THE HIGH COURT

COMMERCIAL

[2018 No. 2349 P]

[2018 No. 9972 P]

BETWEEN

DUBLIN PORT COMPANY

PLAINTIFF

AND

AUTOMATION TRANSPORT LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Denis McDonald delivered on 9 July, 2019

1. In these proceedings, the plaintiff seeks possession of business premises on Promenade Road, Dublin 1 occupied by the defendant pursuant to a lease dated 11th February, 2013. The proceedings seeking possession of the Promenade Road premises were commenced by plenary summons (record no. 2018 No. 2349p) issued in March 2018 in which the plaintiff also seeks damages for alleged breach of certain repairing covenants (described in more detail below).

2. In addition to the proceedings commenced in March 2018, there is also a second set of proceedings before the court between the same parties. This second set of proceedings (record no. 2018 No. 9972 P) were commenced in November 2018. In these proceedings, the plaintiff alleged that, following an inspection of the Promenade Road premises in November 2018, it was discovered that the defendant had been engaged, contrary to the terms of the lease, in the processing or production of plastics in the premises. A number of different provisions of the lease were relied on in support of the claim made in these proceedings. While a series of allegations were made, I believe that it is fair to say that the principal complaint made in the proceedings related to the alleged processing of plastics which the plaintiff maintained was contrary to a covenant in the lease that the defendant should not use the premises for anything other than the permitted user - namely the operation of a road haulage business. Reliance was also placed on a covenant in the lease that the defendant would not contravene any applicable laws, regulations or requirements relating to environmental or pollution control. Immediately after the commencement of this second set of proceedings, the plaintiff brought a notice of motion seeking an interlocutory injunction against the defendant restraining the alleged unlawful use of the premises. Ultimately, that application was not pursued to a hearing. Instead, it was agreed that the proceedings would be heard alongside the possession proceedings described in para. 1 above. On the basis of the evidence heard by me during the course of the trial, it appears that the proceedings launched in November 2018 were based on a mistaken understanding of the activities carried on by the defendant on the Promenade Road premises. For convenience, I will refer to the proceedings commenced in November 2018 as "*the injunction proceedings*". I will refer to the proceedings described in para. 1 as "*the possession proceedings*".

Background

3. The plaintiff is a significant landlord in Dublin Port. Against a background where there are limitations on the ability of the plaintiff to reclaim land from the sea, the plaintiff has sought to prioritise the use of lands at the port for what it considers to be core port uses. According to the plaintiff, core users include the roll-on roll-off and load-on load-off operators. The plaintiff considers hauliers, warehouse operators and storage facilities to be non-core users and it has sought to encourage those users to move to a new site of approximately 40 hectares in the vicinity of Dublin Airport which it has named the "*Dublin Inland Port".*

4. The defendant has operated its road haulage business from various premises within the port for a significant number of years. It currently employs nineteen people, eighteen of whom are full time employees and one is employed part time. The defendant has twelve truck tractor units and 40 trailers all of which are purpose built for bulk loads. There are also two fork lifts and one lift truck. The principal activity of the defendant consists of transporting intermodal bulk material from the port to customers. The containers are collected dockside at the port and thereafter transported to the haulage yard currently on the Promenade Road premises. Deliveries are made as and when customers require the material. Mr. Simon Crosbie (who gave evidence on behalf of the defendant) explained that the principal customers of the plaintiff are those involved in continuous process industry and he emphasised that the defendant had to be in a position to supply material as and when they were required for use in the industrial process in question.

5. Prior to the execution of the lease of the Promenade Road premises, the defendant had been in occupation of part of a site on Tolka Quay Road which is also within the port. The Tolka Quay Road premises (along with premises on the same road known as the Tolka Quay Road extension premises and also a premises on Bond Road known as the State warehouse) were the subject of negotiations between the plaintiff and Mr. Henry A. Crosbie ("*Mr. Crosbie Snr*.") (the father of Mr. Simon Crosbie) and two companies controlled by him namely Henry A. Crosbie (Containers) Ltd and Storecon Ltd. The plaintiff wished to acquire these premises which were held under leases by Mr. Crosbie Snr. and his company. At this time, Mr. Crosbie Snr. was, as part of his arrangements with the National Asset Management Agency ("*NAMA*"), involved in the disposal of his interests in a number of different properties.

6. Following negotiations involving Mr. Crosbie Snr., NAMA and the plaintiff, an agreement was entered into on 17th September, 2012 under which Mr. Crosbie Snr. and the two companies named above agreed to sell to the plaintiff the three premises described in para. 5 above for €5 million. Although Mr. Crosbie Snr. was disposing of his interest in the properties, it appears that he was concerned to ensure that the business of the defendant company run by his son, Mr. Simon Crosbie, would continue to have the ability to service its customers from premises within the port. There was some dispute at the hearing as to whether the concern for the business of the defendant was prompted by Mr. Crosbie Snr. or by NAMA. According to Mr. Simon Crosbie, it was prompted by a concern on the part of NAMA to maintain employment. However, it appears to be clear from the contemporaneous correspondence that representations were in fact made to NAMA by an associate of Mr. Crosbie Snr. (namely Mr. Auke Van Der Werff) to allow the business of the defendant to continue. In those circumstances, it was agreed in the contract for sale of the three premises to the plaintiff that arrangements would be made to allow the defendant to remain on the Tolka Quay Road premises then occupied by it under licence until new premises – namely the Promenade Road premises – would become available. The agreement envisaged that the defendant would be given a three month licence to continue to occupy the Tolka Quay Road premises while the Promenade Road premises were refurbished at a cost of €100,000 (which was to be paid by the plaintiff). The plaintiff also agreed that, upon the expiration of the three month licence and the vacation of the Tolka Quay Road premises by the defendant, it would grant to the

defendant a lease of a new site in a form which had been negotiated and agreed at the time the contract was entered into. Clause 4.35 of the draft lease contained a covenant on the part of the defendant in the following terms:-

> *"The Tenant shall execute a Deed of Renunciation waiving any renewal rights past, present or future, previously acquired or which may be acquired in accordance with s. 47 of the Civil Law (Miscellaneous Provisions) Act, 2008".*

7. I should explain that s. 47 of the Civil Law (Miscellaneous Provisions) Act, 2008 ("the 2008 Act") contains an important amendment to s. 17 of the Landlord & Tenant (Amendment) Act, 1980. In particular, it makes a renunciation of rights to a new tenancy by a business tenant lawful where the renunciation is executed in writing and where the tenant has received independent legal advice in relation to the renunciation. Thus, if a valid renunciation existed in this case, it would defeat the right claimed by the defendant to a new tenancy in the Promenade Road premises even if the defendant, as of the date of expiry of the break notice, had been in continuous occupation of those premises for a period of five years.

8. According to the evidence of Gerard Barry (the retired Estate Facility Manager of the plaintiff), the Promenade Road premises had been re-acquired by the plaintiff from Heatons, the well-known building providers. While Heatons were in occupation, the premises had been used for the storage and distribution of timber products. Mr. Barry's evidence was that, in 2012, the premises were relatively old but in a *"reasonable condition"* and suitable (with some adaptation) for the defendant's purposes. In broad terms, the premises consist of an open yard surfaced in concrete (without reinforcement) with a number of corrugated iron sheds of fairly rudimentary construction. There is also a two storey office building on site.

9. Ultimately, the lease in respect of the Promenade Road premises was executed on 11th February, 2013. It will be necessary, in due course, to consider the terms of the lease in greater detail. At this point, it is sufficient to note that, in addition to the covenant in relation to renunciation (quoted in para. 6 above) the lease also contained a break clause. In particular, clause 6.13 provided that either party might terminate the lease on the expiration of each of the fifth, tenth and fifteenth years of the twenty year term of the lease. During the course of the hearing, it was suggested on behalf of the defendant that an earlier draft of the lease had restricted the exercise of the break clause to the tenth year of the lease. However, I am not convinced that this is a relevant or necessary consideration having regard to the well-established principle that, in interpreting a written contract, the prior negotiations of the parties are inadmissible as an aid to its construction.

10. Under clause 6.13(b), a break notice seeking to avail of the break clause was required to be served not less than six months and not earlier than twelve months prior to the relevant termination date.

11. On 13th March, 2017, Mr. Barry hand delivered a copy of a break notice to the defendant invoking the provisions of clause 6.13 of the lease and requiring the defendant to vacate the premises no later than 10th February, 2018. On 22nd March, 2017, Mr. Simon Crosbie, on behalf of the defendant, acknowledged receipt of the letter stating:-

> *"We are still processing its content and will be in touch in due course".*

12. Many months later, on 8th February, 2018, a long and detailed letter was written by M.E. Hanahoe solicitors on behalf of the defendant to the plaintiff in which it was contended that the provisions of clause 6.13 were amended on or about the date of the contract for sale and that at that point the defendant was not in a position to negotiate but was forced to accept the amended lease (providing for a five year rather than a ten year break clause). The letter suggested that, in effect, a "*gun*" had been put to the head of the defendant. The letter also made the case that the break notice was not effective to terminate the defendant's interest in the premises. That case was maintained by the defendant up to December, 2018.

13. In the meantime, in March 2018 the possession proceedings were commenced. As noted above, those proceedings also included a claim for damages for breach of a repairing covenant in the lease. In turn, on 4th May, 2018, the defendant served a notice of intention to claim relief under the Landlord and Tenant (Amendment) Act, 1980. A statement of claim was delivered in July 2018 in which the exercise of the break option was relied upon (insofar as the claim for possession was concerned) and in which an allegation was made that there was a breach by the defendant of the covenant to keep the premises in repair. According to para. 11 of the statement of claim delivered in June 2018, the plaintiff was not in a position to provide detailed particulars of disrepair and lack of decoration but nonetheless it was alleged that there had been a breach of the covenant to repair. It emerged in the course of the evidence of Mr. Cormac Kennedy, the Head of Property of the plaintiff, that, notwithstanding the right of inspection given to the plaintiff under clause 4.9(a) of the lease, no inspection of the premises had taken place prior to the issue of the plenary summons or the delivery of the statement of claim. Under cross-examination, Mr. Kennedy admitted that the plaintiff had no "*definitive knowledge*" of any breaches of covenant at the time the possession proceedings were commenced. Furthermore, no letter before action was written by the plaintiff alleging any breach of the repairing covenant and calling upon the defendant to remedy any alleged breach. I have to say that I find this approach to be unimpressive. While the claim for possession was not grounded on any breach of covenant but was instead based on the break clause in the lease, it is both surprising and very unsatisfactory that any party (let alone a public body such as the plaintiff) would make an allegation of breach of a covenant to repair without any prior enquiry or inspection having been made and without any evidence of a breach of the covenant relied upon.

14. An inspection of the premises for the purposes of carrying out a schedule of dilapidations subsequently took place on 9th November, 2018 attended by Mr. Stephen Scott of Scott Murphy Chartered Building Surveyors on behalf of the plaintiff. This led to the commencement of the injunction proceedings described in para. 2 above.

15. As noted above, the injunction proceedings were commenced on the basis of a mistaken understanding by the plaintiff that the defendant was involved in some form of processing or production of plastics on the Promenade Road premises. That case was made not only in the statement of claim delivered in the injunction proceedings but also in the written legal submissions delivered on behalf of the plaintiff and in the précis of the proposed evidence of Mr. Scott dated 31st January, 2019 (less than two months prior to the commencement of the trial). However, when Mr. Scott came to give his evidence on day three of the hearing, he confirmed that he was not making the case that any manufacturing of plastic was undertaken on the premises. In the course of his direct examination on that day (at p. 75 of the transcript) Mr. Scott confirmed that he was willing to accept that there was no process taking place by which raw plastic was heated and turned into liquid form. Under cross-examination on the same day (at p. 100 of the transcript) Mr. Scott further confirmed that although his précis of evidence had suggested that the defendant was carrying on a manufacturing process in the Promenade Road premises, he "*on reflection asked that [it] be removed because there was no manufacturing as such taking place on the site*".

16. Again, I have to observe that it is surprising and unsatisfactory that a public body such as the plaintiff would commence proceedings alleging very serious breaches of covenant without properly interrogating the intended claim so as to ensure that it was fully understood and that it had a proper evidential basis. It should be recalled in this context that, not only did the plaintiff

commence proceedings to this effect, but it also invoked the jurisdiction of the court to grant an interlocutory injunction. While ultimately that application was not pursued to a hearing, a case was made on affidavit that the breaches of covenant were so serious as to justify the grant of an interlocutory injunction.

17. There is one further surprising feature of the plaintiff's conduct in these proceedings which should be noted. Following delivery of a very full defence and counterclaim on behalf of the defendant in the possession proceedings in which (*inter alia*) the defendants sought a declaration that the defendant is entitled to a new tenancy pursuant to Part II of the Landlord and Tenant (Amendment) Act, 1980 ("the 1980 Act"), the plaintiff, in December 2018, delivered an amended statement of claim in which clause 4.35 of the lease (quoted in para. 6 above) was invoked for the first time. Under that clause, the defendant covenanted to sign a Deed of Renunciation of any renewal rights that it might acquire under s. 47 of the 2008 Act.

18. Paragraph 10 of the amended statement of claim contained the following plea:-

> *"Despite request, no Deed of Renunciation was ever executed by the Defendant pursuant to Clause 4.35 of the Lease. The Defendant will not execute a Deed of Renunciation unless ordered by this Honourable Court to do so".*

19. Paragraph 12 of the amended statement of claim also contended that, having regard to clause 4.35 of the lease, the defendant is estopped from seeking a new tenancy of the premises. In the prayer, an order was sought requiring the defendant to execute a Deed of Renunciation of its entitlement to a new tenancy. An order for specific performance of the obligation contained in clause 4.35 was also sought.

20. When Mr. Kennedy came to provide his witness statement in the possession proceedings in January 2019, he referred to a letter dated 7th December, 2018 sent by the plaintiff's solicitors to the solicitors acting for the defendant calling upon the defendant to execute a Deed of Renunciation in accordance with clause 4.35. In his witness statement, Mr. Kennedy stated that the defendant had previously executed a Deed of Renunciation in November 2012 but that, following service of the break notice, the plaintiff became aware that this deed "*may not relate to occupation of the premises by the defendant pursuant to the lease*". Furthermore, in a witness statement provided by Martin Colman (the solicitor in Arthur Cox who acted on behalf of the defendant in relation to the transactions of 2012 and 2013) he stated:-

> *"It was contemplated that the defendant would execute a Deed of Renunciation in favour of the Plaintiff for the Lease and I understand that the Defendant is contractually required to do so under clause 4.35…".*

21. Thus, a positive case was made by the plaintiff at that time that the defendant had failed, notwithstanding a belated demand in December 2018, to execute a Deed of Renunciation of its rights under the 2008 Act and that it was thereby in breach of clause 4.35 of the lease. However, on Friday 8th March, 2019 (just two working days prior to the commencement of the trial) the solicitors for the plaintiff wrote by email to the solicitors for the defendant informing them that, at the time the amended statement of claim was filed, it was the plaintiff's understanding that the defendant had not executed a Deed of Renunciation. The email explained that the plaintiff was aware of the existence of a deed dated 12th November, 2012 executed by the Defendant but understood that it related to the licence of the Tolka Quay Road premises (formerly occupied by the defendant) rather than the lease of the Promenade Road premises. The email then explained that, on the previous day (namely Thursday 7th March, 2019), an inspection of the Arthur Cox file had taken place and, from a review of the documents on that file, it now appeared that the Deed of Renunciation dated 12th November, 2012 was in fact referable to the lease the subject matter of these proceedings. A copy of the signed Deed of Renunciation was attached to that email.

22. Subsequently, on 12th March, 2019 (namely on Day 1 of the trial) a re-amended statement of claim was delivered in which, directly contrary to the terms of the amended statement of claim described in para. 18 above, a case was now made that on 12th November, 2012 the defendant had executed a Deed of Renunciation whereby it renounced any entitlement it might have to any rights under Part II of the 1980 Act to a new tenancy in the Promenade Road premises. It was also alleged that, having regard to the provisions of s. 17 (1) (a) (iiia) of the 1980 Act (as inserted by s. 47 of the 2008 Act), the defendant is estopped or precluded from seeking a new tenancy in the premises. A declaration to that effect was also sought in the prayer to the re-amended statement of claim.

23. On the evening of Day 2 of the trial, a new witness statement of Mr. Colman (the solicitor who had acted on behalf of the plaintiff in the relevant transactions) was also provided by the plaintiff. In that witness statement, Mr. Colman referred to the Deed of Renunciation of 12th November, 2012 and said that, while there were "*certain errors*" in the deed, he was "*satisfied beyond doubt that the Deed …was intended to and does relate to the premises and the Lease".*

24. I regret to say that the manner in which the plaintiff has presented its case is unimpressive. I am left with the impression that no proper investigation was undertaken by the plaintiff of its case prior to the launch of these proceedings or even before delivery of its witness statements. This is particularly difficult to understand given that the plaintiff has invoked the jurisdiction of the Commercial Court. Before invoking the jurisdiction of the Commercial Court, one would expect that a party had thoroughly investigated the case which it proposed to pursue so that it would be in a position to deliver its pleadings and witness statements in an accurate and comprehensive form and in a timely way. In this context, it is noteworthy that when Mr. Gerard Barry (the retired Estates Manager of the plaintiff) came to give his evidence on Day 3 of the hearing, he revealed, under cross-examination, that, at the time of service of the break notice, he was aware of the existence of the renunciation and that he had a copy of it on file. The following exchange then took place between counsel for the defendant and Mr. Barry: -

> *"Q. And did you read it?*
>
> *A. Yes.*
>
> *Q. And did you see the references to one year term and exclusively as*
>
> *offices?*
>
> *A. Correct.*
>
> *Q. Did that give you any pause?*
>
> *A. It did, yeah.*

Q. But you decided to run with it anyway?

A. No, I decided – sorry, I took some advices on it. I didn't decide it

myself, that in the context of what had preceded it, in the context of the

understanding of the parties were, in the context of the lease in the

clause that we effectively had a deed. There was a Deed of

Renunciation that had been signed off by Automation."

Surprisingly, Mr. Barry was not re-examined on this issue. At the conclusion of his cross-examination I enquired of him whether I was right in understanding his evidence that, when he came to serve the break notice in 2017, he investigated whether a renunciation existed in relation to the lease. In response, he confirmed that he did so and he was happy that it existed. He also confirmed that he checked the position with Mr. Colman of Arthur Cox at that time. Mr. Barry was not personally aware of what subsequently happened when the proceedings were issued. However, his evidence on this issue exposes a very significant failing in the manner in which the plaintiff mounted and pursued these proceedings. On the basis of the clear discrepancy between Mr Barry's evidence on the one hand and the terms of the amended statement of claim (described in para. 18 above) on the other, it appears that no attempt was made to check the position with Mr. Barry prior to the commencement of the proceedings – notwithstanding that he had only recently retired. The proceedings were accordingly commenced (and an amended statement of claim was delivered) on the incorrect premise that no renunciation existed.

The Renunciation

25. If the case made in the re-amended statement of claim is correct (and if, as a consequence, the case made in the amended statement of claim is incorrect) and there is a valid Deed of Renunciation in place executed by the defendant, that would have the consequence that the defendant would not be entitled to pursue a claim to a new tenancy under the 1980 Act. For that reason, it may be helpful to address the case made on foot of the Renunciation before attempting to consider any of the other issues in the case. As described in para. 27 below, a number of issues arise in relation to the Renunciation. In particular, as outlined below, it is, at first sight, difficult to relate the text of the renunciation to the lease of the Promenade Road premises.

26. In order to appreciate the extent of the inconsistencies between the renunciation and the lease, it is necessary to set out the terms of the renunciation in full:-

"LANDLORD & TENANT (AMENDMENT) ACT, 1994

RENUNCIATION OF RIGHTS TO A NEW TENANCY

THIS RENUNCIATON dated the 12th day of November, 2012.

1. In this renunciation the following words and expressions have the following meanings:

1.1 'Premises' means the premises as so defined and described in the First Schedule of the Lease;

1.2 'Landlord' means the landlord named in the Lease;

1.3 'Lease' means the lease attached to this Renunciation which is intended to be entered into between the Landlord and the Tenant; and

1.4 'Tenant' means the Tenant named in the Lease.

2. The Tenant has negotiated with the Landlord to take a tenancy of the Premises which are a tenement within the meaning of the landlord and tenant Act for the term of one year and upon the terms and conditions contained and set out in the Lease including the condition that the Use of the Premises shall be wholly and exclusively as an office.

3. The Tenant acknowledges that he has received independent legal advice in relation to the Renunciation from a qualified solicitor who holds a practising certificate from the Law Society of Ireland, and has been advised that under existing landlord and tenant legislation he would, subject to the terms of that legislation, be entitled to a new tenancy in the Premises at the expiry (or sooner determination) of the proposed Lease if it should continue for any reason for five years or more.

4. Having received and considered such advice, and under the provisions of Section 4 of the Landlord & Tenant (Amendment) Act, 1994, the Tenant hereby RENOUNCES any entitlement which he may have under the provisions of the landlord and tenant Acts to a new tenancy in the premises should such entitlement, but for this Renunciation, accrue upon the expiration or sooner determination of the proposed Lease.

5. The Tenant hereby acknowledges that he has not yet been permitted into possession of the Premises and that the tenancy to be created by the proposed Lease has not yet commenced."

27. There are a number of striking features of this document:-

(a) In the first place, the references in the document to the 1994 Act have no application to the Promenade Road premises. In the context of a renunciation, the 1994 Act was relevant solely to premises which are used wholly and exclusively as an office. The Promenade Road premises clearly do not fall within that category. The 1994 Act must be seen in light of s. 85 of the 1980 Act which prohibits the contracting out of all rights available under the Act. However, s. 4 of the 1994 Act, for the first time, made it possible to renounce the right to renew a business tenancy where the relevant tenement was used wholly and exclusively as an office and where the tenant had, prior to the commencement of the relevant tenancy, executed a valid renunciation of his entitlement to a new tenancy and had received independent legal advice in relation to the renunciation.

(b) Secondly, the terms of para. 2 of the renunciation bear no relationship to the terms of the lease or to the Promenade

Road premises. Paragraph 2 refers to negotiations between the tenant and landlord to take a tenancy of the premises for a term of one year. The term of the lease (subject to the break clause) is 20 years. Similarly, para. 2 refers to a condition of the lease that the use of the premises should be wholly and exclusively as an office. That is patently inapplicable to the Promenade Road premises. The permitted user under the lease of the Promenade Road premises is:-

> *"The operation of a road haulage business to include parking of lorries, tractors, trailers and other equipment used in the Tenant's business and the cleaning and maintenance of the Tenant's tankers, lorries, tractors, trailers and other equipment used by the Tenant in the Tenant's business, together with the temporary handling, storage and transhipment only of goods on behalf of direct customers of the Tenant in his business as a haulier of goods imported/exported through the Port of Dublin. For the avoidance of doubt, the Tenant shall not be permitted to use or advertise the Demise Premises as a public warehouse facility for use by third parties".*

(c) Thirdly, para. 3 refers to the tenant as "*he*". The defendant here is a limited company and the reference to "*he*" is clearly inappropriate. Nonetheless, this error is not quite on the same scale as those identified at (a) and (b) above;

(d) Fourthly, the operative paragraph of the document (namely para. 4) under which the tenant purported to renounce the entitlement to a new tenancy expressly invokes s. 4 of the 1994 Act. As already discussed, that Act was of no application to premises of the kind in issue here.

(e) There is also the curiosity that Mr. Simon Crosbie's signature appears above the word "*tenant*". However, I do not believe that anything turns on this in circumstances where, opposite the signature of Mr. Crosbie, it is stated that the document is signed for and on behalf of Automation Transport Ltd.

(f) It should also be noted that there is an issue in the case (addressed below) as to whether the defendant received independent legal advice. In this context, it should be noted that, in addition to the terms of para. 3 of the document (which expressly acknowledges that the tenant has received independent legal advice), the execution of the document was witnessed by Mr. Edward Spain of William Fry, solicitors. Mr Spain is a well-known conveyancing solicitor.

(g) In the course of the hearing, an issue was also raised in relation to whether there was evidence as to the authority of Mr. Crosbie to sign the document on behalf of the defendant. For reasons which I discuss in greater detail below, this does not seem to me to be a significant point, on the evidence.

(h) Clause 1.3 of the document is potentially important. It makes clear that the lease, the subject of the renunciation, is attached to the document and is intended to be entered into between the landlord and tenant. The evidence of Mr. Colman was that a draft of the lease was so attached.

(i) The definition of "*premises*" in clause 1.1 allows the premises to be identified by reference to the first schedule to the lease. Thus, if a draft of the lease was attached to the renunciation, it follows that it would be possible to identify that the document was intended to refer to the Promenade Road premises, the subject matter of these proceedings.

28. A significant number of issues arise in relation to the renunciation which were debated in the course of the trial. Logically, the first issue that requires to be determined is whether, notwithstanding the inconsistencies described in para. 27 (a) to (e) above, the document can be said to constitute a renunciation of any right that the defendant may otherwise have under the 1980 Act to a new tenancy in the Promenade Road premises.

The correction of mistakes by construction

29. In this context, the plaintiff has sought to invoke the ability of the court to correct obvious mistakes in documents by construction. The term: "*correction of mistakes by construction"* was coined by Brightman L.J. in *East v. Pantiles (Plant Hire) Ltd* (1981) 263 EG 61 where he explained that two conditions must be satisfied if the court is to take this approach. In the first place, there must be a clear mistake on the face of the document. Secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are both satisfied, Brightman L.J. took the view that: "*the correction is made as a matter of construction".*

30. The ability of the court to take this approach was also recognised in what has now become a classic statement of the principles to be applied in the construction of contractual documents namely the speech of Lord Hoffmann in *ICS v. West Bromwich B.S.* [1998] 1 WLR 896 (which was subsequently adopted by the Supreme Court in *Analog Devices BV v. Zurich Insurance Company* [2005] 1 IR 275). It is unnecessary, for present purposes, to quote, in full, what was said by Lord Hoffmann in that case. It is sufficient to recall that Lord Hoffmann identified the importance of looking at documents against the backdrop of the relevant factual matrix (excluding previous negotiations of the parties and any declarations of subjective intention). In particular, Lord Hoffmann explained that a consideration of the background might also identify that the parties had made mistakes in the language of the relevant document. In that context, he said at p. 912:-

> *"(4)…The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax; …*
>
> *(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania S.A. v. Salen A.B. [1985] A.C. 191, 201:*
>
> > *'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense'."*

31. Subsequently Lord Hoffmann returned to the issue again in C*hartbrook Ltd. v. Persimmon Homes Ltd* [2009] 1 AC 1101 at p. 1114 where he said:-

> *"22. In* East v Pantiles (Plant Hire) Ltd *(1981) 263 EG 61 Brightman LJ stated the conditions for what he called 'correction*

of mistakes by construction':

> *'Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction.'*

23. Subject to two qualifications, both of which are explained by Carnwath LJ in his admirable judgment in KPMG LLP v Network Rail Infrastructure Ltd [2007] Bus LR 1336, I would accept this statement, which is in my opinion no more than an expression of the common sense view that we do not readily accept that people have made mistakes in formal documents. The first qualification is that 'correction of mistakes by construction' is not a separate branch of the law, a summary version of an action for rectification. As Carnwath LJ said (at p. 1351, para 50):

> *'Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph 'as it stands', as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended.'*

24. The second qualification concerns the words "on the face of the instrument". I agree with Carnwath LJ … that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.

25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. …".

32. These principles (which, for convenience, I will refer to as the "*Chartbrook principles*") have been approved and applied in Ireland in a number of cases including by Clarke J. (as he then was) in *Moorview Developments Ltd v. First Active Plc* [2010] IEHC 275 at paras. 3.5 to 3.6 and, more recently, by Haughton J in *Knockacummer Wind Farm Ltd. v Cremins* [2016] IEHC 95. In *Moorview*, a guarantee had been executed by Mr. Brian Cunningham in favour of First Active Plc. The relevant guarantee referred to the liabilities of a company called Moorview Properties Ltd. There was no such company. First Active Plc sought to enforce the guarantee against Mr. Cunningham in respect of the liabilities of a company called Moorview Developments Ltd. It was contended that the reference to Moorview Properties Ltd was an obvious mistake and that the guarantee was always intended to refer to Moorview Developments Ltd. Clarke J. upheld the claim of First Active. At p. 7 he said:-

> *"3.7 The evidence in relation to this case was given on behalf of First Active by Mr. John Collison. Mr. Collison drew attention to the fact that all of the letters and contractual documents passing between the parties at or around the time of the guarantee … made reference to loans being advanced or to be advanced by First Active to Moorview Developments Limited. Mr. Collison gave evidence that, to the best of his knowledge, no one in First Active had ever heard of a company called Moorview Properties Limited. The guarantee was entered into as part of a package of financial arrangements between the Cunningham Group and Mr. Cunningham on the one side and First Active on the other side. The relevant loans were all entered into between First Active and Moorview Developments Limited. Likewise, evidence was produced from the company's register which showed that there never was a company called Moorview Properties Limited.*
>
> *3.8 In those circumstances there is only one conclusion. The reference to Moorview Properties Limited in the guarantee was a clear mistake. Not only was it a clear mistake but also what the correct reference should have been is equally clear. The guarantee should have made reference to Moorview Developments Limited. Moorview Properties did not exist. It never existed. Moorview Developments was, at exactly the same time as the guarantee was entered into, involved in entering into loan arrangements with First Active. It is inconceivable that there could have been any other intention of the parties but that the company whose liabilities were to be guaranteed was Moorview Developments Limited and not Moorview Properties Limited."*

33. The plaintiff argues that, on the evidence here, a similar approach should be taken. In particular, the plaintiff submits that the evidence establishes that there was a very clear mistake made in the drafting of the renunciation here and that it is equally very clear what corrections are required in order to remedy the mistake. It is therefore necessary to consider the material available in relation to the renunciation.

The material available in relation to the renunciation

34. On behalf of the plaintiff, Mr. Colman gave evidence that Arthur Cox (of which firm he was then a partner) was instructed by the plaintiff in relation to the transactions that became the subject of the contract of 17th September, 2012 under which Mr. Crosbie Snr. and two of his companies agreed to sell to the plaintiff the three premises described in para. 5 above for €5 million and under which the defendant was to obtain the benefit of a lease from the plaintiff of the Promenade Road premises. As outlined in para. 6 above the transaction also involved the defendant remaining in occupation of the Tolka Quay Road premises under licence for a period of three months pending the Promenade Road premises being refurbished and made available. Mr. Colman explained that Arthur Cox acted on behalf of the plaintiff, Ms. Majella Egan of McCann Fitzgerald acted on behalf of NAMA and Mr Edward Spain of William Fry acted for Mr. Crosbie Snr. and the companies controlled by him. Mr. Colman described Mr. Spain as a leading property lawyer. It is unnecessary to set out here, in any detail, the evidence given by Mr. Colman as to his dealings with Ms. Egan of McCann Fitzgerald and Mr. Spain of William Fry. It is sufficient to record that Mr. Colman explained that, for the purposes of the transaction, three Deeds of Renunciation were sought by him on behalf of the plaintiff. These were a Deed of Renunciation in respect of the Promenade Road premises, a renunciation to be executed by the defendant in respect of the licence to be granted to the defendant in respect of the Tolka Quay Road premises, and a renunciation to be executed by Storecon Ltd in respect of a twelve month licence (as provided for in special condition 7 to the contract of sale) in respect of the Tolka Quay Road premises occupied by it. Mr. Colman identified the completion list which had been prepared in preparation for the closing of the contract which showed the Storecon Deed of Renunciation at item 13 and the renunciation in respect of the Tolka Quay Road licence to be granted by the defendant at item 45. In addition, he drew attention to item 47 on the completion list (which had been inserted by him) dealing with the execution of a Deed of Renunciation by the defendant in respect of the lease of the Tolka Quay Road premises. It is clear from the completion list and from the terms of the contract itself that only one lease was to be executed as part of the transaction namely the lease to be granted by the plaintiff to the defendant in respect of the Promenade Road premises.

35. Mr. Colman then identified each of the three Deeds of Renunciation that were executed. These included the Deed of Renunciation executed by Mr. Crosbie Jnr. on behalf of Storecon which was witnessed by Mr. Spain of William Fry and recorded that Storecon had received independent legal advice from Mr. Spain. Mr. Colman also identified the Deed of Renunciation that had been executed in respect of the licence to be granted to the defendant in respect of the Tolka Quay premises which also was signed by Mr. Crosbie Jnr. Again, his signature was witnessed by Mr. Spain and the document recorded that the defendant had received independent legal advice from Mr. Spain. Mr. Colman also identified the renunciation signed by Mr. Crosbie Jnr. and witnessed by Mr. Spain (quoted in full in para. 26 above). Mr. Colman acknowledged that the deed contained the errors described above. He was asked by counsel for the plaintiff whether he could be satisfied beyond doubt that it relates to the premises in the lease. His response was:-

> *"I suppose there is a number of items; one is that the focus was… to have a renunciation of the new site lease on completion and you will see from the list of completion requirements that that was there. It is also the case that this renunciation has a draft to the lease attached to it in the documents in Arthur Cox which I inspected too. And generally speaking it was a case that I wanted or needed to have a Deed of Renunciation for each of the occupations or future occupations of the premises and this one related to the lease."*

36. Mr. Colman sought to explain the error on the basis that it appeared that the: "*incorrect precedent was used and as a result I suppose that error in using the incorrect precedent led to there being a number of errors on the face of the document*". In other words, Mr. Colman's explanation was that an old precedent relating to the amendments made by the 1994 Act was used rather than a precedent based on the broader terms of the amendment made by the 2008 Act.

37. Under cross-examination, Mr. Colman explained that in accordance with the Law Society Practice Note on Deeds of Renunciations it is recommended that a draft of the lease should be attached to the renunciation and he said that he followed this recommendation. Mr. Colman accepted that he had no direct contact with Mr. Crosbie Jnr. in relation to the signing of the document. He confirmed that he had dealt solely with Ms. Egan of McCann Fitzgerald on behalf of NAMA and she, in turn, had dealt with Mr. Spain of William Fry.

38. Mr. Colman also accepted, under cross-examination, that he knew that the premises were an industrial type property (i.e. not an office as stated in the renunciation). He was also cross-examined in relation to his first witness statement which was in very terse terms and did not provide any of the detail set out in the witness statement delivered in the course of the hearing. In his first witness statement, he had stated in para. 6 that the defendant had executed a Deed of Renunciation. However, in para. 7 he said that it was: *"contemplated that the Defendant would execute a Deed of Renunciation in favour of the Plaintiff for the Lease and I understand that the Defendant is contractually required to do so under clause 4.35…*". To these questions, his response was that there: "*might have been a misunderstanding at some point as to whether the renunciation existed or not but there was never any doubt in my mind".* In fairness to Mr. Colman, it should be noted that in his first witness statement, he had said that he had reviewed the title documents held by Arthur Cox relating to the lease but that he had not examined the file. While I do not believe that it was appropriate to prepare a witness statement on that attenuated basis, it does provide some level of explanation for the inconsistencies between the first and second witness statements.

39. It was also put to Mr. Colman in cross-examination that the reference to one year in the renunciation might have been understood by Mr. Crosbie Jnr. to relate to the Storecon premises in circumstances where Storecon was to have a one year licence. Mr. Colman, in response, drew attention to the way in which the renunciation in this case does not mention Storecon but clearly mentions the defendant. It should be noted, in any event, that, when Mr. Crosbie Jnr. subsequently came to give his evidence, he did not make the case that he understood the renunciation in issue in these proceedings to relate to the Storecon premises. In addition, it is worth bearing in mind that the renunciation also refers to a lease and, as noted above, the only lease to be executed by the defendant was that proposed in respect of the Promenade Road premises. In this context, it was put to Mr. Colman on cross-examination that special condition 6.2(a) of the contract envisaged that a Deed of Surrender would be executed by the defendant in relation to what was described as its "sub leasehold interest" in part of the Tolka Quay Road premises. This line of cross-examination was pursued with a view to suggesting that the renunciation executed by Mr. Crosbie Jnr. related to the "*sub-lease*" rather than the lease the subject matter of these proceedings. However, Mr. Colman explained that a Deed of Surrender was executed by the defendant in respect of any sub-lease of the Tolka Quay Road premises. The Deed of Surrender in question says in very clear terms that the defendant surrendered the premises to the plaintiff: "*to the intent that the residue of the term and all or any other estate, right title to or interest of the tenants shall merge and be extinguished. In the reversion immediately expectant on the determination of the term*". Counsel for the defendant very properly accepted that this was quite categoric language. As s. 17 (1) (a) (iii) of the 1980 Act makes clear, no entitlement to a new tenancy will arise where the tenant terminates a tenancy by notice of surrender. In circumstances where the defendant executed a surrender, there was plainly no need to execute, in addition, a renunciation of rights.

40. It was also suggested to Mr. Colman, in the course of his cross-examination, that he should have procured a copy of the memorandum and articles of association of the defendant and a copy of all relevant resolutions of that company. Mr. Colman responded that it is not standard practice to do that. There was no contrary evidence from any solicitor called on behalf of the defendant.

41. When Mr. Crosbie Jnr. came to give evidence in relation to the renunciation, he maintained that William Fry were not acting on behalf of the defendant. However, he acknowledged that Mr. Crosbie Snr. was the sole or primary shareholder of the defendant at the time of the transaction and remained so until March 2013 when he also resigned as a director of the defendant. Mr. Crosbie Jnr. confirmed that his father had instructed William Fry and that it was possible that he had instructed William Fry to act on behalf of the defendant. Nonetheless, Mr. Crosbie maintained that no one was acting on behalf of the defendant directly because the new lease to be granted to the defendant was, in his words, just one tiny insignificant element of the disposal of assets undertaken by his father at the behest of NAMA.

42. Mr. Crosbie Jnr. accepted that the transaction was necessary for the survival of the defendant. He also accepted that, if new premises had not been found for the defendant, it would have been wound up at that point. It was put to him by counsel for the plaintiff that this was accordingly a transaction to which he, as a director of the defendant, would have paid significant attention. He confirmed that this was correct. He also confirmed that the lease, the subject matter of these proceedings, is the only lease that the defendant has ever entered into in the Port of Dublin.

43. According to Mr. Crosbie Jnr., he signed whatever he was asked to sign and whatever he was told was necessary to execute. He explained that there were so many documents that it simply was not possible to read all of them. In the course of his direct evidence he maintained that he was not advised by William Fry as to the content of any of the documents he was asked to sign. His evidence was:-

> *"But at no point as I said we were in a process where it was kind of like nearly a fire sale and at no point did I, was I*

advised that I would be renouncing my rights because part of what made me accept the deal, not that I had a choice, was that we had security of tenure and that we could survive this because I can't state it more plainly, I mean it was a time of survival and, you know, certain bits of paper were floating in front of you and you might be able to survive. I signed everything in the presence of people but as I said, nothing was made clear to me …that I would be renouncing my rights".

44. However, on cross-examination he confirmed that there might have been *"general overviews but nothing specific"*. He confirmed that he did not ask any questions of William Fry in relation to the documents and that he never took the opportunity to raise any questions in relation to them.

45. In the course of his cross-examination, Mr. Crosbie accepted that he executed the renunciation quoted in para. 26 above. He was pressed as to whether he was going so far as to contend that he did not get legal advice from Mr. Spain of William Fry in relation to the document. Ultimately, his response was that he could not remember whether or not he got such advice. He confirmed that he executed the renunciation as a director of the defendant and that he was authorised to sign it on behalf of the defendant. He also confirmed that the signature of the witness was that of Mr. Spain.

The position taken by the defendant in relation to the renunciation

46. In response to the attempt by the plaintiff to rely on the renunciation, the defendant raised a number of issues as follows:-

(a) It was submitted that any renunciation would have to be strictly construed against the party seeking to rely upon it. In support of this proposition the defendant drew attention to the approach taken by Lardner J. in *Bank of Ireland v. Fitzmaurice* [1989] ILRM 452 and more particularly to the observations of Charleton J. in *Edward Lee & Co. Ltd v. N1 Property Developments Ltd* [2012] 3 IR 201. In the latter case, Charlton J. said at p. 209:-

> *"At issue here is whether there has been a scheme to effectively force the tenant to surrender the tenement in advance of the term and thereby disbar the fixing of a new tenancy … by application to the court. Such a scheme would render the relevant clause void under the Act of 1931, which in all material respects is the same as the Act of 1980. The entire contract is not void, simply the offending clause: …. I do not believe that a court is entitled, however, to rewrite a clause by running a blue pencil through offending words so as to rewrite the meaning of what the parties intended into a meaning that they never intended*. The law is strict. Direct and indirect attacks on rights under either the Act of 1931 or the Act of 1980 will not be tolerated. …". (Emphasis added).

(b) The next argument made was that the authorities on which the plaintiff seeks to rely are not appropriate in the context of the renunciation which is not a negotiated document between two parties;

(c) It was also submitted that, if the plaintiff wished to rely on a document emanating from a "*third party*", the plaintiff had a duty to take extra care to ensure that the document was reliable. In this context, the defendant sought to characterise itself as a third party to the sale contract between the plaintiff and the vendors;

(d) It was further argued that there was an obligation on the plaintiff to ensure that the defendant obtained fully independent legal advice. It was suggested that William Fry were not in a position to give independent legal advice because they were acting for Mr. Crosbie Snr. and his companies and that the defendant needed to have fully independent advice in circumstances where in the words of counsel:

> *"Nothing about this was in their interest because they received nothing apart from a smaller site further away from the dock. So the idea that somehow they'd negotiated some benefit for themselves and this was some flipside of the benefit is illusionary…";*

(e) A further submission was made that the plaintiff had an obligation, if it wished to be in a position to rely on the purported renunciation, to ensure that it obtained a copy of the relevant minute of the meeting of the directors of the defendant, a copy of the resolution of the directors authorising Mr. Crosbie Jnr. to sign the renunciation and a certificate from Mr. Spain of William Fry addressed to the defendant confirming that he has advised the defendant in relation to its rights under the 1980 Act. I deal further below with the issue relating to legal advice. I do not, however, believe it is necessary to deal in any detail with the submission made that there was an obligation to obtain the suite of confirmatory documents mentioned above. In my view, there is no evidence to substantiate the submission made that the plaintiff had any such obligation. In particular, there was no evidence called on behalf of the defendant to controvert what was said by Mr. Colman (as summarised in para. 40 above). Moreover, the point seems to me to be entirely academic in circumstances where Mr. Crosbie Jnr. very properly confirmed that he executed the renunciation as a director of the defendant and that he was authorised to sign it on behalf of the defendant.

(f) The defendant also submitted that the *Chartbrook* line of authority was not appropriate to landlord and tenant law. As I understand it, this argument proceeded on the basis that landlord and tenant law represented an entirely discrete and separate *corpus* of law. I can deal with that submission quite briefly. In my view, it is mistaken. It is clear from the judgment of the Supreme Court in *Stapleyside Company v. Carraig Donn Retail Ltd* [2015] IESC 60 that the ordinary principles of contractual interpretation apply in the context of property documentation. In that case, Clarke J. (as he then was) observed at paras. 6.2-6.3:-

> *"6.2 …a court is required to do the best it can with the language used by the parties (the text) to be construed in the light of all of the circumstances in which the agreement was entered into (the context). But it is important to acknowledge that both text and context are relevant in the proper interpretation of commercial documents.*
>
> 6.3 Those principles of interpretation (the 'text in context' method) apply to no lesser extent in the field of property documentation. *To ignore context is to ignore the well accepted fact that words used in agreements would be seen by any reasonable person having knowledge of the surrounding circumstances as being potentially affected as to their meaning by the context in which the agreement was entered into in the first place. But equally, the text must be given all appropriate weight, for it is in the terms of that text that the parties have settled on their arrangement*." (Emphasis added).

It should also be noted that, in England, the principle has been applied specifically in the landlord and tenant context in *Littman v. Aspen Oil (Broking) Ltd* [2006] 2 P & CR 2. In that case, a break clause in a lease allowed either party to terminate the lease by giving not less than six months-notice in writing. The clause was subject to the proviso that: "*in the case of a notice* given by the Landlord *the Tenant shall have paid the rents …reserved and shall have duly observed and performed the covenants on the part of the Tenant…*" (Emphasis added). The reference to "*the Landlord*" was considered by Hart J. to be an obvious mistake and that instead the word "Landlord" should be read as "*Tenant*" even though the effect of correcting the error had significant consequences for the tenant in that, if the tenant was to exercise the right to terminate under the break clause (as corrected in the manner suggested by Hart J), it would have to show that it had complied with all of the covenants under the lease.

(g) It was also argued on behalf of the defendant that the *Chartbrook* line of authority has no application unless there is a common mistake and that it would be inappropriate for the court to apply equitable principles to correct that mistake. In making this submission, the defendant appears to have had in mind the principles that apply in the context of an action for rectification. The distinction between the correction of mistakes by interpretation and the equitable remedy of rectification is explained as follows by Lewison in "*The Interpretation of Contracts*" 6th Ed., 2015, at p. 495 as follows: -

> *"a distinction between the correction of errors by interpretation and the equitable remedy of rectification was pointed out in North Circular Properties Ltd. v. Internal Systems Organisation Ltd. The Deputy Judge said:*
>
> *'of course the court will not lightly, as part of a construction process, tamper with the actual words used, particularly in a commercial document such as a Lease. On the other hand, the law is not such an ass as to compel the court to hold the parties to the actual words used when it is, as in my judgment it is in this case, clear from the document itself, without looking at extrinsic evidence, that such words were used only by virtue of a draftsman's blunder. Such a process of correction of obvious drafting errors in the process of construction is of course distinct from the equitable doctrine of rectification. The former can only be adopted where the fact that a mistake has been made and the nature of the mistake can be ascertained with certainty from a consideration of the relevant instrument in the context of objective circumstances surrounding its execution. Rectification, on the other hand, will be appropriate in many other cases where the existence and nature of a mistake are apparent only from extrinsic evidence of the actual intention of the parties'."*

The plaintiff has not, however, sought rectification of the renunciation. The plaintiff has confined itself to contending that the *Chartbrook* principle applies. It therefore appears to me to be unnecessary to consider this argument on behalf of the defendant. It is important to bear in mind that, by confining itself to the *Chartbrook* principle, the plaintiff is limited to asking the court to consider the renunciation itself by reference to its own terms but also construed against the relevant factual background. In contrast to a case where the equitable remedy of rectification is invoked, the plaintiff is not entitled to lead evidence of the subjective intention of the parties.

(h) Counsel for the defendant also suggested that there are cases where a document contains a fatal error and accordingly no reliance can be put on it. In this context, counsel said that: "*if this was a guarantee to a bank and [it] failed to mention the proper parties or the proper facility it would simply be unreli*able". However, I do not believe that this submission is sound. It is clear from the decision of Clarke J. in *Moorview Developments Ltd v. First Active Plc* [2010] IEHC 275 (discussed in para. 32 above) that the *Chartbrook* principle is capable of application to a guarantee which names an incorrect party. I therefore do not believe that it is necessary to deal further with this argument.

47. Of the arguments identified in para. 46 above, I have already addressed those at sub. paras. (e) to (h). I address the balance of the arguments in paras. 48 *et seq*. below. In those paras., I also address the application of the *Chartbrook* principle more generally.

Strict construction

48. As noted in para. 46 (a) above, the defendant contends that any renunciation would have to be strictly construed against the party seeking to rely upon it. This argument appears to have been significantly influenced by the observation made by Charleton J. in *Edward Lee & Co. Ltd. v. M.1 Property Developments Ltd* (quoted in para. 46 (a) above) to the effect that the law is strict and that direct and indirect attacks on rights under the 1980 Act "*will not be tolerated*". Those observations should, however, be seen against the backdrop of s. 85 of the 1980 Act which expressly renders void any attempt to vary, modify or restrict tenants' rights under the 1980 Act. Charleton J. was clearly concerned in that case by an attempt to circumvent s. 85. That is quite different to a renunciation of rights which is expressly permitted under the 1980 Act. The amendments made by s. 47 of the 2008 Act very clearly provide for renunciation of a tenant's right to a new tenancy. Of course, any renunciation must comply with the provisions of s. 17 (1) (a) (iiia) of the 1980 Act if the renunciation is to be relied upon. That is an issue which I address further below. In addressing that issue, it will be necessary to bear in mind that, because a renunciation necessarily involves the giving up of a potentially valuable right, I will have to be satisfied that the terms of the renunciation are sufficiently clear and unambiguous to constitute a valid renunciation. Furthermore, I must keep in mind that the renunciation was drafted not by the defendant but by the solicitor for the plaintiff and in those circumstances any ambiguity in the renunciation must be construed *contra proferentem*. It is important, however, to bear in mind that, as Clarke J. (as he then was) explained in *Danske Bank v. McFadden* [2010] IEHC 116 at para. 4.1, the *contra proferentem* rule is to be applied only in cases of ambiguity and where other rules of construction fail. Thus, it does not displace the *Chartbrook* principle. That principle is an inherent part of the principles of interpretation of contracts embodied in the *Investor Compensation Company* principles approved by the Supreme Court in *Analog Devices*. In the *Danske Bank* case, Clarke J. said:-

> "*The so called, contra proferentem rule, is, of course, only to be applied in cases of ambiguity* and where other rules of construction fail*. As such, the rule can only come into play if the court finds itself unable to reach a sure conclusion on the construction of the provision in question, …. The origin and first purpose of the rule is to limit the power of a dominant contractor who is able to deal on his own "take it or leave it" terms with others, …. The rationale for the rule is as set out in Tam Wing Chuen v. Bank of Credit and Commerce Hong Kong Ltd [1996] 2 B.C.L.C. 69, where at p. 77, Lord Mustill states that:-*
>
> > '*The basis of the contra proferentem principle is that the person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests ….*'" (Emphasis added).

Clarke J. also stressed that the rule only applies in cases of genuine ambiguity.

Applying the *Chartbrook* principle

49. At this point, the next issue that arises is whether the *Chartbrook* principle can properly be applied to the renunciation in issue. If it is capable of being applied, then the renunciation would be construed by correcting any obvious mistakes which fall within the application of the principle (i.e. where the necessary corrections are equally obvious). If I come to the conclusion that the *Chartbrook* principle is capable of being applied and that the renunciation can properly be read in the manner suggested by the plaintiff, it would then become necessary to consider whether the renunciation (corrected in accordance with the *Chartbrook* principle) complies with the requirements of s. 17 (1) (a) (iiia). At that point, it will also be necessary to consider the defendant's arguments in relation to duty of care and independent legal advice. On the other hand, if the *Chartbrook* principle cannot be applied in the manner suggested by the plaintiff, then it seems to follow that the renunciation cannot be relied upon by the plaintiff. In such circumstances, it would become necessary to consider whether the plaintiff is entitled, at this stage, to rely upon the covenant contained in clause 4.35 of the lease.

50. Accordingly, I now turn to consider whether the *Chartbrook* principle can be applied to the renunciation. Having regard to the factors discussed in para. 46 (f) above, I do not believe that there is any basis to suggest that the *Chartbrook* principle is incapable of application to a document such as a renunciation of rights under the 1980 Act. There is nothing in the case law to support such a proposition. On the contrary, the case law suggests that the ordinary principles of contractual interpretation apply equally to property documents including leases.

51. Nonetheless, in light of the sheer number of problems with the text of the renunciation in this case, I have considered whether that, of itself, renders the *Chartbrook* principle inapplicable. However, on reflection, I do not believe that it does. On the contrary, as Lord Hoffmann made clear in the *Chartbrook* case itself, there is no limit to the amount of red ink or verbal rearrangement or correction which the court is allowed under the principle. The principle therefore appears to be capable of application in any case where the court, having regard to the relevant factual background, can come to a clear conclusion that (a) the parties to a contractual document have failed to express themselves correctly such that there are obvious mistakes in the document and (b) it is equally obvious how those mistakes should be corrected.

52. Turning to the mistakes in the renunciation in this case (as quoted in para. 26 above) the following observations can be made:-

> (a) In the first place, insofar as the reference to "*he*" is concerned, that is a very obvious mistake in circumstances where it is clear from the document itself that the entity purporting to renounce its rights is a corporate body in respect of which the inanimate pro-noun "*it*" should have been used. This is an obvious mistake which a court can readily correct by reference to a consideration of the document as a whole.
>
> (b) However, there are a series of words and phrases in the renunciation which bear no relationship to the Promenade Road premises. These include the reference to negotiations between the tenant and landlord to take a tenancy of the premises for a term of one year. The relevant term of the lease of the Promenade Road premises (subject to the break clause) is 20 years. There is then the reference to a condition that the use of the premises should be wholly and exclusively as an office. That is equally inapplicable to the Promenade Road premises where the permitted user is focused on the operation of a road haulage business. If these are to be considered to be "*mistakes*", one would have to be confident that the renunciation was intended to refer to the lease of the Promenade Road premises and not to some other premises.
>
> (c) In my view, it is clear from a consideration of the background facts that the renunciation was intended to apply to the Promenade Road premises. There are a number of features of the factual background that overwhelmingly point to this conclusion. In the first place, as Mr. Crosbie Jnr. acknowledged in the course of his evidence, the defendant has only once entered into a lease in relation to premises within the Port of Dublin namely the Promenade Road premises. Second, it is clear that the renunciation had a copy of the draft lease attached to it in which, of course, the Promenade Road premises were identified. Third, as Mr. Colman confirmed in his evidence, the Promenade Road lease had been drafted at the time of execution of the contract between Mr. Crosbie Snr. and his company and the plaintiff. It is specifically referred to in the Document Schedule at para. 4.3. In turn, the form of the lease is specifically referenced in special condition 6.2 (a). The draft lease contained a covenant that the tenant should execute a Deed of Renunciation waiving any renewal rights in accordance with s. 47 of the 2008 Act. Fourth, a Deed of Renunciation in respect of the Promenade Road premises was expressly included in the completion list for the purposes of completion of the contract. Mr. Colman confirmed that it appears at Item 47 on that list.
>
> (d) In my view, all of these factors point in one direction. There is a renunciation which is signed by Mr. Crosbie Jnr. on behalf of the defendant which refers to a lease to be given to the defendant. We know that the only lease of Dublin Port premises ever taken by the defendant was in respect of the Promenade Road premises. In addition, the draft version of that lease contained a covenant to execute a renunciation. It must follow that the renunciation can only relate to the Promenade Road premises. There is no other plausible explanation why the defendant should execute a renunciation in respect of those premises.
>
> (e) In circumstances where it can only relate to the Promenade Road premises, I believe it is clear that something has gone wrong with the language contained in the renunciation. In particular, it seems to me that the references therein to office premises and to a one year term are very clear errors in the document. The Promenade Road premises are not solely - or even mainly - for office use. Likewise, there was never any question that the term of the lease would be for one year only.
>
> (f) It seems to me to be equally clear what corrections need to be made to the document. The references to a term of one year and to the use of the premises "*wholly and exclusively as an office*" are not only inappropriate but they are otiose. Having regard to the terms of s. 47 of the 2008 Act (which is referenced in clause 4.35 of the Lease) there was no need to include that language. In these circumstances, I am of the view that clause 2 of the renunciation should be interpreted as though those references did not appear therein.
>
> (g) The remaining error of substance in the document is the reference in para. 4 to s. 4 of the 1994 Act and the reference in the title to the 1994 Act. Again, it seems to me that this is a clear error in the document. Section 4 of the 1994 Act has no application whatever to premises of the kind found on the Promenade Road premises. Section 4 of the 1994 Act is confined very narrowly to tenements which were used wholly and exclusively as an office. Having regard to that very obvious fact and having regard to the terms of clause 4.35 of the lease, it seems to me that the correction to be made to the language of para. 4 of the renunciation is very clear – namely that it should refer to s. 47 of the 2008 Act which, at the time of execution of the renunciation, was the relevant statutory provision in force providing for

renunciation of the rights in respect of premises of the kind in issue here.

(h) Accordingly, in my view, subject to the discussion below in relation to legal advice, para. 4 of the renunciation should be read as though the reference to s. 4 of the 1994 Act actually cited s. 47 of the 2008 Act. In my view, the *Chartbrook* principle very clearly applies.

(i) Moreover, even though para. 4 refers erroneously to s. 4 of the 1994 Act, the operative language of para. 4 very clearly evidences an intention to renounce any entitlement which the tenant might have under the provisions of the Landlord and Tenant Acts to a new tenancy. There is no error in any of that language. Nor is there any ambiguity. On the contrary, the terms of para. 3 of the renunciation are plain. In the circumstances, I cannot see any scope for the application of the *contra preferentem* principle. That principle only applies where there is ambiguity in the language used.

(j) Paragraph 3 is the critically important provision in the renunciation. By its terms, the defendant unambiguously gave up any right to a new tenancy under the Acts. In circumstances where (for the reasons outlined above) the renunciation must refer to the Promenade Road premises (notwithstanding the errors in the language in other paragraphs of the document) I am of the view that para. 4 very clearly constitutes a renunciation of rights to a new tenancy in those premises.

53. I have also considered whether the case now made by the plaintiff that there are obvious mistakes in the Deed of Renunciation can properly be made by it in circumstances where the plaintiff (as outlined earlier in this judgment) did not even rely on the renunciation in the statement of claim in its original form or in its first amended form and where Mr. Kennedy, the plaintiff's head of property expressly said that he understood that, at the time of making his witness statement, no renunciation had in fact been executed in respect of the Promenade Road premises. Under cross-examination, Mr. Kennedy said that he formed the view that the correct Deed of Renunciation was not in place. However, while the approach taken by the plaintiff is unimpressive, I do not believe that it defeats the ability of the plaintiff to rely on the *Chartbrook* principle. In truth, the subjective opinion of the plaintiff is entirely irrelevant to the application of the *Chartbrook* principle. That has been made clear in all of the cases in relation to the proper approach to be taken in interpreting contractual documents. One cannot have regard to statements of subjective intention. In those circumstances, it appears to me to follow that the failure of the plaintiff to advert to the renunciation until a very late stage in the proceedings does not deprive the plaintiff of the ability to rely on the principle.

54. One further issue arises in relation to the application of the *Chartbrook* principle. As noted in para. 46 (e) above, it was argued on behalf of the defendant that the renunciation was not put in place pursuant to any negotiations directly between the defendant and the plaintiff and that in those circumstances the *Chartbrook* principle can have no application. However, having reflected on the issue, I do not believe that this submission is sound. There are many circumstances where a document having contractual force is required from a third party as a consequence of an agreement between two contracting parties. A relatively common example is the provision of a guarantee to a bank to guarantee the liabilities of a borrower. Although the guarantor may have no direct dealings with the bank, the guarantee is capable of having contractual force as between the bank and the guarantor. It could scarcely be suggested that the *Chartbrook* principle could not be relied upon in the context of such a guarantee. The *Moorview* case is an obvious illustration – albeit that, in that case, there appears to have been some direct dealings between the guarantor, Mr. Cunningham and the relevant lender there (First Active).

55. It is also important to keep in mind the rationale for the application of the *Chartbrook* principle. As explained by Lord Hoffman, it is to correct obvious errors in the language used by parties to contractual documents. There is no reason in principle why that rationale cannot apply to a unilateral document having contractual force (such as a renunciation or a guarantee) notwithstanding that it is executed by one party only. The reason why a court is entitled to form the view that the language in the contractual document contains a clear error does not depend on what transpired between the parties in the negotiations leading up to the execution of that document. On the contrary, what was said between the parties is inadmissible in order to construe the true meaning and intention of the document. The court is limited to the objective factual background. That objective factual background is equally available in the case of a negotiated document or in the case of a document which is executed unilaterally. I can therefore see no reason why the *Chartbrook* principle cannot be applied to a document such as the renunciation here.

56. Moreover, there have been cases where the courts have applied the *Chartbrook* principle to documents executed unilaterally. An example is to be found in the judgment of Asplin J. in *ICM Computer Group Ltd. v.* Stribley [2013] EWHC 2995 (Ch). That case concerned a deed of amendment to the terms of a pension scheme which was executed by the trustees of the scheme. The amendment was intended to give effect to an EU requirement that the retirement age of male and female members of a pension scheme should be the same. Prior to the amendment, the retirement age of female members had been 60 while the retirement age for men had been 65. The deed of amendment provided in one paragraph that the retirement age should now be 60 for both males and females. However, other clauses of the document suggested that the retirement age was intended to be 65 for both males and females. Although the document was a unilateral one which was not the subject of negotiation between any of the parties to the pension scheme, Asplin J. nonetheless applied the *Chartbrook* principle and held, having considered the language of the deed as a whole and some relevant background facts, that the deed should be construed as intending to make 65 the uniform retirement age for both males and females.

57. In these circumstances, I am of the view that there is no reason why the *Chartbrook* principle should not be applied to the renunciation in this case. It is clear that something has gone wrong with the language of the renunciation. I have already dealt with the errors and inconsistencies that appear in the document. While there are a surprisingly large number of such errors and inconsistencies, it seems to me that these are very clearly mistakes in the document and it is equally clear what corrections ought to be made. Accordingly, the document should be read in the manner outlined in para 52 above. When read in that way, it seems to me that the document is clear on its face. There is no ambiguity in its terms such as to attract the application of the *contra proferentem* principle. In particular, para. 4 of the renunciation contains a clear and unequivocal renunciation by the defendant of any right which it might acquire to a new tenancy under the Landlord and Tenant Act.

Independent legal advice

58. As noted in para 46 (c) and (d) above, the defendant argues that if the plaintiff wished to rely on a renunciation emanating from a third party such as the defendant, it had a duty to take extra care to ensure that the document is reliable. In addition, it was argued that there was an obligation on the plaintiff to ensure that the defendant obtained truly independent legal advice. In the latter context, it was also contended that William Fry were not in a position to give such advice to the defendant because they were acting for Mr. Crosbie senior and his companies.

59. I have come to the conclusion, in this context, that the only issue to be considered is that relating to legal advice. I can see no basis (and none was identified in the course of argument) to suggest that the plaintiff had any wider duty to take extra care that the

renunciation was reliable. Moreover, this seems to me to be an entirely academic argument in circumstances where, as he very fairly acknowledged, Mr. Crosbie Jnr. was authorised to sign the renunciation on behalf of the defendant and did so. The only issue raised by Mr. Crosbie Jnr. in his evidence was in relation to legal advice. Initially, his evidence was that he did not receive such advice. Ultimately, however, on cross-examination, he said that he could not remember whether any such advice had been given.

60. Before addressing the legal advice issue in any detail, a preliminary point arises as to whether the plaintiff is entitled to rely on a confirmation in relation to legal advice contained in a renunciation which plainly refers to an incorrect statutory provision namely s. 4 of the 1994 Act. An issue arises as to whether that reference (albeit mistaken) calls into question whether appropriate legal advice was given at all. Having reflected on the issue, it seems to me that the reference to the 1994 Act does not have that effect. The nature of the legal advice to be given to a tenant is not identified either in the amendments made by s. 4 of the 1994 Act or the wider amendment made under s. 47 of the 2008 Act. Those provisions merely provide statutory authority for a tenant to renounce the right to a new tenancy. In both cases, they impose, as a condition to the validity of the renunciation, that the tenant should have received independent legal advice. However, neither provision prescribes the parameters of the advice that must be given. In circumstances where neither section is prescriptive as to the nature of the advice to be given, I do not believe that it is fatal to the renunciation in this case that the document refers to the inapplicable 1994 Act. I might well have reached an entirely different conclusion if the respective provisions of the 1994 and 2008 Acts set out different criteria in relation to the extent or nature of the advice to be given.

61. Both provisions are entirely consistent insofar as they each require that the advice to be given is independent legal advice. In circumstances where the test is the same in both cases, it seems to me that the reference to the 1994 Act is not sufficient of itself to invalidate the renunciation.

62. The next question to be considered is whether the statutory requirement in s. 17(1) (a) (iiia) of 1980 Act (as inserted by s. 47 of the 2008 Act) as to independent legal advice has been satisfied in this case. In this context, the renunciation (which is quoted in full in para. 26 above) contains an express acknowledgement that the defendant has received independent legal advice. As noted in para. 52 (a) above, while there is a reference to "*he*" in that paragraph, it is perfectly obvious that this should read "*it*" since the use of the pro-noun "*he*" is clearly referable to the word "*tenant*" (i.e. the defendant) in the same line. The acknowledgement is not merely that the tenant has received independent legal advice but it also records that the advice which has been given was to the effect that under: *"existing landlord and tenant legislation he would, subject to the terms of that legislation, be entitled to a new tenancy in the Premises at the expiry (or sooner determination) of the proposed Lease if it should continue for any reason for five years or more".*

63. Thus, on the face of the document, there is an express acknowledgement that the defendant was advised as to its rights under the 1980 Act in the event that it entered into the Lease and remained in occupation for a period of five years. As noted above, no guidance is given in s. 17 (1) (a) (iiia) of the 1980 Act (as inserted by s. 47 of the 2008 Act) as to the nature of the legal advice that must be given to a tenant in relation to a renunciation. Nor was I referred to any authority which provides any assistance as to the nature of the legal advice to be given. However, it seems to me to be clear that the reason why the Oireachtas imposed a requirement that a tenant should receive independent legal advice, was to ensure that, before taking the very significant step of renouncing rights, the tenant should be aware of the rights that exist under the 1980 Act to a new tenancy. By stipulating such a requirement, the Oireachtas has made sure that, before abandoning this valuable right, tenants will be apprised of the nature of the right they are asked to renounce. Such an approach is not peculiar to the 1980 Act. The importance attached to such a requirement can also be seen in other contexts. For example, in the case of the abandonment or waiver of a constitutional right, the courts have stressed the need for full knowledge. As Walsh J. observed *in G. v. An Bord Uchtála* [1980] I.R. 32 at p. 80, before anybody can be said to have surrendered or abandoned a constitutional right, it must be shown that he or she is aware of what the rights are and of what he or she is doing. While Walsh J. was concerned, in that case, with the potential waiver of a constitutional right, it seems to me that the basic concern is the same whether one is concerned with the abandonment or waiver of a constitutional right or of a legal right.

64. Furthermore, it seems to me that para. 3 of the renunciation in this case clearly records that advice was given to the defendant here that under existing landlord and tenant legislation, it would have an entitlement to a new tenancy in the premises should it continue to occupy the premises for a period of five years or more. On the face of the renunciation, it is therefore clear that the defendant was told of the right which it would have, absent the renunciation. That seems to me to encapsulate the nature of the advice which a tenant should be given so that the tenant will be aware of the effect of the renunciation.

65. Quite apart from the text of para. 3 of the document, I have come to the conclusion that legal advice was given to Mr Crosbie Jnr. by William Fry. In this context, as noted above, Mr. Crosbie Jnr. has accepted, in the course of his evidence, that the document was signed by him on behalf of the defendant. I appreciate that, in his evidence, Mr. Crosbie Jnr. initially contended that he was not given legal advice. Ultimately, however, his evidence, on cross-examination, was that he could not remember whether such advice was given. On a consideration of his evidence as a whole, I do not accept that Mr. Crosbie Jnr. was not given advice as to the effect of the renunciation. In the first place, the relevant exchange which took place between Mr. Crosbie Jnr. and counsel for the plaintiff, in the course of his cross-examination is important. Having acknowledged that he signed the renunciation, that he was authorised to do so as a director of the defendant and that his signature was witnessed by Mr. Spain, the following exchange took place between him and counsel:-

> *"Q. And in relation to that document, again what is your position? Are you saying that –*
>
> *A. The same position as before, there was a huge amount of documents, a huge amount of stuff going on and I do not remember any specifics about anything.*
>
> *Q. OK, so again, and I'm sorry for this, Mr. Crosbie but it is just important to be precise about this, are you positively asserting that Mr. Spain did not advise you in relation to this document or are you saying you can't remember?*
>
> *A. I can't remember".*

66. Secondly, at a later point in his cross-examination, Mr. Crosbie Jnr. conceded that William Fry gave him an overview of the documents that he was asked to sign. This was not something that he had addressed in his evidence in chief. Thirdly, the suggestion that the advice was not given is utterly inconsistent with the terms of the document which Mr. Crosbie accepts that he signed (with the authority of the defendant). The document records on its face the nature of the advice that was given. For the reasons explained above, that advice seems to me to encapsulate what is required for the purposes of 17 (1) (a) (iiia) of the 1980 Act.

67. Furthermore, having signed the document which records the giving of advice, I do not believe that it is open to Mr. Crosbie Jnr. to

now contend that such advice was not given. The truth is that the advice given is apparent on the face of the document which Mr. Crosbie signed. Moreover, no case was made at the hearing that the defendant is entitled to rely on the defence of *non est factum* in relation to the renunciation. In this context, the Court of Appeal in *Allied Irish Banks Plc v. Higgins* [2015] IECA 23 has reiterated that, in accordance with the decision of the House of Lords in *Saunders v. Anglia Building Society* [1971] AC 1004, three conditions must be satisfied before the defence of *non est factum* can be accepted namely:-

> *(a) That there was a radical or fundamental difference between the document that a person signed and what that person thought he was signing;*
>
> *(b) The mistake must have been as to the general character of the document as opposed to its legal effect; and*
>
> *(c) That there was a lack of negligence i.e. that the person signing the document took all reasonable precautions in the circumstances to find out what the document was.*

68. Although no defence of *non est factum* has been pursued, it seems to me that a similar principle applies by analogy in the context of the renunciation here insofar as it has been submitted by the defendant that, contrary to the terms of para. 3 of the renunciation, the defendant did not have the benefit of legal advice. While I appreciate that Mr. Crosbie Jnr. was asked to sign a significant number of documents, it is clear from his evidence that he did not take the opportunity to ask William Fry any questions about the contents of the documents and he likewise did not take the opportunity to raise any queries in relation to the documents. Mr. Crosbie took this course even in relation to the lease itself. In the course of his cross-examination, he was asked whether he was aware that the lease contained a covenant that a Deed of Renunciation would be executed by the defendant, as tenant. His answer was:-

> *"A. No, the only thing I familiarised myself with was the user clause because I just wanted to be specific about that.*
>
> *Q. Would it be fair to say that when it came to the detail of the various covenants, you didn't read those and you took those to be sort of legal matters and you didn't concern yourself with them?*
>
> *A. Possibly".*

69. Mr. Crosbie Jnr. is undoubtedly a very intelligent man. He was signing documents in a solicitor's office. The very fact that he had to attend a solicitor's office to sign documents would have carried its own message. The renunciation in question is clearly headed: "*RENUNCIATION OF RIGHTS TO A NEW TENANCY*". I find it impossible to accept that, in these circumstances, the defendant is entitled to contend that the legal advice recorded in para. 3 of the renunciation was not duly given to a defendant prior to its execution by Mr. Crosbie Jnr. on the defendant's behalf.

70. In the course of the hearing, a suggestion was made on behalf of the defendant that, in the circumstances of this case, it should have been advised not to execute a renunciation. It was also argued on behalf of the defendant that the only advice that would suffice for the purposes of satisfying the s. 17 (1) (a) (iiia) requirement was positive advice that it was in the tenant's interest to renounce and that there was no evidence here that went that far. However, no authority was cited in support of either of these propositions. Nor can I find any support for them in the text of s. 17 (1) (a) (iiia) of the 1980 Act (as amended by the 2008 Act). As noted previously, the Act provides no guidance as to the advice to be given. For the reasons already explained above, I believe that what the Oireachtas had in mind was that a tenant should be advised of the nature of the right which would otherwise be available to it in the absence of a renunciation so that the tenant will understand the significant effect any renunciation will have. I cannot see anything in the language of the sub-s. either to require that a tenant should be advised against entering into a renunciation or to require that the only form of advice that would work is positive advice that it is in the tenant's interest to renounce.

71. There is no suggestion, here, that the defendant or Mr. Crosbie Jnr. (who signed the renunciation on its behalf) were to be treated as vulnerable persons or that the renunciation constituted an improvident transaction. While it was suggested, in the course of argument, that the arrangements put in place for the defendant, as part of the overall arrangements entered into between Mr. Crosbie Snr. and his companies on the one hand and the plaintiff on the other, was not in the defendant's interests, that stopped well short of suggesting that the transaction was improvident. Moreover, the suggestion that the move to Promenade Road was not in the defendant's interest was never substantiated by any appropriate analysis or detailed argument. The defendant (and Mr. Crosbie Jnr. acting on its behalf) are very far removed from the positon of the vulnerable donor considered by Budd J. in *Gregg v. Kidd* [1956] IR 183 or by the Supreme Court in *Carroll v. Carroll* [1999] 4 IR 241. In these circumstances, I cannot see any basis for the contention that only positive advice to proceed will suffice or for the contention that the tenant must be advised not to proceed. Equally, I cannot see any basis to suggest that a tenant (who, in contrast to the donors in *Gregg v Kidd* and *Carroll v Carroll*, is a commercial entity capable of weighing where its business interests lie) must be advised not to renounce. No authority for that proposition has been identified. Nor was any principle of law or logic identified that would support the proposition.

72. As noted above, it was also argued that the advice given by William Fry to the defendant in relation to the renunciation could not be said to be "*independent*" as required by s. 17 (1) (a) (iiia) (as amended). It was argued that William Fry were "*conflicted*" in circumstances where they also acted for Mr. Crosbie Snr. and the other companies controlled by him. It was argued that there was a conflict between the interests of Mr. Crosbie Snr. and his other companies on the one hand (in seeking to come to terms with NAMA) and the interests of the defendant (which it should be noted was also controlled by Mr. Crosbie Snr. at this time) on the other. The suggestion was that Mr. Crosbie Snr. and his companies were anxious to finalise the arrangements with NAMA (which required the sale of the Tolka Quay Road premises) while, on the other hand, the defendant had a manifest interest in remaining either in the Tolka Quay Road premises or in some other premises within Dublin Port.

73. In my view, the defendant faces a significant difficulty in seeking to put forward this argument. Although a witness statement was furnished by Mr. Crosbie Snr., he was not ultimately called as a witness by the defendant. I therefore heard no sufficiently detailed evidence as to the nature of the arrangements between Mr. Crosbie Snr. and his companies, on the one hand, and NAMA, on the other. I am therefore not in any position to make any necessary findings of fact in relation to the alleged conflict of interest. The evidence of Mr Crosbie Jnr did not substantiate the existence of such an alleged conflict.

74. Furthermore, even if this evidential difficulty did not arise, I cannot see any legal basis for the defendant's contention. In my view, when the Oireachtas spoke of "*independent*" legal advice, it clearly had in mind advice which is independent of the landlord. In this context, s. 17 (1) (a) (iiia) must be seen in context. It is a provision that deals with the rights of a landlord and tenant *inter se*. It is situated within Part II of the 1980 Act. The entire of that part is concerned with the right to new tenancies as between landlord and tenant. Part II is not concerned with third parties at all. Thus, when s. 17 (1) (a) (iiia) refers to "*independent legal advice in relation to the renunciation*", it seems to me to follow that what the Oireachtas had in mind was legal advice in relation to the renunciation which is independent of the other party to the landlord and tenant relationship – namely the landlord. It is crucial that

the advice should be given by someone who is independent of the landlord so as to ensure that the tenant is not influenced to grant the renunciation as a consequence of advice that is given by a lawyer associated with the landlord. This is consistent with the approach which the courts take in a range of circumstances involving the validity of *inter partes* transactions. Thus, for example, in the case of improvident transactions, as the decision in *Carroll v Carroll* illustrates, the courts will frequently set such transactions aside where it is shown that the only advice available to the donor was advice from a solicitor who also acted for the donee.

Is the defendant estopped from contending that it did not receive independent legal advice?
75. In the circumstances, I am satisfied that the defendant had the benefit of independent legal advice within the meaning of s. 17 (1) (a) (iiia) of the 1980 Act (as amended). Lest I am wrong in that conclusion, I will, for completeness, also consider the alternative argument put forward by the plaintiff – namely that the defendant is estopped from contending that it was not in receipt of independent legal advice within the meaning of the subsection.

76. The plaintiff relies on two species of estoppel for this purpose namely estoppel by convention and estoppel by representation. The nature of both forms of estoppel was addressed by Charleton J. in the Supreme Court in *Ulster Investment Bank Ltd v. Rock Rohan Estate Ltd* [2015] 4 I.R. 37. In that case, Charleton J., at p. 52, endorsed the explanation of estoppel by representation given in the 32nd edition of *Snell* where the author stated at para. 12 – 009:-

> *"Where by his words or conduct one party to a transaction freely makes to the other a clear and unequivocal promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by the other party to have that effect, and, before it is withdrawn, the other party acts upon it, altering his or her position so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it".*

77. At p. 53, Charleton J. explained that, where the estoppel alleged is based on a representation, it should be a relatively straightforward process to identify whether the relevant requirements have been met. On the same page, he also explained how estoppel by convention may arise. He said:-

> *"Where, … it is a matter of both parties proceeding on the basis of a clear common understanding, the mutual convention of the parties may suffice as a foundation for estoppel. Depending on the facts, estoppel may become operative in that situation, but only because of that common understanding. In Treitel's The Law of Contract, 13th Ed. (Sweet & Maxwell, 2011), at pp. 124 and 125, the editor sets out the law thus:*
>
> > *'3.094. Estoppel by convention may arise where both parties to a transaction act on an assumed state of fact or law, the assumption being either shared by both or made by one and acquiesced in by the other. The parties are then precluded from denying the truth of that assumption, if it would be unjust or 'unconscionable' to allow them (or one of them) to go back on it. Such an estoppel differs from estoppel by representation and from promissory estoppel in that it does not depend on any 'clear and unequivocal' representation or promise. It can arise where the assumption was based on a mistake spontaneously made by the party relying on it, and acquiesced in by the other party, though the common assumption of the parties, objectively assessed, must itself be 'unambiguous and unequivocal'".*

78. In this case, there was a clear representation made in para. 3 of the renunciation (quoted para. 62 above). The representation is quite clear in its terms that the defendant had received independent legal advice. Furthermore, the evidence of Mr. Colman was that he relied on the fact that the language of para. 3 was included in the renunciation. In the course of his direct examination he was asked about para. 3 of the renunciation:-

> *"Q Can you explain to the court from your perspective as a conveyancing solicitor, what's the importance of that paragraph in a renunciation?*
>
> *A. Well I suppose for the renunciation to be valid there has to be independent legal advice and you would expect either there to be a reference to who the solicitor providing the advice was or that they would countersign or witness the Deed of Renunciation.*
>
> *Q. Would a renunciation in writing be acceptable if it didn't contain that confirmation?*
>
> *A. Well you would probably need an additional document to back it up to say that I received independent legal advice, so arguably no, it's a prerequisite for a renunciation.*
>
> *Q. What reliance, if any, did you place on the fact that the renunciation in writing contained that statement?*
>
> *A.* Well that it is valid on the basis that there is (a) renunciation of the rights and (b) there is independent legal advice…." (Emphasis added).

79. This element of Mr. Colman's evidence was not explored on cross-examination. Understandably, the cross-examination focused on the series of errors in the document. He was also cross examined in relation to the covenant in the lease to execute a Deed of Renunciation. It was also suggested to him that William Fry were not in a position to give independent legal advice. In the course of his cross-examination, Mr. Colman suggested that the independent legal advice that is required to be given to a tenant is advice as to the effect of the renunciation. The following exchange also took place between counsel for the defendant and Mr. Colman:-

> *"Q. You see I am suggesting to you, Mr. Colman, that where a Deed of Renunciation renouncing rights which are essentially if (sic) ease of the landlord here, your client, that it would be good practice and I would suggest to you obligatory for the landlord to ensure that the renunciation, in terms of a renunciation, that the tenant got independent legal advice and executed the renunciation in a proper way.*
>
> *A. You know, I wouldn't see that as an obligation of the landlord. I disagree. I think there was a solicitor who purported to give independent legal advice and there was a confirmation that the rights that may arise are renounced and I would have understood on that basis that it was properly executed."*

80. No evidence was led by the defendant to substantiate the proposition that it was either obligatory or good practice for the landlord to take the steps outlined in the question put to Mr. Colman, on cross-examination, quoted in para. 79 above. I therefore have no contrary evidence to that given by Mr. Colman.

81. I have come to the conclusion that a clear case of estoppel by representation arises. In taking that view, I draw attention to the following: -

(a) In the first place, as I outlined above, a clear representation was made in para. 3 of the renunciation that independent legal advice was provided to the defendant.

(b) Secondly, the statements made in a document such as the renunciation were clearly intended to be acted upon by the recipient of the renunciation (namely the plaintiff). The renunciation was clearly put forward as a legal document signed by the defendant as required by the plaintiff in order to close the transactions contemplated by the contract entered into by Mr. Crosbie Snr. and his companies on the one hand and the plaintiff on the other.

(c) Thirdly, the evidence of Mr. Colman establishes that the representation that independent legal advice had been provided to the defendant was acted upon by the plaintiff.

(d) Fourthly, the insistence by Mr. Colman that the renunciation (containing this representation) should be available on closing of the transaction reinforces his evidence that the plaintiff required a renunciation in order to close the transaction.

(e) Having entered into the transaction on that basis, it would clearly be inequitable now to permit the defendant to resile from the representation made in expressed terms in para. 3 renunciations.

82. For the reasons outlined in para. 81, I am of the view that, even if I am wrong in the conclusion which I have reached in relation to the availability of independent legal advice, the defendant is estopped by its own representation (made in writing in para. 3 of the renunciation) from contending that it did not receive independent legal advice. In these circumstances, it appears to me to be unnecessary to consider the case made by the plaintiff based on estoppel by convention.

The plaintiff's alternative case to enforce clause 4.35 of the Lease

83. If I am wrong in the conclusions reached by me in relation to the interpretation of the renunciation, the availability of independent legal advice and the alternative conclusion reached by me in relation to estoppel, there is one further aspect of the plaintiff's case for possession that requires to be considered – namely the case for specific performance of clause 4.35 of the lease. The terms of that clause have already been quoted in para. 6 above. In summary, clause 4.35 contains a covenant on the part of the defendant to execute a Deed of Renunciation waiving any renewal rights "*in accordance with s. 47 Civil Law (Miscellaneous Provisions) Act, 2008".*

84. In response to this element of the plaintiff's case, the defendant makes two arguments as follows: -

(a) In the first place, the defendant maintains that clause 4.35 of the lease is caught by s. 85 of the 1980 Act and is therefore void;

(b) Secondly, the defendant submits that the plaintiff has lost the ability to rely on the covenant in circumstances where the plaintiff did not seek to rely on it until after it had exercised the break option in the lease.

85. I propose to deal with these arguments in reverse order. The second argument can be readily disposed of. In my view, the second argument ignores the provisions of clause 6.13 (h) of the lease which expressly provides that any termination under the break clause: "*shall be without prejudice to any right or remedy of either the Landlord or the Tenant in respect of any antecedent breach by the other of any of their respective covenants contained in this Lease".* In my view, clause 6.13 (h) makes very clear that any failure by the tenant (or by the landlord as the case might be) to comply with a covenant in the lease will be enforceable even after the termination of the lease pursuant to the break option. In this context, the obligation of the tenant (if it is enforceable) under clause 4.35 to execute a Deed of Renunciation is not dependent on any demand made by the landlord. It is a self-standing obligation to execute a Deed of Renunciation. The opening words of clause 4 of the lease makes clear that the tenant's obligations under the covenants which follow are to continue throughout the term of the lease. Thus, the obligation to comply with clause 4.35 continued throughout the term of the lease. It was not dependent upon a demand being made. Accordingly, on the assumption that clause 4.35 is enforceable, the failure of the tenant to comply with that obligation during the currency of the lease constituted an "*antecedent breach*" of the covenant contained in clause 4.35. If the covenant is a lawful covenant (an issue addressed below) it remained enforceable even after the exercise of the break option by the plaintiff and the expiry of the lease.

86. On the other hand, the argument made by the defendant in relation to s. 85 of the 1980 Act raises a significant issue. On its face, clause 4.35 of the lease requires the defendant to execute a Deed of Renunciation waiving any renewal rights in accordance with s. 47 of the 2008 Act. By its terms, on the execution of the lease, the defendant committed itself to executing a Deed of Renunciation come what may. This is the very basis on which the plaintiff has sought specific performance of the defendant's obligation under clause 4.35. However, s. 85 of the 1980 Act (as amended by s. 6 of the 1994 Act and s. 48 of the 2008 Act) expressly renders void (a) any provision of a contract excluding the application of the 1980 Act or (b) any provision which varies, modifies or restricts the application of the Act in anyway. The defendant argues that, in so far as it commits the defendant to execute a renunciation, clause 4.35 has the effect of excluding the application of those provisions of the Act dealing with the right to a new business tenancy. The clause, by its terms, does not make the renunciation conditional upon the provision of independent legal advice.

87. The defendant draws attention to the way in which s. 85 (2) of the 1980 Act (as substituted by s. 47 of 2008 Act) expressly provides that subs. (1) (i.e. the subs. which renders void any contractual provision excluding or restricting the application of the Act) does not apply to a renunciation referred to in s. 17 (1) (a) (iii) (as inserted by s. 47 of the 2008 Act). Thus, a renunciation which complies with the requirements of s. 17 (1) (a) (iii) of the 1980 Act is not void. However, the defendant argues that clause 4.35 of the lease cannot take the benefit of s. 85(2) in circumstances where it is not itself a renunciation which complies with the requirements of s. 17 (1) (a) (iii). In particular, clause 4.35, by its terms, constitutes a commitment by the defendant, given in advance of the receipt of legal advice, to execute a renunciation. The defendant accordingly argues that clause 4.35 cannot comply with the requirements of s. 17 (1) (a) (iii).

88. In my view, the argument made by the defendant has very significant force. I accept fully that, as Wylie observes in "*Landlord and Tenant Law*", 3rd Ed., 2014, at para. 30.26, the way in which the 2008 Act amendment drops any reference to "*prior to the commencement of the tenancy*" (which had appeared in the amendment made by the 1994 Act) means that a renunciation can be made at any time, i.e. before, at the time of, or after the grant of a tenancy. However, it seems to me to be clear from the terms of s. 17 (1) (a) (iiia) of the 1980 Act (as inserted by s. 47 of the 2008 Act) that the independent legal advice to be provided to the tenant must exist at the time of renunciation. This seems to me to follow from the language of the subsection which expressly refers

to: "*the tenant…* has received *independent legal advice in relation to the renunciation …*" (emphasis added). Moreover, the protection of independent legal advice would be of no benefit to the tenant if it were to be provided after the renunciation had been executed. As noted earlier, the underlying policy of the provision appears to be clear – namely that a tenant should be aware of the valuable right being renounced before renouncing that right.

89. It might, of course, be said that there is no reason why the advice could not be given before the formal renunciation is executed by the defendant pursuant to clause 4.35. However, that would seem to entirely undermine the policy of the Act. By committing the tenant to renounce, clause 4.35 could plainly have the effect that a tenant would lose the right to a new tenancy before the tenant has had the benefit of any independent legal advice as to the nature of the right to be renounced. It would reduce the requirement that the tenant should have the benefit of independent legal advice to a purely formal step. The tenant would be committed to executing the deed of renunciation irrespective of the advice subsequently given and irrespective of whether the tenant had understood (prior to the execution of the lease) the valuable right that would otherwise be available in the event that the conditions for the entitlement to a new tenancy were satisfied.

90. I am very conscious that, in circumstances where the renunciation has become the main plank of the plaintiff's case, the issue in relation to the enforceability of clause 4.35 was not addressed extensively in the plaintiff's argument. I am also very conscious that, in light of the view which I have formed in relation to the renunciation, any view I express on this issue is strictly *obiter*. Subject to those very important qualifications, it seems to me that the argument of the defendant in relation to this aspect of the case is correct. On the basis of the arguments which I have heard, it seems to me that clause 4.35 is caught by the prohibition contained in s. 85 (1) of the 1980 Act. It is clearly a provision which restricts the rights of the defendant under the 1980 Act and s. 85 (1) therefore *prima facie* applies. In circumstances where it cannot itself be said to constitute a renunciation which complies with the requirements of s. 17 (1) (a) (iiia) of the 1980 Act, it does not seem to me to have the benefit of s. 85 (2). In those circumstances, it must follow that clause 4.35 is void and unenforceable.

91. I do not believe that it is necessary to deal with the plaintiff's alternative argument, based on estoppel principles, in relation to clause 4.35. If clause 4.35 is void under s. 85 (1) of the 1980 Act, I cannot see any basis on which estoppel could be said to arise. If I am right in my view that clause 4.35 of the lease is void, then the lease must be interpreted as though clause 4.35 did not exist within it. In those circumstances, the argument made by the plaintiff that clause 4.35 estops the defendant from claiming a new tenancy in the premises must, of necessity, fall away.

92. The view set out in para. 90 above is, however, of no avail to the defendant. For the reasons stated earlier in this judgment, I am of opinion that the plaintiff is entitled to rely on the renunciation which was in fact executed after the necessary legal advice had been given. It follows that the plaintiff must also be entitled to an order for possession of the Promenade Road premises.

The covenants to repair

93. In addition to the claim for possession, the plaintiff also seeks to enforce the repairing covenants in the lease. In its statement of claim, its amended statement of claim and its re-amended statement of claim in the possession proceedings, the defendant relies on clause 4.6, 4.7 and 4.8 of the lease in support of its contention that the defendant is in breach of its repairing obligations under the lease. The plaintiff contends, on the basis of a report from Mr. Scott, that it has sustained damages of the order of €307,479.24 (inclusive of estimated professional fees) arising out of the alleged failure by the defendant to honour its repairing obligations. The single largest element of this claim relates to the concrete hardstanding (i.e. the concrete surface of the yard contained in the Promenade Road premises). The amount claimed in respect of this item is €115,830.00. It is alleged that the concrete hardstanding has been allowed to fall into a poor state of repair due to the operations of the defendant.

94. Before addressing the complaints made by the plaintiff, it is necessary to consider the nature of the repairing obligation imposed on the defendant under the lease. In this context, the language of clauses 4.6, 4.7 and 4.8 is important. Insofar as clause 4.6 is concerned, it contains a covenant on the part of the defendant to:-

> *"…to keep clean and tidy and to maintain, repair, replace and reinstate and to put into and keep in good order repair and condition the interior and exterior of the Demised Premises which shall include the obligation to rebuild the entire or any part of the buildings on the Demised Premises and every part of it and any additions, alterations and extensions to it including, without derogating from the generality of the foregoing, the roof, structure, drains, foundations, walls…".*

95. However, as the defendant has emphasised in the course of the hearing, this clause is not unqualified in its terms. The final sentence in clause 4.6 (a) is important:-

> *"Notwithstanding the above the Tenant shall not be obliged to put the Demised Premised (sic) into any better condition than evidenced in the Condition Survey to be carried out by the Landlord within eighteen months of the Term Commencement Date and to be appended to Schedule 6 hereto".*

96. The final sentence of clause 4.6 (a) must be seen against the backdrop of the condition of the premises at the time the defendant took the lease. Although the plaintiff had agreed to spend €100,000 on the premises, they were nonetheless in a very rudimentary state. Furthermore, no work was intended to be done on the surface of the concrete hardstanding which, from photographs which were produced at the hearing, was already significantly cracked at this time. The last sentence in clause 4.6 (a) was therefore clearly included to provide some measure of protection for the defendant as incoming tenant so as to ensure that it should not be required, as a consequence of the ordinary legal effect of a repairing covenant, to carry out works to the existing premises which would effectively involve an improvement of the premises over and above their pre-existing state of repair. As Buckley L.J. explained in *Lurcott v. Wakely* [1911] 1 KB 905 at pp. 923-924 (a case discussed by the Supreme Court in Groome *v. Fodhla Printing Company Ltd.* [1943] I.R. 380) a common form repairing covenant can operate to require a tenant, in effect, to improve the demised premises through the carrying out of necessary repairs. As he said:

> *"Repair always involves renewal; renewal of a part; of a subordinate part. A skylight leaks; repair is effected by hacking out the putties, putting in new ones, and renewing the paint. A roof falls out of repair; the necessary work is to replace the decayed timbers by sound wood; to substitute sound tiles or slates for those which are cracked, broken or missing; to make good the flashings, and the like. Part of a garden wall tumbles down; repair is effected by building it up again with new mortar, and, so far as necessary, new bricks or stone. Repair is restoration by renewal or replacement of subsidiary parts of a whole….".*

97. It should be noted that the plaintiff accepts that no condition survey was ever carried out. As a consequence, there was never anything appended by way of Schedule 6. The obligation to carry out the condition survey was clearly placed by clause 4.6 (a) on the plaintiff as landlord. That is clear from the language quoted above. The failure of the plaintiff to carry out such a condition survey

is of some importance in circumstances where the plaintiff clearly bears the burden of proof insofar as this element of the case is concerned. It is for the plaintiff to establish that the defendant is in breach of the covenant to repair.

98. Although clause 4.7 is also relied on by the plaintiff, it did not feature significantly in the course of the hearing. Under clause 4.7, the defendant is under an obligation to keep the Promenade Road premises in a condition fit for use and in a condition compliant with all relevant Health and Safety regulations. In the closing submissions made on behalf of the plaintiff, the obligation under clause 4.7 was treated in the same way as the obligation which arises under clause 4.6 (a) and clause 4.8. Furthermore, the obligation imposed by each of those clauses was collectively characterised (on p. 47 of the transcript on Day 6) as an obligation to "*keep the premises in repair, in the state of repair that they were in at the commencement of the demise*". In these circumstances, it does not seem to me to be necessary to analyse the language of clause 4.7 any further.

99. The plaintiff placed significant reliance on clause 4.8 (a) which provides as follows:-

> *"At the expiration or sooner determination of the Term to quietly yield up the Demised Premises to the Landlord in such good and substantial repair and condition as shall be in accordance with the covenants on the part of the Tenant in this Lease…".*

100. Again, the language of clause 4.8 (a) is not unqualified. It will be seen that the obligation to yield up the premises in good and substantial repair is qualified by the words: *"As shall be in accordance with the covenants on the part of the Tenant in this Lease".* Accordingly, the obligation in clause 4.8 (a) is no greater than the obligation imposed by clause 4.6 (a) under which the tenant is not obliged to put the Promenade Road premises into any better condition than evidenced in the Condition Survey to be carried out within eighteen months of the commencement of the terms of the Lease.

101. In the course of his evidence, Mr. Kennedy conceded that there had been a failure to carry out a condition survey as envisaged by clause 4.6 (a) of the lease. He had no explanation as to why it was not carried out. When Mr. Barry subsequently gave his evidence he also acknowledged that no condition survey had been carried out. However, he drew attention to a number of photographs that had been taken on 26th October, 2011 after the previous tenant (Heatons) had vacated the Promenade Road premises. He also drew attention to a number of other photographs that had been taken on 4th February, 2013 during the course of the carrying out of the works to the value of €100,000 prior to the defendant taking up occupation of the premises.

102. However, these photographs (such as they are) fall far short of a condition survey. Furthermore, the quality of the photographs is extremely poor. A significant number of the photographs are so dark and indistinct as to be virtually indecipherable. Unfortunately, the photographs were not taken (or arranged) in any methodological way. They do not record every aspect of the condition of the premises either in October 2011 or in February 2013. Nonetheless, the photographs give some impression of the state of the premises prior to its occupation by the defendant. Thus, for example, a photograph taken on 26th October, 2011 at 10.43 a.m. (regrettably no steps were taken by the plaintiff to number the photographs for identification purposes) shows the very rudimentary nature of the corrugated iron sheds along one side of the premises. They are clearly of a very basic nature. The same photograph shows that the concrete hardstanding was already significantly cracked as of 26th October, 2011. It is important to keep in mind in this context that no work was done to the concrete hardstanding as part of the works carried out prior to occupation of the premises by the defendant.

103. Similarly, a photograph taken at 10.43 a.m., on the same day (with a portacabin in the background) shows the concrete hardstanding with several potholes which are partially filled with water. In circumstances where the foreground of the photograph is in the shade (and is accordingly indistinct) it is difficult to say anything more about the surface of the concrete in that area of the yard. However, a photograph taken of a wider area on the same day at 10.42 a.m. (with sheds on the right hand side of the photograph and the office building and entrance gate in the background) again shows many puddles in an expansive area of the concrete hardstanding shown. This photograph also suggests that the area of concrete in the vicinity of the entrance gate and the office building is already significantly cracked. There are also areas of cracking in the middle distance to the left hand side of the photograph. Regrettably, the foreground of the photograph is so dark and indistinct as to be of no assistance.

104. There is a further photograph taken at 10.50 a.m. on 26th October, 2011 which shows the concrete hardstanding in the foreground with the corrugated iron sheds in the background and an estate motor car. The photograph is very dark and indistinct. However, one of the striking features of the photograph is that it shows the concrete hardstanding laid out in largely rectangular sections with significant gaps between each section. It also shows extensive cracking in the concrete hardstanding in the right foreground of the photograph.

105. A somewhat better quality photograph was taken at 10.52 a.m. on the same day. It shows a view of the concrete hardstanding looking towards the office building with the entrance gates to the premises on the right hand side of the photograph. In the only well-lit section of this photograph (in the right foreground) one can see the concrete hardstanding with substantial and extensive cracking. This is consistent with what is seen of the hardstanding shown in the photograph taken at 10.42 a.m. on the same day (discussed in para. 103 above). There also seems to be cracking in the concrete hardstanding in the left foreground of the photograph but it is difficult to be certain of this. What is clear is that even in this section of the yard, the surface is very uneven as confirmed by the large puddle of water in the immediate left foreground.

106. Insofar as the February 2013 photographs are concerned, their quality is, again, very poor. There is one photograph taken at 11.04 a.m. on 4th February, 2013 (again, regrettably, the photographs were not numbered for identification purposes by the plaintiff) which shows the area of the concrete hardstanding immediately adjacent to the entrance gate to the yard. The surface is extremely pitted and there are also significant cracks.

107. A photograph taken at 10.08 a.m. on 4th February, 2013 shows the sheds in the background. This element of the photograph is well lit. Although work had been done to the sheds, it is very much of a patchwork nature and the fundamental condition of the sheds (as basic corrugated iron structures) largely remained the same. The foreground (which unfortunately is quite dark) shows some of the concrete hardstanding. Again, it is noteworthy that the photograph shows (particularly on the right hand side where it is reasonably well lit) very significant and extensive cracking in the concrete hardstanding.

108. There is a further photograph taken at 10.46 a.m. on 4th February, 2013 which shows some panels of corrugated iron which had been replaced apparently as part of the works carried out by the plaintiff but it is clear that only occasional panels were replaced. The overall appearance of the corrugated shell of the sheds remains very untidy and rudimentary.

109. Some emphasis was placed by the plaintiff on a photograph taken at 10.58 a.m. on 4th February, 2013. This shows an area of low bund walls with an area of the concrete hardstanding in the background and the corrugated iron sheds in the distant background.

The section of the concrete hardstanding in the foreground (while appearing to be extensively pitted) does not exhibit the same level of cracking as can be seen in some of the photographs discussed above. However, it could not conceivably be suggested that this photograph is representative of the state of the yard as a whole. In the first place, it is only one section of the concrete hardstanding which is shown clearly. Most of the concrete hardstanding shown in the photograph cannot be seen clearly at all. Secondly, the remaining photographs (discussed above) convey a different picture of the state of the concrete hardstanding as of 2011 and 2013.

110. Moreover, when the plaintiff's expert, Mr. Scott came to give his evidence, there was no corresponding photograph to that taken on 4th February, 2013 (taken at 10.58 a.m.) showing the same location. In fact, notwithstanding Mr. Barry's evidence that the photographs of 2011 and 2013 were intended to convey some picture of the state of the premises prior to their occupation, no attempt was made on behalf of the plaintiff to co-relate the photographs taken in 2018 with the photographs taken in 2011 and 2013. It would have been a very simple matter for the plaintiff to arrange that up to date photographs would be taken of the same locations and from the same angles as the photographs taken in 2011 and 2013. Yet, this very obvious and basic step was not taken. As a consequence, it is impossible to conclude that any one area of the concrete hardstanding (or indeed of the corrugated iron cladding) is in a worse condition now than it was when the defendant first occupied the premises.

111. Mr. Scott took a number of photographs in the course of his inspection of the premises in 2018. They show extensive cracking of the hardstanding. They also purport to note, for example, that there are "*excessive gaps between concrete hardstanding slabs*". However, the very same gaps are evident in the photograph taken at 10.50 a.m. on 26th October, 2011 as described in para. 104 above. These gaps in the hardstanding clearly existed at the time the defendant took up occupation of the premises and appear to have been part of the design of the hardstanding.

112. Insofar as the cracking in the concrete hardstanding is concerned, the defendant's witnesses were entirely frank that the cracking is likely to have increased since the defendant took up occupation. This was accepted by Mr. Crosbie Jnr., by Mr. John Foskin, the defendant's transport manager and also by Mr. Val O'Brien, the surveyor, called as an expert witness by the defendant. Mr. O'Brien's evidence, on Day 4, was very stark. He explained that a cracked concrete surface is likely to crack further the more it is used. His evidence was as follows:-

> *"…if you have cracked concrete hardstanding, any form of crack, cracked roadway and you drive across it, every time you drive across it, particularly heavy vehicles it can only crack more. There was some reference I noticed in the transcripts to concrete rocking in places underneath the foot. If you've a cracked surface of course it's going to rock. It would have been rocking back in 2013. But drive a lorry across it once or twice and that big fragment is going to go into two or three fragments and drive across it again it's going to go into more. It will eventually end up in dust. It's inevitable."*

113. In the course of his cross-examination, it was suggested to Mr. O'Brien that the broken bits of concrete can be taken out and replaced with new concrete. The relevant exchange between counsel for the plaintiff and Mr. O'Brien on Day 4 is illuminating:-

> *"Q. so if we take for example just a residential building that's an old building, that's one leaf wall rather than a cavity wall and you're putting that into a state of repair, you can put it into a state of repair with a single leaf wall, you don't have to knock it down –*
>
> *A. Agreed.*
>
> *Q. – and build a new cavity wall.*
>
> *A. I agree.*
>
> *Q. And even though it doesn't meet modern standards in terms of comfort or anything like that, you will repair the wall as is.*
>
> *A. Agreed in that context, yes, but you can't do that with a yard. It is completely broken.*
>
> *Q. And you can take out the broken bits and you can put in replacement concrete?*
>
> *A. To break again?*
>
> *Q. Well, it will break again in the future but that's to put it back into the state and condition it was.*
>
> *A. There is no loss to the landlord. Taking out something to put something else that is going to break up the next time a lorry drives on it? Not going to happen. Complete and utter waste of money. The landlord wouldn't even benefit from it. The landlord does not gain by somebody putting in substandard concrete. Of course you could cut out and repair the cracks. You could take – what Stephen [Scott] has allowed for is not all the yard, he has probably allowed for too much but you could break out – there is two areas where it is particularly badly cracked, you could break those areas out and put in a bit of concrete, yes, you could, of course you could.*
>
> *Q. And Mr. Scott is not suggesting that the entire yard is being replaced. As you say, he has identified the bad portions of the yard.*
>
> *A. Yes, but I would suggest on any person's money, €89,000 putting concrete into a hole that is going to crack doesn't make sense. It doesn't make any form of sense and I don't think it is the intent of the lease or the intent of the law to support that sort of illogical expenditure in terms of trying to, when there is already some lack of clarity about the degree of repair and the degree of cracking in the concrete before we started."*

114. Although Mr. O'Brien was criticised (with some justification) for taking a somewhat adversarial approach in some aspects of his evidence, this exchange between counsel and Mr. O'Brien highlights a fundamental difficulty with this part of the plaintiff's case. In light of the photographs which exist from 2011 and 2013, it is undoubtedly the case that, at the time the defendant took up occupation of the Promenade Road premises, the concrete hardstanding was already significantly cracked, heavily pitted, and very uneven. While there may have been some areas where no cracking had occurred, I have not been provided with any evidence to identify those areas and to show that those particular areas have become cracked for the first time since the defendant first entered the premises. That evidence is singularly lacking. Bearing in mind the proviso to clause 4.6 (a) (quoted above) the plaintiff, if it is to

succeed in this element of its case, must prove what elements of the cracking that are seen in the hardstanding today have arisen since the defendant first occupied the premises. Having regard to the proviso to clause 4.6 (a) there is no basis on which the plaintiff can contend that it is entitled to have every crack in the hardstanding repaired by the defendant. As noted above, the plaintiff bears the burden of proof in demonstrating that the defendant is in breach of its covenant. If the defendant is to be held liable, the plaintiff would have to be in a position to identify which of the broken bits of concrete are due to the defendant's user of the premises rather than the pre-existing condition of the premises so that those particular items can be taken out and replaced with new concrete.

115. In my view, the plaintiff has wholly failed to prove which elements of the cracking in the concrete have arisen since the defendant took up occupation of the Promenade Road premises. Thus, notwithstanding the frank admissions by the defendant's witnesses that the cracking has increased since the defendant took up occupation of the premises, there is no mechanism by which the court, on the basis of the evidence available, can evaluate this element of the plaintiff's claims. As noted at the outset, it was for the plaintiff to prove the breach of covenant. Having regard to the final sentence of clause 4.6 (a), if the plaintiff is to succeed in relation to this element of its claim, the plaintiff must, in my view, prove the element of disrepair which has arisen over and above the state of disrepair of the premises at the time the defendant entered into occupation. Had the plaintiff carried out a condition survey it might have been in a position to prove this element of the case. Similarly, if the plaintiff had taken the simple expedient of taking a comprehensive suite of photographs of the premises immediately prior to the defendant moving in, the plaintiff might have been in a position to establish a yardstick against which the alleged state of disrepair of the concrete hardstanding might have been assessed. All the plaintiff would have to do, in such circumstances, would be to present a new suite of photographs of precisely the same locations (taken from the same angles) which would indicate to the court and to the defendant the extent of any alleged breach of the obligation to repair insofar as the concrete hardstanding is concerned. As noted above, the plaintiff had some photographs from 2011 and 2013 but they were far from complete and, moreover, they were of limited assistance in circumstances where they were of such poor quality. Furthermore, as noted above, the 2018 photographs that were taken were not taken by reference to the same locations and the same angles. Thus, even if the 2011 and 2013 photographs had been of better quality, it would still have been difficult for the plaintiff to prove this element of its case.

116. Quite apart from the considerations identified in paras. 114 to 115 above, I am also concerned about the futility of any exercise of repairing the concrete hardstanding. The evidence of Mr. O'Brien was very strong in this context. His position was entirely understandable. In this context, it seems to me that the exercise would be futile for two reasons. In the first place, it is impossible to understand how a tenant could put a cracked pavement into the condition it was in five years previously when it was already significantly cracked at that time. Having regard to the final sentence of clause 4.6 (a), if the surface of the yard was broken up at the time the defendant commenced occupation (which it was) the fact that it may be more broken up now does not require the defendant to put in place a smooth and even surface that never existed in the first place. In this context, it is very important to bear in mind that the repairing covenant here is qualified in a way that was absent in the repairing covenant considered by the Supreme Court in *Groome v. Fodhla Printing Co. Ltd.* [1943] IR 380 (on which the plaintiff sought to place significant reliance). If the final sentence in clause 4.6 (a) did not exist, I could well see that a tenant might have an obligation to replace the concrete surface of the yard even if it had been cracked at the time the tenant took up occupation. It is clear from the judgement of O'Byrne J. in *Groome* (with which Maguire C.J. agreed) at p. 401 that he took the view that this followed from the decision in *Lurcott v. Wakely* (from which the extract from the judgment of Buckley L.J. quoted in para. 96 above has been taken). Crucially, however, there was no qualification on the repairing covenant in either *Lurcott v. Wakely* or in *Groome v. Fodhla Printing Co*. In both cases, the repairing covenant was in fairly standard terms. It did not contain a qualification of the kind set out in the final sentence of clause 4.6 (a) of the Lease in this case.

117. The works which the plaintiff contends are necessary to the concrete hardstanding are also futile in a different sense. In this context, it is clear from the evidence of Mr. Kennedy on Day 2 of the hearing, that it is intended to subsume the Promenade Road premises into a bigger yard to be used by a customer of the plaintiffs. It is also clear from Mr. Kennedy's evidence on the same day that it is not intended to retain the corrugated iron sheds. If the sheds are to go, and if the yard is to be subsumed into an adjoining premises, it is inevitable that works will have to be done to ensure that there is a similar surface in both premises at a similar level or height. In those circumstances, in my view, it is simply not credible that the current surface of the Promenade Road premises would be retained (even if it was not cracked to the extent it is now or to the extent it was prior to occupation by the defendant). Under cross-examination, Mr. Kennedy said that the intention was that the yard (when subsumed into the adjoining premises) would be used for trailers. Mr. O'Brien gave evidence that the appropriate surface that would be required for a modern yard fit to take substantial lorries would be either clause 804 aggregate or a 300mm reinforced concrete structure designed by a structural engineer. In the course of his evidence, Mr. Barry, the retired Estates Manager of Dublin Port, confirmed that clause 804 aggregate would be standard for other transport operations in the Port. While Mr. Barry sought to suggest that a concrete surface was more "*high-spec*" than clause 804, this is manifestly not so in the case of the hardstanding here as borne out by the photographs taken in 2011 and 2013. The concrete surface (unsupported by any reinforcement) was plainly unsuitable for the purposes of the heavy duty use to which it was put by the defendant and, before it, by Heatons, the timber merchants.

118. In light of the considerations identified in paras. 116-117 above, I have come to the conclusion that even if the plaintiff had been in a position to prove the breach of the repairing covenant in relation to the concrete hardstanding, it would be inappropriate to award any damages to the plaintiff in respect of that breach in circumstances where (a) as a consequence of the findings made earlier in this judgment, the plaintiff will recover possession of the premises and (b) it is apparent that the concrete hardstanding will not, in fact, be used in the future.

119. I have reached a similar conclusion in relation to the corrugated iron sheds. While Mr. Crosbie Jnr. frankly acknowledged that some damage had been done to the corrugated iron sheds while the defendant has been in occupation of the premises, in circumstances where the plaintiff is to recover possession of the premises, it would serve no useful purpose to direct that the defendant should repair the corrugated iron sheds in the manner suggested by Mr. Scott at a cost of approximately €15,000 (excluding professional fees). Under cross-examination, Mr. Kennedy conceded that the plaintiff did not intend to retain the sheds. In these circumstances, it would be wholly inappropriate to direct the defendant to compensate the plaintiff for the damage done to sheds which the plaintiff has no intention of using in the future.

120. In the course of his evidence, Mr. Crosbie Jnr. also conceded that the condition of the office had deteriorated to the extent that some relatively minor repairs and redecoration are required. In this context, however, I note that Mr. Kennedy, under cross-examination indicated that no decision had yet been made by the plaintiff to retain the office. His evidence was that, within the plaintiff, a debate about the future of the office building was ongoing. This requires to be clarified.

121. In Mr. Scott's report, there are sundry other items which are raised. However, when Mr. O'Brien came to present his report, he indicated that these were matters that could readily be dealt with by negotiation and agreement between the surveyors for the parties. This led to the plaintiff, on the day prior to the commencement of the trial, to (somewhat belatedly) suggest to the defendant that such discussions should take place. An application was subsequently made to me on the first day of the hearing that

the damages issue should be separated from the question of liability on the basis that it was hoped (but this could not be guaranteed) that, if discussions took place between the surveyors, the issue of damages would not trouble the court. That application was opposed at the time by counsel for the defendant. I can well understand why counsel for the defendant should take that course given the very late suggestion made by the plaintiff. In circumstances where the case had been fixed for hearing for a period of six days and where the plaintiff's suggestion would inevitably mean splitting the trial with no guarantee that the damages issue would not require a court resolution, I took the view, in light of the defendant's opposition to the application, that the most appropriate course was to direct that the trial should proceed in the usual way.

122. With regard to the sundry items that arise in Mr. Scott's report, it strikes me, having now had an opportunity to consider all of the evidence, that these should be well capable of resolution between the parties. There is, clearly, not the same level of dispute between the parties in relation to these items as there was in relation to the concrete hardstanding and the corrugated iron sheds. I therefore believe that discussions should take place between the surveyors with a view to amicably resolving any issues which arise in relation to such items. Obviously, in light of the findings made by me earlier in this judgment, the defendant will now also have to vacate the premises. It will therefore be necessary for the defendant to remove all of its fixtures and fittings in the usual way. Again, it strikes me that it would make sense for the surveyors to discuss this issue also with a view to agreeing how this can be best achieved. If any further dispute arises between the parties either in relation to the sundry items mentioned above or in relation to the removal of fixtures and fittings, the matter can be re-entered before me.

The remaining covenants in issue

123. In the injunction proceedings, the plaintiff claimed that the defendant was in breach of a significant number of covenants in the Lease. These can, conveniently, be divided into three categories: -

(a) Covenants relating to environmental matters;

(b) Covenants as to user; and

(c) Covenant as to storage of fuel on the premises.

124. Insofar as the first of those categories is concerned (namely environmental matters) the principal ground of complaint made by the plaintiff related to the mistaken understanding of the plaintiff that the defendant was engaged in some form of manufacturing or processing of plastics on the premises. In addition, following a detailed inspection of the premises by Mr. Shane Herlihy of Environmental Risk Solutions Limited, the plaintiff also identified a number of other concerns. Those concerns were addressed by the defendant following Mr. Herlihy's inspection of the premises. On Day 5 of the hearing, Mr. Crosbie Jnr. very properly accepted that a clean-up had been required and had been carried out. In turn, on Day 6 of the hearing, counsel for the plaintiff, in his closing submissions, very helpfully accepted that the concerns of the plaintiff had been remedied and that there was nothing further that required the intervention of the court in relation to the environmental covenants. It is therefore unnecessary to make any findings in relation to the issue.

125. Insofar as user is concerned, the complaint made in the statement of claim delivered in the injunction proceedings, focused on the fact that fuel is stored on the premises without a licence which, it is alleged is contrary to clause 4.14 (a) of the Lease and also contrary to the Dublin Port and Docks Board Bye Laws. No complaint was made about storage of goods.

126. Notwithstanding the terms of the statement of claim, the plaintiff, in the course of the hearing, also complained that the defendant was, in breach of its covenant as to user, also storing the personal effects of Mr. Crosbie Jnr. or other directors of the defendants. In this context, the only form of storage which is permitted under the Lease is the temporary handling storage and shipment of goods on behalf of direct customers of the defendant in its business as a haulier of goods either imported or exported through Dublin Port. The plaintiff maintained that, accordingly, by storing materials of the directors on the premises, the defendant was in breach of this covenant. In the course of the cross-examination of Mr. Crosbie Jnr., he accepted that such material was stored on the premises. When it was put to him that this was not in compliance with the user clause, his evidence was: -

> *"I think you might be splitting hairs there with respect because when we emptied out of our other facility, Tolka Quay Road, … took then and they have been sat there since. I suppose technically you are probably correct but perhaps a bit harsh."*

127. In the course of his closing submissions, counsel for the plaintiff very wisely acknowledged that the plaintiff's claim in relation to the storage of goods is not a significant issue. I agree. Not only was the matter not pleaded, but it is also clear that such storage was not injurious to the interests of the plaintiff in any way. In this context, the covenant in respect of user appears to have been directed towards the storage for commercial purposes of goods and materials on the premises which might be unconnected with the import and export of goods through the Port. If there was a breach in this case, it was a very technical kind and is not one which, in my view, should result in any relief in favour of the plaintiff.

128. The remaining complaint of the plaintiff relates to the storage of fuel on the premises. For this purpose, the plaintiff relied upon clause 4.25 of the Lease which explicitly provides that the defendant should not keep or store any petrol, oil, gas or similar flammable material for any purpose save in accordance with a licence from the plaintiff. In the course of the hearing, the defendant acknowledged that it was storing fuel on the premises for its own purposes. Mr. Crosbie Jnr. gave evidence that he mistakenly understood that a licence was not required in those circumstances. In the course of his cross-examination on Day 5 of the hearing, he explained the position as follows: -

> *"…there was an issue in the Tolka Quay Road site where Harry [Crosbie] and Auke [Van der Werff] were bunkering fuel to third parties and it was a big issue. So in Storecon we were bunkering fuel, we were selling it to third parties. My mistake I made was that I did not think we needed it [in the Promenade Road Premises] and as soon as this process is over in whatever form it takes, I will be applying to rectify that and I do apologise to the Port for that."*

129. The unauthorised storage of fuel by a tenant would ordinarily be a very serious matter. A landlord will wish to be assured that the storage of flammable material is undertaken safely and there are obvious risks for a landlord if appropriate precautions are not taken by the tenant. However, in this case, it was conceded by Mr. Barry, in the course of his cross-examination, that he could see no obvious reasons why the defendant would not receive a licence for the storage of fuel. Thus, although there has been a breach of covenant in relation to the storage of fuel as a consequence of the failure of the defendant to obtain a licence for that purpose pursuant to the Petroleum Bye-Laws of the Port, the breach is one which is capable of being readily remedied. In any event, I have not been asked by the plaintiff, at this point, to grant any relief in relation to this breach of covenant. In the course of his closing submissions, counsel for the plaintiff noted the apology made by Mr. Crosbie Jnr. and his undertaking to remedy the situation and

indicated that he might wish to address the court further on this issue after delivery of this judgment.

The defendant's counterclaim
130. In its defence and counterclaim, the defendant counterclaimed for an order declaring that it is entitled to a new tenancy in the premises under the 1980 Act. It also sought damages including punitive, aggravated and/or exemplary damages. In light of my findings in relation to the renunciation of rights, the counterclaim as to the defendant's entitlement to a new tenancy must fail and be dismissed.

131. In so far as the defendant claims damages, the basis for that claim has not been adequately explained either in the pleadings or in the case made at trial. The only basis pleaded was that, in circumstances where the defendant was alleged to be entitled to a new tenancy, the proceedings were incapable of delivering any benefit to the plaintiff and were accordingly an abuse of process. However, in light of my findings in relation to the renunciation, the claimed basis falls away and I must therefore dismiss the defendant's damages claim.

132. While I have criticised several aspects of the manner in which the plaintiff has conducted these proceedings, this is an issue which may have some relevance to costs. On the basis of the counterclaim, as pleaded, I cannot see any basis on which it sounds in damages.

Conclusion
133. In light of the findings made earlier in this judgment, I am of opinion that the plaintiff is entitled to recover possession of the Promenade Road premises from the defendant. This follows from my finding that the defendant has executed a valid renunciation of any right it might otherwise have under the 1980 Act to a new tenancy. In circumstances where the defendant is not contesting the exercise of the break clause in the lease, the lease has come to an end and the defendant, in the absence of a right to a new tenancy, must deliver up possession of the premises to the defendant. I will hear submissions from the parties as to an appropriate timeframe for that purpose.

134. In view of the findings I have made with regard to the concrete hardstanding and the corrugated iron sheds, I will dismiss the plaintiff's claim for damages for breach of covenant in respect of those items. Pending the holding of discussions between the parties' surveyors, I will defer making any further order in relation to the remaining elements of the plaintiff's claim for damages for alleged breaches of the repairing covenant.

135. I will also dismiss the plaintiff's claim in so far as it alleged that the defendant was carrying out any form of processing or manufacture of plastics on the premises. With regard to the remaining breaches of covenant alleged, I will make no order but I will, as requested by counsel for the plaintiff, give liberty to apply in relation to the fuel covenant.

136. To the extent that it may be necessary to do so, I will also hear the parties in due course in relation to costs.