**THE HIGH COURT**

[2022] IEHC 465

**[2020/215S]**

**BETWEEN**

**GRADUAL INVESTMENT LIMITED**

**PLAINTIFF**

**AND**

**FIONA GRANT**

**DEFENDANT**

**JUDGMENT of Ms. Justice Bolger delivered on the 25th day of July, 2022**

1. This is an application by the plaintiff for summary judgment against the defendant. For the reasons set out below I refuse the plaintiff's application and I direct that the matter should proceed to plenary hearing.

**Background**

2. The plaintiff is the landlord of premises rented by the defendant. The plaintiff seeks summary judgment in respect of its claim for unpaid rent, interest on unpaid rent and on arrears of rent, and unpaid service charges and expenses which it claims to have incurred and for which it says it should be indemnified by the defendant.

3. The terms of the plaintiff's thirty-five-year lease dated 27 July 2009, which the defendant entered into with the plaintiff's predecessor, provided for *inter alia*, an initial rent of €50,000 plus VAT per annum and a rent review every five years from 27 July 2014.

4. The plaintiff issued a special summons on 10 August 2020 in which it sought judgment in the amount of €142,412.69 made up principally of unpaid rent for the period January 2016 to July 2020 and other smaller sums in relation to underpayment of service charge, interest on unpaid rent and late payment of rent and costs incurred by the landlord. The summons also claims interest and costs but makes no mention of an ongoing failure by the defendant to discharge rent beyond 1 July 2020 or any claim for ongoing rent or service charge or interest.

5. The plaintiff's claims under the four headings set out above are disputed by the defendant. The details of each heading of claim are examined further below.

**The law**

6. The parties agree that the appropriate test for the court to enter summary judgment is whether it is very clear that the defendant has no defence. The relevant authorities on this test including the decisions of the Supreme Court in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 IR 607 and *IRBC v. McCaughey* [2014] 1 IR 749 and the principles set out by McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 IR 1, were discussed in my recent decision in *Primeline VNE Limited v. Centz Retail Holdings Limited* [2022] IEHC 365.

**Issues of dispute**

i. Unpaid Rent

7. The defendant never paid the initial rent as set out in the lease as it was abated by agreement immediately after the parties entered into the lease. The plaintiff claims that the rent was subsequently reviewed on 27 July 2014, as provided for by the terms of the lease, and set at €52,000 plus VAT. In his grounding affidavit on behalf the plaintiff Mr. Dualta Moore avers that on or about 27 July 2014 the rent was reviewed and set at €52,200 plus VAT per annum for the period from 27 July 2014 to 26 July 2019. In a later affidavit he avers once again that the first rent review took place in July 2014 and that the parties were thereafter committed to conduct a further review on or after 27 July 2019. Whilst the plaintiff had sought to rely on the term of the lease that provides for time not being of the essence in relation to holding a rent review, it is clear from both of Mr. Moore's affidavits that his evidence to this Court was that the rent was reviewed in July of 2014 in accordance with the terms of the lease and that that review set the rent at €52,200 plus VAT.

8. The parties entered an abatement agreement dated 11 February 2016 whereby the plaintiff agreed to accept an abated rent from the defendant for the period from 1 January 2016 to 27 July 2019, the parties acknowledged that the agreed rent for the period to 27 July 2019 was €52,000 plus VAT and the plaintiff company was prepared to agree to a payment schedule in relation to the amount outstanding arising from a separate Circuit Court judgment it had secured against the plaintiff in 2015. The parties agreed that if there was any default in complying with the terms of the abatement agreement, that they would immediately become null and void *ab initio* and that the landlord would be entitled to pursue all monies owed under the lease without reference to the abatement agreement. The plaintiff claimed that the defendant failed to comply with the abatement agreement and never paid the full amount of abated rent including in respect of January and February of 2016 or the discharge of arrears of the Circuit Court judgment. Therefore, the plaintiff contended that the abatement agreement was null and void and that the rent due for the period thereof reverted to the full amount of €52,000 plus VAT, which the plaintiff contended had been acknowledged by the defendant in entering the abatement agreement.

9. The defendant disputed that she had failed to pay the abated rent in accordance with the terms of the abatement agreement. She acknowledged she had paid the lesser amount for January and February 2016 as provided for in the pre-abatement agreement but she claimed that the "new" abated rent only applied from the date of the agreement (i.e. 11 February 2016) even though the agreement referred to the company's agreement to abate rent from 1 January 2016 to the next rent review day being 27 July 2019. The defendant acknowledged a small underpayment of rent for three months in 2017 due to an administrative error which she says was rectified. She does not seem to dispute that the underpayment for those three months remains outstanding but submitted that the parties could not have intended the entire agreement to be rendered null and void for what she said was a *de minimis* breach. The plaintiff, in claiming the entire agreement

was null and void, sought to rely on the express provisions of the agreement to which it said it was entitled to expect strict adherence.

10. The defendant's main challenge to the plaintiff's claim of substantial unpaid rent related to her entitlement, under the lease, to a rent review on 27 July 2014 and again on 27 July 2019. The plaintiff claims the rent was reviewed in 2014 but this is heavily disputed by the defendant. The defendant stated on affidavit that the review figure of €52,200 plus VAT was never agreed by her and was unilaterally imposed by the plaintiff on the basis of what the defendant described as false and misleading misrepresentations about the rent being an upward only rent. The defendant exhibited a letter that the plaintiff sent to her on 30 October 2014 (three months after the date on which Mr. Moore on behalf of the plaintiff averred to the rent having been reviewed) which referred to abating the rent from 15 November 2013 to 31 December 2014 to €29,520 inclusive of VAT. The letter referred to the defendant wanting to agree a rent for the period from 1 January 2015 to 26 July 2019 and asking the plaintiff to arrange a time for them to meet. The letter seems inconsistent with Mr. Moore's averments in his affidavits to the effect that the rent was reviewed on or about 27 July 2014 and set at €52,200 plus VAT (in his affidavit sworn on 27 October 2020) and his averment in his subsequent affidavit sworn on 14 July 2021 that the first review took place in July 2014. Mr. Moore in replying to the defendant's affidavit, in which he disputed that the rent had been reviewed in 2014, does not seek to address this dispute but simply swore an affidavit to update the figures comprised in the plaintiff's claim for rent arrears, interest and arrears for service charges.

11. However, in his submissions, counsel for the plaintiff emphasised the defendant's acknowledgement in the abatement agreement of the agreed annual rent for the period to 27 July 2019 of €52,000 plus VAT. Counsel for the defendant argues that if the abatement agreement was breached (which he disputes), then the abatement agreement is void *ab initio* and the rent therefore reverts to what it was prior to the abatement agreement which was an abated rent of €29,520 plus VAT. That figure seems to be acknowledged in the defendant's letter of 30 October 2014 referred to above, in spite of Mr. Moore's account of the abatement agreement having abated the rent reviewed and set on 27 July 2014 at €52,200 plus VAT.

12. The terms of the lease provide at clause 8.1 of schedule four for the rent payable where it is not ascertained on or before the rent review date *i.e.* at the rate payable during the preceding period. The defendant argues that if she is correct and the entire agreement is void including her acknowledgement of rent of €52,200 plus VAT and that there was no rent review in 2014, then she was correct in her payment of rent at the abated amount she was paying before the abatement agreement i.e. €29,520 plus VAT as acknowledged by the defendant in its letter of 30 October 2014.

13. Counsel for the plaintiff submits that the abatement agreement being rendered null and void by the defendant's breach of it does not alter the plaintiff's acknowledgement of the agreed rent of €52,500 plus VAT. It is not clear how he distinguishes this acknowledgement, which is part of the express terms of the agreement, as something

that survives an agreement which he claims to be null and void. It is not clear how it is maintained that the defendant can be estopped from denying the validity of an agreed rent that she swears on affidavit was procured by misrepresentations that the rent was upwards only. I note that the plaintiff on affidavit seemed to maintain its position that the rent was an upwards only rent even though the reference to 'upwards only' in the lease had been crossed out.

14. Counsel for the defendant says that there is an issue to be determined at trial as to whether the rent was reviewed on 27 July of 2014 as Mr. Moore claims or whether the rent was, as of that date, the abated rent of €29,520 as suggested by the defendant's letter of 30 October 2014. He submits that discovery and oral evidence are necessary and that the issues of law are complex and not straightforward.

15. While this Court can resolve disputes on issues of law on a summary judgment, it may not be appropriate to do so where there are complex issues of law and certainly where the issues of law require to be determined in the light of disputed facts. As confirmed by Clarke J. in *IRBC v. McCaughey* [2014] IESC 44, this Court is not obliged to come to a final resolution on issues of law or construction.

16. Having reviewed the affidavits sworn on behalf of both parties and considered the submissions of counsel, I am not satisfied that this is a straightforward breach of the abatement agreement leading to a reinstitution of an agreed rent, as claimed by the plaintiff. The issues seem to me to be more complex, including issues revolving around whether or not the rent was ever agreed on 27 July 2014 and whether the plaintiff can rely on what it claims was the agreed rent that was never actually paid by the defendant and which was not sought to be relied on or enforced by the plaintiff until the letter of demand grounding the summary proceedings of 17 July 2019.

17. This is not a case in which the defendant has made a mere assertion of a defence. The defendant has set out a credible basis for her view that she is not and never was obliged to pay rent at the rate now sought by the plaintiff. The defendant acknowledges that there has been *de minimis* shortfalls in the rent due. Whether her default is as minimum as that or whether the absence of a rent review in July 2014 entitled her to revert to the pre-2014 abated rent, are matters to be determined by the trial judge. The defendant is entitled to seek discovery and adduce oral evidence in advance of that determination

18. The issue of the status of the abatement agreement and the rent that should have been paid if the abatement agreement was breached and therefore set aside, addresses the main component of the plaintiff's claim, i.e. unpaid rent and interest on arrears of rent and late payments of rent. However, for completeness I will address the additional claims made by the plaintiff in relation to service charge, indemnified costs and alleged ongoing rent arrears.

ii. Service Charges

19. The plaintiff relies on the terms of the lease whereby the tenant was required to pay the service charges incurred by the landlord in providing services relating to the common areas and on a statement of service charge payments and arrears. The defendant highlights that this statement is from the management company and not the plaintiff and refers to the lease of 6 March 2014 pursuant to which the plaintiff took over as landlord from the previous landlord and to which the management company was a party. The defendant contends that this agreement transferred the obligation to service the common areas from the landlord to the management company and that it was, therefore, the management company's obligation to collect service charges from the defendant. As the plaintiff had not incurred that cost, they could not seek to recover it from the defendant.

20. Mr. Moore deposes on behalf of the plaintiff in his affidavit that the defendant covenanted pursuant to clause 2.3 of the lease to pay the general common part service charge in accordance with clause 8 of the lease. He states that between 2015 and 2020 the defendant consistently failed to fully discharge the service charges for which she was liable when the rent fell due and that a debit balance of €5,105.86 remains due and owing on her account. He refers to a statement of service charge payments and arrears. He does not set out the basis on which the statement of account from the management company gives rise to a debt for which the defendant is liable to the plaintiff. Counsel for the plaintiff submitted that the plaintiff would have to pay those charges if the defendant didn't. He also sought to rely on the defendant's historic acknowledgement of her liability to the defendant in discharging some of the service charges to the defendant. However, there is no evidence on affidavit that the plaintiff has had to pay those service charges. Therefore, there is a dispute between the parties as to whom the defendant is indebted arising from her non-payment of the service charges, which may or may not be the plaintiff.

21. I am satisfied that this aspect of the plaintiff' claim should proceed to plenary hearing.

iii. Indemnified costs

22. The plaintiff seeks to rely on clause 4.16 of the lease in which the defendant agreed to keep the landlord fully indemnified from and against all actions, proceedings, claims, demands, losses, costs, expenses, damages and liability arising directly or indirectly from, *inter alia*, breach by the tenant of any of the provisions of this lease or of any regulations made by the landlord. The plaintiff brought Circuit Court proceedings in 2015 in respect of arrears of rent in which the plaintiff obtained judgment in default of appearance in the amount of €37,146 plus €704 for costs on 26 November 2015. The plaintiff, in these summary proceedings, seeks the legal costs it claimed it had incurred in pursuing the recovery of sums due as a result of the defendant's failure to pay rent or other sums due under the terms of the lease or the abatement agreement. The plaintiff relies on a bill of costs from its then solicitors in 2015 in relation to three invoices prior to the Circuit Court judgment and two invoices raised during the months following that judgment. All of the invoices are stated by the plaintiff's solicitors to be in relation to the name of the Circuit

Court case. Counsel for the defendant contend that those costs cannot be included in the claims before this Court and argues that the issue is *res judicata* and that the plaintiff should have, in accordance with the rule in *Henderson v. Henderson*, pursued those costs in its Circuit Court proceedings. Counsel for the defendant argues that because judgment was obtained in default, there was nothing for the court to adjudicate upon and that the matter was not *res judicata*. Whether or not that can be correct (and counsel for the plaintiff offered no authority to support his submission in this regard) the plaintiff, in accordance with the rule in *Henderson v. Henderson* could and should have pursued those costs in the Circuit Court proceedings pursuant to which they were incurred whether in entering judgment or seeking to enforce that judgment. The mere fact that two invoices were raised by the plaintiff's solicitors after the date of the default judgment does not necessarily permit the plaintiff to include those costs in the summary proceedings.

23. There is a *bona fide* dispute as to the plaintiff's entitlement to claim for those costs in these proceedings and this issue should therefore proceed to a plenary hearing.

iv. <u>Can the plaintiff seek ongoing arrears of rent in the summary proceedings?</u>

24. Given my findings about the need for the plaintiff's claim for historic unpaid rent to go to plenary hearing, it is not necessary for me to determine whether the plaintiff's claim for ongoing arrears of rent beyond July 2020 is properly made out in the summary summons.

**Indicative view on costs**

25. In my previous decision in *Primeline VNE Limited v. Centz Retail Holdings Limited* I gave an indicative view that costs should be treated as costs in the cause. I noted that Clarke J. in *ACC Bank Plc v. Hanrahan* [2014] 1 IR 1 observed that where the court remitted the matter to plenary hearing and was satisfied that a plaintiff had acted in a particularly unreasonable manner in not agreeing to that course of action, the court should consider whether the justice of the case requires that some or all of the costs of the summary judgment motion should be borne by the plaintiff. Clarke J. said that in the majority of these cases, "the costs of a summary judgment motion as a result of which the proceedings are remitted to plenary hearing should either be reserved or become costs in the cause". In the circumstances of the case of *Primeline VNE Limited v. Centz Retail Holdings Limited*, whilst I noted the defendant did invite the plaintiff to remit the matter to plenary hearing which the plaintiff declined to do, I did not consider the plaintiff's conduct to come within the concept of particularly unreasonable behaviour as referred to by Clarke J. The plaintiff believed that the defendant has no defence to its claim. Ultimately, I found that this would be a matter for the trial judge. In those circumstances, my indicative view on costs was that costs of that motion should be treated as costs in the cause.

26. For the same reason my indicative view on costs here is that the costs of this motion should be treated as costs in the cause.

27. I will list the matter for mention before me at 10 a.m. on 29 July to allow the parties to make such further submissions on costs as they may wish to make and on any final orders that they require to be made.