct of an agreed mediation. In

this regard see the decision of Laffoy J. in *Kilarden Investments Ltd v. Kirwans (Galway) Ltd* [2013] IEHC 602 at para. 19 *et seq*, where she relied on the decision of the Court of Appeal of England and Wales in *Halsey v. Milton Keynes General NHS Trust* [2004] 1 WLR 3002. Similarly, Kelly J. (as he then was) considered in *Musgrave Ltd v. Kay-El (Hong Kong) Ltd* [2005] IEHC 418 whether the lack of success at an unsuccessful mediation (which had been ordered under Order 63A, rule 6(1)(xiii) of the RSC) had costs implications for the parties. At para. 5, he stated:

“On foot of the order which I made I was furnished with a report by the mediator who, unfortunately, had to record that although very substantial progress was made in the mediation she was unable to finalise a solution. I should mention that the mediator expressed the view that the parties came to the mediation in good faith and made genuine efforts to reach a compromise. Such being so the lack of success at mediation carries no costs implication for the litigation.”

14. Accordingly, at the costs hearing in this case, this Court raised with the parties (i) whether any party offered to mediate, (ii) whether this offer was accepted by the other party/parties and (iii) whether a mediation was held. This Court was advised that an offer of mediation was made by the defendants and accepted by the plaintiff and that an unsuccessful mediation had been undertaken before a mediator, whose identity was disclosed to the Court.
15. In light of the relatively straight forward compromise (i.e. a series of confirmations and undertakings) which was reached on the day of the hearing of the strike out application, it is disappointing that the parties were not able to reach these agreements at that mediation. If they had, this would have saved considerably on court resources and would also have reduced the legal costs for the parties themselves. However, this Court has no idea of the reasons for this failure and so the fact that the mediation was unsuccessful is not relevant to this application for costs, particularly as there was no evidence provided to the Court that the parties had not engaged in good faith in the mediation and had not made genuine efforts to compromise.

Decision on the costs

16. It is clear from the pleadings in this case, and in particular from the Notice for Particulars and the Replies to Particulars, that one of the significant issues in this case was whether the restrictive covenant was binding on any future third party owner of the Balark Property. It is understandable that this issue was of significant concern to Dublin Cinema Group, since if the covenant was not to bind future third-party owners, Dublin Cinema Group might not have the benefit of a restrictive covenant for 20 years. Instead, the restrictive covenant would be binding only until the defendants disposed of the Balark Property.
17. In addition, paragraphs 8, 12 and 13 of the Amended Defence clearly outline the defendants' position regarding future owners of the Balark Property not being bound by the restrictive covenant. This position is outlined in the following terms:

Para. 8: “[...] it is denied either (i) that the burden of the Deed of Covenant runs with and/or binds the [Balark Property], or (ii) that the benefit of the Deed of Covenant is annexed to and runs with the Savoy Property or any part thereof.”

Para. 12: “If the Plaintiff chooses to persist with these proceedings, the Defendants will contend that the Covenant is not as a matter of law capable of constituting a covenant which runs with the land and binds the Balark Property for the benefit of the Savoy Property.”

Para. 13: “In particular:

13.1 By its nature, the covenant is collateral and personal to the Plaintiff.

13.2 The covenant does not “touch and concern” the Savoy Property.

13.3 That the Savoy Property houses a cinema is a collateral circumstance which cannot transform a personal covenant into one which can be enforced against the Second Defendant’s successors.

13.4 The Plaintiff’s interest in enforcing the Covenant, if any, is purely financial or commercial and does not concern the nature or quality of the Savoy Property.”

18. Dublin Cinema Group, at para. 2 (a) of the Reply to Defence, put the issue front and square in the proceedings in the following terms:

“[T]he Defendants, in tendering the said undertaking, reserve the right to transfer title to the Balark Property (as defined in the pleadings) or any part thereof to a third party (whether part of the Balark Group or not), at any time, whereupon the undertaking would dissipate.”

19. It is clear therefore from the pleadings that the ability of the defendants to effectively terminate the 20-year restrictive covenant at any time by transferring the Balark Property to a third party was a significant issue in the proceedings.

20. It is also clear that, once the defendants gave the confirmation, that the restrictive covenant (not to use the Balark Property as a cinema/theatre for 20 years) ran with the land, and the undertakings (to seek to bind future owners of the Balark Property), the necessity for reliefs one and two (an injunction and declaration preventing Balark Trading from using the Balark Property as a cinema/theatre for 20 years) fell away. These confirmations and undertakings were clearly in response to the proceedings issued by Dublin Cinema Group and led to that part of the proceedings (reliefs one and two) being withdrawn. One of these confirmations involved the defendants confirming that paragraphs 8, 12 and 13 of the Amended Defence (denying that the restrictive covenant ran with the land) would not be relied upon by the defendants.

The ‘event’ for the purposes of costs

21. In *Godsil v. Ireland* [2015] 4 I.R. 535, the Supreme Court decided that the event, for the purposes of deciding liability for costs, was the introduction by the Oireachtas of

legislation which enabled the plaintiff, an undischarged bankrupt, to run for election. This 'event' rendered the issues in that case moot, since the proceedings sought to have the statutory rule, that an undischarged bankrupt could not run for election, declared unconstitutional. The circumstances in *Godsil*, where the introduction of legislation rendered the reliefs sought by the plaintiff moot, can be compared to the circumstances in this case. Here the 'event' was the confirmation and undertakings given by the defendants and this 'event' rendered the first two reliefs moot. On the basis that costs follow the event, this Court concludes that in relation to these two reliefs, costs should be awarded to the plaintiff.

22. It is this Court's view that although the Declaration and Injunction in reliefs one and two are presented in the Statement of Claim as two unconnected reliefs, they are in fact both concerned with the same issue. This is because both reliefs are concerned with seeking confirmation that future owners of the Balark Property are to be bound by the restrictive covenant.
23. On this basis, this Court concludes that when looking at these proceedings in the round, the proceedings were ultimately about two key issues. First, whether the construction of a cinema/theatre amounts to a breach of a covenant not to use a property as a cinema/theatre, which issue the plaintiff lost - as this element of the proceedings was struck-out by this Court. The second issue was whether the restrictive covenant bound future purchasers of the Balark Property, which issue was ultimately withdrawn because of the concessions made by the defendants on the first day of the hearing – which issue was therefore won by the plaintiff.
24. On the basis that, of the two key issues in this case, the plaintiff successfully pursued one issue but the defendants were successful in striking-out the other, it seems to this Court that this is a case where there should be no order as to costs between the parties. This Court therefore declines to make any order for costs in favour of the plaintiff or any order in favour of the defendants.