Neutral Citation No. [2011] NICh 17 | *Ref:* **WEI8316**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **29.09.2011**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

SUREFAC LIMITED

Plaintiff;

-and-

MICHAEL HEANEY

Defendant.

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WEIR J

The nature of the proceedings

[1] This action was commenced by way of specially endorsed writ in the Queen's Bench Division but transferred by agreement to the Chancery Division. The plaintiff claims possession of lands in respect of which it is the lessor and the defendant is the lessee by reason of an alleged breach by the defendant of a covenant in the lease which precludes the lessee from using or permitting the use of the demised lands "for the purposes of a club, place of amusement, theatre or entertainment." The defendant denies that his use of the premises is in breach of the restrictive covenant and declines to deliver up possession.

The background

[2] On 19 December 1989 the then Department of Economic Development leased lands to the rear of premises fronting Buncrana Road, Pennyburn, Londonderry ("the lands") to one Joseph Heaney for a term of 999 years. Among the covenants on behalf of the lessee is the following:

> "2(5) Not to use or permit the premises to be used for any purpose other than a commercial or industrial purpose and in particular but without prejudice to the

generality of the foregoing not to use or permit the premises to be used

(a) for the carrying on the business of a licensed victualler, retailer of beer, wines or spirits, restaurant keeper or caterer;

(b) f*or the purposes of a club, place of amusement theatre or entertainment*;

(c) for the purposes of a dwelling house and

(d) for any noxious or offensive trade or business."

(*Emphases here and below supplied*).

[3] On 15 April 1998 the lessee's interest in the lands was acquired by the defendant and on 16 October 2000 the plaintiff acquired the lessor's interest. In the mid-1990s there was a former dairy situated on other land near to the lands but separated from them by an access road. The defendant decided to apply for planning permission to change the use of the vacant dairy to that of a bingo and snooker club and, the planning authority having failed to determine his application, he appealed in default to the Planning Appeals Commission ("PAC"). The PAC decided on 3 April 1998 to allow the appeal subject to conditions, one of which was that the lands in question in this action, although not part of the site which was the subject of the planning application must, before any development of the site for the bingo and snooker club took place, be laid out with car parking for a minimum of 100 cars and turning facilities for coaches in accordance with a scheme to be agreed with the planning authority and permanently retained as such. Some time elapsed before on 1 February 2001 the defendant applied for planning permission to change the use of the lands from "part of vacant of dairy and LPG storage and distribution centre to car park". On 5 December 2001 the planning authority granted that permission but imposed, inter alia, the following condition:

> "2. The bus turning area and a minimum of 100 of the car parking spaces hereby approved shall be exclusively reserved and permanently retained for the use approved by the PAC under [the bingo and snooker club permission]."

[4] The defendant then proceeded to implement these two planning permissions and in consequence the lands are used for car parking by patrons of the bingo and snooker club. The defendant gave unchallenged evidence at the hearing that they are also used on a casual basis by people walking their dogs in the area or visiting a

local bar but that generally the car park is used by those visiting the bingo and snooker club.

The issue

[5] The crucial issue is whether the lands are being used "for the purposes of a club, place of amusement .. or entertainment"? It is contended on behalf of the lessor that they are being so used. There was no dispute that the bingo and snooker premises are themselves used for or the purposes of a club, place of amusement or entertainment. However the question for decision is whether the fact that the car park which has had to be provided in order to comply with the planning permission for the bingo and snooker club may as a result be said to be being used "for the purposes" of that club.

The law

[6] It is agreed that there is no authority directly in point and counsel on both sides have looked far and wide for authorities that might throw light, even tangentially, upon the question. I mean no disrespect to their considerable industry when I say that most of them are not of assistance. That which most closely approximates is Co-operative Retail Services Limited v Tesco Stores Limited (1998) 76 P and CR 328, a decision of the English Court of Appeal. In that case Tesco had obtained planning permission to erect a superstore with petrol filling station, car parking, landscaping and associated highway works. The site which was the subject of the permission included a portion subject to a restrictive covenant, of which unhappily for Tesco the Co-op enjoyed the benefit, "not at any time hereafter to use the property hereby conveyed for the *purpose* of food retailing". Tesco laid out the site and as Millett LJ put it:

> "Whether or not out of excessive caution, Tesco also took care that it should not use the burdened land for the purposes of the filling station or as part of the car parking area. The burdened land falls within one of the landscaped areas comprised in the site. It consists of open area in front of the superstore with car parking spaces on either side of it. Part is planted with shrubs and trees and part is paved."

The argument advanced by the Co-op in that case was that its restrictive covenant was being breached because Tesco was using the burdened land "for the purpose of food retailing". Millet LJ did not accept that argument even though the provision of amenity land was a condition of the grant of the planning permission for the superstore and notwithstanding the fact that the site when developed included the burdened land as an integral part. In that latter respect it is somewhat different from the facts of the present case where as I have said the lands are separated from

the bingo and snooker club land by the access road. Millet LJ dealt with the matter in this way:

> "I accept that the act of making amenity land available for that purpose is incidental to the carrying on of a food retailing business. But it does not follow that the use to which the land is thereafter put is *for the purpose of* a food retailing business. It may be advantageous to a business of food retailing not to use part of the site for food retailing. In my judgment 'for the purpose of food retailing' means 'for food retailing'. In either case the covenant prohibits *activities on the burdened land* and not the use of the burdened land to enhance the attractions of other land on which the prohibited activities are carried on."

[7] Of course, quite apart from whether Tesco thought it advantageous to provide landscaping around the superstore, in that case the provision of the landscaped area and in this case the provision of the car parking area were mandatory requirements of the respective planning permissions. Millett LJ dealt with that aspect as follows:

> "In my judgment Tesco is currently using the burdened land as an open space or landscaped area in conformity with the planning permission and as an amenity for customers of the store and other members of the public. But I do not agree that it is using the land for the purpose of food retailing. In my view, the judge came to the wrong conclusion because he asked the wrong question. The question is not whether the land is an integral part of a single site which contains a food store in which the business of food retailing is carried on. Nor is it whether the land forms part of a single site for which planning permission was granted for use for (inter alia) the purpose of food retailing. The question is whether the burdened land is used for the purpose of food retailing. In my judgment land is not used for the purpose of food retailing merely because it forms part of a single site on other parts of which food retailing takes place."

And later:

> "It is of course true that Tesco exploited its ownership of the burdened land in order to obtain planning permission for the development of the entire site as a superstore. If it had not been in a position to offer the burdened land as amenity land it might not have obtained planning permission at all, or it might have been required to provide other parts of the site as landscaped areas and amenity land. Thus Tesco undoubtedly made use of its ownership of the burdened land in order to obtain a commercial advantage for its food retailing business carried on elsewhere. But I cannot see that that is conduct which is prohibited by the covenant."

I respectfully accept that reasoning and had the language of the instant covenant spoken of "purpose" rather than "purposes" that would in my view and without more have concluded the matter in favour of the defendant. The question which I have to determine and in relation to which counsel have been unable to discover any direct authority is whether the use of the plural ought to lead me to a different conclusion. Mr Michael Lavery QC ingeniously submitted that the use of the plural word "purposes" in Clause 2(5)(b) derived from the fact that a number of prohibited purposes are therein prescribed and for that reason the plural "purposes" required to be used. That theory is however not supported by the fact that Clause 2(5)(c) prohibits the lands being used "for the purposes of a dwelling house" which is a singular prohibition. I fear the explanation may simply lie in careless drafting of the sub clause.

[8} It seems to me that the answer is assisted by an examination of the entirety of Clause 2(5) and the bearing in mind that this lease was created by a Government department whose principal *raison d'etre* was to procure investment in industrial and commercial activity on lands owned by it by creating leases for those purposes. Those purposes are precisely echoed in the initial words of the sub-clause which provide that the lands may only be used for a commercial or industrial purpose and, without prejudice to that overarching requirement, are in particular not to be used for the purposes set out at (a), (b), (c) or (d). Construing the terms of the sub-clause as a whole it is clear that the mischief at which it aims is the use of the lands for anything other than a commercial or industrial purpose and the particular matters that follow are inserted to make it clear that those are not examples of possible "commercial or industrial purposes" within the contemplation of the parties. There is in addition a further prohibition on the use of the premises for a purpose which although it may be commercial or industrial involves the carrying on of any noxious or offensive trade or business and which is obviously intended to avoid nuisance

being caused to adjacent occupiers. Mr Orr QC for the lessor expressly conceded that the present use of the lands as a car park constitutes a use for a commercial purpose. I think it quite inconceivable that the lessor or the lessee contemplated, much less intended, that the terms of this covenant should prevent the lands being used for an admittedly commercial purpose in case that use might in turn facilitate the use of other land outside the demised lands for a purpose such as a club or place of entertainment which could not have been carried out on the lands themselves without breach of covenant.

Conclusion

[9] I accordingly conclude that the use of the plural "purposes" instead of the "singular "purpose" does not alter the decision that, in respectful agreement with Millet LJ, I earlier reached in relation to the use of that singular in a factual context very similar to the present. It follows that I find that the defendant is not in breach of the covenant contained at Clause 2(5)(b) of the lease, that his interest is accordingly not liable to forfeiture on that account and thus the plaintiff is not entitled to possession of the lands.