THE HIGH COURT

[2022] IEHC 731

Record No. 2020/102S

BETWEEN

PROPMASTER VENTURES LTD

APPLICANT

- and -

FUN GALAXY ASHBOURNE LTD

RESPONDENT

JUDGMENT of Ms. Justice Niamh Hyland of 16 December 2022

Introduction

1. This is an application by the plaintiff for summary judgment in the sum of €454,117.33. The summary summons was issued on 19 March 2020 and identified that the parties are both limited liability companies. The plaintiff as landlord and the defendant as tenant entered into a lease dated 29 July 2019 whereby the plaintiff demised to the defendant unit 1 North Rd., Finglas in Dublin 11 for a period of 10 years commencing on 6 June 2019. It is pleaded that pursuant to the terms of the lease the defendant agreed to pay to the plaintiff the sum of €250,000 per annum by equal quarterly payments without any deduction or set-off or counterclaim.
2. The defendant took possession on 6 June 2019 and commenced trading from the premises and the parties agreed a rent-free period of 3 months. The rent was to be due from 6 September 2019. The plaintiff has set out details of the invoices raised at that

point in time and has pleaded that the defendant has refused to pay the agreed or any rent and that at the date of commencement of the within proceedings the sum of €174,811.65 remained due and owing.

3. The fourth affidavit of Mr. Prendergast, director of the plaintiff, sworn 12 December 2022 identifies that €503,350 was owing at the date of the swearing of the affidavit but the parties clarified at the hearing that the outstanding amount at this point in time is €454,117.33.
4. When seen in the context of the arrangement between the parties this is a very significant sum. The defendant has had an obligation to pay the rent since 6 September 2019. That means the total rent payable over that period was in the region of €825,000. The amount outstanding - €454,000 - is over 50% of the total rent amount.

Application for summary judgment

5. By Notice of Motion of 21 December 2020, an application for liberty to enter final judgment was issued. At that time the sum outstanding was €327,311.65 and that was sought plus €75,625 for each quarterly gale day prior to the date of judgment.
6. The application was grounded on an affidavit of Mr. Prendergast. He avers at paragraph 3 that the defendant agreed to pay the plaintiff a rent of €250,000 per annum exclusive of VAT and other payments without any deduction set off or counterclaim whatsoever. That averment is informed by Schedule 4 of the lease headed up "*Tenant's Covenants*". Paragraph 1.1 identifies that the tenant throughout the term covenants with the landlord as follows — "*To pay the rents in the manner specified at clause 1.1 of Schedule 3 (save for the first payments which shall be made on the execution of this Lease) and without any deduction set off or counterclaim whatsoever.*"
7. Mr. Prendergast avers that after the proceedings issued, the defendant only paid one quarter's rent in the sum of €76,875 for the first time on 3 April 2020, despite the

express terms of the lease, the defendant having entered into occupation on 6 June 2019, and repeated demands for rent. At paragraph 10 he avers that the defendant has taken possession of the premises, signed the lease, carried out its own fit out without the plaintiff's written permission, and commenced trading from the demised premises while refusing to pay rent. He avers that the defendant alleges that the plaintiff has failed to carry out certain works to the demised premises and on that basis is withholding the payment of rent, notwithstanding having entered into possession and commenced trading in excess of 15 months ago. He avers that this is contrary to the express terms of the lease which requires the payment of rent without any deduction, set-off, or counterclaim whatsoever. He avers that he believes that the defendant has no defence to the within claim.

8. A replying affidavit of Sharon Farrell, director of the defendant, was sworn on 7 April 2021 and she avers that the fact of the lease agreement is not denied and that the defendant will rely upon the lease and the covenants for their force and effect at the hearing of the action. She avers that it was intended to operate two businesses, one being a childcare service and the other a family entertainment centre. She says the defendant could not open as planned as a result of the plaintiff's failure to carry out the agreed works. She says the family entertainment business opened in December 2019 and that the defendant could not carry out its childcare facility due to the plaintiff's failure to carry out agreed works. At paragraph 10 she says that the plaintiff agreed to carry out certain works to facilitate the defendant operating the business. She says the defendant agreed to commence the lease in advance of such works being carried out on the strict understanding and agreement that the plaintiff would carry out the outstanding works properly and fully complete them.

9. At paragraph 15 she denies that the sum of €327,311.65 is due and owing as the defendant has a valid claim/counterclaim against the plaintiff for loss and damage suffered by it as a result of the plaintiff's refusal to carry out agreed works to the premises, and the negative impact this has had on the defendant's ability to run its businesses.
10. At the hearing it was made clear that the defendant agreed that the sum of €454,117.33 was due and owing under the lease as I have identified at the start of this judgment.
11. At paragraph 19 of the affidavit, she says the plaintiff continues to act in breach of the covenants in the lease agreement and in breach of its representations and agreement to carry out work to render the premises weathertight and fit for use. At paragraph 25 she says that the matter should be brought by way of plenary summons so that oral evidence can be given, and the matter properly and fully determined.
12. These are important averments. Critically, it is clear that the nature of the defence being put forward to the claim is that the defendant has a claim/counterclaim against the plaintiff for loss and damage. There is no dispute but that the amount of rent identified is due and owing under the terms of the lease.
13. Mr. Prendergast filed a supplemental affidavit of 4 June 2021. He points out in that affidavit that as of the date of swearing the defendant had paid one quarter's rent despite the obligation to pay rent commencing on 6 September 2019.
14. At paragraph 37 he avers that the defendant took the property in the condition in which it was in. Counsel informs me that the basis for that position under the lease is paragraph 1.4 of Schedule 4 which identifies that the tenant covenants to repair the interior of the demised premises and keep and put same in good repair and condition.

15. A second replying affidavit was sworn by Ms. Farrell of 17 January 2022 dealing in some detail with the alleged breaches of the agreement between the parties to repair the building and to put the building in good order.

16. A further replying affidavit was sworn by Mr. Prendergast on 2 February 2022. At paragraph 24 of that affidavit, he avers that the counterclaim is not a meritorious one but even if it was, it represents a very small portion of the sum now due and owing to the plaintiff.

17. A further replying affidavit was sworn by Ms. Farrell on 9 March 2022. She notes that a sum of €68,509 had been spent by the plaintiff on repairs and rhetorically asks why the money would have been spent if the plaintiff was not obliged to carry out those works.

18. No identification of the sums allegedly due and owing by the plaintiff to the defendant is provided in any of the three affidavits of Ms. Farrell. Nor is there a breakdown of the alleged loss, or vouching documentation, or any expert report. There is nothing that approximates to a claim against the plaintiff in this respect. Rather there is a list of complaints about the building and arguments raised as to who bore the responsibility for the defects in this respect. In fairness to the plaintiff, this is in response to Mr. Prendergast's arguments that the majority of issues that arose were matters for the defendant. Equally, in the extensive solicitor's correspondence between the parties, there does not appear to be any identification of heads of claim by the defendant or the breakdown of such heads of claim or vouching documentation in respect of losses allegedly incurred.

19. Given what I must decide today, it is significant that the defendant has not identified a claim in this regard. Having regard to my summary of the pleadings, I am satisfied that the defendant is objecting to summary judgment on the basis that it has a valid

claim/counterclaim arising from the same set of facts and therefore it has a defence justifying the matter being sent to plenary hearing.

Arguments of the parties

20. Both parties filed written legal submissions and set out those arguments in further detail in the hearing before me yesterday. I would like to thank counsel on both sides for their extensive and helpful arguments which greatly assisted me in giving judgment today.
21. The plaintiff argues that the claim based on set-off is not open to the defendant given the fact that the lease excludes the possibility of set-off or counterclaim. That is the plaintiff's first argument.
22. The plaintiff then goes on to argue that, in the alternative or in addition, it would be inequitable to permit the case to go to plenary hearing given the failure of the defendant to specify its claim. In this respect counsel referred to Circuit Court proceedings issued by the plaintiff in 2021 against the defendant for ejectment for overholding in relation to the demised premises and identified that the defendant had lodged a defence and counterclaim but that in those proceedings the counterclaim had not been specified.
23. In support of the arguments identified above, counsel for the plaintiff opened the decision of Clarke J. in *Moohan v S&R Motors (Donegal) Ltd.* [2008] 3 IR 650, that I discuss in detail below and relied upon it, as well as the decision of the Court of Appeal of 2016 in *NAMA v Kelleher* [2016] 3 IR 568.
24. Third and finally, it argues that in any case there is no bona fide defence put forward by the defendant.
25. The defendant on the other hand argues that the defendant has put forward both a defence and a counter claim. It is argued there was an agreement between the parties

prior to the signing of the lease whereby the plaintiff agreed to do certain works in respect of the property. Counsel for the defendant opened solicitor's correspondence and emails in support of this argument, which documents referenced a discussion in respect of the works to be carried out by the plaintiff. Counsel also points to certain provisions in the lease which she argues demonstrate an obligation on the plaintiff to repair and maintain the premises. Counsel points out that although proceedings were issued, there was a forbearance in respect of advancing same for a considerable time, and that is evidence of an acceptance by the plaintiff that it was obliged to carry out certain works. In respect of the question as to whether the claim had been specified, she said that matters were advanced in the Circuit Court proceedings and pointed to discovery made. I understand that an affidavit of discovery was in fact sworn on 15 December 2022.

26. Counsel argued that the case of *Moohan* was of no relevance, as it was in relation to an arbitration agreement and did not apply to leases. She said there was no case law in relation to the application of the principles of *Moohan* in the context of leases. She relied on the dicta in *Harrisrange Ltd v Duncan* [2003] 4 IR 1 and *Aer Rianta v Ryanair* [2001] 4 IR 607 and associated cases, and said a plenary hearing was required in circumstances where oral evidence would be needed.

27. I should add that counsel for the defendant initially took the view that she was taken by surprise by the plaintiff's first argument i.e. that there could be no set off of the rent under the lease and that she might need additional time to deal with it. That point was noted in the first affidavit of Mr. Prendergast as identified above. Nonetheless, the Court offered time to the defendant to provide further submissions on this point if required. Counsel, having made her arguments, declined to put in further submissions

and dealt with the point in the course of oral submission. As noted, I found the submissions of both counsel of considerable assistance in this matter.

Applicable law

28. The law applicable in such a situation has been identified with great clarity by Clarke J. in the case of *Moohan*. That case in turn drew on the Supreme Court decision of *Prendergast v Biddle* (Unreported, Supreme Court, 21 July 1957, Kingsmill Moore J.). In *Moohan*, the plaintiff agreed to build a car showroom for the defendant and the parties entered into a written construction contract based on the Royal Institute of Architects of Ireland ("RIAI") standard form building contract. The plaintiff issued a summary summons for non-payment of sums due on foot of architects' certificates and brought a motion for judgment in the amounts claimed. The defendant asserted faulty workmanship on the part of the plaintiff and sought a stay to allow the issues to be referred to arbitration. Clarke J. granted judgment in the amount sought but placed a stay on the execution of any sum in excess of €100,000 until the determination of arbitration proceedings in respect of the defendant's cross claim.

29. He commenced by noting that the question as to whether a party should be given leave to defend a summary judgment application had been addressed in *Aer Rianta v Ryanair*. Because of the importance of paragraph 4.2 of his judgment in the instant case, I will quote it in full:

> *"4.2 Where the nature of the defence put forward amounts to a form of cross claim slightly different considerations may apply. In those circumstances the court has a wider discretion. Where the defendant does not establish a bona fide defence to the claim as such, but maintains that he has a cross claim against the plaintiff, then the first question which needs to be determined is as to whether that cross claim would give rise to a defence in equity to the proceedings. It is*

clear from Prendergast v. Biddle (Unreported, Supreme Court, 21st July, 1957, Kingsmill Moore J.), that the test as to whether a cross claim gives rise to a defence in equity, depends on whether the cross claim stems from the same set of facts (such as the same contract) as gives rise to the primary claim. If it does, then an equitable set off is available so that the debt arising on the claim will be disallowed to the extent that the cross claim may be made out."

30. At paragraph 4.5 he noted as follows:

> *"4.5 It seems to me that it also follows that a court in determining whether a set off in equity may be available, so as to provide a defence to the claim itself, also has to have regard to the fact that the set off is equitable in nature and, it follows, a defendant seeking to assert such a set off must himself do equity."*

31. At paragraph 4.6 he identifies that the overall approach to a case involving a cross claim meant it was necessary to determine if the defendant had established a defence as such to the plaintiff's claim and that "[*i*]*n order for the asserted cross claim to amount to a defence as such, it must arguably give rise to a set off in equity, and must, thus, stem from the same set of circumstances as give rise to the claim*". I emphasise the words "*arguably give rise to a set-off in equity*".

32. The effect of those paragraphs appears to be that, where a party asserts a cross claim – which I take as the equivalent of a counter claim – as a reason to avoid summary judgment, a court must consider whether the cross claim would give rise to a defence in equity to the proceedings such that the debt arising in the claim i.e. the primary claim, will be disallowed to the extent that the cross claim may be made out. If so, then summary judgment should not be given.

33. At paragraph 5.7 and 5.8 Clarke J. turns his attention to the first issue raised by the plaintiff in these proceedings i.e. whether a contract can displace the normal default

position that a party is entitled to a set off in equity in relation to any cross claim arising out of the same contract. In fact, in this case, that default position is not as obvious because the alleged cross claim only partly arises out of what the defendant says are obligations under the lease. The greater part of the defendant's case appears to be based on obligations under an alleged agreement identified by the correspondence between the solicitors, and the parties themselves. The effect of that agreement is alleged to be that the plaintiff agreed to do works for the defendant in relation to the premises. Clarke J. identifies that if a builder is owed money on foot of the construction contract, the employer is *prima facie* entitled to a set off in equity in respect of any defective works.

34. He goes on to state "*the question which arises is as to whether that prima facie position has been displaced by the terms of the contract. There is no doubt but that the parties are free to agree that there will be no set off. The question is whether they have in fact done so*". He then goes on to consider the case law in relation to the RIAI contract and concludes that, as a matter of construction, the defendant is *prima facie* entitled to a set-off in respect of any cross claim which it can maintain under that contract.

35. Here the position is the opposite. The lease makes it absolutely clear that there may be no set off, deduction or counterclaim in respect of the payment of rent. Counsel for the defendant has attempted to avoid the implications of *Moohan* being applied to this case by arguing that the principles identified therein are limited to cases involving either an arbitration clause and/or an application to stay proceedings to permit arbitration to take place and/or cases involving the RIAI contract. I see no such limitation in the decision. The terms in which the judgment is cast go well beyond those limited fact situations. A reading of the case discloses that Clarke J. is establishing general statements of principle. The decision has been endorsed in this respect by the Court of Appeal in the case of *NAMA v Kelleher*. In that case Finlay Geoghegan J. held as follows:

"31. The Court was referred to applicable principles set out by Clarke J. in the High Court in Moohan v. S. & R. Motors (Donegal)Limited [2007] IEHC 435, [2008] 3 I.R. 650 at p.656 where on an application for summary judgment the single defence advanced is one to set off a counterclaim or cross claim. Whilst those principles do not determine the questions at issue on this appeal nevertheless the judgment is of assistance. It indicates, I would respectfully say correctly, that when as in these proceedings a defendant contends for a bona fide defence which is to set off a counterclaim or cross claim there are two separate questions which the court must address in considering whether the defence meets the Aer Rianta threshold. A court must consider both whether the connection between the plaintiff's claim and the counterclaim or cross claim of the defendant is such as to establish a prima facie entitlement of the defendant to set off in equity the amount recoverable on the counterclaim and also whether or not the substance of the counterclaim itself reaches the arguable or bona fide threshold…."

Decision

36. I am acutely conscious of the approach of the courts to summary judgment. As carefully identified by counsel for the defendant in cases such as *Aer Rianta* and *Harrisrange*, courts should be slow to grant summary judgment. They should refrain from doing so where the defendant has an arguable defence. It need not be a defence that is likely to succeed, or as counsel put it, a good defence. McKechnie J. in *Harrisrange* noted that the power to grant summary judgment must be exercised with discernible caution.

37. I am satisfied that this approach applies equally in the context of a defence based on a counter claim and set off, as in the instant case. In *Aer Rianta*, Hardiman J. quoted the case of *Sheppards* as follows:

"In Sheppards and Co. v. Wilkinson and Jarvis (1889) 6 T.L.R. 13, Lord Esher said:-

> *"..... The rule which had always been acted upon by this Court in considering cases under Order 14 was that the summary jurisdiction conferred by that order must be used with great care. A Defendant ought not to be shut out from defendingunless it was very clear indeed that he had no case in the action under discussion. There might be either a defence to the claim which was plausible, or there might be a counterclaim pure and simple. To shut out such a counterclaim if there was any substance in it would be an autocratic and violent use of Order 14. The Court had no power to try such a counterclaim on such an application, but if they thought it so far plausible that it was not unreasonably possible for it to succeed if brought to trial, it ought not to be excluded""*

38. However, the purpose of refusing to grant summary judgment and sending a case to plenary hearing in circumstances where it is argued that the defendant has a counterclaim arising out of the same set of facts, is so that the counterclaim can be advanced in the plenary proceedings at the same time as the summary claim. As Clarke J. notes, this is to permit the amount owing, if any, under the counterclaim to be set off against the amount owing under the original proceedings.

39. If there is no possibility of set-off at the plenary hearing, then it would be futile to send a matter otherwise appropriate for summary judgment to plenary hearing to allow a counterclaim to be heard and determined. In other words, the concept of a counterclaim as a defence is premised on the existence of a possible set off. Where the parties have by contract expressly excluded the possibility of a set-off or counterclaim, a court

should apply the provisions of the contract assuming there is no doubt as to the validity of the contractual provision and should refuse set off.

40. In this case, the lease is unambiguous in its terms. I have already identified that there is no defence to the claim for rent under the lease other than a set-off of the claim for loss caused by the allegedly defective building and the plaintiff's failure to repair. But the lease provides that no set off or counterclaim may be raised against rent due and owing under the lease. Critically, no argument has been made by the defendant, either legal or factual, to the effect that the lease does not in fact preclude set-off and/or counterclaim. None of the voluminous averments of Ms. Farrell raised this issue at all. There is no reference to this part of the lease in her affidavits. The legal submissions filed by the defendant do not raise this point.

41. In argument, no case was put forward on behalf of the defendant that set-off is, in fact, permitted under the terms of the lease. By analogy with the test as to whether an arguable defence has been made out, in the words of McKechnie J. in *Harrisrange*, there are truly no issues raised as to whether set-off is permissible. The only response to this point was that the defendant had raised a bona fide defence. For the reasons set out above, I am satisfied that this is not a case where the defendant is asserting a defence *simpliciter* but rather, as per the first affidavit of Ms. Farrell, is asserting a defence by way of counterclaim or claim.

42. In those circumstances it seems to me that (a) the defendant has put up no defence in relation to the rent due and owing under the terms of the lease and (b) the defendant has failed to establish that it can rely on a defence by way of counterclaim in circumstances where the lease expressly prevents any claim for rent being subject to a counterclaim or set off. There is no issue to be tried on the question of the rent owing and, even assuming success in a counterclaim, any amount awarded cannot be set off against the

amount of rent owing due to the provisions of the lease. The relevant issues are therefore simple and capable of being easily determined at this summary stage.

43. In those circumstances I can see no basis for sending the case to plenary hearing. The defence based on the existence of a counterclaim that may be set off against amounts owing is not open to the defendant for the reasons identified above. I will therefore give judgment in the amount of €454,117.33

Defendant's failure to act equitably

44. I should add for the sake of completeness that I would have refused to send this case to plenary hearing, even if I was persuaded that a set-off was available to the defendant. This is because it would be inequitable in the circumstances to allow the asserted set off. In *Moohan*, Clarke J. assessed the counterclaim and noted that he was not satisfied that any meaningful attempt to quantify a claim arising from the counterclaim, or have the same referred to arbitration, had been established by the defendant in that case until very recent times. He concluded the defendant had not made any reasonable attempts to quantify or pursue its cross claim in a timely manner.

45. Precisely the same reasoning applies here, but with much greater force. In *Moohan* the claim appears to have been quantified late in the day. Here on the other hand, as noted above, the claim has still not been quantified in any respect despite this motion having been extant for 2 years.

46. Even more remarkably, the defendant appears to have already made a claim for loss and damage due to the plaintiff's alleged failure to repair the demised premises in Circuit Court proceedings, mentioned above, brought by the plaintiff for ejectment. It appears that the defendant has lodged a defence and counterclaim and claimed in the Circuit Court proceedings for the loss now invoked in these proceedings as requiring the matter to be sent to plenary hearing. The defendant does not explain how the very

same claim could be agitated in two sets of proceedings. The plaintiff argues in its written submissions that in fact, even in the Circuit Court, the claim has not been properly quantified. The defendant argues that it has been so quantified. I declined to receive a copy of the Circuit Court proceedings in circumstances where counsel for the defendant indicated that I should not consider the pleadings since they were irrelevant to the High Court case. I tend to agree with that position since what I must consider here, in the context of assessing equitable considerations, is whether the defendant has advanced its counter claim in a timely manner.

47. However, the fact, as opposed to the detail, of the Circuit Court proceedings is relevant because it shows that the defendant has chosen to concentrate its efforts to advance its counterclaim in the Circuit Court proceedings as opposed to the within proceedings. That is another matter that points to the inequity of permitting the defendant to advance a counterclaim as a defence to summary judgment here. The defendant has elected to advance its claim in this regard in the Circuit Court; it cannot delay summary judgment in this Court on the basis that it now also wishes to advance that claim in the High Court. Nor does the defendant seek to explain how the same claim can be litigated in both the Circuit Court and the High Court, although that is the necessary implication of its approach in this case.

48. In short, it seems to me that it would be wholly inequitable to permit the defendant to seek to avoid summary judgment in these proceedings in the circumstances outlined above.

Stay application

49. I am conscious that the next question that arises, having given judgment, is whether my Order should be stayed, having regard to the approach of Clarke J. in *Moohan* and to the existence of the Circuit Court proceedings.

[Case was adjourned to permit parties consider whether a stay should be sought and for submissions on any stay application]