Neutral Citation Number: [2007] IEHC 140

THE HIGH COURT

2006 155 SP

IN THE MATTER OF THE ARBITRATION ACT, 1954

BETWEEN

ANDREW MOFFAT

PLAINTIFF

AND
NOEL FRISBY AND PAUL GOOD

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 20th March, 2007.

Factual background

1. By a lease dated 16th August, 1999 made between Green Property Plc of the one part and the plaintiff of the other part (the Lease) Unit No. 22C, being part of Waterford Shopping Centre situate as Lisduggan, Waterford, was demised to the plaintiff for the term of twenty years from and including 1st July, 1999 at the initial rent, after the first six months, of €15,000 per annum. The lease contained provision for the review of the rent at five-yearly intervals. The first review period commenced on 1st July, 2004. The rent review clause provided for measures whereby the revised rent for a review period might be agreed between the lessor and the lessee. It also provided that, in default of agreement, the ascertainment of the "deemed market rental value" should be referred to the arbitration of a single arbitrator. The mechanism for appointment of the arbitrator provided for in default of agreement between the lessor and the lessee was that he or she was to be nominated on the joint application of the lessor and the lessee, or, if either of them should neglect within seven days on being requested so to do to concur in such application, then on the sole application of the other, by the chairman for the time being or acting chairman of the Society of Chartered Surveyors in Ireland (the Society).

2. By letter dated 30th June, 2003 from A & L Goodbody, solicitors, the plaintiff was notified that Waterford Shopping Centre had been sold to the first defendant, who thereby became entitled to the reversion on the Lease and the plaintiff's landlord.

3. Hamilton Osborne King (HOK), Estate Agents, Auctioneers and Valuers, acted for the first defendant in connection with the first rent review of Unit No. 22C. The rent review procedure in accordance with the lease was set in train by a Rent Notice served by HOK on the plaintiff on 13th January, 2004. The Rent Notice referred to the Lease and suggested that the landlord's interest was vested in "Frisby Construction". This error was repeated in subsequent notices, applications and correspondence. The plaintiff has characterised the error as a "false misrepresentation" and has submitted that it somehow adversely impacted on the efficacy of what the various documents were intended to achieve. While the first defendant's agents should have described him properly in the documents required under the rent review clause in the Lease, the fact is that the plaintiff has at all material times known the true identity of his landlord and that his landlord is the first defendant. In the circumstances, I consider the submission made by the plaintiff as being specious.

4. Through 2004 and 2005 despite negotiations the plaintiff and the first defendant's agents did not succeed in agreeing the revised rent. At the beginning of September, 2005 HOK asked the plaintiff to concur in an application to the Society to have an arbitrator appointed. On 20th September, 2005 the first defendant issued ejectment proceedings on title in the Circuit Court (South Eastern Circuit, County Waterford) (Record No. 534/05) against the plaintiff claiming, *inter alia*, to recover possession of Unit No. 22C. On 26th September, 2005 the plaintiff wrote to HOK stating that this effectively stopped the review until such time as the Circuit Court proceedings were finalised.

5. On 10th November, 2005 HOK applied to the Society to appoint an arbitrator. On the application form the name of the lessor was given as "Frisby Construction". The plaintiff has taken issue in relation to that description and he also has taken issue with the negative response to a question on the application form querying whether there were any issues, apart from the amount of the rent, which were in dispute and were likely to be raised. The existence of the ejectment proceedings was not disclosed. By letter dated 15th November, 2005 the Arbitration Officer of the Society wrote to the plaintiff, sending him a copy of the application form as submitted by HOK and enclosing a form for him to complete, which, if he had completed it, would have given him the opportunity to name individuals he considered to be unsuitable for appointment as arbitrator because of conflict of interest. The plaintiff did not return the form, but he contacted the office of the Arbitration Officer by telephone. He has averred that, in her absence, he left a detailed message on her voice mail advising her that the title was in dispute, that ejectment proceedings were before the Circuit Court and that, therefore, he was not in a legal position to proceed with an arbitration.

6. On 23rd November, 2005 the President of the Society appointed the second named defendant as arbitrator to determine the revised rent on Unit No. 22C in accordance with the provisions of the Lease. Subsequent to his appointment the second defendant endeavoured to carry out his duties as arbitrator. The plaintiff resisted those attempts, contending that his appointment was void because of the misdescription of the lessor and relying also on the existence of the ejectment proceedings. Eventually, after the second defendant had directed that the matter be dealt with by way of oral hearing, the plaintiff initiated these proceedings.

The proceedings

7. In these proceedings, which were initiated by special summons which issued on 20th April, 2006, the plaintiff claims the following reliefs:

> (1) an order setting aside the appointment of the second defendant as arbitrator under the Arbitration Act, 1954 (the Act of 1954); and
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> (2) an injunction restraining the first defendant from making further application to the Society in respect of Unit No. 22C pending the trial of –
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> > (a) the first defendant's ejectment proceedings (Record No. 534/05), and
> >
> > (b) proceedings initiated by the plaintiff on 12th May, 2005 in the Circuit Court (South Eastern Circuit, County Waterford, Record No. 242/05) by way of Landlord and Tenant Civil Bill, in which, as amended pursuant to an order of the Circuit Court made on 12th October, 2005, the plaintiff claimed, inter alia, relief against forfeiture, the first defendant having, at the time of the amendment, served three forfeiture notices dated 15th March, 2005, 12th May, 2005 and 29th July, 2005 respectively.

8. The grounds on which the plaintiff seeks the reliefs sought in the special summons, insofar as they can be gleaned from the special summons, are that the first defendant's contention that the Lease has been validly forfeited and no longer exists precludes him from relying on the lease and, in particular, on the rent review provision and the alleged "false misrepresentations" made to the Society in the first defendant's agent's application for the appointment of an arbitrator. In view of what I have stated earlier in relation to the misdescription of the lessor, it will be clear that I consider the latter ground to be lacking in merit and I do not propose to consider it further.

Interlocutory application
9. On 2nd May, 2006 the plaintiff issued a notice of motion seeking an interlocutory injunction pending the trial of these proceedings restraining the defendant from holding a hearing in relation to the arbitration for fixing the revised rent. On foot of that application this Court made an order on 15th May, 2006 in which the plaintiff's undertaking on oath as to damages was noted and it was ordered that pending the hearing of these proceedings the second defendant be restrained from acting as arbitrator in the arbitration. However, the second defendant was relieved from taking any further part in these proceedings.

The Circuit Court Proceedings
10. When the substantive proceedings came on for hearing in summary the position in relation to the Circuit Court proceedings was as follows:

> (1) There was a motion pending before the Circuit Court in the first defendant's ejectment proceedings (Record No. 534/05) seeking leave to discontinue the ejectment proceedings pursuant to the Rules of the Circuit Court and an order striking out the defence and counterclaim. The position adopted by the first defendant in this Court was that the defence and counterclaim for relief against forfeiture did not have to be pursued by the plaintiff in these proceedings because the first defendant in these proceedings was conceding that the Lease had not terminated by the forfeiture notices of 15th March, 2005, 12th May, 2005 or 29th July, 2005.
>
> (2) In relation to the plaintiff's Landlord and Tenant Civil Bill (Record No. 242/05) those proceedings were still pending in the Circuit Court. However, the civil bill appears to have been amended after the initiation of these proceedings on 16th June, 2006, pursuant to an order dated 22nd May, 2006, and an amended defence and counterclaim thereto had been delivered on 22nd September, 2006. In the amended defence and counterclaim the first defendant asserted that the lease was forfeited as a result of the service of a forfeiture notice, which I understand to be the forfeiture notice of 8th February, 2006 referred to later, and that the defendant was entitled to possession of Unit No. 22C. A declaration was sought that the plaintiff was not entitled to relief against forfeiture and, if necessary, an order for possession was sought.

11. This Court has been inundated with copies of pleadings, amended pleadings, notices of motion, affidavits, including affidavits of discovery, and exhibits relating to the two Circuit Court actions. As I understand the position, in particular on the basis of the affidavit sworn by the first defendant in these proceedings on 4th May, 2006, the position of the first defendant is that his ejectment proceedings (Record No. 534/05) were founded on forfeiture notices (the notices of 15th March, 2005, 12th May, 2005 and 29th July, 2005) which have been "waived" because of the contention of the plaintiff in these proceedings that when the forfeiture notices were served there were ongoing negotiations between the parties in relation to the revision of the rent, which the plaintiff contended amounted to a recognition of the Lease. The intention of the first defendant, as intimated in a letter of 20th January, 2006 to the plaintiff, was that his ejectment proceedings would be struck out by the Circuit Court on 7th February, 2006, but that did not happen because of the existence of the plaintiff's counterclaim seeking relief against forfeiture. The concession made by the first defendant is that prior to 8th February, 2006 the Lease had not been terminated by forfeiture because he has "waived" his entitlement. However, a fresh forfeiture notice was served on 8th February, 2006 and it is in respect of that forfeiture notice that the plaintiff seeks relief in his amendment to Landlord and Tenant Civil Bill dated 16th June, 2006 and, as I understand it, it is on foot of that forfeiture notice that the first defendant asserts that the Lease no longer exists.

12. I think it is important to emphasise that the Circuit Court has seisin, and is the arbiter, of all issues arising in the Circuit Court proceedings. I have striven in this judgment not to trespass on the jurisdiction of the Circuit Court and nothing in this judgment is to be taken as the expression of any view in relation to any such issues.

The core issue
13. Against that background, the core issue is whether, given that the first defendant asserts that the Lease is forfeited and that the plaintiff is not entitled to relief against forfeiture, and proceedings are pending in the Circuit Court to enforce the contended for forfeiture (Record No. 242/05), as a matter of law, the first defendant is entitled to operate the rent review clause to determine what the rent due from 1st July, 2004 should or would be. It was submitted on behalf of the first defendant that he is so entitled because the quantum of the revised rent is relevant whether the Circuit Court enforces the forfeiture or not. If the forfeiture is not enforced, it is relevant in the context of the continued existence of the Lease. If the forfeiture is enforced, it is relevant to the determination of the mesne rates to which the first defendant is entitled in respect of the plaintiff's continued occupation of Unit No. 22C since 1st July, 2004.

14. The plaintiff, who appeared in person, submitted that the first defendant was and is not entitled to pursue the revision of the rent in accordance with the Lease while seeking to enforce the forfeiture of the Lease.

The law: The parties' submissions
15.In the context of discussing the circumstances in which a lessee will be granted relief against forfeiture, the status of a lease in the period between the commencement of a lessor's action for possession and the determination of that action, and, in particular, the determination as to whether the lessee is entitled for relief against forfeiture, is considered in Wyle on Landlord and Tenant Law, 2nd Edition at para. 24.22 in the following passage which was relied on by counsel for the first defendant:

> "It is true that the issue of proceedings for recovery of possession technically determines the lease, so that thereafter the landlord cannot claim any further rent, but rather mesne profits, but in reality the operation of the lease is suspended only, depending on the outcome of any claim for relief by the tenant. If relief is refused the lease is treated as determining from the issue of possession proceedings and a claim for mesne profits to cover occupation by the tenant (in effect as a trespasser) from then until the landlord recovers actual possession can be maintained. If, on the other hand, relief is granted, the lease is treated as restored and so the rent and other payments under it can be claimed as if no forfeiture had occurred."

16. Counsel for the first defendant referred the court to a number of authorities, some of which are referred to in the footnotes in Wylie, as supporting the proposition set out in that passage. I propose considering the authorities chronologically.

17. The earliest is *Dendy v. Evans* [1910] 1 K.B. 263. There a head lessor issued a writ against the lessee to recover possession on the grounds that the head lease had been forfeited for breach of a covenant by the lessee to repair. The lessee had created an underlease. The assignee of the lessee had obtained relief against forfeiture of the head lease under s. 14(2) of the Conveyancing Act, 1881. The plaintiff assignee then brought an action against the defendant under-lessee for rent due under the underlease subsequent to the issue and service of the writ to recover possession by the head lessor. Having outlined the provisions of sub-s. (2) of s. 14, Cozens-Hardy M.R. stated as follows (at p. 269):

> "The ground on which the plaintiff sought relief has been disposed of by the order made by the Court under section 14. For all purposes, and as between all parties, rights and liabilities are absolutely unaffected by the circumstance that there was a breach of covenant and that there was a writ issued not followed by judgment or entry, and I cannot listen for one moment to the suggestion that the effect of this is merely to resuscitate the lease from the date of the order or to grant a new lease from the date of the order, leaving the underlease to perish, although the original cause of mischief, namely, the forfeiture by the lessee, has been absolutely and entirely got rid of. In my opinion that would be an unreasonable and unnatural construction, and I think Darling J. was quite right when he said in effect that the lease continued for all purposes; it is the original lease which continues, not a new lease; and, that being so, the derivative lease which was created out of the original lease has not ceased to exist, but is still a valid lease in respect of which the defendants are liable to the plaintiffs on the covenants."

18. The decision in *Dendy v. Evans* was followed by the Court of Appeal in *Driscoll v. Church Commissioners for England* [1957] 1 Q.B. 330. There the appellant tenant held a number of houses from the Church Commissioners under leases which restricted the use to a private dwelling house save with the written consent of the lessor. In 1949 the tenant applied to the Lands Tribunal pursuant to a statutory provision for an order discharging or modifying the restrictions. In 1952 the Church Commissioners issued writs claiming forfeiture for breaches of covenant. At the hearing of the landlord's action in July, 1956 the tenant appellant was granted relief on forfeiture subject to certain conditions. Prior to that, in May, 1956, the Lands Tribunal had refused the tenant's application. The tenant appealed that decision. On the appeal, the Court of Appeal had to consider a point taken on behalf of the Church Commissioners that the tenant had no *locus standi* in May, 1956 because of the existence of the writs for forfeiture. Denning L.J. dealt with this point in the following passage in his judgment at (p. 338):

> "I will mention one point at once, a technical point taken by Mr. Lamb on behalf of the Church Commissioners. He raised it by cross-notice under the new Rules which is, I think, open to him. He said that because of those writs for forfeiture being issued, Mr. Driscoll had no *locus standi* to apply for these restrictions to be modified at all in regard to six of these leases. He said that the issue of a writ for forfeiture is an unequivocal election by the landlords to determine the leases, and in consequence the leases had gone and the covenants had gone, and that there was nothing left to modify. I do not agree with that argument, for this reason: that, although a writ is an unequivocal election, nevertheless, until the action is finally determined in favour of the landlord, the covenant does not cease to be potentially good. For instance, the forfeiture may not be established; or relief may be granted, in which case the lease is re-established as from the beginning. That appears from the case of *Dendy v. Evans* … . It seems to me that so long as the covenant is potentially good, Mr. Driscoll, or anyone in like position, has a *locus standi* to apply to the Tribunal for a modification of the covenant. So I think that Mr. Driscoll is not defeated on any technical point."

19. In *Meadows v. Clerical Life Assurance* [1981] 1 Ch. 70, the issue Sir Robert Megarry V.-C. was concerned with was whether the plaintiff tenant could pursue a claim for a new tenancy under a statutory provision against the defendant head lessor in circumstances where his underlease, though subject to forfeiture in proceedings by the underlessor, was the subject of a subsisting application for relief in those proceedings when he issued his originating summons for a new tenancy under the relevant statute. In the following passage (at p. 75) the Vice-Chancellor considered the status of a forfeited lease while an application for relief against forfeiture is pending:

> "There are, of course, curiosities in the status of a forfeited lease which is the subject of an application for relief against forfeiture. Until the application has been decided, it will not be known whether the lease will remain forfeited or whether it will be restored as if it had never been forfeited. But there are many other instances of such uncertainties. When the validity of a notice to quite is in dispute, until that issue is resolved it will not be known whether the tenancy has ended or whether it still exists. The tenancy has a trance-like existence *pendente lite*; none can assert with assurance whether it is alive or dead. The status of a forfeited underlease which is the subject of an application for relief seems to me to be not dissimilar; at least it cannot be said to be dead beyond hope of resurrection."

20. Later, at p. 76, the Vice-Chancellor stated that the right of a tenant to apply for relief is part of the process of forfeiture, and until that process is complete, he did not think the tenancy had come to an end within the meaning of the relevant statutory provision, so that the plaintiff was entitled to apply for a new tenancy.

21. The most recent of the authorities relied on by the first defendant is a decision of the Court of Appeal in *Maryland Estates Limited v. Bar-Joseph and Anor.* [1998] 2 All E.R. In that case the Court of Appeal was concerned with a provision in a statute governing forfeiture of a lease in the County Court. The sub-section in issue provided that, where the court at the trial was satisfied that the lessor was entitled to enforce the right of re-entry of forfeiture, the court should make an order that possession be given to the lessor within four weeks, unless within that period the lessee should pay into court "all the rent in arrear" and the costs of the action. At first instance, the expression "all the rent in arrear" had been interpreted as meaning the arrears of rent due at the date of the service of the writ. Beldam L.J. stated (at p. 201) that, in his view, it was not straining the interpretation of the language to hold that all rent in arrears meant the rent in arrears at the time when the court making its order assumes the payment of that rent will result in the lease continuing for all purposes. I have adverted to this decision for the sake of completeness. As it turned on the interpretation of the words of a U.K. statute I do not consider it to be particularly helpful in the resolution of the issues before the court and I do not propose to consider it further.

22. The plaintiff made his main points on the application of the law on the relationship of landlord and tenant to the issues in these proceedings by reference to the following:

> (a) A statement in the Law Reform Commission Report on Consolidated Landlord and Tenant Acts (LRC 28. 2003) in the following terms:
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> > "The general rule is that a valid forfeiture operates to determine the tenancy in full and thereafter deprives the landlord of any remedies based on the continuance of the lease."
>
> (b) The decision of the Supreme Court in *O'Reilly v. Gleeson* [1975] I.R. 258.

(c) Paragraph 24.25 of Wylie and the reference there to *Rainey Bros. Ltd. v. Kearney* [1990] N.I. 18.

23. The passage in the judgment of Henchy J. in *O'Reilly v. Gleeson* which the plaintiff highlighted concerned the effect of the conduct of the tenant, rather than the landlord, on the landlord and tenant relationship. Henchy J. stated as follows (at p. 272):

> "It is fundamental to the relationship of landlord and tenant that the tenant is estopped from denying (i.e. disclaiming) his landlord's title. That is to say, he cannot assert the rights of a tenant and at the same time say, in effect, that there is no tenancy because the landlord has not title to grant the tenancy, or because the title is in himself or in someone else. He cannot have it both ways. If what he does is a repudiation of the relationship of landlord and tenant, then in the case of a periodic tenancy terminable by notice to quit, he is debarred from insisting on the necessity for a notice to quit if the landlord chooses to eject him without serving one. The reason is that a notice to quit is necessary only where there is an admitted tenancy, so when the tenant repudiates the existence of a tenancy he thereby admits that there is nothing to terminate and that a notice to quit is unnecessary. However, as I have pointed out, in the case of a lease for a fixed term not terminable by notice to quit, the estate of the lessee in the land is not defeasible by mere disclaimer of title on his part."

24. Another aspect of the decision of Henchy J. in *O'Reilly v. Gleeson* opens the commentary on the effect of forfeiture contained in para. 24.25 in Wylie: the general rule is that a forfeiture operates in *toto*, i.e. there is no question of it affecting part only of the premises demised by the lease or tenancy, citing a passage from the judgment of Henchy J. at p. 274. The commentary continues as follows:

> "Since, as Henchy J. explained, the effect of a forfeiture is to render the lease or tenancy void 'in every respect', it follows that the landlord can no longer rely upon it. By electing for the remedy of forfeiture he thereafter deprives himself of remedies based upon the continued existence of the lease or tenancy. He cannot sue, therefore, for rent accruing due after the forfeiture has been effected, though he can sue the tenant or any guarantor for rent accruing due up to that time. The same applies to enforcement of other provisions in the lease, such as covenants for repair. Since forfeiture involves, as again Henchy J. explained, an election by the landlord for a particular remedy, it would seem to follow that he cannot use this election to found a claim against the tenant in respect of matters which are a consequence of that election."

25. Wylie cites *G.S. Fashions Ltd. v. B & Q* [1995] 4 all E.R. 899, following *Jones v. Carter* (1846) 15 M & W 718, as authority for those propositions.

26. Wylie's commentary continues with a consideration of the decision of the Court of Appeal in Northern Ireland in *Rainey Bros. Ltd. v. Kearney*, where the Court of Appeal held that a lessor who terminates a lease for non-payment of rent may recover damages to compensate him for the loss of rent which would have been payable under the lease. The damages which the plaintiff lessor in that case recovered compensated him for the loss of rent during the void period between the termination of the lease and the commencement of the re-letting and the lower rent achieved on the re-letting of the demised premises (interestingly located in Letterkenny, County Donegal). The rationale of the decision, as I understand it, is that the defendant tenant's liability to damages arose from a breach of contract prior to re-entry.

The law: Conclusions

27. In my view, the invocation by the first defendant of the propositions set out in Wylie at para. 24.21 and the authorities which I have outlined above misses the point. All of the authorities are concerned with the status or efficacy of an action by the tenant: in *Dendy v. Evans*, the creation of an underlease before the forfeiture; in *Driscoll v. Church Commissioners*, an application to the Lands Tribunal before the forfeiture; and in *Meadows v. Clerical Life Assurance*, an application for a statutory new tenancy after forfeiture. It is also noteworthy that in the first two cases the court's determination as to the efficacy of the actions of the tenant having regard to the status of the lease during the limbo between the forfeiture and the determination of the application for relief against forfeiture arose after the limbo period had ceased. In the third case, the outcome turned on the construction and application of a statutory provision.

28. This case is concerned with the actions of the lessor. Just as the tenant cannot have it both ways, neither can the landlord. As is stated by Wylie at para. 24.25, by electing for the remedy of forfeiture, the lessor thereafter deprives himself of remedies based on the continued existence of the lease or tenancy. In the authority cited by Wylie*, G.S. Fashions Ltd. v. B & Q Plc*, Lightman J. quoted (at p. 904) what he described as the classic statement of Parke B. in *Jones v. Carter* (at p. 726) to the following effect:

> "… The bringing of an ejectment for forfeiture, and serving it on the lessee in possession, must be considered as the exercise of the lessor's option to determine the lease; and the option must be exercised once and for all … for after such an act, by which the lessor treats the lessee as a trespasser, the lessee would know that he was no longer to consider himself as holding under the lease, and bound to perform the covenants contained in it; and it would be unjust to permit the landlord again to change his mind, and hold the tenant responsible for the breach of duty, after that time."

29. Lightman J. continued:

> "The words of Parke B. were uttered in the context where the breaches of covenant by the lessee and the entitlement of the lessor to forfeit were established. The words and the same principle have been applied in cases where, after the service of the writ, the lessee has challenged the lessor's right to forfeit or claimed relief from forfeiture. In such situation the validity of the forfeiture must await to be determined either by the court or by agreement of the parties. In the meantime there is inevitably a twilight period of some uncertainty. During this period the lessor is, on the principle stated by Parke B., precluded from treating the terms of the lease or the covenants in the lease as on foot as against the lessee; but the lessee who has not elected to determine the lease can seek to rely on and enforce the covenants in the lease against the lessor …"

30. In my view, the legal position is that when a lessor serves a forfeiture notice and seeks to enforce it by ejectment proceedings or, alternatively, by counterclaiming in the lessee's action seeking relief against forfeiture for a declaration that the lessee is not entitled to such relief, thereafter the lessor is not entitled to treat the terms of the lease as binding the lessee. This means that the lessor is not entitled to invoke the rent revision procedure in the lease with a view to either the quantification of the arrears of rent due by the lessee or the quantification of the mesne profits to which the lessor will be entitled, if the court enforces the forfeiture, or what will be the passing rent, if the lease continues, the lessee having been granted relief against forfeiture.

31. Apart from the fundamental principle that, once he has elected for forfeiture, the lessor cannot rely on the provisions of the lease

going forward, there is another reason why the argument of the first defendant that the implementation of the rent review procedure during the limbo period before determination of the lessee's claim for relief against forfeiture has necessary relevance is incorrect. If it is determined against the lessee at the urging of the lessor, the lessor's monetary entitlement from the date of the termination of the lease will be to mesne profits. As is pointed out in Wylie at para. 27.17, formerly there was a rule of thumb that mesne profits would be assessed at the same rate as the former rent no matter how long that rent had operated. However, modern courts tend to assess a fair market rent or thereabouts though this may be affected by factors such as the short-term nature of an overholding period in most cases and that the tenant is departing at the end of the period. Thus the quantification of mesne profits may or may not take account of revised rent determined in accordance with the rent review provisions of the lease. That is a matter for the trial judge. The important point is that the fact that an assessment of mesne profits may have to be made in the proceedings in the Circuit Court (Record No. 242/05) is not a basis for concluding that implementation of the rent review is of necessary or any relevance.

Application of the law to the facts
32. When the first defendant applied to the Society to appoint an arbitrator pursuant to the provisions of the Lease, the Lease was already the subject of three forfeiture notices and the first defendant had commenced ejectment proceedings on title (Record No. 534/05) in the Circuit Court to enforce the forfeiture. In those circumstances, the first defendant was not entitled to invoke the rent revision provision of the Lease or seek to have an arbitrator appointed. His attempts to do so were wholly ineffective. The "waiver" by the first defendant of the three forfeiture notices served in 2005 in January, 2006 could not have given those actions retrospective efficacy.

33. As regards the current position, even if the first defendant's ejectment proceedings (Record No. 534/05) no longer exist, the first defendant served a forfeiture notice on the plaintiff on 8th February, 2006. Before these proceedings commenced, the first defendant's solicitors wrote to the plaintiff on 12th April, 2006 referring to that forfeiture notice and confirming that the Lease was validly forfeited and is no longer in existence. In the amended defence and counterclaim delivered by the first defendant on 22nd September, 2006 in the Circuit Court proceedings (Record No. 242/05), as I have already recorded, the first defendant claims a declaration that the plaintiff is not entitled to relief against forfeiture and seeks possession of the property, if necessary, and also seeks mesne rates. In the circumstances, the first defendant is not entitled to pursue the review of the rent initiated in 2005. If it transpires that the plaintiff is granted relief against forfeiture, the first defendant will be entitled to invoke the rent review provisions in the Lease *de novo*.

The position of the Society/second defendant
34. I think it is only fair to record that I consider that it is entirely understandable that neither the Society nor the second defendant appreciated the implications of the actions which the lessor had taken both before and after the application to have an arbitrator appointed on the status of the Lease.

35. As the reality of this case is that the invocation of the rent review procedure by the first defendant at the time he invoked it was a nullity, I consider that the appropriate course is to make an order to the effect that the appointment of the second defendant as arbitrator was null and void, rather than an order setting aside the appointment under the Act of 1954, which, in my view, never had any application to the relationship of the parties hereto.

Orders
36. There will be an order declaring that the appointment of the second defendant as arbitrator was null and void. There will also be an injunction in the terms of para. 2 of the prayer on the endorsement of claim on the special summons.